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

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### Intra-team Comparison Report for **AUSTRIA, GERMANY, LUXEMBOURG, SWITZERLAND<sup>1</sup>**

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<sup>1</sup> The comparison was made between the following versions of each national report: Germany: v. 09.05.2014 ([http://www.tenlaw.uni-bremen.de/reports/GermanyReport\\_09052014.pdf](http://www.tenlaw.uni-bremen.de/reports/GermanyReport_09052014.pdf)); Austria: v. 27.05.2014 ([http://www.tenlaw.uni-bremen.de/reports/AustriaReport\\_18062014.pdf](http://www.tenlaw.uni-bremen.de/reports/AustriaReport_18062014.pdf)); Luxembourg: v. 25.05.2014 ([http://www.tenlaw.uni-bremen.de/reports/LuxembourgReport\\_26052014.pdf](http://www.tenlaw.uni-bremen.de/reports/LuxembourgReport_26052014.pdf)) and Switzerland: v. 25.05.2014 ([http://www.tenlaw.uni-bremen.de/reports/SwitzerlandReport\\_24072014.pdf](http://www.tenlaw.uni-bremen.de/reports/SwitzerlandReport_24072014.pdf)). Throughout the report one will refer to the male form ("he", "him", "his"), which shall be understood as referring to the female form likewise. The current version of the report is dated as of 25.07.2015. This report will be subject to regular updates, which will be made available for upload in the website of the TENLAW project. For queries or comments please contact [marta.silva@zerp.uni-bremen.de](mailto:marta.silva@zerp.uni-bremen.de)

## **1. The current housing situation**

### **1.1. General Features**

#### **1.1.1. Historical evolution of the national housing situation and housing policy**

##### **1.1.1.1 From the World Wars until the 1990s**

In the aftermath of WW II, the housing policies in Germany<sup>5</sup>, Austria<sup>6</sup>, Switzerland<sup>7</sup> and Luxembourg<sup>8</sup> were aimed at supplying new dwellings to a growing population, which included a large number of war refugees from lost territories in DE and AU. Whereas in DE and AU the supply of new dwellings focused on the reconstruction of the destroyed housing stock, in CH and LU, which were not affected by the war's destruction, the *Wohnförderung* mainly involved constructing from scratch<sup>9</sup>.

In DE and AU, public authorities administrated dwellings in a planned manner in the post war years (*Wohnraumzwangswirtschaft*). Under such planned administration, living space was assigned to people who had lost their dwellings due to warfare or foreign occupation. Often, such space consisted of rooms in the dwellings of other families. In CH, during the WWS, decreased construction led to housing shortage which, in turn, led to regulated rents.

The economic boom (*Wirtschaftswunder*) which occurred from the 1950s on enabled the construction of an unprecedented number of new buildings and led to the abandonment of these measures and the liberalisation of rents for private landlords. However, between 1969 and 2005 the rising demands of comfort led to increase of about 330% of the construction costs in CH.

Other important policies present in all countries are the promotion of home-ownership (directly or indirectly) and the wide range of housing subsidization measures, particularly to more disadvantaged households.

The 1990s brought increasing concerns about the quality of the living space (*Wohnraumförderung*). This phenomenon was particularly significant in DE where, before the reunification, the authorities in Eastern DE had been mainly concerned with the quick and inexpensive construction of (state-owned) dwellings in an industrial style (*Plattenbauten*)<sup>10</sup>.

Moreover, from the 1990s onwards, a slight increase in home ownership rates was reported for DE, AU and CH. The predominance of rental tenure over homeownership tenure is attributed to the high quality of rented dwellings and to the high costs of purchase and construction.

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<sup>5</sup> Thereinafter, DE.

<sup>6</sup> Thereinafter, AU.

<sup>7</sup> Thereinafter, CH.

<sup>8</sup> Thereinafter, LU.

<sup>9</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 1.2; Hofmann – National report for AU, 2014, sec. 1.2; Wehrmüller – National Report for CH, 2014, sec. 1.2, “Housing production and construction costs” and Santos Silva – National Report for LU, 2014, sec. 1.2.

<sup>10</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 1.2.

In all four countries the main concern is not increasing the construction of dwellings but, instead, providing qualitative and yet affordable dwellings to the population at large.

### **1.1.1.2 The effects of immigration in housing policies**

Another common feature between the countries under analysis is immigration and its consequences for housing supply.

Immigration has mostly been due to demands for additional working force, but it is also due to warfare and political oppression in foreign countries. As for the latter, the most important phenomenon is the war migration of refugees of the Yugoslav civil wars.

The homeownership rate is relatively lower among immigrants in all four countries except LU, where this is only true for the higher skilled immigrants. In Luxembourg, even though many immigrants are homeowners, foreigners are entitled to subsidies for the construction of housing.

Related urban policies such as anti-ghettoization measures aiming at decreasing the concentration of particular ethnic groups in problematic neighbourhoods have not been so far implemented at a large scale.

## **1.1.2. Current situation**

### **1.1.2.1 Statistical data**

The overall amount of dwellings in DE, AU, CH and LU varies significantly and is in direct proportion to the size of each country.

DE has the highest number of dwellings, with 41.3 million reported units (*Statistisches Bundesamt*, 2011). It is followed by CH, with one tenth of this amount, more precisely 4,131,342 dwellings (2011) and AU with 3,705,100 (2012) dwellings. In LU there are only 130,091 residential dwellings (2011).<sup>12</sup>

In contrast to the EU average, where homeownership surpasses renting by far (70.6% as compared to 29.4%), renting prevails in both DE (2011) and CH (2011). According to Eurostat, in DE it amounts to 52.1% (as opposed to 42.4% of homeownership) and in CH it is even higher (59.8%, as opposed to 36.8%, which includes full-, co- and condominium ownership). In AU, renting also prevails over homeownership, although less significantly than in its two west-bordering countries. In 2012 50% of the residential housing stock was owner occupied (including condominium occupation), and 41.5 % was rented or sub-rented. LU is the only country of the group where owner-occupied dwellings are clearly predominant. According to STATEC, they correspond to 69.0% of the dwellings, whereas only 28.3% are tenant-occupied (2013)<sup>13</sup>.

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<sup>12</sup> See, respectively, Cornelius & Rzeznik – National Report for DE, 2014, sec. 1.3; Hofmann – National report for AU, 2014, sec. 1.3; Wehrmüller – National Report for CH, 2014, sec. 1.3 and Santos Silva – National Report for LU, 2014, sec. 1.3.

<sup>13</sup> See, respectively, Cornelius & Rzeznik – National Report for DE, 2014, sec. 1.3; Hofmann – National report for AU, 2014, sec. 1.3 and Santos Silva – National Report for LU, 2014, sec. 1.3.

### 1.1.2.2 Comfort of the housing stock

In all four countries the percentage of dwellings with minimal comfort (i.e., with bathroom or interior WC, running warm water and heating) is higher than 90% and in LU and CH this percentage was close to 100%. A relatively higher standard of comfort (including the quality and environment of housing) may be identified in LU and in CH, where both owner-occupied and rented dwellings usually come with a fully-equipped kitchen and laundry facilities and the overcrowding rate is one of the lowest in Europe (5.9%)<sup>14</sup>.

Regulations on the quality of the dwellings are particularly thorough in LU and CH. Indeed, in LU, the RGD of 23 March 1979 requires an installed kitchen equipment and art. 32 of the LBUH<sup>15</sup> provides for the minimum size of rooms according to occupancy.

In CH, provisions on the inhabitability of rooms relate the size and height of the rooms and the minimum size for windows, access to sanitary facilities and laundry, etc.<sup>16</sup>.

On the other hand, in DE the Building Regulations of the *Länder* require only that a dwelling has a lockable door, heating, functioning electricity supply, a room where a kitchen or a kitchenette can be set up (no previously installed kitchen is thus required) and it must be also technically possible to set up a toilet or a bathroom, which however do not necessarily have to be placed within the dwelling itself (§ 3 BauNVO, rec. 18)<sup>18</sup>. The relatively low ratio of vacant dwellings (4.5%) shows that the fact that lower-quality dwellings (namely, with no kitchen nor sanitary facilities) are still rented. It has not yet been assessed whether the more detailed regulation on the criteria of inhabitability of dwellings which must be observed in LU and CH reflects in the relatively better quality of the dwellings in the two countries. Likewise, it has not been assessed there is some connection between the relatively worse quality of dwellings in DE and the prevailing public opinion that rental tenancy is as a less desirable kind of tenure<sup>19</sup>.

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<sup>14</sup> For the definition of 'overcrowding rate', see [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Glossary:Overcrowding\\_rate](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Glossary:Overcrowding_rate) (last retrieved 16 December 2013).

<sup>15</sup> *Loi du 21 septembre 2006 sur le bail à usage d'habitation* (law of 21 September 2006 on residential rental agreements).

<sup>16</sup> See for example: § 300 ff *PBG Zürich* (*Planungs- und Baugesetz Zürich*, Planning and Building Act of Zurich) and § 8 ff *BBV I Zürich* (*Besondere Bauverordnung I Zürich*, Special Building Regulation I of Zurich); § 63 ff *BV Berne* (*Bauverordnung Berne*, Building Regulation of Bern); Art. 52 ff of the *Loi sur les constructions et les installations diverses* Geneva (Law on the constructions and other installations of Geneva) and *Règlement d'application de la loi sur les constructions et les installations diverses* (Regulation of execution of the Building and Planning Act); § 63 ff *BPG Basel* (*Bau- und Planungsgesetz Basel*, Planning and Building Act of Basel).

<sup>18</sup> See Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.4.

<sup>19</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 2.7.

### **1.1.3. Types of housing tenures**

#### **1.1.3.1 Homeownership and renting with and without a public task**

Although roughly the same housing tenures exist in the four countries under comparison, they are object of distinct classifications, according to the importance they have in each of the countries.

The national German and Luxembourg reporters of the TENLAW project classified housing tenures in two main categories, namely home-ownership and renting. To these two categories, the Austrian reporter added another category in the national report, namely, the ownership of dwellings in condominiums (which in all other three countries was included under the broader category of homeownership). In the Swiss report, cooperative housing and condominium were included as intermediate tenure<sup>21</sup>.

##### **1.1.3.1.1 Homeownership**

Homeownership is not predominant in any of the countries except LU. This is so despite in CH most citizens prefer homeownership to renting and in DE and AU the population recognises the advantages of homeownership (namely, as retirement planning and as long-term investment<sup>22</sup>). Also, private financing of housing has been facilitated by private banks<sup>23</sup> and state subsidies<sup>24</sup> or indirect subsidies via the tx system (CH) 3.7. Indeed, renting is a competitive alternative to purchasing, where good quality dwellings are available with a high level of security of tenure, and purchase and construction costs are high, even if all countries are associated with high disposable incomes.

In DE 42.4% (2011) of the housing stock is owner-occupied. In AU the percentage was lower in 2012, at 39.4% (of which 10.3% are condominiums). In CH homeownership reached 36.8%. Contrary to this tendency, in LU homeownership predominates with a clear 69% (2011).

Owner-occupied housing is owned mostly by private persons. The percentage of private individual homeowners is particularly high in AU (88.7%<sup>25</sup>), and in all four countries it surpasses 70%. The State has a modest share in the property of these dwellings: such percentage does not surpass 4% in any of the countries analysed.

##### **1.1.3.1.2 Renting**

In every country of the group which one is analysing, renting may be divided in “renting with a public task” (i.e., dependent from any form of state intervention, which corresponds particularly to the so-called “social housing”) and in “renting without a public task” (i.e., determined by the free market). Besides these, all four countries know other

<sup>21</sup> According to the CH national reporter, cooperative housing was included as an intermediary tenure due to the specific terminology adopted by the TENLAW project. Nevertheless, condominium tenure and cooperative housing are to be generally included in a broader category of homeownership.

<sup>22</sup> Hofmann – National report for AU, 2014, sec. 2.2; Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.4.

<sup>23</sup> Cornelius & Rzeznik – National Report for DE, 2014, 1.4.

<sup>24</sup> Hofmann – National report for AU, 2014, sec. 3.6 and Wehrmüller – National Report for CH, 2014, sec. 3.6.

<sup>25</sup> Hofmann – National report for AU, 2014, sec. 1.4.

forms of lawful possession of premises for housing purposes, but they have secondary relevance in the overall housing panorama.

One important aspect which DE, AU, CH and LU have in common is the highly satisfactory level of quality of rental housing. Nevertheless, there are differences in the overall level of quality of dwellings between rented and owner-occupied dwellings.

Indeed, in all four countries owner-occupied dwellings have a higher living space available compared to tenant-occupied dwellings. In AU, the average inhabitable surface for owner-occupiers is more than the double of the size of rented dwellings<sup>26</sup>.

The same could be said for comfort. Indeed, according to the European Union Statistics on Income and Living Conditions (EU-SILC), there is a higher percentage of dwellings with deficiencies or in need of maintenance in the rental sector as compared to the homeowner sector. In DE, about 35% of the German households live in "deficient"<sup>27</sup> dwellings and the percentage is 20% higher for rental households as compared to owner households (46.4% against 26.4%)<sup>28</sup>. Nevertheless, both rented and owner-occupied dwellings generally have comparable quality standards and, namely, are occupied with sanitary facilities.

Therefore, it can be said the quality of rental housing provided in all four countries is good, as compared to the EU average, but is still in tendency worse than the quality of owner-occupied housing.

### 1.1.3.2 Intermediate tenures

In all four countries also some kind of intermediate tenures, i.e., types of tenures which are between homeownership and renting, may be identified.

That is the case of the condominium tenure, which is to be found in every country of this group, although in different proportion and under distinct classifications.

In DE condominiums amount to 23% of the total dwelling stock<sup>29</sup> and in CH they reach 30% which is quite remarkable considering that the legal form of a condominium has generally been allowed only since 1965<sup>30</sup>. In AU *Wohnungseigentum* does not surpass 11%.

Another kind of intermediate tenure which may be found in CH and AU are company law schemes.

In CH the so-called tenant public limited company (*Mieteraktiengesellschaft*) involves "holding shares of a corporation combined with a rent (or a right defined in the statutes" for an apartment held by this corporation)<sup>31</sup>. However, since condominium

<sup>26</sup> Hofmann – National report for AU, 2014, sec. 1.4.

<sup>27</sup> A "deficient" dwelling is, particularly, that which is affected by noise disturbance, moisture damages and insufficient daylight.

<sup>28</sup> Cf. Federal Statistical Office, *Leben in Europa (EU-SILC), Einkommen und Lebensbedingungen in Deutschland und der Europäischen Union* (Wiesbaden: 2012), available at: [https://www.destatis.de/DE/Publikationen/Thematisch/EinkommenKonsumentenLebensbedingungen/LebeninEuropa/EinkommenLebensbedingungen2150300117004.pdf;jsessionid=4CE9AC7C01A6EE05A09DF8A0851C6955.cae1?\\_\\_blob=publicationFile](https://www.destatis.de/DE/Publikationen/Thematisch/EinkommenKonsumentenLebensbedingungen/LebeninEuropa/EinkommenLebensbedingungen2150300117004.pdf;jsessionid=4CE9AC7C01A6EE05A09DF8A0851C6955.cae1?__blob=publicationFile), 39 (last retrieved: 06.03.2014).

<sup>29</sup> Cf. Federal Statistical Office, *Zensus 2011: Gebäude und Wohnungen*, 6.

<sup>30</sup> Wehrmüller – National Report for CH, 2014, sec. 1.2.

<sup>31</sup> Wehrmüller – National Report for CH, 2014, sec. 1.4 "Company law schemes".

ownership was introduced at the national level, tenant public limited companies have lost their utility.

In AU, company law schemes arise when limited profit housing associations (*gemeinnützige Bauvereinigungen*, GBV), who provide housing to individuals on a non-profit basis, have the legal form of limited company (*Gesellschaft mit beschränkter Haftung*) or public limited company (*Aktiengesellschaft*).

Another type of intermediate tenure – at least as categorized in AU – are cooperatives. These are present in all countries except LU, and in DE they are considered a particular kind of tenure within the rental sector, even if they admittedly represent a “compromise between property and rent”<sup>32</sup>.

Cooperative dwellings are particularly important in CH, where in addition to being available on the private rental market, they are subsidized by the State at the federal level, in most cantons, and at the municipal level<sup>33</sup>. In DE, the cooperative sector amounts to 5% of the full housing stock, and it may be classified as tenure with or without a public task depending upon whether or not they are subsidized with public funds<sup>34</sup>. Also in AU cooperatives may be classified as a type of tenure with or without a public task. In the latter case, they are deemed not relevant in the private rental market.<sup>35</sup>

In Germany, 52.1% of the full housing stock is rented, and from it 92.3% is privately rented. In AU rental housing with a public task takes the lead: limited-profit rental housing in dwellings owned by limited profit housing associations represent 40.5%, whereas municipal rental housing in dwellings owned by municipalities or non-profit municipal bodies amounts to 19%<sup>36</sup>.

Both in LU and in CH the rental housing sector is residual, not surpassing 6% (provided that we exclude the cooperative sector in CH)<sup>37</sup>.

Therefore, the sector of rental housing with a public task has a different importance in each of the countries under analysis, but in all it is aimed at providing affordable yet good quality dwellings to those who cannot afford renting on the private market.

#### **1.1.4. Other general aspects of the current housing situation in comparative perspective**

##### **1.1.4.1 Lobby and umbrella groups**

Several lobby and umbrella groups in the field of housing are active in DE, AU, LU and CH. These are aimed at protecting the interests of homeowners, tenants and real estate service providers and often cooperate with each other within the scope of their activities. The interests of tenants are sometimes pursued through consumer associations, as happens in AU (*Verein für Konsumenteninformation*)<sup>42</sup> and LU (*Union Luxembourgeoise*

<sup>32</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 1.4.

<sup>33</sup> Wehrmüller – National Report for CH, 2014, sec. 1.4 “Cooperatives and other non-profit housing organizations”.

<sup>34</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 1.4 “Cooperatives”.

<sup>35</sup> Hofmann – National report for AU, 2014, 4.2.

<sup>36</sup> Hofmann – National report for AU, 2014, 1.4 “Cooperatives”.

<sup>37</sup> Respectively, Santos Silva – National Report for LU, 2014, table 1 and Wehrmüller – National Report for CH, 2014, sec. 4.3.

<sup>42</sup> Hofmann – National report for AU, 2014, sec. 1.5.

*des Consommateurs, ULC*)<sup>43</sup>. Also, chambers of commerce have been actively cooperating in the field of housing in AU (*Wirtschaftskammer Österreich, WKÖ*)<sup>44</sup> and LU (*Chambre de Commerce du Grand-Duché de LU*)<sup>45</sup>.

#### 1.1.4.2 Vacant dwellings

Another relevant aspect of the current housing situation is vacant dwellings. The relevance of this phenomenon has to do with the influence it has on the functioning of the domestic housing system as a whole.

In most countries of this group there are few reported vacant dwellings. Nevertheless, there are regional differences, and the data available can be misleading due to the lack of a common, widely shared definition of “vacant dwelling”. Taking the example of secondary residences (namely, holiday homes), these are usually (but not always) classified as vacant dwellings, a distinction which necessarily has an effect on the calculation of percentages within the full housing stock.

In LU, where there are allegations that the high rate of vacancy (8%) has been artificially increased, some cantons effectively implemented a tax to be paid by owners of vacant dwellings<sup>47</sup>.

One may thus conclude that, although vacancy of dwellings is not a problem in the remaining countries of the group, the lack of uniformity in the definition of “vacant dwellings” has been leading to inaccurate or confusing statistic data, and thus it would be helpful if a European definition would be put forward.

#### 1.1.4.3 Black market and other irregular practises

As for black market or otherwise irregular practices, one may say they are **practically absent** in most countries of this group. In AU there is however one irregular practice of renting out dwellings at prices which significantly surpass the rent level imposed by law<sup>48</sup>.

In DE and LU there are a few irregular practises. The unauthorized use of housing units for the accommodation of tourists and workers occurs in large German cities and tourist destinations<sup>49</sup>, and in LU landlords provide unofficial rental agreements so that they do not have to pay tax on rental income<sup>50</sup>. Black market or other irregular practices were not reported for CH.

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<sup>43</sup> Santos Silva – National Report for LU, 2014, sec. 1.5.

<sup>44</sup> Hofmann – National report for AU, 2014, sec. 1.5.

<sup>45</sup> Santos Silva – National Report for LU, 2014, sec. 1.5.

<sup>47</sup> Santos Silva – National Report for LU, 2014, sec. 1.5.

<sup>48</sup> Hofmann – National report for AU, 2014, sec. 1.5.

<sup>49</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 1.5.

<sup>50</sup> Santos Silva – National Report for LU, 2014, sec. 1.5. See sec. 2.3 of the same report for further details.

## **1.2 Economic factors in comparison**

### **1.2.1. Comparative view of the housing market**

#### **1.2.1.1 Freedom of contract**

In every country of the group under analysis, there is both a regulated and an unregulated housing market, but, with the exception of AU, the latter is predominant. Tenancy law is characterized by freedom of contract. Provided that the tenant agrees upon the conditions of the dwelling put forward by the landlord, the rental agreement is considered legally valid, which often results in prohibitive rents for good quality dwellings, particularly in the main urban centres. In Luxembourg households who are not eligible for social housing (or who are still in the waiting line) more often than not rent dwellings across borders. In Switzerland, renting across borders is made by about one fifth of the people employed in the Geneva area and at an exceptional basis.<sup>54</sup>

#### **1.2.1.2 Insufficient supply for increasing demand**

Particularly problematic in the overall current housing situation is the fact that, except in AU, housing supply does not cope with increasing demand. This phenomenon, particularly intense in the great metropolises is especially due to a rising number of households (particularly single-occupied ones). The insufficient supply of dwellings has been leading to rising rents and, in the cases of LU and CH, as mentioned supra, to cross-border commuting.

The fact that the Austrian housing market works relatively well is attributed to the fact that, contrary to the liberal-oriented trend which spread generally in Europe from the 1980s on<sup>62</sup>, Austrian housing policy remained strongly based on an exceptional continuity and maintenance of public and private financing structures and a combination of other factors, particularly during the crisis, among which are a high level of confidence in the financing structures and legal frameworks; a high quality of living and satisfaction; the increase of green housing construction and building renovation.<sup>64</sup>

#### **1.2.1.3 Social rental agencies and other half-ways between public and private renting**

In all four countries, particularly in LU and CH, housing with a public task presents good quality. Due to the unfortunate combination of insufficient supply and increasing demand in all four countries except AU, some “middle ways” have been pursued. That is the case of private housing with public task in LU (by means of social rental agencies) and in DE, through the *Soziale Wohnraumhilfen* or housing assistance agencies<sup>65</sup>. Nevertheless, in both countries this is still a residual section of housing in general.

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<sup>54</sup> Wehrmüller – National report for CH, 2014, sec. 2.1.

<sup>62</sup> Hoffmann – National report for AU, sec. 1.2.

<sup>64</sup> Oberhuber/Schuster, Wohnbauförderung als Instrument zur Sicherung des Wohnstandortes Österreich – Kurzfassung (2012), 8-9.

<sup>65</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 4.3.

## **1.2.2. Comparative view on price and affordability**

### **1.2.2.1 Housing and disposable income**

DE, AU, CH and LU are European countries which are known for the high cost of housing when compared to Southern or Eastern European countries. It comes thus as no surprise that the average percentage of disposable income devoted to housing expenses exceeds, in all four countries, the EU average of 16.6% (2012)<sup>67</sup>, and in AU it is about double the average<sup>68</sup>. The percentage of income that housing absorbs is particularly high for lower-income households (including unemployed persons and pensioners); there are thus clear social inequalities as far as affordability is concerned<sup>69</sup>.

Among all the countries, housing associated costs are particularly high in LU and CH, comprising the largest single expenditure for many individuals and families. The housing cost overburden rate – i.e., the share of households where housing costs account for more than 40% of their disposable income – is not significant for average households, but it is clearly higher for tenants than for owner-occupiers, particularly those who are not burdened with a mortgage or loan<sup>70</sup>.

All in all, in spite of a high level of rents and associated housing costs, the average households still cope with them due to the high level of income in these countries.

### **1.2.2.2 Rental tenure: An effective alternative to homeownership?**

Rental housing has been an attractive alternative to home ownership, particularly because, even if mortgage rates have decreased in the last years, the costs of purchase and construction are still relatively high. For such reason, most households (particularly single and young households) opt for renting, which provides high security of tenure in affordable, good-quality housing and consists of a flexible alternative in scenarios of academic or professional change. Moreover, and even though many households would recognize their preference for homeownership, this kind of tenure is not associated with social recognition, as it is in most southern European countries. All in all, rental tenure is a competitive alternative to home-ownership in DE, AU and LU<sup>71</sup>.

Still, home-ownership is unanimously recognized as an attractive long-term investment, both for retirement planning and for passing on property to one's children<sup>73</sup>.

## **1.2.3 Tenancy contracts and investment**

The basic assumption made by most real estate investors is that stable and performing can “pay” for the credit instalments. Nevertheless, even when the dwelling is rented

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<sup>67</sup> [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc\\_lvho08a&lang=de](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc_lvho08a&lang=de) (last retrieved: 07.07.2014).

<sup>68</sup> Hofmann – National report for AU, 2014, sec. 2.2.

<sup>69</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 2.2.

<sup>70</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 2.2; Santos Silva – National Report for LU, 2014, sec. 2.2.

<sup>71</sup> See Cornelius & Rzeznik – National Report for DE, 2014, sec. 1.4; In AU it is particularly so in the capital city of Vienna (Hofmann – National report for AU, 2014, sec. 1.4).

<sup>73</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 1.4; Hofmann – National report for AU, 2014, sec. 1.4.

without interruption until the payment of all the instalments, the fact is that very often at least a decade will be needed to recover the significant, initial investment and start making profit. Successful private landlords make an average of 1% to 6% return on rented residential property<sup>74</sup>. However, in DE, for example, only 40% of the landlords make profit: Most of the time, landlords either equalize costs with profits or they suffer losses<sup>75</sup>.

#### 1.2.4. Other economic factors

One particularly important actor in the tenancy economic machinery are real estate agents. These are intermediaries in transactions between third parties which involve real estate. They usually promote the renting or the sale of a dwelling (such as in DE)<sup>76</sup>, but can provide for the exchange, cession of real estate, real estate rights or retail fund<sup>77</sup> as well. The figure exists in DE, AU, LU and CH, but in the latter these functions are more often performed by property administration companies, which are also in charge of the performance of some or all duties of the landlord as agreed in the contract<sup>78</sup>.

The core of the real estate agent's role consists of his duty of information to potentially interested people, which must be performed diligently or otherwise involves disadvantages for the real estate agent<sup>79</sup>. The performance of estate agents is usually controlled by the respective chambers, which are active in LU and AU<sup>80</sup>.

Although engaging the services of a real estate agent is still generally recognized as useful, the society as a whole is not uniformly content with their performance. There is some lack of clarity as far as what the money is being paid for, particularly when the agent's fees must be paid for in full or in part by the tenant<sup>81</sup>.

The activity of real estate agents is particularly regulated in AU, where they must fulfil general and specific admission criteria, contract professional insurance and obtain a qualification certificate<sup>84</sup>. In DE, there are regulatory provisions in the BGB and Law on Housing Agency<sup>85</sup> and in LU the *Chambre immobilière du Grand-Duché de LU* (CIGDL) is engaged in ensuring quality in the performance of real estate services.

A sensitive question is that of who shall pay the commission fees. In AU and DE, even though real estate agents are traditionally mandated by the landlord, it is the tenant who must usually pay for their services<sup>87</sup>.

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<sup>74</sup> For AU, see [http://www.bank Austria.at/files/Real\\_Estate\\_Country\\_Facts\\_Oesterreich\\_9\\_2013.pdf](http://www.bank Austria.at/files/Real_Estate_Country_Facts_Oesterreich_9_2013.pdf), especially p. 20 et seq. (21.03.2014); for CH see Study of the Zurich School of Management and Law, cited in: Boligøkonomisk Videncenter, *The Private Rented Sector in the New Century – A Comparative Approach* (Copenhagen: University of Cambridge, 2012), 193.

<sup>75</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 2.2.

<sup>76</sup> See Cornelius & Rzeznik – National Report for DE, 2014, sec. 2.4.

<sup>77</sup> See Wehrmüller – National report for CH, 2014, sec. 2.4.

<sup>78</sup> See Wehrmüller – National report for CH, 2014, 2.4.

<sup>79</sup> See Hofmann – National report for AU, 2014, 2.4.

<sup>80</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 6.2; Hofmann – National report for AU, 2014, sec. 1.5; Santos Silva – National report for LU, 2014, sec. 6.2.

<sup>81</sup> See Cornelius & Rzeznik – National Report for DE, 2014, 2.4.

<sup>84</sup> Hofmann – National report for AU, 2014, sec. 2.4.

<sup>85</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 2.4.

<sup>87</sup> Hofmann – National report for AU, 2014, sec. 2.4 and Cornelius & Rzeznik – National Report for DE, 2014, sec. 2.4.

A draft amendment imposing the obligation of payment on the party who mandates the agent (*Bestellerprinzip*) was recently adopted by the DE Parliament, which is an example of a good practice to be followed in this domain<sup>88</sup>.

As of 2015, commission fees are usually based upon the value of the monthly rent<sup>89</sup>. In DE, contrary to long-standing practice, it was proposed and adopted that the party to the rental agreement who contracts the real estate agent, i.e. the landlord<sup>90</sup>, shall pay the commission fees. As far as fees are concerned, in CH they cannot surpass 75% of a monthly rent in and the court may in any case reduce excessive fees to an appropriate amount<sup>91</sup>.

### 1.2.5. Effects of the current crisis in comparative perspective

The widespread global financial crisis hardly affected DE and AU as far as housing is concerned, and is safe to say it did not affect CH or LU.

In every country of this group there has been some sort of immunity to the pernicious effects of the financial crisis. For such reason, the allocation of mortgage loans was not strongly affected, and in AU and CH it even increased<sup>92</sup>. However, CH implemented additional requirements for their provision<sup>93</sup> and in LU, the attribution criteria of loans were slightly strengthened in the second quarter of 2013<sup>94</sup>.

In the field of repossession, the crisis did not seem to have had a remarkable impact either, although the lack of current national figures on repossession and the respective effects on the rental market in DE, AU and LU makes it difficult to objectively evaluate this aspect.

Out of the four countries only CH and LU have introduced housing-related legislation in response to the crisis.

Indeed, as a measure against the overheating of the market, the Swiss "Federal Council activated a counter-cyclical capital buffer in February 2013 which required from banks that they would hold an additional equity capital of one percent of the issued mortgage credits from 30 October 2013 on"<sup>95</sup>. It is argued that banks are currently less likely to provide mortgage credit than they were before such measure was enacted<sup>96</sup>.

In LU, the Housing Ministry enacted the *Pacte Logement* (October 2008) and the *Règlement Grand-Ducal* of 5 May 2011 (as amended by the RGD 30 December 2011) which, among other objectives, aimed at promoting homeownership. Finally, The RGD 24 March 2010 (as amended by the RGD 22 January 2011) developed a program of

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<sup>88</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 2.4.

<sup>89</sup> Cornelius & Rzeznik – National Report for DE, 2014, 2.4.; Hofmann – National report for AU, 2014, 2.4; Santos Silva – National report for LU, 2014, 2.4.

<sup>90</sup> Cornelius & Rzeznik – National Report for DE, 2014, 2.4.

<sup>91</sup> Wehrmüller – National report for CH, 2014, sec. 2.4.

<sup>92</sup> Respectively, Hofmann – National report for AU, 2014, sec. 2.5 and Wehrmüller – National report for CH, 2014, sec. 2.5.

<sup>93</sup> Namely, the investment, by the borrower, of at least of 10% of own, non-pension fund assets. See Wehrmüller – National report for CH, 2014, sec. 2.5.

<sup>94</sup> This was particularly so as far as margins of loans, demands of guarantees and amount of loans are concerned. See Santos Silva – National report for LU, 2014, sec. 2.5.

<sup>95</sup> Wehrmüller – National report for CH, 2014, sec. 2.5.

<sup>96</sup> *Ibid.*, with additional references.

construction of blocks of subsidized dwellings in response to the chronic need of affordable housing in LU<sup>97</sup>.

As mentioned supra, the recent global financial crisis hardly affected the countries of this group as far as housing is concerned. Among the four countries, AU has proven to be the country that most effectively prevented the pernicious effects. The provision of varied (object-related) subsidized rental dwellings allowed for a stable level of prices and of debt-equity ratio of private households<sup>98</sup>.

### **1.3. Urban and social aspects of the housing situation in comparison**

#### **1.3.1. Urban aspects in comparative perspective**

In each of the countries under analysis, the housing structure differs significantly based upon whether the area is rural or urban. In rural areas the rate of vacancies has been progressively increasing<sup>99</sup>, as people move to the largest cities. In the latter, it is always more difficult to find a good-quality, affordable dwelling, and this is reflected in the high amount of rents.

Homeownership predominates in rural areas<sup>100</sup> (although this tendency has been reverted in DE in the last ten years<sup>101</sup>) and medium-sized<sup>102</sup>, peripheral municipalities<sup>103</sup> (usually with lower land prices). On the other hand, tenancies predominate in the largest metropolises, and this is also the case in LU, which is by far the country of the group where homeownership takes the lead over rental tenures.

It was not reported in any of the countries under comparison that a particular housing tenure has contributed to ghettoization. In DE, AU, CH and LU, recipients of subsidized housing live in a wide spectrum of dwellings that uniformly mix with those which are not subsidized<sup>104</sup>. The fact that dwellings with a public task cannot usually be easily identifiable from the outside helps to avoid the rise of the problem of ghettoization and contributes to prevent social stigmatization of the population who lives in subsidized dwellings<sup>105</sup>.

Still, there is a certain residential segregation of the poorer households – almost exclusively tenants in DE<sup>106</sup> and almost exclusively homeowners in LU<sup>107</sup> – which typically concentrate in rural districts far away from the city centre where housing is more affordable. On the other hand, the better-off households usually live in neighbourhoods close to the city centre, and most of them are tenants, due to the significant cost of purchasing land in those areas.

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<sup>97</sup> Santos Silva – National report for LU, 2014, sec. 2.5.

<sup>98</sup> Hofmann – National report for AU, 2014, secs. 1.2 and 2.5.

<sup>99</sup> Wehrmüller – National report for CH, 2014, sec. 2.6.

<sup>100</sup> Hofmann – National report for AU, 2014, sec. 2.6; Wehrmüller – National report for CH, 2014, sec. 2.6.

<sup>101</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 2.6.

<sup>102</sup> Wehrmüller – National report for CH, 2014, sec. 2.6.

<sup>103</sup> Santos Silva – National report for LU, 2014, sec. 2.6.

<sup>104</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.4; Hofmann – National report for AU, 2014, sec. 3.4; Wehrmüller – National report for CH, 2014, sec. 3.4.

<sup>105</sup> Santos Silva – National report for LU, 2014, sec. 3.4.

<sup>106</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.4.

<sup>107</sup> Santos Silva – National report for LU, sec. 1.2.

On the other hand, the high (sometimes prohibitive) amount of rents in the centre of capital cities has been contributing for the socio-urban phenomena of gentrification, with sitting residents moving out of those freshly desired areas, as rents become unaffordable.

Besides gentrification, there seems to be some form of squatting in each of the four countries under analysis, even though there are few (or no) official statistics on this phenomenon. Likewise, in the four countries analysed, squatting seems to represent more an act of peaceful protest against a social situation or event than a way of irregularly obtaining gratuitous housing<sup>109</sup>. In LU, squatters have been protesting against the “artificial increase of rents, which is aimed at increasing the price of real estate”.

Squatting can only rarely lead to property acquisition, due to the need of a lengthy, uninterrupted und unchallenged factual possession of the immovable<sup>110</sup>. Furthermore, it can be penalized as trespass to the home<sup>111</sup>, leading to fine or imprisonment<sup>112</sup>, and there are actions for eviction of the unauthorized occupiers<sup>113</sup>. Property owners sometimes avoid the occurrence of squatting by renting their premises at lower rents<sup>114</sup>.

### 1.3.2. Social aspects

It may be said that currently renting is still seen as an inferior form of tenure as compared to home ownership in the four countries under comparison, and that the latter consists of a safe investment for retirement time. This somehow harmonized way of envisaging renting is particularly interesting, especially provided that the rates of renting are very distinct among these countries.

In AU renting is considered socially inferior to home ownership, even though private rental housing, municipal rental housing and limited-profit rental housing (when the MRG is fully or partially applicable) also offer a safe protection after retirement in the case of contracts unlimited in time, due to the strict conditions on the landlord to give notice<sup>115</sup>.

The fact of owning real estate is still considered to be a sign of wealth in DE, as well as a safe provision for old age.

The Home Ownership and Pensions Act (*Eigenheimrentengesetz*) from 29 July 2008 integrated owner-occupied dwellings (i.e., houses, condominium units, cooperative dwellings, and other owner-like households) into the system of tax deductions in private pension plans<sup>116</sup>.

In LU, renting is no longer considered, as it was twenty to thirty years ago, socially inferior to homeownership. This is so because a great percentage of tenants are bankers and foreign high-skilled workers who would be able to purchase a dwelling if

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<sup>109</sup> Hofmann – National report for AU, 2014, sec. 2.6.; Cornelius & Rzeznik – National Report for DE, 2014, sec. 2.6; Santos Silva – Natinal report for LU, sec. 2.6.

<sup>110</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 2.6, Wehrmüller – National report for CH, 2014, sec. 2.6.

<sup>111</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 2.6; Wehrmüller – National report for CH, 2014, sec. 2.6.

<sup>112</sup> Santos Silva – National report for LU, sec. 2.6.

<sup>113</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 2.6.

<sup>114</sup> Wehrmüller – National report for CH, 2014, sec. 2.6.

<sup>115</sup> Hofmann – National report for AU, 2014, sec. 2.7.

<sup>116</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 2.7.

they wish, but opt for renting for the flexibility it provides. Nevertheless, home ownership is clearly perceived as a source of safety after retirement<sup>117</sup>.

Finally, in CH renting is not seen negatively, but there is also a clear preference for homeownership<sup>118</sup>.

Even though Austrians are generally satisfied with the respective housing tenure, that degree of satisfaction is lower for those who live in rental housing, as compared to homeowners<sup>119</sup>. In DE, the percentage of tenants who are pleased with their current tenure is, like in AU, above 80%, and more than 70% are even pleased with the amount of rent<sup>120</sup>.

LU follows the same pattern, as many tenants are satisfied with their status. However, the predominant idea in LU – which, among all four countries has the significantly highest percentage of homeownership – is that homeownership is the ideal form of tenure, not only because instalments are often lower than monthly rents for an equivalent dwelling, but also because having one's own dwelling is still seen as a financial safety net for retirement<sup>121</sup>. A similar line of thought is followed by Swiss citizens as well, who are also inclined to consider, based on economic reasons, homeownership an ideal form of tenure<sup>122</sup>.

## 2. Housing policies and related policies in comparison

### 2.1. Introduction

According to the typology of Esping-Andersen<sup>123</sup>, AU and DE can be classified as conservative welfare states in an international context.

In AU the role of housing with a public task is stronger and, accordingly, policies promote an affordable supply of good-quality dwellings. Even though there are less tax incentives than in the remaining countries of this group, policies for public loans and subsidies for construction and modernization of dwellings, building society savings and building society loans are some of the most important housing policies<sup>124</sup>.

According to the jurisprudence of the German Federal Constitutional Court, one of the primary obligations of the German welfare state is to care for those in need, and that is the case of households with lower income, who struggle to find adequate housing.

Art. 1 (I) of the German Basic Law in conjunction with the welfare state imperative contained in Article 20 (III) GG is considered the origin and legitimization for social housing policy. The judgement of the BVerfG of 9 February 2010 concretized this

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<sup>117</sup> Krieger – Le bail d'habitation, 2009, pp. 18-19. See, also, <http://www.statistiques.public.lu/catalogue-publications/RP2011-premiers-resultats/2013/08-13-fr.pdf> (last retrieved: 15.05.2014).

<sup>118</sup> Wehrmüller – National report for CH, 2014, sec. 2.7.

<sup>119</sup> Hofmann – National report for AU, 2014, sec. 2.7.

<sup>120</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 2.7.

<sup>121</sup> Santos Silva – National report for LU, sec. 2.7.

<sup>122</sup> Wehrmüller – National report for CH, 2014, sec. 2.7.

<sup>123</sup> G. Esping-Andersen, The three worlds of welfare capitalism (New Jersey: Princeton University Press, 1990) available at:

<http://isites.harvard.edu/fs/docs/icb.topic1134169.files/Readings%20on%20Social%20Democracy/Esping%20Andersen%20-%20The%20Three%20Worlds%20of%20Welfare%20Capitalism.pdf>, 27 (last retrieved: 10-03-2014).

<sup>124</sup> Hofmann – National report for AU, 2014, sec. 3.1.

principle insofar as the provision of the subsistence level aid is supposed to cover both the need to secure physical existence, thus accommodation, as well as the possibility to cultivate interpersonal contacts<sup>125</sup>.

In Luxembourg, in the last few years, particularly since the enactment of the LBUH, the Housing Ministry has been promoting the rental sector. The Government is particularly concerned with households who are not entitled to access the residual social rental sector but cannot afford to rent a dwelling in the private rental sector. The already existent AIS<sup>126</sup> has a characteristic which seems to be original in the European panorama. It involves cooperation with social security services, which are responsible for drafting a personal and professional development plan of the tenant. When signing the agreement with the AIS, the tenant agrees to follow the individualized program. This shall allow him or her to gather sufficient financial autonomy to be able to enter the private rental sector after three years, which is the fixed and non-extendable length of the contract with the AIS. The new rent subsidy provided for in the Law Project 6542 will assist households in risk of poverty to cope with the payment of rents ‘without actually creating a general rise in rents. The Law Project 6583 provides for a significant public subsidization of land for development and of immovables aimed at accommodating particular parts of the population. Elderly persons benefit from priority access to social housing (Art. 10 in fine of the amended RGD 16 November 1998), and minor children of low age have special treatment in eviction procedures. Nowadays, there are practically no homeless people in LU. Young adults facing social difficulties are the main target of services which provide the so-called “*logements encadrés*”, where, despite their fragile social and financial position, tenants are still expected to pay rent and associated costs<sup>127</sup>.

In CH the subsidization of tenants on the federal level is subject-related; persons in need are supported with social assistance provided as an amount of money. Taxation also plays a role in the housing system as private landlords and cooperatives can optimize taxes by investing in maintenance projects annually<sup>128</sup>.

An express, fundamental and enforceable “right to housing” does not exist in any of the countries of the group. Nevertheless, each country has regulations (constitutional or infra-constitutional) supporting access to decent housing.

In DE Article 13 GG provides for a “defence right” (*Abwehrrecht*) against violations of an existing home. Article 14 GG guarantees protection of ownership within the limits that are defined by the laws, and the case law of the German Constitutional Court has established that the right of possession of a tenant is protected within the scope of this article as well, consistent with its social functions.

Some of the *Länder* (Bavaria, Berlin, Bremen) have provisions in the respective *Land* constitutions (*Landesverfassungen*) which go further in the protection of the home, but according to the jurisprudence of the Constitutional Courts of Bavaria and Berlin, these provisions do not include subjective rights (even in the social housing sector). Instead, they refer merely to the obligation of the *Länder* and the municipalities to invest in construction projects.

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<sup>125</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.1.

<sup>126</sup> Agence Immobilière Sociale, social rental agency.

<sup>127</sup> Santos Silva – National report for LU, sec. 3.1.

<sup>128</sup> Van Wezemael, 123 f. For further details see Wehrmüller – National report for CH, 2014, sec. 3.1.

Article 1 GG, which protects human dignity, allows for the assumption that such a right could be derived from the dignity-based need for living space and the welfare state principle, but this would not guarantee effective enforcement.

In AU the constitutional framework of housing is relevant by reference to the spheres of competencies for legislating over and executing housing policy. The Austrian Constitution of 1920 (*Bundes-Verfassungsgesetz*, *B-VG*) divides such competencies of the federal state (*Bund*) and the different Austrian states (*Länder*), but several competencies are mixed.

The right to housing is not contemplated by the LU Constitution, nor is a definition of “decent housing” found in LU legislation. However, the amended Law of 25 February 1979 and the policy of housing which was put in place to take action in this field are instruments aimed at facilitating access to housing in the Grand-Duchy. For that reason one might consider that there is a certain guarantee of access to housing in the Grand-Duchy. Nevertheless, due to the residual percentage of social housing in LU, the introduction of a “right to housing” in the LU Constitution is currently not an issue.

Although also in CH there is no real “*droit au logement*”, there are several provisions, at the federal and cantonal level, which provide some degree of protection in this field. Art. 41 s. 1 ff of the Const. provides that all persons should be entitled to “suitable accommodation on reasonable terms”, which constitutes a social objective (*Sozialziel*) of the Confederation and the cantons. Arts 108 and 109 of the Swiss Constitution contribute for achieving such objective. While art. 108 Const. serves as a basis for the Housing construction and Housing Ownership Promotion Act (WEG) and the Federal Act for the promotion of Affordable Housing (WFG), art. 109 s. 1 Const. provides for the obligation of the confederation to legislate against abuses in tenancy matters.

On a cantonal level few constitutions provide for a right to housing. Some constitutions mention it as a social objective, but as we have seen in the case of DE, this does not translate into a greater protection in practice.

## 2.2. Policies and actors

### 2.2.1. Governmental actors

In all four countries, not only national but also regional and local levels of government are actively involved in the design and implementation of housing policies.

In AU several important housing policies are designed and implemented at the national, i.e., federal state level. The Ministry of Economy is responsible for international representation of housing policy and for the design and supervision of the law on limited-profit housing<sup>129</sup>. The Ministry of Justice is responsible, in particular, for the Rent Act and the Home Ownership Act. The Ministry of Environment is responsible for climate programs, together with state governments, and the Ministry of Finance is responsible for tax law, also sharing some competencies with the states. The nine Austrian States (regional level) design and promote housing policies and implement the law relating to limited-profit housing and climate programs (the latter together with the Ministry of Environment). Finally, at the local level, municipalities are responsible for building law

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<sup>129</sup> Hofmann – National report for AU, 2014, sec. 3.2.

and planning regulations (both with limits set at the regional level); they are also responsible for policies on the use of land and allocation for housing purposes and for the allocation of subsidized dwellings<sup>130</sup>.

In DE the federation is responsible for the design of laws concerning tenancy law. The Ministry dealing specifically with housing issues is the Federal Ministry of Transports, Building and Urban Development, and the most important policies on housing management are climate policy, regional planning and urban development promotion. At the state level, housing policy is dealt with by different regional ministries, and only the city-states (namely, Bremen, Hamburg and Berlin) have ministries dedicated specifically to construction, housing and urban development. According to constitutional provisions, in regard to fields being subject to concurrent legislation, the *Länder* have the right to adopt their own legislation in so far as the *Bund* has not made use of its legislative powers in the same field. Even with the limitations at the national and regional level, local authorities play the most important role in housing policies, as they manage the existing housing stock and plan the new residential space<sup>131</sup>.

In LU the competent ministry on housing issues is the *Ministère du Logement*. It is responsible for housing policies and the Housing Observatory, legislation on rents, state subsidies for the construction of housing units and public housing promoters, state subsidies for individuals, the Service for Housing Aids and Commission for individual housing aids and the housing pact. The *Observatoire de l'Habitat* was set up for the planning of a coherent and efficient policy in the short, middle and long term, concerning housing in particular and habitat in general<sup>132</sup>.

In CH there are three different entities responsible for housing: the confederation, the cantons and the municipalities. The cantons exercise all rights that are not transferred to the Confederation by the Constitution (Art. 3 Const.). The distribution of competences is, thus, as in DE, made by constitutional provisions.

Accordingly, the responsibility for legislation in tenancy law and housing policy is assigned to the Confederation. The cantons have the responsibility of organizing the courts and administrating justice in civil matters. The promotion of the construction of housing and home ownership gives the Confederation a parallel competence to the cantons. Thus, promotional measures as well as legislation concerning these measures can be taken by the Confederation and the cantons. Construction and planning legislation is organized at all three political levels, though the Confederation lays down the principles on land use and spatial planning and decides directly on "important matters"<sup>133</sup>.

## 2.2.2. Housing policies

The main objective of Austrian housing policies pursued at all levels of governance is to provide affordable housing of high quality to the citizens. This is also the main goal of the policies in LU, where the Government is committed to getting the evolution of the

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<sup>130</sup> Hofmann – National report for AU, 2014, sec. 3.2.

<sup>131</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.2.

<sup>132</sup> Santos Silva – National report for LU, 2014, sec. 3.2.

<sup>133</sup> See Wehrmüller – National report for CH, 2014, sec. 3.2 and art. 13 from the *Bundesgesetz über die Raumplanung (Raumplanungsgesetz, RPG)*, available under <https://www.admin.ch/opc/de/classified-compilation/19790171/201405010000/700.pdf> (last retrieved: 04.06.2015).

prices in the real estate market under control, by increasing the supply of dwellings and land for property development and by simplifying and shortening the administrative procedures concerning the construction of housing<sup>134</sup>.

In DE construction of new dwellings is one of the country's top priorities due to the expiration of the temporary commitments of social dwellings<sup>135</sup>.

In AU a clear national policy preference for a specific tenure cannot be noticed and thereby one may conclude that neutrality of tenure is promoted. In DE, however, policy is directed at renting as the dominant housing choice. The political system is highly sensitive to tenants' rights even though the most recent amendment to the German Civil Code on tenancy law also strengthened the right of landlords

In LU promoting homeownership was a clear housing policy for several decades, but more recently, and having acknowledged the importance of the rental sector particularly in the city centres, Government has been promoting it as well with subsidies and tax benefits<sup>136</sup>.

In CH Art. 108 of the Federal Constitution provides that the Swiss Confederation shall "encourage the acquisition of the ownership of apartments and houses for the personal use of private individuals". The Federal Council intends to support particularly the improvement of the promotion of non-profit housing, for example by facilitating access to construction land and measures in the field of spatial planning<sup>137</sup>.

The countries under review do not have special housing policies targeted at certain ethnical groups of the population, but they do acknowledge particularly the rights of some social segments, namely the elderly, disadvantaged people, families with children and migrants.

In AU special housing policies targeted at certain groups exist primarily for elderly people with reference to barrier-free construction of new buildings and barrier-free modernization of existing buildings.

In DE local projects financed within the scope of the national "Social City" programme aim at improving the housing situation in socially disadvantaged neighbourhoods, where many Sinti and Roma people live, as well as other migrants<sup>138</sup>.

In LU amended Law 25 February 1979 granted a significant amount of state grants to people who had lower incomes and families with children. With a new law project submitted in June 2013 to the LU Parliament the Government intends to enlarge the beneficiaries of these individual aids; in particular persons living in a detention centre or prison could also apply to these grants for the purpose of renting. The Service for Housing Aids provides advice and information on housing subsidies to seniors and people in need of handicapped-adapted dwellings<sup>139</sup>.

Cantons and especially municipalities are responsible for rendering services to elderly people in CH, who benefit for special protective rules upon termination of rental agreements<sup>140</sup>.

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<sup>134</sup> Hofmann – National report for AU, 2014, sec. 3.3.

<sup>135</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.3.

<sup>136</sup> Santos Silva – National report for LU, 2014, sec. 3.3.

<sup>137</sup> Wehrmüller – National report for CH, 2014, sec. 3.3.

<sup>138</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.3.

<sup>139</sup> Santos Silva – National report for LU, 2014, sec. 3.3.

<sup>140</sup> Wehrmüller – National report for CH, 2014, sec. 3.3.

## 2.3. Urban policies

Even though ghettoization is not a concerning phenomenon in the countries under analysis, Governments have been actively promoting a more diverse social mix of different housing tenures<sup>141</sup>.

Gentrification is also not problematic, but raises a greater concern of public authorities than ghettoization does. It has been combatted with different instruments, among which is the imposition of certain quotas of non-profit dwellings among “good neighbourhoods”<sup>142</sup>, which may go up to 50%<sup>143</sup> or the delimitation of a maximum level of rents in those areas<sup>144</sup>.

The concern of public authorities for providing a social mix of tenures, a significant percentage of social housing (except for LU) and the availability of social dwellings which look the same as dwellings from the private rental market has avoided that social rental housing is perceived as a less respectable form of tenure. Nevertheless, the expensive cost of rental housing in certain urban central areas will always provoke a centralization of the poorer households in peripheral areas and the concentration of the better-off in the main central ones.

In all four countries the quality of private rented housing is not only determined by free market mechanisms, but there are means of controlling and regulating it as well.

The Construction Law Statutes of the nine Austrian states and bylaws provide a compulsory valid permit of usage by the local construction authorities, and there are binding technical standards for the construction of new dwellings<sup>147</sup>.

In DE the Building Regulations of the *Länder* require that a dwelling must fulfil basic minimum requirements in order to be called housing. Nevertheless, tenancy law is a field of private law characterized by freedom of contract, and thus even dwellings which do not fulfil the minimum standard are considered contract-compliant if these conditions were explicitly agreed upon<sup>148</sup>.

Art. 34 of the amended *loi du 25 février 1979* in LU concerns state financial subsidy to housing, and it provides that municipal authorities are responsible for controlling dwellings. Pursuant to this provision, the competent municipal service, in collaboration with the police, executes regular controls of immovables with furnished rooms. Art. 33 of the same Act reads that any person or body which rents or makes available furnished dwellings and collective dwellings must previously declare it to the mayor of the municipality, indicating the maximum number of persons who can be simultaneously accommodated and the amount of the rent, and annexing to the declaration a detailed description of the state of the sites. Moreover, every dwelling for renting must meet requirements of hygiene and habitability defined by RGD 23 March 1979. Authorities have concluded that these measures have been leading to a significant improvement of the degree of comfort of the furnished rooms<sup>149</sup>.

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<sup>141</sup> Santos Silva – National report for LU, sec. 3.4; Wehrmüller – National report for CH, 2014, sec. 3.4.

<sup>142</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.4., Hofmann – National report for AU, 2014, sec. 2.6.

<sup>143</sup> Wehrmüller – National report for CH, 2014, sec. 3.4.

<sup>144</sup> *Ibid.*

<sup>147</sup> Hofmann – National report for AU, 2014, sec. 3.4.

<sup>148</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.4.

<sup>149</sup> Santos Silva – National report for LU, sec. 3.4.

In CH provisions concerning structural safety and requirements for inhabited rooms are incorporated in cantonal and/or municipal building acts. Apart from these regulations, a tenant can require that the landlord maintain the apartment in a condition fit for its designated use, which is determined by the contractual agreement and the requirements for normal use of the apartment<sup>150</sup>.

## 2.4. Energy policies

European, national and local energy policies affect (rental) housing substantively in AU, DE, LU and CH with regard to the aim to increase energy efficiency of buildings.<sup>151</sup> Especially in the fields of construction and modernization of buildings and of housing subsidies and taxation, energy policies have a high influence on the housing market in all four countries under review except LU.

As a consequence of the two severe oil crises of the 1970s, many European countries have developed strategies of state intervention to secure a more sustainable use of energy resources. The energy policies since the 1970s in all four countries under review have at first mainly focused on questions of individual or collective mobility (e.g. transportation and sustainable use of cars). However, the national or local state authorities of these countries have by that time started to implement some limit values for essential components of new buildings e.g. with regard to insulation of roofs or walls.<sup>152</sup>

The aim to increase energy efficiency in buildings steadily gained more importance in the 1990s in Europe: In 1993 Directive 93/76/EE<sup>153</sup> to limit carbon dioxide emissions by improving energy efficiency (SAVE) was enacted, and in 1997 the 'Kyoto-protocol' was concluded. The following commitments<sup>154</sup> of the European Commission in 1998 towards a strategy for the rational use of energy lead to a first action plan<sup>155</sup> by the European Commission to improve energy efficiency in the European Community in 2000.

The Directives 2004/8/EC<sup>156</sup> and 2006/32/EC<sup>157</sup> on energy efficiency as well as the first Directive 2002/91/EC<sup>158</sup> and the second Directive 2010/31/EU<sup>159</sup> on the energy

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<sup>150</sup> Wehrmüller – National report for CH, 2014, sec. 3.4.

<sup>151</sup> As CH is not an EU member state, EU Directives and Regulations do not have to be implemented into Swiss law. The relations of CH with the European Union are governed by bilateral agreements. EU energy policy therefore has only direct effect if governed by these bilateral agreements; see Wehrmüller – National report for CH, 2014, sec. 7 for details. AU became an EU member state in 1995. EC law although had some effects before as AU has been a contracting state of the agreement on the European Economic Area.

<sup>152</sup> Cf. Hofmann – National report for AU, 2014, sec. 3.5.

<sup>153</sup> Council Directive 93/76/EEC of 13 September 1993 to limit carbon dioxide emissions by improving energy efficiency (SAVE), OJEEC L 237, 22.9.1993.

<sup>154</sup> Communication from the Commission of 29. April 1998: Energy Efficiency in the European Community – Towards a Strategy for the Rational Use of Energy, COM (1998) 246.

<sup>155</sup> Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, of 26. April 2000, entitled: 'Action Plan to improve energy efficiency in the European Community', COM (2000) 247.

<sup>156</sup> Directive 2004/8/EC of the European Parliament and of the Council of 11 February 2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42/EEC, OJEC L 52, 21.2.2004.

performance of buildings were entirely implemented in AU, DE and LU. Furthermore, the 'National Energy Efficiency Action Plans' of AU, DE and LU<sup>160</sup> in accordance with the EU-directive 2006/32/EC list a number of energy efficient measures with reference to private households, such as improving the thermal quality of the building shell, the use of energy-efficient building installations, in the case of new construction, renovation and ongoing operation, or the use of energy-efficient appliances and lightening.

In CH, the cantons regulate about efficient use of energy in new and existing buildings. All cantons have enforced insulation requirements and maximum percentages of non-renewable energy. Furthermore, a building programme was started in 2010 by the confederation and the cantons to reduce energy consumption and CO<sub>2</sub> emissions by supporting energy-efficient renovation and the use of renewable energy in buildings.<sup>161</sup> Similar subsidization programmes for modernization of existing buildings have been established in DE and AU as well.<sup>162</sup>

With regard to rental tenancies in AU, DE and LU, the most visible influence of the EU energy policy for any tenant so far is the obligation of landlords to provide an energy performance certificate whenever a new rental contract is concluded.<sup>163</sup> Also, the energy performance indicator of the energy performance certificate has to be stated in the advertisements in commercial media.<sup>164</sup> In CH, these concrete obligations have not been reported.<sup>165</sup>

Energy efficient modernization of buildings is in all four countries a reason to allow extraordinary rent increases in continuing contracts temporarily (AU)<sup>166</sup> or permanently (DE, CH, LU).<sup>167</sup>

## 2.5. Subsidization

All four countries under review have both object-related and subject-related funding, but through different providers of dwellings and with certain emphasis.

While in AU and Luxembourg object-related subsidies for the construction and modernization of buildings are dominant, in DE and CH subject-related subsidies are the preferred type of housing subsidies available.<sup>168</sup>

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<sup>157</sup> Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC, OJEC L 114, 27.4.2006.

<sup>158</sup> Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings, OJEC L 1, 4.1.2003.

<sup>159</sup> Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings, OJEU L 153, 18.6.2010.

<sup>160</sup> [http://ec.europa.eu/energy/efficiency/eed/neep\\_en.htm](http://ec.europa.eu/energy/efficiency/eed/neep_en.htm) (last retrieved 27.10.2014).

<sup>161</sup> Wehrmüller – National report for CH, 2014, sec. 3.5.

<sup>162</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.5; Hofmann – National report for AU, 2014, sec. 3.5.

<sup>163</sup> Arts. 11 and 12 of the Directive 2010/31/EU.

<sup>164</sup> Art. 12 par. 4 of the Directive 2010/31/EU.

<sup>165</sup> Wehrmüller – National report for CH, 2014, sec. 3.5,

<sup>166</sup> For a maximum period of 10 years in case the MRG is fully applicable (§ 18 MRG).

<sup>167</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.5; Wehrmüller – National report for CH, 2014, sec. 3.5; Santos Silva – National Report for LU, 2014, sec. 6.5.

Although both AU and LU provide object-related subsidies, the aim of the subsidies differs noticeably between these two countries. Whereas in LU a broad range of state financial funding in the form of capital or interest subsidies has been launched to encourage individuals to construct their own dwellings and thereby build-up private assets,<sup>169</sup> in AU limited-profit housing associations profit most of all from public loans or annuity and interest subsidies.<sup>170</sup> In CH, the Confederation financially supports construction and renovation works by giving advantageous loans to organizations that are involved in the construction of non-profit housing (mainly housing cooperatives, but also foundations and public limited companies).<sup>171</sup> In DE, every type of landlord is entitled to apply for social housing subsidies according to the Law on State Funding of Housing and Housing Construction.<sup>172</sup>

In return for the object-based subsidies, the landlords in AU, DE and CH are committed to observe certain limitations such as special occupancy requirements for low income households. In AU and DE rent ceilings are also common.<sup>173</sup>

Object-based instruments in AU are (long-term) low-interest loans, annuity and interest subsidies for construction and modernization of dwellings, non-refundable one-off payments for construction and modernization of dwellings for citizens or property developers, tax incentives and building society savings (premiums).<sup>174</sup> In DE low-interest loans and interest subsidies granted by the Reconstruction Credit Institute (*Kreditanstalt für Wiederaufbau*<sup>175</sup>) for the construction and modernization of dwellings for low income households and special purpose investments like energy efficient modernization dominate. Further instruments are building society savings (premiums), an employee saving bonus, which is a subsidy to promote the capital formation of employees e.g. for buildings society savings), and the *Riester Pension programme*, which pension scheme can be used for building loan contracts or for buying real estate by individuals.<sup>176</sup> In LU the preferred object-based instruments are construction subsidies in the form of one-off payments granted to individuals for the construction of a single family dwelling or apartment,<sup>177</sup> annuity and interest subsidies granted to individuals for the construction of a single family dwelling or apartment and guarantees

<sup>168</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.6; Wehrmüller – National report for CH, 2014, sec. 3.6; Santos Silva – National Report for LU, 2014, sec. 3.6; Hofmann – National report for AU, 2014, sec. 3.6.

<sup>169</sup> Santos Silva – National Report for LU, 2014, sec. 3.6.

<sup>170</sup> Hofmann – National report for AU, 2014, sec. 3.6.

<sup>171</sup> Wehrmüller – National Report for CH, 2014, sec. 3.6.

<sup>172</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.6.

<sup>173</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.6; Wehrmüller – National report for CH, 2014, sec. 3.6; Hofmann – National report for AU, 2014, sec. 3.6.

<sup>174</sup> Hofmann – National report for AU, 2014, sec. 3.6.

<sup>175</sup> The ‘*Kreditanstalt für Wiederaufbau*’ is closely linked with the economic development of the Federal Republic of DE since WW II and has been founded as public-law institution to support change and encourage forward looking ideas in Germans, Europe and throughout the world; see Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.6 for details.

<sup>176</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.6.

<sup>177</sup> Luxembourg also grants in addition to the construction subsidy a financial subsidy for paying the architect and engineer consulting fees in certain circumstances; Santos Silva – National Report for LU, 2014, sec. 3.6.

for loans by the State.<sup>178</sup> In CH low-interest loans and guarantees for loans with counter-guarantee are granted for non-profit housing providers.<sup>179</sup>

With regard to subject-related subsidies, it can be noticed that in CH a specific subsidy programme for housing apart of the general social assistance benefits system does not exist. AU and DE both rely on a mixed subject-based funding system granting either specific housing subsidies to low income households or accommodation cost subsidy as part of the social welfare system. In LU, only subsidies directly linked to housing have been reported.<sup>180</sup>

Subject-based instruments in AU are a housing subsidy (*Wohnbeihilfe*) granted to low income households, a subsidy for heating costs granted to low income households and an accommodation cost subsidy as part of needs-based minimum benefits (*Bedarfsorientierte Mindestsicherung*) granted to low income households.<sup>181</sup> DE provides housing allowance (*Wohngeld*) granted to low income households and an accommodation cost subsidy granted to the recipients of minimum social welfare.<sup>182</sup> In LU the subject-based instruments are a subsidy for the financing of the rental guarantee and a rent subsidy (*subvention de loyer*) granted to tenants with low income paying more than 1/3 of their income for the rent.<sup>183</sup> CH offers accommodation cost subsidy as part of social assistance benefits.<sup>184</sup>

## 2.6. Taxation

Tax policies of DE, CH and LU regarding rental tenancies do not differ significantly. In general the rule that “no tax is paid on rental tenancies” applies. However, the real property tax charges due by a landlord in DE are usually passed on to the tenant and the municipal taxes for the use of a dwelling like waste collection fees can be imposed on a tenant in LU.<sup>185</sup>

AU is the only country under review where tenants have to pay a value added tax (VAT) of 10% on their rent for dwellings. Tenants even need to pay 20% VAT on their rent for furniture or garages and heat supply. Furthermore, the stamp duty on written tenancy agreements and the real property tax expenses of the landlords (like in DE) are regularly transferred to the tenant.<sup>186</sup>

Homeowners in all four countries under review are confronted with a duty to pay a land transfer tax at time of acquisition of immovable property. In DE and CH additionally

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<sup>178</sup> Santos Silva – National Report for LU, 2014, sec. 3.6.

<sup>179</sup> Wehrmüller – National Report for CH, 2014, sec. 3.6.

<sup>180</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.6; Wehrmüller – National Report for CH, 2014, sec. 3.6; Santos Silva – National Report for LU, 2014, sec. 3.6; Hofmann – National Report for AU, 2014, sec. 3.6.

<sup>181</sup> Hofmann – National Report for AU, 2014, sec. 3.6.

<sup>182</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.6.

<sup>183</sup> Santos Silva – National Report for LU, 2014, sec. 3.6.

<sup>184</sup> Wehrmüller – National Report for CH, 2014, sec. 3.6.

<sup>185</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.7; Wehrmüller – National Report for CH, 2014, sec. 3.7; Santos Silva – National Report for LU, 2014, sec. 3.7.

<sup>186</sup> Hofmann – National Report for AU, 2014, sec. 3.7.

inheritance or gift tax is also charged, whereas in Luxembourg and AU no such tax has been reported.<sup>187</sup>

In CH and Luxembourg homeowners have to pay income taxes on imputed rental value but may also deduct certain expenses related to the acquisition or use of their property such as mortgage interest payments. Also, income tax deductions may be acquired in Luxembourg within the frame of a home-buyer savings plan or for mortgage registration costs.<sup>188</sup> In marked contrast to CH and Luxembourg, occupying your own house is not considered as taxable income in AU and DE. However, landlords' income of renting out a premise is subject to income or corporate income tax in all four countries, providing also a broad range of instruments for deductions for property owners in general and exceptions e.g. for limited-profit housing associations (AU) or cooperatives (DE, CH).<sup>189</sup>

Homeowners in AU and DE also have to pay real property taxes. Austrian and German landlords are in principle also obliged to pay real property taxes but – as already stated above – regularly impose this obligation to their tenants. The tax amount differs with respect to the involved state (DE) or municipality (AU).<sup>190</sup>

In CH, real property tax for homeowners and landlords is known at cantonal and/or municipal level either in addition to wealth and equity tax or instead of income and wealth or equity tax, depending on the concrete regulations of each canton and/or municipality.<sup>191</sup> In Luxembourg recently the introduction of a new real property tax has been discussed but has not been implemented yet.<sup>192</sup>

In case of disposal of immovable property, homeowners and landlords in AU, CH and DE also have to pay real property profit taxes. In DE, this kind of tax is part of the income tax and only applies to objects that are sold within 10 years after acquisition.<sup>193</sup>

With regard to tax evasion, only marginal problems have been reported in all countries under review.<sup>194</sup>

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<sup>187</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.7; Wehrmüller – National Report for CH, 2014, sec. 3.7; Santos Silva – National Report for LU, 2014, sec. 3.7; Hofmann – National Report for AU, 2014, sec. 3.7.

<sup>188</sup> Wehrmüller – National Report for CH, 2014, sec. 3.7; Santos Silva – National Report for LU, 2014, sec. 3.7.

<sup>189</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.7; Wehrmüller – National Report for CH, 2014, sec. 3.7; Santos Silva – National Report for LU, 2014, sec. 3.7; Hofmann – National Report for AU, 2014, sec. 3.7.

<sup>190</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.7; Hofmann – National Report for AU, 2014, sec. 3.7.

<sup>191</sup> Wehrmüller – National Report for CH, 2014, sec. 3.7.

<sup>192</sup> Santos Silva – National Report for LU, 2014, sec. 3.7 (cf.)

<sup>193</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.7; Wehrmüller – National Report for CH, 2014, sec. 3.7; Santos Silva – National Report for LU, 2014, sec. 3.7; Hofmann – National Report for AU, 2014, sec. 3.7.

<sup>194</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 3.7; Wehrmüller – National Report for CH, 2014, sec. 3.7; Santos Silva – National Report for LU, 2014, sec. 3.7; Hofmann – National Report for AU, 2014, sec. 3.7.

### 3. Comparison of tenures without a public task

#### 3.1. Evaluative criteria for landlord

##### 3.1.1. Profitability

**Table 1<sup>195</sup>**

	DE	AU	CH	LU
<b>Taxation</b>	Income for rent taxed (cooperatives and REITS exempted) Tax benefits - Tenant and landlord excepted from VAT Tax costs partially transferable to tenant	Real property profit tax and rental revenues taxed Tax costs transferable to tenant Tenants pay VAT on rent, furniture, garages and on their costs	Tax benefits (advantageous imputed rent) Energy efficiency renovations deductible	Income for rent taxed
<b>Incentives to renting besides taxation</b>	Low interest rates Liberal requirements for providing rental dwellings Mechanisms for rent increase <sup>196</sup>	Lien <sup>197</sup> secures patrimonial interests of landlord	Early withdrawal of pension funds	Low interest rates (but complex set of rules and procedures; speculative bubbles)
<b>Perceived effects of renting</b>	Stable financial security for retirement planning	Strategic option after price of real estate increased with the crisis	Sense of security prevails over objective lower return as compared to other types of investment	Stable option in particular in times of crisis

<sup>195</sup> The issue of the determination and increase of rents is addressed in the table \* under "Affordability".

<sup>196</sup> See sec. on "affordability".

<sup>197</sup> § 1101 AGBG.

<b>Cost for repairs or maintenance “fit-for- use”</b>	On the landlord <sup>198</sup> Minor and cosmetic repairs on the tenant <sup>199</sup>	On the landlord, assignable to the tenant <sup>200</sup>	On the landlord <sup>201</sup> , assignable <i>de facto</i> to the tenant through rent or accessory charges Minor defects and defects attributable to tenant on the tenant	On the landlord <sup>202</sup>
<b>Other costs</b>	On the landlord, assignable to tenant (except operating costs <sup>203</sup> )  Electricity costs on the tenant <sup>204</sup>	General expenses, public charges and extraordinary costs on the tenant  Improvement works on the tenant  Subject to judicial price control	Accessory charges <sup>205</sup> must be specifically described to be collectable apart from rent and landlord must not profit from them  Costs of renovation works can be passed on to tenant <sup>206</sup>	On the tenant the costs for which he contributed

In most cases, the decisive aspect in the decision of real property owners to become landlords consists of whether letting their dwellings will be profitable for them, at least in the long-run. Nevertheless, national and European regulation are traditionally protective of the weaker contractual party, and this will often mean that the interests of the tenant will be protected (namely, that renting will be affordable). This is the case of regulation on rents.

Each of the four countries has some type of rent regulation, but this does not seem to be preventing investors (mostly individuals) in the private market of making profit on their investment.

German landlords can increase the rent when it has remained unchanged for fifteen months or when they carried out modernization works which lead to energy saving or a greater comfort. Operating costs may likewise be adjusted to a reasonable amount in case advance payments have been agreed upon.

<sup>198</sup> § 535 (I) 2 BGB.

<sup>199</sup> § 28 III, 1 IV, II Regulation on Housing Costs Calculation.

<sup>200</sup> § 1096 ABGB.

<sup>201</sup> § 265 s. 1 CO.

<sup>202</sup> Art. 1719 CC.

<sup>203</sup> § 556 (I, 1).

<sup>204</sup> § 556 II BGB.

<sup>205</sup> Accessory charges are defined as “actual outlays made by the landlord for services connected to the use of property”.

<sup>206</sup> About 50 to 70%, according to the CH report. See § 14, sec. 1 VMWG.

Nevertheless, § 126b BGB imposes on German private investors the obligation of thoroughly justifying, in text, all types of unilateral rent increases to the tenant. Only when the landlord wants to increase the rent up to the customary level in the locality (*ortsübliche Vergleichsmiete*) is he free from the previous approval by the tenant (§ 558b (1) BGB). Up to 2006 the declining-balance method of depreciation for investment (*degressive Abschreibung für Anlagen*) allowed investors to make higher tax deductions in the first years of the investment so that the investment turned out to be rentable earlier. The abolition of this tax-shifting effect led to significant enough losses in the beginning of the investment that is started becoming unattractive in the eyes of some investors<sup>207</sup>.

In AU, the calculation of rent is limited only to the general restrictions of the ABGB.

In LU there are three limits on private rent regulation: rents cannot be automatically increased; they cannot be increased during the first six months at the beginning of the rental agreement (and afterwards they can only be increased after every two years according to ratios of adaptation) and finally, whenever rents are increased, they cannot surpass 5% of the invested capital<sup>208</sup>. As far as the last limit is concerned, the legislator has acknowledged the interests of the landlords of used dwellings by allowing a re-evaluation of the dwellings to compensate inflation (art. 3, 3 LUBH).

Finally, in CH the landlord is usually free to increase the rent in unlimited-in-time contracts, but the tenant can challenge the initial rent (under Art. 269 and 269a CO) or rent increases during the tenancy (Art. 270a s. 1 CO). The tenant can request a rent reduction during the tenancy, whenever he has good reason to assume that the landlord is profiting excessively from the premises because of significant changes to the calculation basis.

When compared with the profit obtained by other investment activities, the return on investment from offering rental housing is typically less appealing, but the sense of security that it inspires in investors compensates somewhat for the generally lower return. On these grounds, investment in real estate is considered a stable option in DE, AU, CH and LU, particularly in current times of crisis<sup>209</sup>.

Investment in rental objects is considered reasonable in the context of personal retirement arrangements and tax deductions. In all countries this perception of real estate as a safe investment has been leading to a steady increase of real estate prices<sup>210</sup>.

One way of analysing whether national regulations are aimed at incentivising real estate owners to rent their dwellings is looking into tax law, namely into specific tax rules which may tax income from rent.

Income for rent is taxed in every of the four systems.

Both the German Income Tax Act<sup>211</sup> and the Austrian Income Tax Act (*Einkommensteuergesetz*) impose on natural persons the submission of their rental revenues (*Einkünfte aus Vermietung und Verpachtung*) to tax. While in DE REITS and cooperatives are exempted from such tax, in AU rental revenues of corporate bodies are

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<sup>207</sup> Cornelius & Rzeznik – National Report for DE, sec. 2.3.

<sup>208</sup> See Santos Silva – National report for LU, sec. 6.5.

<sup>209</sup> Cornelius & Rzeznik – National Report for DE and Hofmann – National report for AU, 2014, sec. 2.3.

<sup>210</sup> Hofmann – National report for AU, 2014, sec. 2.3.

<sup>211</sup> *Einkommenssteuergesetz* (v. 08.10.2009, BGBl. I 3366; corr. I 3862).

a type of income subject to a flat tax of 25% under the Corporate Income Tax Act "Körperschaftsteuergesetz 198").

In LU income from rents is calculated according to the surplus of revenues in relation to the costs of acquisition (*frais d'obtention*), and it is taxed in the category of net income arising from leasing of goods (*revenus nets provenant de la location de biens*). The advances of costs (*advances sur frais*) provided for by the tenant will be considered income only if it is lawfully retained by the landlord in the end of the contract.

In CH the tax on imputed rental value, which is a highly political and controversial topic, was introduced as part of the personal income tax to grant equal treatment of rental tenants and homeowners, who could always deduct costs related to the use of the property.

The aspect which has usually a bigger influence on the landlord's profits arising from the rental agreement is the expenses which he has to bear. These are not the same in every European country and certainly not the same in all four countries of this group.

The landlord's main responsibility to ensure that the rented property is in suitable condition for the designated use in the rental agreement is expressly provided for in DE (sec. 535 (I 2) BGB), LU (Art. 1719 of the CC) and CH (Art. 256 s. 1 CO). In AU whenever the MRG is not or is only partially applicable, such obligation may be, in principle, lawfully assigned to the tenant under sec. 1096 ABGB.

From such obligation derives the responsibility of the landlord to provide maintenance works (*Erhaltungsarbeiten*) and repairs which result from a responsible and normal use of the dwelling. Nevertheless, it is usual that rental agreements include clauses according to which the tenant must bear a portion of the costs for minor or trivial maintenance works (*kleine Instandhaltungsarbeiten, réparations locatives*) and cosmetic repairs (*Schönheitsreparaturen*)<sup>212</sup>. In CH the landlord can pass 50-70% of the costs of the renovation work to the tenant (Art. 14 s. 1 VMWG).

In AU maintenance works are to be distinguished from improvement works (*Verbesserungsarbeiten*). As for costs of utilities, other charges and taxes, they are shared by the tenant and the landlord according to different criteria.

In DE the landlord is, as a rule, to bear every cost to which the rented dwelling is subject. Nevertheless, it can be agreed between landlord and tenant that the latter is to bear the operating costs (§ 556 (I 1) BGB), which include the costs for the supply and the consumption of water and heating but not the costs for the supply and consumption of electricity. Pursuant to § 556 (II) BGB, electricity costs are to be paid by the tenant through a lump sum (*Betriebskostenpauschale*) or advance payment in a reasonable amount.

In AU general expenses, public charges and extraordinary costs are usually borne by the tenant whenever the MRG does not apply or applies only partially. However, in LU the rule is that the tenant will only bear the costs for which he contributed or which he consumed (*charges locatives*). It is debated whether administrative expenses (*frais de gérance*) may be placed at the expenses of the tenant; technical assistance expenses (*frais de gérance technique*) may, in principle, be.

In CH every cost necessary for keeping the dwelling fit for its designated use must be borne by the landlord but is usually covered by the rent paid by the tenant. The

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<sup>212</sup> See in DE section 28 (III 1, IV 1) of the II. Regulation on Housing Costs Calculation (II. BV). For LU see Santos Silva – National Report on LU and CH see Wehrmüller – National report on CH.

parties to the rental agreement can agree that costs necessary for keeping the dwelling fit for its intended use shall be included as accessory charges. All services defined as “accessory charges” can be charged to the tenant in addition to the rent; in such case, the latter will be reduced accordingly., which results in a respective reduction of rent.

As for costs, one may consider that the ones which are the responsibility of the landlord are usually covered by the amount of rent which he receives by the tenant or are (fully or partially) paid by the latter within contractual arrangements or compulsory national rules. From this point of view, one may consider that regulations in force permit to landlords to profit from the rental activity.

But there are other economic and financial advantages from landlords which arise from this investment.

In DE, for example, home ownership is regarded as a stable financial security for retirement planning, due to low interest rates and the widespread fear of inflation<sup>213</sup>. Homeowners benefit from a legally friendly environment to rent their premises, and this has to do with the liberal requirements for provision of dwellings, tax benefits and mechanisms for rent increase. Moreover, due to the fact that freedom of contract generally applies to tenancy law, dwellings can be rented without main equipment (namely, a furnished bath) provided that the tenant agreed upon such situation. Tax rules are also protective of the landlord, as they exempt him from the value added tax (§ 4 (no.12a) VAT Act, *Umsatzsteuergesetz*), in contrast to what happens to an owner-occupier.

Even though the situation of landlords varies according to whether the rental agreements are or are not regulated by the MRG, one may consider that home-owners are also protected by Austrian tenancy law regulations. This is, for example, the case of tax rules. Although the transfer tax is usually paid by the landlord or his legal representative, he is allowed to transfer this cost to the tenant together with the demanded deposit. As for the latter, there is no rule which establishes a limit for its amount and, contrary to what happens in the other countries under analysis, the OGH has held that landlords can ask up to an amount of six months of rents including charges (whenever the MRG is fully applicable<sup>214</sup>) or, even further, that they can establish the amount they please, provided that the amount does not contradict general contract rules.

As far as security, the landlord benefits from a lien on all moveable property (including money) within the rented dwelling owned by the tenant and the relatives who live together with him in the rented dwelling (*gesetzliches Bestandgeberpfandrecht*, § 1101 ABGB). The lien secures not only the payment of the rent, but also the payment of overheads, taxes and other costs and expenses.

In contrast to these two scenarios, LU's rental market is said to be “strongly pro-tenant” as far as investment in housing is concerned.

Indeed, on the one hand, rent control limits the amount of return a landlord can receive (rent can only be increased every two years), and if illegally evicted, the tenant is usually awarded a generous compensation.

The regulations in force might make landlords think twice before deciding to invest in renting. First, and despite LU being one of the countries which allows compensation with other types of revenues, as the rental losses are deductible from professional

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<sup>213</sup> Cornelius & Rzeznik – National Report for DE, sec. 2.2.

<sup>214</sup> To remove references to where MRG is applicable fully.

revenues, landlords are subject to different types of taxation. Second, rules (particularly those on energy efficiency) and administrative procedures are relatively complex. Third, the development of speculative bubbles may be a concern for investors: a sudden decrease of the value of their assets may effectively be disadvantageous to economic agents, as it reduces their consumption, but also their capacity of lending.

Despite the above, LU investors are uniformly positive about the attractiveness of their market as a location for real estate investment. This is mainly due to the low interest rates, which were boosted with the crisis and are expected to keep stable in the next few years.

Article 108 s. 1 of the Swiss Constitution states that “the Confederation shall encourage the construction of housing, the acquisition of the ownership of apartments and houses for the personal use of private individuals, as well as the activities of developers and organizations involved in the construction of public utility housing.” Non-profit house providers receive indirect aid under the WFG.

Landlords are not especially encouraged to enter the rental market.

Personal income tax, levied by the confederation and all cantons and municipalities, is the most important type of tax and includes the imputed rent of owner-occupied housing and the income from immovable property, such as the rental income. Expenses related to the earning of income are deductible from the gross income.

The politically controversial tax on imputed rental value was introduced as part of the income tax to grant equal treatment of rental tenants and homeowners. It was aimed at compensating the fact that homeowners could deduct costs related to the use of the property – such as mortgage interest payments and maintenance costs – and in most of the cantons the tenants could not deduct the rent from their taxable income.

Value-adding investments, which entitle the landlord to raise the rent, are generally not deductible, but value-adding *energy efficient* renovations are and entitle the landlord to raise the rent.

Provided that value-preserving investments can be deducted from the taxable income, landlords may optimise tax-savings by investing in rental property and keeping it in good shape, but all in all, renting may well be seen as a less profitable investment option.

### 3.1.2. Property rights respected *de iure* and *de facto*

	DE	AU	CH	LU
<b>Consequences of delayed payment</b>	Automatic default of tenant <sup>215</sup> Interests on the unpaid rent <sup>216</sup> May lead to termination	May lead to termination in case the period of grace expires	Default on expiry of the deadline and interests due <sup>217</sup>	

<sup>215</sup> 286 I BGB.

<sup>216</sup> 288 I BGB.

<sup>217</sup> S. 102, 2 CO.

Risk of deterioration of dwelling	On the tenant (damage caused by him does not entitle to rent reduction)	On the tenant	On the tenant (damage caused by him does not entitle to rent reduction) <sup>218</sup>	On the tenant
Conditions for eviction	<p>Yes</p> <p>Situation leading to eviction</p> <p>Enforceable documents</p> <p>Compliance with deadlines</p> <p>Bailiff for enforcement</p> <p>Custody of goods</p> <p>Eviction costs (to be paid by tenant)</p>	<p>Yes</p> <p>Situation leading to eviction</p> <p>Enforceable documents</p> <p>Compliance with deadlines</p> <p>Bailiff for enforcement</p> <p>Workmen if necessary</p> <p>Custody of goods (to be paid by tenant)</p>	<p>Yes</p> <p>Regular and summary process<sup>219</sup></p> <p>Presence of police may be required<sup>220</sup></p>	<p>Yes</p> <p>Complex process dependent on several factors (grounds of termination; date purchase of dwelling)</p>
Defences against eviction	<p>Reasonable period to vacate the dwelling<sup>221</sup></p> <p>Irreplaceable disadvantage plus payment of security is defence against eviction<sup>222</sup></p> <p>No extension of lease</p>	<p>Extension of tenancy or suspension under general rules<sup>223</sup></p> <p>Snow-flake order prohibits eviction in Winter</p>	<p>Challenge of notice and extension of lease</p>	<p>Extension admitted up to two times</p> <p>Special treatment of families including minors</p>

<sup>218</sup> 259a s. a CO *a contrario*.

<sup>219</sup> 257 s. 1 CPC.

<sup>220</sup> 343 s. 3 CPC.

<sup>221</sup> 721 VI, 94 II, 1 ZPO.

<sup>222</sup> 712 (I), 712 II ZPO.

<sup>223</sup> 42 EO.

<b>Lien or pledge over tenant's belongings</b>	Yes <sup>224</sup> but complex and unpractical Limited to the minimum existence level <sup>225</sup>	Yes, also over co-resident relatives belongings <sup>226</sup> Limited to the minimum existence level <sup>227</sup>	Yes, only for commercial tenancies <sup>228</sup> since 1990	Yes, regulated in Commercial Code
<b>Insurances</b>	Contracted by landlord, transferable to tenant ( <i>Betriebskosten</i> ) Building insurance Personal liability insurance Household insurance Etc	Contracted by landlord, transferable to tenant ( <i>Betriebskosten</i> ) Building insurance Personal liability insurance Household insurance Fire insurance	Contracted by landlord Building insurance Household insurance	Compulsory for tenant Fire insurance Household insurance
<b>Personal need</b>	Yes (personal or professional use, own use or use by relatives), conditioned	Yes (exceptional termination), conditioned (special notice length)	Yes <sup>229</sup> (ex.: renovation works)	Yes (own use or use by relatives), conditioned (special notice length)
<b>Performance in kind</b>	No statutory right Allowed as set-off costs assumed by repairs owed by landlord <sup>230</sup>	No statutory right	No statutory right Allowed as set-off costs assumed by repairs owed by landlord <sup>231</sup>	No statutory right

<sup>224</sup> 562 (I) BGB.

<sup>225</sup> 811 (I) BGB.

<sup>226</sup> 1101 ABGB.

<sup>227</sup> 1101 ABGB.

<sup>228</sup> 268 CO.

<sup>229</sup> 261 s. 2 ff a CO.

<sup>230</sup> 556 b I; 536 II BGB.

<sup>231</sup> 259b s. b. CO.

<b>Subsidisation</b>	(re)construction and modernisation works (ex.: energy efficiency)	(re)construction and modernisation works	Cooperatives receive indirect aid Subsidisation via taxation	Construction grants Energy efficiency related subsidies
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The only source of income of the landlord when he enters into a rental agreement is the rent and associated costs which are paid by the tenant. For such reasons, default in rent payment puts profitability at risk and can make the landlord incur significant losses, particularly if the renting activity has been performed for a shorter period.

In DE, AU, LU and CH, landlords incur a different degree of risk as far as default with rent payment is concerned, and this is particularly due to differences in the regulations.

In DE the rent is to be paid at the beginning of each payment period that the parties agreed in the contract (§ 556b (I) BGB), at the latest on the third working day. Most of the times the parties agree that the tenant has to pay the rent every month via bank transfer, and this is often done through standing order.

In case of delayed payment, the tenant is automatically in default (§ 286 (I) BGB). This means that the landlord does not need to issue a warning notice (§ 286 (II no. 1) BGB). For the length of time that the tenant is in default, he must pay interest on the rent (§ 288 (I) BGB), and the default rate of interest per year is 5% above the basic rate of interest. Currently, the basic rate of interest is -3,62 (§ 247 (I) BGB), so that the default rate of interest amounts to 4.62%.

If the tenant (i) is in default, on two successive dates, of paying the rent or a portion of it that is not insignificant or (ii) is in default of paying the rent in a period of time spanning more than two months and in an amount that is as much as the rent amount for two months, then the landlord is after an unheeded warning notice entitled to terminate the tenancy without notice period (§ 543 (II no. 3) BGB).

In AU, § 1100 II ABGB, which is a dispositive rule, provides that the rent of premises has to be paid monthly and is due on the 5th day of the month, but the parties often agree that the rent shall be paid (become available within the landlord's sphere) on the first day of the month.

In case of delayed payment the landlord can demand payment from the tenant and set a reasonable grace period. If the tenant fails to pay the rent within the next rent period and the period of grace expires, there is a "qualified rent delay" (*qualifizierter Mietzinsrückstand*), which entitles the landlord to formlessly declare the immediate termination of the tenancy agreement.

In LU, as in other countries, the main obligation of the tenant is to pay the rent (usually in the first day of the month), and non-payment of the rent justifies an immediate termination by the landlord. Many lease contracts provide a clause according to which the lease contract automatically terminates upon the non-payment of one rent, and case law has been upholding termination even in cases of delayed payment.

The landlord to whom the due rent is not paid can address the court to obtain a declaration of termination of the lease and an order for the tenant to pay the lease arrears. The landlord can also deduct the due rents from the deposit, in case it was invoiced as "upon first demand" guarantee". These rules apply to social rental agreements and private rental agreements with a public task, according to Art. 1 *in fine* LBUH (*a contrario sensu*).

In CH, contrary to what is common in the other countries of the group under analysis, the rent and accessory charges are considered due at the end of each month (Art. 257c CO), although most often the parties agree on an obligation for advance performance by the tenant. If the rent is owed as a monetary payment, the date agreed upon for payment consists of a deadline for performance according to Art. 102 s. 2 CO; on expiry of the deadline, the obligor is automatically in default and must pay default interests (5% per year, under Art. 104 s. 1 CO).

A usually less frequent – but always possible – risk to the property rights of the landlord is the risk of abuse or deterioration of the house by the tenant.

In DE using the dwelling in conformity with the contract is a secondary obligation arising from the rental agreement, together with the obligation of informing the landlord of a defect (defined according to §§ 536 (I) and (III) BGB and of tolerating the measures required for the maintenance of the dwelling.

Damage caused by the tenant is not regarded as a defect, with the consequence that the landlord maintains his claim for rent to the full extent pursuant to § 326 (II) BGB. The damage caused by third parties will be considered a defect only in case the tenant does not have fault, such as in the case of damage caused by neighbours, thieves or the landlord himself. In this case, the tenant will be allowed to reduce the rent amount.

In AU the tenant may use the dwelling as he pleases, but he must not cause damage to it or contradict the use for which the dwelling was rented.

Both in LU and CH, repairing minor defects or defects caused by him are the responsibility of the tenant. In the case of CH this is provided for by Art. 259 CO and minor defects are to be distinguished from *serious* defects (Art. 259b s. a CO; similar: Art. 258 s. 1 CO) and *major* defects. In LU, where the tenant causes damage to the dwelling while carrying everyday repairs, he will be liable towards the landlord.

In CH, if a defect is attributable to the tenant, he has no claim towards the landlord (Art. 259a s. 1 CO *a contrario*). On the other hand, if there is a major or serious defect, the tenant may require the landlord to reduce the rent proportionately.

In case the tenant does not comply (or does not comply fully with his obligations) the only chance for the landlord to avoid suffering financial and economic losses arising from the rental agreement will often be eviction. Nevertheless, there are diverse social protective rules which limit the cases where certain persons can be evicted.

In DE in any given case there might be the situation of moral hardship for the tenant, special provisions protect the tenant from the enforcement of eviction judgments or settlements. The court may allow the tenant to avert enforcement whenever it would entail a disadvantage for him that it is impossible to compensate or remedy (§ 712 (I) ZPO) or allow enforcement only against provision of security by the landlord (§ 712 (II) ZPO). The court may also grant, *ex officio* or upon a tenant's request, a reasonable period to vacate the dwelling (§ 721 (I 1) 794a (I 1) ZPO) which must not amount to more than one year (§§ 721 (V 1), 794a (III 1) ZPO).

After this time limit has passed, § 765a (I 1) ZPO allows the court, upon request of the tenant, to reserve, prohibit or temporarily suspend the measure of compulsory enforcement, in case eviction entails a hardship that due to very special circumstances is immoral (such as if the tenant has a life or health threatening disease). In general, impending homelessness does not constitute a hardship in this sense, since the tenant is responsible to find a new dwelling within the period of time set by the court and there exists also public accommodation for homeless persons. Nevertheless, public authorities may intervene and make the judgment temporarily unenforceable by allowing the tenant to continue to occupy the “previous” dwelling.

As a last resort, the tenant may file an action raising an objection to the claim being enforced (*Vollstreckungsabwehrklage*) pursuant to § 767 (I) ZPO.

In case the court grants protection according to any of these provisions, this does not mean that the tenancy contract was prorogued, but only that the right of continuing to occupy the dwelling was authorized. The tenant is therefore in default in his duty of returning the dwelling, and thus the landlord is allowed to demand as compensation the agreed rent or the rent that is customarily paid for comparable items in the locality (§ 546a (I) BGB).

In AU tenants shall usually leave the dwelling within the period of fourteen days after the decision of the court.

When the MRG does not apply, the tenant cannot apply for an extension of the term for eviction before the court decides on it. In case there is already an enforceable court order or settlement, the tenant can benefit from a prolongation of the eviction term or a suspension according to the general rules for challenging foreclosure procedures (§ 42 EO).

When the MRG applies partially or fully and there are “important reasons”, the tenant is allowed to apply for an extension of the term up to nine months (§ 34 par. 1 MRG). Furthermore, eviction may be suspended in case a purported subtenant (*Scheinuntermieter*) claims to be accepted as main tenant (*Anerkennung als Hauptmieter*) (§ 34a MRG). In case there is already an enforceable court order or settlement, the tenant can apply for an extension of the clearance period (usually three months) in case of imminent danger of homelessness or other important reasons, provided that the prolongation of the term is also reasonable for the landlord (§ 35 MRG). A prolongation would be unreasonable if the tenant is not able to pay the rent equivalent (*Benützungsentgelt*) for the actual use of the dwelling.

In extraordinary situations, the clearance period can even be prolonged by the court two more times up to a total amount of nine months (§ 35 sentence 3 MRG). If an extension of the clearance term has already been granted, another extension of the clearance period in the foreclosure procedure is lawful only up to a maximum amount of altogether one year (§ 35 sentence 4 MRG).

In the “snow-flake order” (*Schneeflockenerlass*) the Ministry of Justice recommended that tenants should not (or only exceptionally) be evicted in the cold period of the year.

In LU it is possible to delay eviction for one or two periods of three months each, and in CH the only social defences from eviction available are the possibilities to challenge the notice of termination and to request an extension of the lease.

Due to the existence of several real risks to the property rights of the landlord there are several legal mechanisms aimed at protecting or guaranteeing these rights. One of the most current and effective is the deposit.

Deposit in the sense of “*Kaution*”<sup>232</sup> refers to an amount of money intended to be held as security to ensure that the tenant pays the rent and complies with the terms of the tenancy<sup>233</sup>. We will refer to this second meaning.<sup>234</sup>

The request for paying a deposit by the landlord to the tenant is relatively widespread in all four countries under comparison<sup>235</sup>, except in CH, where it occurs only in 1/3 of the rental agreements (1999). This is so despite the fact that the deposit is not compulsory in any of the countries.

In AU<sup>236</sup>, DE<sup>237</sup> and LU<sup>238</sup>, several possible ways of paying the deposit are permitted. In CH, on the other hand, specifically in the field of tenancy law the “landlord must deposit [the amount] in a bank savings or deposit account in the tenant’s name”<sup>239</sup>.

If it was stipulated that the tenant would pay the deposit before the beginning of the tenancy and he or she does not do it, the landlord can refuse to deliver the rental property to the tenant, claim damages for non-performance or even terminate the agreement<sup>240</sup>. Termination of the agreement can occur as well whenever the deposit could be paid in instalments and the tenant only pays a few of them<sup>241</sup>.

Generally, one may consider that the deposit consists of an effective protection of the immovable property of the landlord. Indeed, in every country of this group, it corresponds to a guarantee against every future claim the landlord might have over the tenant based on the tenancy agreement<sup>242</sup>, such as a claim for a contractually prohibited or illegal usage of the rented object<sup>243</sup>, the lack of payment of rent or the lack of payment of accessory charges<sup>244</sup>. This means that a private landlord can take the rent payment from the amount of the deposit in case the tenant is in arrears<sup>245</sup>. In contrast to AU, where the landlord can dissolve the deposit if the tenant is in arrears (although he/she is not obliged to it), in DE a private landlord cannot simply dissolve the deposit in case the tenant is in arrears (*Zahlungsrückstand*). In general, the landlord is prohibited from

<sup>232</sup> In legal German, deposit may be used to translate two different concepts. “*Mietzinsreserve*” (“*Mietzinsvorbehalt*”, as it is also called in CH or “*Erhaltungs- und Verbesserungsbetrag*”, as it is known in AU), where it means the part of the rent which is set aside to cover future necessary maintenance or modernization worksIn LU, art. 5 of the Tenancy Act (*loi 21 septembre 2006*) forbids the fixation of amounts other than the deposit. According to art. 5 IV the costs may be adapted during the performance of the rental agreement.

<sup>233</sup> More specifically, it is a right to secure obligations that the creditor (i.e. the landlord) has over a movable asset of the debtor (tenant) which is relieved from obligations. This right arises at the time of the *traditio*, i.e., when the tenant delivers that asset or makes it available to the landlord.

<sup>234</sup> See Art. 257e CO (CH).

<sup>235</sup> See table 1.

<sup>236</sup> 16b MRG does not mention the bank guarantee, but it is common in practice.

<sup>237</sup> See Cornelius & Rzeznik – National Report for DE, sec. 6.4 and Hofmann – National report for AU, 2014, sec. 6.4.

<sup>238</sup> Thewes, *Le nouveau droit du bail*, ULC: Luxembourg, 2007.

<sup>239</sup> Art. 257e CO § 1. See table 3.

<sup>240</sup> Wehrmüller – National report for CH, 2014, sec. 6.4; Santos Silva – National report for LU, sec. 6.4.

<sup>241</sup> Cornelius & Rzeznik – National Report for DE, sec. 6.4.

<sup>242</sup> See table 2 and Cornelius & Rzeznik – National Report for DE, sec. 6.4.

<sup>243</sup> Hofmann – National report for AU, 2014, sec. 6.4.

<sup>244</sup> Wehrmüller – National report for CH, 2014, sec. 6.4.

<sup>245</sup> LG Mannheim, WuM 1996, 269; BGH, NJW 1972, 625.

making use of the security deposit during the tenancy. Only if he or she has an undisputed, legally recognized or obviously justified claim arising from the tenancy would such dissolution be possible. Therefore, the landlord would have to demand payment and be awarded an executive title by the court (according to the *Deutsche Mieterbund*, Berlin), apply for an order to pay (*Mahnscheid*) or apply for an enforcement order (*Vollstreckungsbescheid*). After the dissolution of the deposit, the landlord may demand the tenant to replenish it pursuant to § 240 BGB.

In DE the guarantee is narrower within social rental agreements: The deposit is aimed at covering only damage in the dwelling or forborne cosmetic repairs<sup>246</sup>, which means that social landlords cannot take the rent payment from the amount of the deposit in case the tenant is in arrears<sup>247</sup>. On the other hand, the tenant is also not allowed to pay rents out of the deposit, even when these relate to the remaining payments due before termination of the contract<sup>248</sup>.

Table 2 – Payment of deposit

	Private rental agreement	Social rental agreement	Private rental agreement with a public task					
DE	Not compulsory but common practice							
CH	Not compulsory							
LU	Not-compulsory but common practice							
AU	Rental tenancies with a public task		Rental tenancies without a public task / private rental tenancies					
	Limited-profit rental housing tenancies	Municipal rental tenancies	MRG fully applicable	MRG partially applicable	MRG not applicable			
	Not compulsory but common practice							

<sup>246</sup> See sec. 9 V WoBindG and Cornelius & Rzeznik – National Report for DE, sec. 6.4.

<sup>247</sup> For the analysis of the deposit within rental housing with a public task see sec. 4.3.2. of this report.

<sup>248</sup> See table 6.

Table 3 - Scope of guarantee

	Private rental agreement	Social rental agreement	Private rental agreement with a public task					
DE	Guarantee for every future claim based on tenancy agreement	Guarantee for damage in dwelling or forborne cosmetic repairs						
CH	Guarantee for every future claim based on tenancy agreement							
LU	Guarantee for every future claim based on tenancy agreement							
AU	Rental tenancies with a public task		Rental tenancies without a public task / private rental tenancies					
	Limited-profit rental housing tenancies	Municipal rental tenancies	MRG fully applicable	MRG partially applicable	MRG not applicable			
Guarantee for every future claim based on tenancy agreement								

Table 4 – Forms of payment of deposit when asked by landlord

	Private rental agreement	Social rental agreement	Private rental agreement with a public task					
DE	Unregulated; tenant entitled to interests							
CH	Deposit in bank savings account in tenant's name + lien on assets; tenant entitled to interests							
LU	Unregulated (usually landlord entitled to interests)							
AU	Rental tenancies with a public task		Rental tenancies without a public task / private rental tenancies					
	Limited-profit rental housing tenancies	Municipal rental tenancies	MRG fully applicable	MRG partially applicable	MRG not applicable			
Cash, surrender of bankbook (16b MRG) or bank guarantee (tenant entitled to interests)				Unregulated (tenant entitled to interests)				

The deposit has been an effective guarantee of the landlord's premises and it is allowed in all four countries under comparison.

A slightly different situation is that of liens and pledges on the tenant's belongings, which are allowed in only some of the four countries. For example, the special lien of the landlord of residential premises previously available under Swiss law was abolished with the new tenancy law of 1990, and now only the landlord of commercial premises has a special lien on chattels located on the leased premises (Art. 268 CO).

In DE, although it is often complex, useless and of little practical importance, the law in force provides the landlord a right of lien (*Vermieterpfandrecht*) over the things brought into the dwelling by the tenant (§ 562 (I) BGB). This right may not be asserted for future compensation claims and for rent for periods subsequent to the following years

of the tenancy.<sup>249</sup> Furthermore, it does not extend to the things that are not subject to attachment (*Pfändung*). These are namely, under § 811 (I) ZPO, things serving the tenant's personal use or his household, food, fuel for heating and cooking, and means of lighting needed by the tenant and remaining household members for the period of four weeks. The right of lien is extinguished upon the removal of the things (§ 562a BGB) or provision of security (*Sicherheitsleistung*) by the tenant (§ 562c BGB), although the landlord can try to enforce his right under § 562b (I) BGB<sup>250</sup>.

As in DE, in AU the landlord also has a lien over all moveable property of the tenant and co-resident relatives (*gesetzliches Bestandgeberpfandrecht*, § 1101 ABGB). This includes money and in general every movable which is above the minimum subsistence level (*Existenzminimum*).

The lien secures both the payment of the rent and the payment of overheads, taxes and other costs and expenses considered as performance of the tenant in return for the use of the dwelling. To enforce his lien a landlord usually files a request for attachment of property (*Antrag auf pfandweise Beschreibung*) together with a claim for rent payment and for eviction (*Mietzins- und Räumungsklage*).

Liens & pledges	DE	AU	CH	LU
<b>Admissibility</b>	Yes (moveables and claims) – 562 I BGB	Yes (moveables) – 1101 ABGB	No (abolished 1990) Yes for commercial tenancies (268 CO)	Yes (Commercial Code)
<b>Scope</b>	Things listed in 811 I ZPO	Above <i>Existenzminimum</i>		
<b>Specificities</b>	Removable by the tenant against provision of security (562c BGB)			

One of the methods of guaranteeing the property rights of the landlord which are also permitted inclusion in rental agreements in LU and CH is personal securities.

In LU personal guarantees are one of the three methods available to guarantee payment, besides bank guarantee and the deposit. Whereas the deposit is so far the most ubiquitous, the bank guarantee is considered a less favourable option for the tenant, due to the time-consuming administrative procedures it implies and the need of paying for a commission. Personal securities are admitted in the field of tenancy law up

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<sup>249</sup> WiP.

<sup>250</sup> Cornelius & Rzeznik – National Report for DE, sec. 6.4.

to the point that the lease can be guaranteed by a third party, who is usually a family member or a friend. Nevertheless, the validity of this option is controversial, and therefore, it is generally not recommended (*cautionnement entre privés*).

In CH, only the deposit in cash or negotiable securities are especially regulated by federal tenancy law, namely in the Code of Obligations. However, the cantons are free to enact further provisions (e.g. additional provisions on the deposit) subjecting other forms of security to restrictions or excluding some forms of security. As far as the latter is concerned, some cantons have excluded the guarantee of performance by third party when, as a rule, this could have otherwise been provided for in the contract and legally admitted.<sup>251</sup>

Personal securities	DE	AU	CH	LU
<b>Admissibility</b>	Yes ( <i>Bürge</i> ) – 232 BGB	N.A.	Yes but some cantons exclude it	Yes but validity controversial

Provided that during the performance of the rental agreement the landlord is deprived of having access to the dwelling, it is usually advised that tenants or landlord conclude insurance contracts, which would protect the landlord against damage caused to his dwelling and protect tenant from liability, particularly when it is a luxurious dwelling or when the dwelling is furnished.

In DE insurance is concluded by both parties to the rental agreement. As far as the tenant is concerned, he is advised to conclude household insurance, private third party liability insurance (§§100-124 Insurance Contract Act), glass insurance and legal protection insurance (125-129 WG). None of these types of insurance is compulsory for the tenant. The landlord, in his turn, must contract building insurance, building liability insurance and independent household insurance<sup>252</sup>.

In AU there are also several types of insurance connected to housing<sup>253</sup>. Usually they are concluded by the landlord, but, in practise, they are paid by the tenant through the payment of general expenses connected to the rental agreement. Among these types of insurance are insurance of the building, fire insurance, tap water damage insurance, fire alarm systems<sup>254</sup> and third party liability insurance. Particularly important is household insurance (*Haushaltsversicherung*), which is sometimes imposed in the rental agreement<sup>255</sup>.

Similar to in AU, in LU the most common types of insurance are fire insurance, insurance against losses caused by floods and insurance for tenancy losses. Fire

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<sup>251</sup> WiP.

<sup>252</sup> Cornelius & Rzeznik – National Report for DE, sec. 2.4.

<sup>253</sup> § 21, 1, fig. 4,5,6, MRG.

<sup>254</sup> MietSlg 45.311.

<sup>255</sup> Hofmann – National Report for AU, sec. 2.4.

insurance is particularly relevant because, although it is not compulsory, it is strongly advisable to the tenant to have it: He will be responsible, in principle, for losses caused by fire in the dwelling<sup>256</sup>.

In CH the property rights of the owner are protected, but it is the landlord himself who must contract the insurance policies, namely building insurance (mandatory), personal liability insurance (not compulsory) and household insurance. As far as the latter is concerned, it is more expensive for homeowners because damage done by tenants is covered by private liability insurance<sup>257</sup>.

One of the aspects having direct implications on the protection of the property rights of landlords is the possibility for the landlord to terminate the rental agreement in case he needs the dwelling for personal use, the use of close relatives or another economic use. In this aspect, regulations differ significantly among countries, and these four countries under analysis are no exception.

In DE, the landlord is able to terminate the rental agreement in case he proves that he needs the premises for himself, members of his family or his household<sup>258</sup>. This need may be personal or professional<sup>259</sup>. On the one hand, the BGH has been considering a broad notion of family for this purpose, which is an advantage for the landlord: On the other hand, however, regulations are tendentially protective of the tenant. Courts have held, for example, that the intention to use the dwelling only for a few months is insufficient<sup>260</sup> to have a justification to terminate the rental agreement. Also, in case the landlord has another suitable dwelling in the same house or housing complex which is available for rent, he is obliged to offer it to the tenant as replacement accommodation<sup>261</sup>. Moreover, termination for personal needs is finally regarded as an abuse of rights if the landlord could have foreseen his needs at the time of concluding the tenancy contract<sup>262</sup> (applicable only when notice is given within the first three years of the tenancy)<sup>263</sup>.

In AU, whenever the MRG applies, subleases may be terminated by the main tenant in case he needs the dwelling for his own or his relatives.

In LU termination is only legally possible in the cases foreseen by Art. 12-2 of the LBUH with a notice of three months (Art. 1736 CC). The landlord is allowed to terminate the agreement based upon personal reasons (personal need or need of relatives by blood or affinity until third degree). As in DE, the concept of "relative" is a relatively broad one, and the landlord is allowed to terminate the agreement even when he (or his relatives) do not want to live but only occupy the dwelling (for example, through the deposit of furniture). However, although occupation must not be permanent, it must be effective<sup>264</sup>. Whenever the landlord intends to terminate the rental agreement based upon personal reasons, an extraordinary notice period applies, namely, of six months (Art. 12-3 LBUH). Besides the obligation of warning the tenant of his intention of

<sup>256</sup> Santos Silva – National Report for LU, sec. 2.4.

<sup>257</sup> „Der beste Schutz für Ihre Siebensache“, K-Tipp, 9/2002 (1 May 2002). WiP.

<sup>258</sup> Art. 573 II BGB.

<sup>259</sup> BGH, NZM 2005, 943; BGH, NZM 2013, 22.

<sup>260</sup> Cf. BayObIG, NJW-RR 1993, 979 (980); AG Cologne, WuM 1992, 250 (2 years not enough).

<sup>261</sup> BGH, NJW 2010, 3775; NJW 2003, 2604.

<sup>262</sup> BGH, NZM 2013, 419; to date 5 years were assumed: BGH, NJW 2009, 1139 (1140) with further references.

<sup>263</sup> Cornelius & Rzeznik – National Report for DE, sec. 2.4.

<sup>264</sup> Santos Silva – National report for LU, sec. 6.6.

terminating the contract a half of year in advance, the landlord must also occupy the dwelling within three months after the tenant vacates it. This period is however suspended in case of renovation or transformation works.

As in the other three countries, in CH the landlord can also terminate the agreement for personal reasons<sup>265</sup>, based on art. 261 s 2ss a CO<sup>266</sup>. Such is also the case when the landlord needs to carry out renovation works.

The lack of performance of the rental agreement implies the opening of an eviction procedure, which is shorter in some cases than in others, depending on whether the particular national legislation is more or less protective of the tenant.

Besides the possibility to bring cases concerning tenancy law to courts<sup>267</sup>, there are ways to get an out-of-court settlement (*Vergleich*) between tenant and landlord in DE. On the one hand, there are conciliation boards (*Schlichtungsstellen*) founded by tenants and landlords associations. On the other hand, practitioners offer mediation as a method to settle disputes amicably<sup>268</sup>. The results of these procedures, however, are not enforceable. Beyond that, § 15a of the Introductory Act to the Civil Procedure Code (*Einführungsgesetz zur Zivilprozessordnung*<sup>269</sup>) empowers the *Länder* to establish a mandatory pre-trial conciliation process for pecuniary disputes if the amount in dispute is less than EUR 750. Certain cases, especially those which concern rent increases or accountings of service charges, lend themselves to conciliations, while claims for eviction are not really suitable<sup>270</sup>.

In AU, in proceedings which have as their object rights *in rem*, immovable property or tenancies of immovable property, the ordinary court (*Bezirksgericht*, District Court) generally has exclusive jurisdiction *rationae materiae* (§ 49 par. 2 lit. 5 *Jurisdiktionsnorm* 1895 (JN), § 37 par. 1 MRG). In some municipalities arbitration boards for housing (*Schlichtungsstellen*) are authorized to settle specific tenancy law cases in first instance. These arbitral boards are only competent to settle cases in which the MRG is fully applicable and which are explicitly listed there.

In LU tenancy disputes are usually handled by the court of peace (*tribunal de paix*) of the municipality where the rented dwelling is located (Art. 19 of the LBUH) with possibility of appeal to the District Court (*tribunal d'arrondissement*). At the municipal level, the Rents Commission (and, subsidiarily, the justice of peace) is competent for disputes on the determination of the rent.

In general, prior to litigation an attempt at conciliation before a conciliation authority is mandatory in CH (Art. 197 CPC). For disputes relating to the lease of residential (or business) premises, there are special joint conciliation authorities (*paritätische Schlichtungsbehörde*), including a representative of tenants and a representative of landlords (Art. 200 s. 1 CPC) providing legal advice to the parties (Art. 201 s. 2 CO).

Exceptions to the principle of attempting conciliation before litigation are listed in Art. 198 CPC, and among them are actions for eviction, which can be made without conciliation (Art. 257 CPC) and "financial disputes with a value in dispute of at least

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<sup>265</sup> Boligøkonomisk Videncenter, The Private rental Sector in the New Century - A Comparative Approach, 193 & 195.

<sup>266</sup> Rohrbach, 12.

<sup>267</sup> Cornelius & Rzeznik – National Report for DE, sec. 6.1.

<sup>268</sup> *Mediationsgesetz* of 21-07-2012 (BGBl. I 1577).

<sup>269</sup> Gesetz, betreffend die Einführung der Zivilprozessordnung of 30-01-01 – 1877 (BGBl 244).

<sup>270</sup> Cornelius & Rzeznik – National Report for DE, sec. 6.8.

100,000 CHF" (Art. 199 CPC). The parties are also free to replace the conciliation proceedings by mediation (Art. 213 s. 1 CPC)<sup>271</sup>.

A particular case which brings judicial specificities and usually (overly) complex procedures is that of eviction.

In CH there are two different procedures leading to eviction: the regular and the summary one, and the landlord can only access directly courts through the latter (257 s. 1 CPC)<sup>272</sup>.

Both in DE and AU the access to the court to start an eviction procedure depends on the confirmation of legal enforceability of documents or court orders<sup>273</sup>. Local courts (district courts) are competent for deciding on these claims<sup>274</sup>. The practical enforcement is provided for by bailiffs, who enters and seizes the goods subject to compulsory enforcement and delivers or stores the remaining ones<sup>275</sup>. In DE the bailiff must warn the tenant three weeks in advance of his visit.

In LU, where – unlike the remaining countries of this group – the eviction procedure is regulated by only one legal document, the procedure for eviction is the most complex, because it depends on the grounds of termination, on whether the landlord had purchased the dwellings in the preceding three months and on whether the tenant had asked for a delay of the procedure. These conditions influence the time for which the tenant is authorized to obtain a delay, which can range from three to eighteen months.

Asking for a delay of the eviction procedure is a prerogative generally available to the tenant in all four countries.

In AU and in CH, this right should be exercised under the general terms<sup>276</sup>.

Whereas when the MRG is not applicable, the tenant can ask for a delay of the eviction only after the eviction order is taken judicially, whenever the MRG applies partially or fully the tenant can already ask for a delay of up to nine months based on "important reasons" (§ 34, s. 1 MRG). A particular protective measure for tenants consists of the "snow-flake order" from the Ministry of Justice, which recommends that tenants are not evicted in winter months. Provided that DE, CH and LU are traditionally snowy countries from November to February, it would be advisable that similar measures be adopted also, even if – as in AU – they are not legally enforceable (yet).

In eviction procedures the movable goods seized by German and Austrian bailiffs are a relevant part of the security procedures related to rental agreements.

The question of securities is transversal to the field of tenancy law. It is one of the most important sub-topics, for it influences the real estate market and the decision of consumers in the time of buying or renting is the availability of mortgage credit.

In contrast to the EU tendency, the Swiss mortgage and real estate market has grown significantly for the last years, and one cannot say it suffered a real estate crisis. Nevertheless, two relevant restrictive measures on mortgages were registered. First, the Federal Council activated a counter-cyclical capital buffer in February 2013, which makes mortgage credit less attractive for banks, when compared to the provision of

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<sup>271</sup> WiP.

<sup>272</sup> Wehrmüller – National report for CH, 2014, sec. 6.7.

<sup>273</sup> See, for DE, 574 ss BGB s. 708 (7) ZPO, 724 (I) ZPO.

<sup>274</sup> 764 (I) BGB and 764 II ZPO apply in DE. See, for AU, Tanczos, *Mietrecht Kompakt 2012*<sup>2</sup>, 202.

<sup>275</sup> In AU, §§ 253 ss and 349 (1) apply. See also Tanczos, *Mietrecht Kompakt (2012)*<sup>2</sup>, 211 ss and Lurger et al. EUI Tenancy Law project, AUn report (2004), 24. In DE, see 753 (I) ZPO.

<sup>276</sup> For AU see § 42 EO. See also Wehrmüller – National report for CH, 2014, sec. 6.7 for CH.

other credits. Second, since mid-2012 the banks can provide a mortgage loan only if the borrower invests at least ten percent of his own, non-pension fund assets<sup>277</sup>.

The lack of (affordable) housing has been a major concern of public authorities who, particularly in the current times of crisis, are unable to finance on their own the necessary construction and rehabilitation projects. For such reason, there are public subsidies to allow privates to do so.

In all four countries there are public subsidies directed at promoting (re)construction and modernization of the housing stock.

While in AU these differ according to the states<sup>278</sup>, in DE homeowners receive subsidies from the Reconstruction Credit Institute for doing special investments in the dwellings, such as energy-efficiency measures<sup>279</sup>. The concern with energy efficiency has been very present in Luxembourgish public policies too, which provide for particular subsidies for homeowners willing to improve their dwellings as far as energy use is concerned, besides other general construction grants<sup>280</sup>. In CH cooperatives receive indirect aid under the WFG, and home-owners benefit from a reduced tax on the financing funds<sup>281</sup>.

The financing of housing, however, not only places difficulties on those who are investing in its construction and who are usually relatively financially stable collective or private entities. It affects particularly tenants as well, who often are people who cannot afford to purchase their own dwelling. Still, and particularly in the countries under comparison, rents can be significant as opposed to the available income, and thus some tenants attempt to convince landlords to pay, fully or partially, in kind, namely through reparations to the dwelling. Sometimes tenants are given a statutory right to such payment, but that is not the case in DE, AU, CH or LU.

Indeed, in all four countries under comparison, the tenant does not have a statutory right to performance in kind, e.g., through the rehabilitation of the contract, in lieu of payment of rent, but that is allowed provided that the landlord agrees<sup>282</sup>.

Nevertheless, in DE the tenant is entitled in certain circumstances to a statutory right of set-off right against the claim for rent pursuant to § 556 b I BGB. This rule relates to the reimbursement of expenses in the case where the tenant remedied a defect because the landlord was in default in remedying the defect or because an immediate remedy was necessary to preserve or restore the state of the rented property (§ 536 II BGB).

This situation slightly resembles what happens also in CH, where, whenever the landlord would be obliged to repair a defect and fails to do so, the tenant may arrange for the defect to be repaired at the landlord's expense (259b s.b. CO). Moreover, the tenant may set off other claims he has towards the landlord against rent that he owes<sup>283</sup>.

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<sup>277</sup> WiP.

<sup>278</sup> Hofmann – National Report for AU, sec. 3.6.

<sup>279</sup> See Cornelius & Rzeznik – National Report for DE, sec. 3.6.

<sup>280</sup> Santos Silva – National Report for LU, sec. 3.6.

<sup>281</sup> Wehrmüller – National Report for CH, 2014, sec. 3.6.

<sup>282</sup> See Cornelius & Rzeznik – National Report for DE, sec. 6.4; Hofmann – National Report for AU, sec. 6.4.; Santos Silva – National report for LU, sec. 6.4.; Wehrmüller – National report for CH, 2014, sec. 6.4.

<sup>283</sup> WiP.

## 3.2 Important evaluative criteria for the tenant

### 3.2.1. Affordability

Table 5<sup>284</sup>

	DE	AU	CH	LU
<b>Regulation of initial rent</b>	Freedom of contract Rent regulation for renting with public task	Freedom of contract Rent regulation when MRG does not apply when fixed flat rent agreed upon	Freedom of contract but unfair rents are revisable on initiative of tenant within a certain time frame	
<b>Regulation of rent increase</b>	Whenever not provided for by the contract <sup>285</sup> , conditioned to: - Rent unchanged 15 months - Energy saving or improvement works - Written justification <sup>286</sup> - Approval of tenant <sup>287</sup>	General conditions on ABGB apply (MRG not applicable)	No conditions in open-ended contracts but revisable on initiative of tenant <sup>288</sup> Admitted in every contract after energy efficiency enhancement works	
<b>Deposit<sup>289</sup></b>	No advanced payment			
	Covers all claims arising from tenancy			
	Payment in instalments a	Payment in instalments	Payment in instalments	

<sup>284</sup> For regulation of expenses and regulation of repairs see table 1.

<sup>285</sup> § 557a and 557b BGB.

<sup>286</sup> § 126 b BGB.

<sup>287</sup> Except § 558 b (I) BGB.

<sup>288</sup> § 20 a sec. 1 CO.

<sup>289</sup> In AU the regulation for agreements to which the MGR does not apply or applies partially is considered minimal and for CH it only exists for deposits in cash or negotiable securities. For further details see tables 6 ff.

	right of tenant	possible if landlord agrees	possible if landlord agrees (security deposit insurance as functional equivalent)	
	Up to three months rent (excluding accessory charges)	Up to six months rent including utilities and charges (case law), when MRG applies partially or does not apply	Up to three months rent (including accessory charges)	
	Upon performance no time limit for return	Upon performance returnable within reasonable delay	Upon performance returnable within a year	
	Landlord must deposit in <i>Treuhandkonto</i> or savings, usually in tenant's name put in pledge for landlord benefit	Landlord must deposit in savings account in tenant's name put in pledge for landlord benefit ( <i>pignus irregulare</i> )	Landlord must deposit in bank savings or deposit account in tenant's name with lien of landlord over assets	
Tenant entitled to income				
	Prescription of claim after three years	Prescription within 30 years <sup>290</sup> (MRG not applicable)	No prescription of claim	
<b>Subsidies to worse-off tenants</b>	See sec. "Subsidisation"	See sec. "Subsidisation"	See sec. "Subsidisation"	

<sup>290</sup> §1479 ABGB.

The main obligation of a tenant in a rental agreement consists of paying the rent. This is also the biggest regular expense that the tenant must make in order to perform the contract and not be evicted. Affordability for the tenant is tendentially boosted by national regulations which limit the amount of the rents or the respective increase, but these regulations are not found in every country in this group.

Initial rents have usually a different regime according to whether we are speaking of rental housing with or without a public task.

In DE, there is no system of rent control in housing without<sup>291</sup> a public task (private rental market plus cooperatives), and only general contract rules (as well as criminal rules) apply. This situation is similar in AU and CH, where rents can usually be determined freely by the parties but different from LU, where the initial rent may not surpass 5% of the capital invested by the landlord in the dwelling<sup>292</sup>. In DE tenancy contracts may include clauses on rent increase concerning future changes in the amount of rent. Those are the cases of stepped rent (557a) and indexed rent (557b). The first relates an automatic increase clause by which the rent is fixed in varying amounts for specific periods of time. The second is a written agreement by which the rent is determined by means of the price index for the cost of living of all private households in DE. While any of them are applicable, the rent must remain unchanged for one year.

In AU one must distinguish more specifically between cases where the MRG is not applicable or applicable partially, on the one hand, and the cases where the MRG is fully applicable. In the first group, whenever the parties have agreed on a fixed flat rent, the rent can only be exceptionally increased by request of the landlord if the general expenses and public charges have increased during several years. In the second group, i.e., when the MGR is fully applicable, only within the strict limits of § 16 MGR will a rent increase be possible; any part exceeding the regular amount would be void<sup>293</sup>.

In LU the landlord can increase the rent and to do so must inform the tenant in writing of his reasons for the increase. Nevertheless, he cannot do so in the first six months of the contract (8, 1 LBUH) or in case two years have not elapsed since the last increase. The request for rent increase follows a specific procedure<sup>294</sup>.

In CH, despite the free determination of the amounts of rents, an unfair rent is revisable within a certain period of time, but the tenant can challenge it whenever it is deemed "unfair"<sup>295</sup>.

Tenants are expected to pay a deposit of similar forms of security in any of these countries<sup>296</sup> for the protection of the landlord against any claim he might have against

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<sup>291</sup> In the housing with a public task, however, landlords can only demand rents which cover current expenditures with a maximum permitted amount determined by the premise to grant public funds. See Cornelius & Rzeznik – National Report for DE, sec. 6.4.

<sup>292</sup> Rents may be as well determined by the Rents Commission as far as private rental housing is concerned. To public rental agreements the LBUH does not apply: rents are calculated according to the available annual net income of the household and the main surface area. See Santos Silva – National Report for LU, sec. 6.4.

<sup>293</sup> For details see Hofmann – National Report for AU, sec. 6.4.

<sup>294</sup> Santos Silva – National Report for LU, sec. 6.4.

<sup>295</sup> Tenants can also challenge the initial rent in emergency situations and where the new rent is significantly higher than the previous one. For details see Wehrmüller – National Report on CH, sec. 6.4. WiP.

the tenant, including rent arrears. Paying a deposit is very often a significant financial burden on tenants, who often must invest several hundred or even thousand euros to be able to start living in a rental dwelling. Besides, as was referred to supra, the deposit does not serve as advance payment of rent in any of the countries compared here<sup>297</sup>.

The security deposit is regulated for the private rental sector in all four legal systems<sup>298</sup>, although regulation is minimal in LU (where only the maximum amount of the deposit is fixed)<sup>299</sup> and in AU, whenever the MRG does not apply or applies only partially<sup>300</sup>.

From the perspective of affordability, there is no form of payment<sup>301</sup> which is generally considered as more affordable. Bank transfer or cash is usually the most economical way of guaranteeing a lease<sup>302</sup>.

Instead of paying a deposit as security for the dwelling, recently the possibility to conclude a security deposit insurance policy grows in popularity in CH: Instead of paying a large sum at once, the tenant pays regular contributions to the guarantor, who, in return, guarantees free payment to the landlord up to the amount of the security deposit. Despite the name, the security deposit insurance is not an actual insurance but rather a guarantee (*Bürgschaft*) which often non-transparently and misleadingly implies costs for the tenant<sup>303</sup>: the tenant pays, but if the insurance company must pay to the landlord, it will return to the tenant asking that same amount. Tenant associations are thus very critical<sup>304</sup>.

In all legal systems except AU when the MRG applies and in LU when the rental agreement concerns a luxurious dwelling, the deposit cannot surpass the amount equivalent to three months' rent (including accessory charges in CH and AU and excluding them in DE)<sup>305</sup>. The MRG does not provide any limits for the legal amount of the deposit, and, if it is fully applicable, the amount of the deposit has to be in an adequate relation to the guarantee interests of the landlord<sup>306</sup>, depending on the property value and the size of the dwelling. An amount of deposit up to six months' rent including utilities and taxes has been accepted by the OGH.<sup>307</sup>

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<sup>296</sup> That is the case of liens in movable things (*Verpfändung von Wertsachen*), government bond (*Bundesanleihe*), bank guarantee (*Bankbürgschaft*) in DE (see § 232 BGB and Cornelius & Rzeznik – National Report for DE, 2014, sec. 6.4.), joint or several liability, contract of surety, etc. in CH (Wehrmüller – National report for CH, 2014, sec. 6.4) and third party guarantee in LU (Santos Silva – National Report for LU, 2014, sec. 6.4). See table 9.

<sup>297</sup> See table 6.

<sup>298</sup> See table 4. In the case of CH, only deposit in cash or negotiable securities is regulated. See Wehrmüller – National Report for CH, 2014, sec. 6.4.

<sup>299</sup> Santos Silva – National Report for LU, 2014, sec. 6.4.

<sup>300</sup> Legal limits for extraordinarily high deposits exist only with reference to general provisions of private law (§ 879 I and III ABGB).

<sup>301</sup> See table 5.

<sup>302</sup> See Santos Silva – National Report for LU, 2014, sec. 6.4.

<sup>303</sup> “Das Geschäft mit klammen Mieter”, Neue Bürcher Zeitung, 16.09.2014,  
<http://www.nzz.ch/finanzen/das-geschaeft-mit-klammen-mietern-1.18383561> (last retrieved: 30.09.2014).

<sup>304</sup> See “Kautions garantiert, Geld garantiert weg”, derstandard.at,  
<http://derstandard.at/1319182294678/Neue-Variante-Kautions-garantiert-Geld-garantiert-weg> (last retrieved: 30.09.2014), on the services provided by a AUn start-up.

<sup>305</sup> § 551 I BGB (DE); 5 II of the Tenancy Act (LU) and Art. 257e CO § 8 (CH). See table 7.

<sup>306</sup> See OGH 9 Ob160/02y; OGH 6 Ob13/08t.

<sup>307</sup> Prader, MRG<sup>4.01</sup> § 16 b Anm 1.

In DE the tenant is entitled to pay the deposit in three equal monthly instalments. This is also possible in the remaining countries but under the condition that the landlord agrees. DE is thus more tenant-protective in this regard.

A functional equivalent to the payment in instalments is to be found in CH, through the already mentioned “security deposit insurance”.

Particular attention is also given to the way that landlord shall preserve the deposit.

In DE, when the deposit is paid in cash, the landlord must invest it in a separate bank account (at the usual rate of interest) with a notice period of three months<sup>308</sup>.

Usually the savings is in the name of the tenant but put in pledge for the landlord's benefit. The tenant is also entitled to receive all the information on the account<sup>309</sup>. Other forms of investments are allowed if kept separate from the assets of the landlord, usually in the form of a trust account (*Treuhandkonto*). The tenant is entitled to the income<sup>310</sup>. Moreover, in the event of insolvency of their landlord, tenants are allowed to suspend rent payments until the amount of the deposit paid is safe from bankruptcy<sup>311</sup>.

In AU when the MRG applies fully and the deposit is paid in cash, the landlord is obliged to invest the money in a bank savings account (in name of the tenant but in the property of the landlord as *pignus irregulare*). There is no such thing as a deposit account. The tenant is entitled to receive all the information on the account<sup>312</sup>. The deposit in AU is invested in the name of the tenant who also receives the interest. Other forms of investments are allowed if these forms offer at least the same guarantees and interest for the invested money as a bank savings account and a separation of the property<sup>313</sup> of the landlord is possible in case of bankruptcy<sup>314</sup>.

In CH the deposit shall be invested in a bank savings or deposit account (*Mietzinskautionskonto*) in the tenant's name (and thus belonging to the patrimony of the tenant)<sup>315</sup>. The security deposit is considered a “deposit with a third party (the Bank) made as a precaution”. The landlord then has a lien (*Pfandrecht*) on these assets.<sup>316</sup> It is therefore not an irregular lien (by which the debtor transfers to the creditor a *vertretbare Sache*). The interest on the deposit is owed to the tenant.<sup>317</sup>

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<sup>308</sup> 551 (III) BGB.

<sup>309</sup> According to the *Verbraucherzentrale Mecklenburg-Vorpommern* (Schwerin). See “Bessere Zinsen für Mietkaution”, Süddeutsche.de, 10.05.2010, <http://www.sueddeutsche.de/geld/produktvergleich-bessere-zinsen-fuer-mietkaution-1.558782> (last retrieved: 30.09.2014). See also “Mietrecht. So zügelt die Kautions mit Ihnen”, Beobachter [http://www.beobachter.ch/wohnen/umzug/artikel/mietrecht\\_so-zuegelt-die-kaution-mit-ihnen/](http://www.beobachter.ch/wohnen/umzug/artikel/mietrecht_so-zuegelt-die-kaution-mit-ihnen/) (last retrieved: 30.09.2014).

<sup>310</sup> “Wann muss der Vermieter die Kautions zurückzahlen?”, in Süddeutsche.de, 11.05.2010, <http://www.sueddeutsche.de/geld/-frage-wann-muss-der-vermieter-die-kaution-zurueckzahlen-1.562482> (last retrieved: 30.09.2014). This is not so, however, when the tenants are students.

<sup>311</sup> Bundesgerichtshof Karlsruhe (Az.: VIII ZR 336/08). “Zahlen nicht um jeden Preis”, Süddeutsche.de, 17.05.2010, <http://www.sueddeutsche.de/geld/mietkaution-zahlen-nicht-um-jeden-preis-1.47969> (last retrieved: 30.09.2014).

<sup>312</sup> § 16b I sentence 2 MRG.

<sup>313</sup> See table 8.

<sup>314</sup> § 16b I sentence 3 MRG.

<sup>315</sup> Before the expiry of the time period, the bank may only release the security (to the tenant or to the landlord): with the consent of both parties; in compliance with a final payment order; or in compliance with a final decision of the court (art. 257e III CO). See Wehrmüller – National report for CH, 2014, sec. 6.4.

<sup>316</sup> Heinrich, *CHK Miete*, Art. 257e CO § 4; Weber, *BSK OR*, Art. 257e CO § 4.

<sup>317</sup> Lachat et al., *Mietrecht für die Praxis*, 264.

In LU and AU (whenever the MRG does not apply or applies only partially) the law does not regulate the way that the landlord shall manage the deposit. So, this will depend on the terms of the tenancy agreement, but in LU, the tenant is most of the time not entitled to interests.

Tenancy law imposes that the return of the deposit (plus interest from a bank deposit) should occur as soon as the deposit fulfilled its role: that usually happens when the tenant paid all rents and costs and no losses (or only use-related losses) to the premises where caused.

As for that same recovery upon regular performance of the rental agreement by the tenant, there is no time limit for the landlord to return the amount in DE (except for when a new tenant takes possession of the premises, in which case the deposit must be returned to former tenant first<sup>318</sup>) and in LU. This is not the case in CH, where the landlord must return the deposit at the latest within a year (and usually occurs within a month)<sup>319</sup>, and in AU, where he or she must do it *immediately* upon termination of the contract<sup>320</sup>, which shall be understood as “within a reasonable delay”. After the deposit is paid back to the tenant, the latter can no longer be asked to return the deposit<sup>321</sup>.

In case there were losses irregularly caused to the premises, the landlord writes a losses protocol. Only after obtaining the authorisation of the tenant, the landlord may invest the deposit or part of it to repair such losses. If the tenant does not authorise it, the deposit will remain blocked up to the moment where an arbitration committee will intervene on the case.

In case the landlord irregularly retains the deposit, the tenant may resort to arbitration mechanisms (competent District Court *Bezirksgericht*). In CH, the tenant can be made to wait for up to one year after the termination of the contract, after which he or she may withdraw it without consent of the landlord (if no claim has been brought against the tenant by the landlord within this time period). In AU, in case the tenant provided the deposit in cash, he or she can submit a claim aimed at determination of the amount which should be paid back within non-adversarial proceedings in court (*Ausserstreitverfahren*).

The return of the deposit is an important aspect which very often influences the ability of the tenant to enter into another tenancy agreement. Indeed, a significant number of tenants attempt to pay the deposit of the new rental dwelling with the deposit of the old rental dwelling<sup>322</sup>. In this regard, it would be advisable that a deadline be established for the return of the deposit.

The tenant's claim for return of the deposit prescribes after three years<sup>323</sup> calculated not from the end of the contract but from the emergence of the right to

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<sup>318</sup> This seems to be so in practice (see “Wann muss der Vermieter die Kaution zurückzahlen?”, in Süddeutsche.de, 11.05.2010, <http://www.sueddeutsche.de/geld/-frage-wann-muss-der-vermieter-die-kaution-zurueckzahlen-1.562482> [last retrieved: 30.09.2014]) but so far there is no case law available in the topic.

<sup>319</sup> Wehrmüller – National Report for CH, 2014, sec. 6.4.

<sup>320</sup> Hofmann – National Report for AU, 2014, sec. 6.4. See table 9.

<sup>321</sup> Wann muss der Vermieter die Kaution zurückzahlen?”, in Süddeutsche.de, 11.05.2010, <http://www.sueddeutsche.de/geld/-frage-wann-muss-der-vermieter-die-kaution-zurueckzahlen-1.562482> (last retrieved: 30.09.2014). For further references see 3.2.1 Affordability, Regulation of deposit.

<sup>322</sup> “Kein Geld zurück”, in Süddeutsche.de, <http://www.sueddeutsche.de/geld/einbehaltene-mietkautionen-kein-geld-zurueck-1.171728> (last retrieved: 30.09.2014).

<sup>323</sup> General prescription period, § 195 BGB.

repayment of the deposit, i.e. when the landlord can conclude whether he is entitled to the deposit<sup>324</sup>. This, however, does not happen in CH. Indeed, as the deposit belongs to the patrimony of the tenant, he or she does not have any claim against the landlord which could prescribe. The tenant has a claim against the bank, as does any other person who has a savings account. In AU, according to general rules, contractual claims prescribe after 30 years according to § 1479 ABGB (non-applicability of MRG) and after 3 years according to § 27 par. 3 MRG (full or partial applicability of the MRG). Finally, in LU there is a special prescription of 5 years for rents and charges (the common prescription foreseen by the Civil Code is 30 years). For the credit on the deposit, there is no special prescription indicated specifically in the tenancy law, but it would be advisable to not wait more than 5 years for such a claim.

Table 6 – Forms of payment of deposit when asked by landlord

	Private rental agreement	Social rental agreement	Private rental agreement with a public task					
DE	Unregulated; tenant entitled to interests							
CH	Deposit in bank savings account in tenant's name + lien on assets; tenant entitled to interests							
LU	Unregulated (usually landlord entitled to interests)							
AU	Rental tenancies with a public task		Rental tenancies without a public task / private rental tenancies					
	Limited-profit rental housing tenancies	Municipal rental tenancies	MRG fully applicable	MRG partially applicable	MRG not applicable			
	Cash, surrender of bankbook (16b MRG) or bank guarantee (tenant entitled to interests)				Unregulated (tenant entitled to interests)			

Table 7 - Advance payment?

DE	No advance payment
CH	
LU	
AU	

<sup>324</sup> OLG Düsseldorf, NZM 2005, 783. Landgericht Oldenburg (Az.: 4 T 93/13).

Table 8 - Regulation of amount

	Private rental agreement		
DE	3 months of rent excluding charges – right to instalments		
CH	3 months (including charges)		
LU AU	3 months; no limit for luxurious residences Rental tenancies without a public task / private rental tenancies MRG fully applicable	MRG partially applicable	MRG not applicable
	6 months (including utilities and taxes) “adequate relation to the guarantee interests of the landlord”		No limits except general contract law exist (usuary, <i>laesio enormis</i> etc.)

Table 9 - Preservation of amount

	Private rental agreement		
DE	Bank savings account in name of tenant with lien of landlord on assets <sup>325</sup> Other investments if separate assets Interests to tenant		
CH	Bank savings account or deposit account in name of tenant with lien of landlord on assets Interests to tenant		
LU	Freedom of contract Interests to landlord		
AU	Rental tenancies without a public task / private rental tenancies MRG fully applicable	MRG partially applicable	MRG not applicable
	Bank savings account in name of tenant with lien of landlord on assets Other investments if separate assets Interests to tenant		

Table 10 - Return deposit: timeframe

	Private rental agreement		
DE	No time limit (usually <6 months)		
CH	One year (usually 1 month)		
LU	No time limit		
AU	Rental tenancies without a public task / private rental tenancies MRG fully applicable	MRG partially applicable	MRG not applicable
	Immediately (i.e. within reasonable delay)		

Another aspect which influences affordability concerns the regulation of expenses. In this field, national statutory provisions which provide that the landlord shall be responsible for assuming the dwelling related expenses are often merely a façade.

<sup>325</sup> In case of a deposit in cash.

In DE, for example, statutes regulate that the landlord must, in principle, bear all the costs for utilities, but in practice it is the tenant who bears them through allocation of costs. The same happens in AU, and expenses may even be freely determined by the landlord whenever the MRG applies partially or does not apply.

In LU the tenant is usually expected to pay every expense related to his consumption.

In CH regulations seems to be tendentially more beneficial as far as affordability is concerned. Indeed, the landlord shall pay the expenses connected to the use of property without being authorized to profit from them. Moreover, any expense which is not specified in the contract shall be considered as integrated in the rent.

The regulation on the obligation to provide repairs (both maintenance and improvement repairs) follows a certain similar pattern when we compare it to the regulation of expenses.

In DE, for example, the landlord is theoretically responsible for all kinds of maintenance works and repairs, but in practice the tenant bears a portion of those costs as far as minor maintenance costs and cosmetic repairs are concerned.

In AU, freedom of contract rules in relation to housing without a public task, and thus the landlord or the tenant will be responsible according to what was provided for in the contract.

The regulation of CH and LU is identical. In both countries it is the landlord's responsibility to ensure that the dwelling is in fit conditions for renting, and the tenant will be responsible only for minor defects or whenever the defects are attributable to him. In the private housing with a public task sector in LU, which is the sector where the *Agence Immobilière Sociale* operates, the latter assumes every maintenance and improvement work necessary in the dwelling to which the celebrated rental agreement respects<sup>326</sup>.

## 4.2. Stability

Table 11

	<b>DE</b>	<b>AU</b>	<b>CH</b>
<b>Demand of written form for the validity of rental agreements</b>	No	No	No
<b>Demand of registry for the validity of rental agreements</b>	No	No	No

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<sup>326</sup> WiP for other fees and rent subsidies for poor tenants (particularly in DE).

<b>Black market practises</b>	Existence of unofficial rental agreements Dwellings illegally rented as tourist accommodation of housing for workers	Existence of unofficial rental agreements Miscalculation of rents ( <i>Richtwertgesetz</i> 1994)	Unknown
<b>Admissibility of unlimited rental agreements</b>	Yes	Yes	Yes
<b>Requirements for landlord to terminate rental agreement</b>	Both ordinary (justification necessary) and extraordinary termination possible (ordinary not possible for agreements in § 549 II III)	Both ordinary and extraordinary (§ 30 par. 2 MRG) termination possible	Notice must meet formal requirements and is challengeable (e.g. when done in bad faith)
<b>Defences of tenant</b>	Protections for tenant (§ 712 ZPO)  1 year to vacate dwelling (s. 721 (I 1 and VI), 794 a (I 1, III 1) ZPO)  Attempt to good morals or serious condition of tenant may lead to reserve, prohibition or temporarily suspension of eviction procedures (§ 765 (I 1) ZPO)  Enforcement costs paid in advance by landlord	Not specified	Requirement of extension of tenancy possible  Old or ill tenants or tenants who cannot find an apartment can challenge termination
<b>Emption non tollit locatio</b>	Yes (I 21 § 358 ALR)	Yes but landlord is not bind by length of the agreement)	Yes If sold or transferred in public auction, with extraordinary termination right for landlord

One may draw a few conclusions on the whether the position of the tenant is stable<sup>327</sup>.

One the one hand, insecure instruments such as licences instead of leases are not usual in any of the countries.

On the other hand, the fact that in every country under comparison, rental agreements may be both verbal or written (i.e., the freedom of contract applies) may have concerning implications for the tenant, particularly in the case of agreement related disputes, where the tenant will not be able to easily prove what was agreed upon<sup>328</sup>.

The fact that a rental agreement is not registered does not necessarily affect the stability of the tenant in the tenancy relationship. In AU there is no duty of registration (except for tax law, cf. § 15 ss and 33 TP5 *Gebührengesetz* 1957). Even in LU, where every written rental agreement shall, in principle, be registered within the three months which follow its conclusion the agreement is still valid *inter partes*. Under the LU Civil Code, the tenant in relation to whom the rental agreement was not registered runs the risk of being expelled by the new purchaser of the dwelling, in case it was sold (art. 1743 CC). However, for the agreements to be regulated by the LBUH, tenants do not run such risk because this law provides a right to oppose the rental agreement against a potential purchaser. For this reason, even in relation to third parties, the non-registration of a rental agreement raises risks to the stability of the tenant<sup>329</sup>.

The question of registration is a particularly delicate one, provided that most people ignore that rental agreements must be registered.

One phenomenon which often occurs in the field of housing and which is capable of menacing the stability of a tenant in a rental agreement is that of black market practices. Among the four countries under comparison – and despite the fact that all except CH know some black market practices, i.e., conclusion of unofficial, “secret” agreements – the origin of black market phenomena in AU can most clearly be traced to the national regulations.

Indeed, in 1994 a new form of rent regulation was introduced. According to the new regulation, a standard premise is defined by a special statute (*Richtwertgesetz* 1994) and for this standard premise, each state fixes a certain basic rent per m<sup>2</sup>. Surcharges and deductions to this basic rent, depending on size, kind, location, maintenance, condition and furniture must be taken into account. In virtue of the circumstance that landlords cannot freely determine the rents to be paid for their dwellings, the illegal practice of miscalculating rents in favour of landlords widespread<sup>330</sup>.

In DE, due to the lack of available dwellings particularly in the biggest cities, such as Berlin and Hamburg, and some state regulations (*Zweckentfremdungsverordnung*), some dwellings are illegally rented<sup>331</sup>.

In CH, as tenancy contracts do not have to be registered and there are few formal requirements (the compliance of which does not have influence on the rights of the tenant), there are no important housing black market phenomena<sup>332</sup>. Finally, in LU there

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<sup>327</sup> WiP.

<sup>328</sup> WiP.

<sup>329</sup> WiP.

<sup>330</sup> See Kammer für Arbeit und Angestellte Wien, Die Praxis des Richtwert – Mietzinssystems (2010), available in <http://www.arbeitkammer.at/bilder/d142/Richtwert.mietenzall.pdf> (09.06.2013). See also Hofmann – National report for AU, 2014, sec. 1.5.

<sup>331</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 1.5.

<sup>332</sup> Wehrmüller – National Report for CH, 2014, sec. 1.5.

seems to be a few unofficial rental agreements aimed at saving the payment of real estate taxes to landlords.

When one speaks of stability in the rental relationship, one of the most important aspects relates to the security of tenure, which exists only if the tenant knows that, if he respects the contract, he will be allowed to stay for as long as he would like.

In all four countries under comparison, it is possible to conclude both limited and unlimited rental agreements<sup>333</sup>.

In DE both extraordinary and ordinary termination are possible. For terminating the contract ordinarily, the landlord must have a justification. However, this is not possible as far as tenancies in art. 549 II III are concerned, as these – tenancies for residential space that have been rented from a legal person under public law or recognized private welfare work against because of an urgent need of accommodation – are excluded from security of tenure.

In AU extraordinary and ordinary termination are possible as far as the MRG regulation does not apply (§ 1118 ABGB). In case it does, fully or only partially, only extraordinary termination is possible (§§ 29 I and 30 MRG). In AU there are no statutory restrictions on notice for specific dwellings or tenants<sup>334</sup>.

In CH, as in LU<sup>335</sup>, the tenant has the possibility of requesting an extension of the tenancy, and this both in open-ended and limited rental agreements.

In CH notice by the landlord must observe formal requirements<sup>337</sup>, and, under 271 a s.1 ff c. CO a notice of termination may be challenged as unfair whenever it is given for the sole purpose of “forcing” the tenant to purchase the dwelling. But there are other situations where the tenant can defend himself from termination. That is the case in situations of old age or illness, as well as when the tenant cannot find a new apartment. Finally, whenever the notice contravenes the principle of good faith it can be challenged by the tenant.

As far as open-ended leases are concerned, the landlord would always have to have a grounds for terminating the contract<sup>338</sup>. There are no specific statutory restrictions on notice for specific types of dwelling, but the LBUH includes a particular protection in benefit of the spouse, partner, cohabitee, or their members of the deceased tenant. Indeed, for the people who cohabited with the deceased tenant, the contract persists and the contractual relatives continue in the tenancy<sup>339</sup>.

The principle that purchase is subject to existing tenancy (*emptio non tolit locatum*) has a particular, different regulation in all four countries under comparison. It is relevant whenever the rented dwelling changes landlords through sale or inheritance.

In DE this principle was introduced by I 21 § 358 ALR, and it comes from the Prussian Civil Code. It means that the new owner is due to respect the tenancy agreement, and, among other duties, he takes over rights and duties created by a rent security deposit.

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<sup>333</sup> See 542 BGB (DE), 255 s. 1 CO (CH) and 12, 2 LBUH and 1737 CC (LU).

<sup>334</sup> Hofmann – National Report for AU, sec. 6.6.

<sup>335</sup> See Wehrmüller – National Report for CH, 2014, sec. 6.6 and Dos Santos Silva – National Report for LU, 2014, sec. 6.6.

<sup>337</sup> For details see Wehrmüller – National Report for CH, 2014, sec. 6.6.

<sup>338</sup> For details, see Dos Santos Silva – National report for LU, 2014, sec. 6.6.

<sup>339</sup> ULC – Le bail à loyer, 2009, p. 13. WiP - Fixed term leases possible so as to circumvent the protection of the tenant in case of open ended leases & Protected periods effective and long enough (are there adequate prolongation rights?).

In AU, as far as the sale of the dwelling one must distinguish, on the one hand, whether the MRG applies fully or not (namely, applies partially or does not apply) and, on the other hand, on whether it corresponds to a private sale or a public auction.

In the case the MRG fully applies (§ 2, 1, sent. 2), the singular successor of the landlord is bound to all the clauses of the previously existing tenancy agreement including the length of the contract. Therefore, termination is impossible, and thereby the position of the tenant is clearly safeguarded. Whenever the MRG does not apply fully, the acquirer is generally bound by the previous tenancy agreement. However, the landlord is not bound by the length of such agreement.

Whenever the dwelling was sold through public auction (both when the MRG applies and when it does not apply or only applies partially), the acquirer is placed in the position of landlord. If the MRG does not apply fully, however, there is a need for registration<sup>340</sup>.

DE is apparently the country where tenants have more social defences against eviction at their disposal.

First, the tenant benefit of the provisions provided for in art 712 ZPO. Second, the tenant is usually given a period of up to one year to vacate the dwelling (s. 721 (I 1 and VI), 794 a (I 1, III 1) ZPO. Finally, art. 765 (I 1) ZPO reserves, prohibits or temporarily suspends eviction procedures whenever these would be against good morals, as would be the case of an important, life-threatening psychological condition of the tenant. In this particular situation, the law does not provide for a time limit for the eviction to take place. Moreover, German regulations are less landlord-friendly in the fact that they – despite the *Berliner Räumung*<sup>341</sup> – must pay the enforcement costs in advance, which would then ultimately be paid by the tenant.

### 3.2.3. Flexibility

The main reason for which people rent – particularly when they would be in financial conditions to purchase a dwelling as well – is the flexibility which this alternative provides.

One may see flexibility from at least two angles, namely, whether the tenant can leave the rental relationship within a reasonable delay and whether he can sublet the dwelling in case of interest or need.

As for the first, in all four countries the tenant must observe the terms of the contract which provide for the notice delay<sup>342</sup>.

Whenever the parties did not provide for that aspect, the subsidiary applicable regime differs according to whether the rental agreement was celebrated for an undetermined length or if it is limited in time.

In DE, for the agreements concluded for an indefinite period of time, the ordinary notice of three months applies (573 BGB), and this is also the case in LU<sup>343</sup>, AU (when

<sup>340</sup> Hofmann – National Report for AU, 2014, sec. 6.4. WiP. WiP: Right of first refusal (call option) of the tenant in cases of sale of the house to a third party; Indirect impediments: if massive rent increases allowed, the tenant may be forced to leave.

<sup>341</sup> For details, see Cornelius & Rzeznik – National Report for DE, sec. 6.7.

<sup>342</sup> See, for AU, § 560, p. 1 fig 1. ZPO.

<sup>343</sup> ULC, *Le bail à loyer*, p. 14.

the MRG applies partially or fully<sup>344</sup>) and CH, although a different rule for furnished room applies. The tenant does not need to invoke a reason for terminating. Whenever the agreement is limited in time, however, the tenant must invoke extraordinary reasons (“good cause” in CH<sup>345</sup>) for terminating the agreement and can only do it, at the earliest, one year after the beginning of the contract (550 (1) BGB). It shall be noticed, however, that if those reasons relate to the use of the dwelling, termination might be done without a notice period (543, 569 BGB). In LU, on the other hand, the tenant can only leave the rental relationship limited in time if the landlord so agrees<sup>346</sup>.

In AU, whenever the parties did not provide for a specific notice period, the law applies subsidiarily. Whenever the MRG does not apply, it is enough that the tenant warns the landlord one month ahead of his intention to leave the rental relationship (§ 560 1 fig. 1 ZPO), at least for tenancies in which the rent is paid on a monthly basis. Whenever the rental agreement is of definite duration, the tenant is allowed to terminate before the end of the term under two conditions: first, if at least one year has passed since the conclusion of the contract (§ 29, par. 2 MRG), as in DE; and for important reasons connected to the use of the dwelling (1117 s. 1 ABGB), as in DE but here there is a restriction: if the tenant is to blame for such conditions of use he cannot invoke this as a grounds for termination.

All in all, we may say that regulations are similar and all aim at allowing the tenant to leave the rental agreement within a reasonable period of time if he has reasons to do so.

An advantageous alternative to termination for some tenants, particularly for reasons of finances or old age, is to sublet one room or several rooms of their rented property.

The regimes on subletting in the four countries are diverse, but some form of total or partial subletting is allowed in each country.

In DE and in CH, the tenant can only sublet with the consent of the landlord<sup>347</sup>. In both countries there are some restrictions to the power of the landlord. Indeed, in DE the tenant can sublet independent from the authorization of the landlord whenever the conditions on 553 (I 1) apply, as is the case of personal or economic need of the tenant<sup>348</sup>. In CH, on the other hand, the landlord can only refuse his consent for reasons stated in art. 262 s. 2 CO. This article is semi-mandatory for the benefit of the tenant: The landlord cannot exclude or restrict the tenant’s right to sublet the dwelling by contract<sup>349</sup>.

In AU (1098 ABGB, whenever the MRG does not apply) and LU (1717 CC), the tenant has a right to sublet provided that the rental agreement does not preclude subletting (and that it is not disadvantageous for the landlord)<sup>350</sup>. This means that in LU, if the first owner of the house did not prohibit subletting in the rental agreement, the

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<sup>344</sup> § 29, par. 2, par. 3 lit. B) and par. 4

<sup>345</sup> 266 g CO.

<sup>346</sup> ULC – *Le bail à loyer*, p. 13.

<sup>347</sup> 540 (1) BGB for DE and 262 s. 1 CO for CH.

<sup>348</sup> For case law references, see Cornelius & Rzeznik – National Report for DE, sec. 6.4. See also Blank in Schmidt – Futterer, S. 553 BGB rec. 4 et seq. with further examples.

<sup>349</sup> Weber, BSK OR Art. 262 CO § 2 Honsell, OR BT 228; BGE 134 III 300 E.3.

<sup>350</sup> Oberhamme/Domej in Rainer, Miet-und WohnR Kap 2.7.4. Stand April 2013, rbd at. for details.

second owner and landlord, if that is the case, will not be able to refuse subletting either<sup>351</sup>.

It shall be noticed that in LU, in great contrast to the solution in force for the private rented dwellings, subletting is a serious legitimate reason for termination of the contract<sup>352</sup>.

#### 4. Comparison of tenures with a public task

##### 4.1. Generalities

One of the aspects which exists in all four countries under comparison, but which has a very different dimension and importance in each of them is rental housing with a public task, which may be considered the umbrella term for non-profit or public owned housing allocated primarily to the households in need.

In CH and in LU, rental housing with a public task is less representative than in AU and DE. In CH the stock of dwellings owned by the state is 2.4% of the full housing stock and 3.4% of the rental stock. In LU the social housing stock is very recent and even smaller than in CH: It represents a mere 2% of the full housing stock<sup>353</sup>. There is a concern that this supply does not meet demand in LU. As the construction costs of more social housing would represent an unbearable investment from the State, alternatives have been studied and promoted, among them the solution of engaging social rental agencies to meet demand for affordable housing.

In CH the sector is composed of housing co-operatives in particular, but also foundations and public limited companies. In LU the sector comprises public promoters, housing associations and the *Agence Immobilière Sociale* or AIS. In both countries the rental agreements concluded by these entities are subject to different regulations<sup>354</sup>: In LU the LBUH applies except for rents and rental expenses law 25 February 1979 concerning housing aid.

Rental housing with a public task appears in different forms, and one of them is municipal tenancies.

Municipal rental housing in dwellings owned by municipalities or non-profit municipal bodies is one of the three types of rental housing in DE, LU and AU, and in the latter municipalities often provide a rent level which is lower than the rent limits provided for the MRG<sup>355</sup>.

Besides municipal tenancies, there are also housing association tenancies. In DE, the contracts concluded by these are regulated by the same rules as private rental agreements, while in AU the MRG fully applies, even though it was derogated by special rules<sup>356</sup>.

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<sup>351</sup> See ULC, *Le bail à loyer*, 2009, p. 6; Krieger – *Le bail d'habitation*, 2009 p. 69.

<sup>352</sup> RGD 16 November 1998.

<sup>353</sup> Santos Silva – National report for LU, 2014, sec. 1.2.

<sup>354</sup> Wehrmüller – National report for CH, 2014, sec. 4.3.

<sup>355</sup> WiP.

<sup>356</sup> WiP.

In DE social tenancies are understood as the legal relationships which bind landlords and tenants who fulfil the conditions of the Housing Promotion Act, which applies together with regular tenancy law (partly in the BGB)<sup>357</sup>.

A phenomenon which also has a very different significance in each of the countries under comparison is that of social housing agencies. Indeed, in AU and CH they are nonexistent. In DE the *Soziale Wohnraumhilfe* exists in a few German cities, most of the time in cooperation with religious-based charitable organizations. In LU there is so far only the *Agence Immobilière Sociale*, which is funded 100% by national public funds. In both cases there is so far a lack of legal regulation on the national level, and these initiatives remain local ones<sup>358</sup>. In LU the government has already recognized the potential of these agencies and intends to multiply them and provide them with a legal regime, so that they would be able to fight lack of offer of affordable dwellings.

Privatized and restituted housing with social restrictions does not exist in any of the countries under analysis: in DE private investors usually put the commercial interests above social commitments<sup>359</sup>.

This is also the case of public entities taking over private contracts, typically for poor tenants to counteract homelessness, with the exception only of DE. Here, municipalities are obliged under police and regulatory law to counteract homelessness. For that purpose, they can either assign a homeless person to a particular dwelling or purchase the occupancy rights through contract between the landlord and the municipality. The tenancy is regulated under the general tenancy law of the BGB, but this model is not very widely practised<sup>360</sup>.

## 4.2. Evaluative criteria for public/social/private subsidized landlords

Public subsidization of landlords does not exist in all of the four countries under comparison, and when it does, it exists in different proportions and has a different impact on the decision of the landlord of investing.

In DE and in CH, there is no public subsidization of landlords. In DE, real estate is particularly financed by bank credits, but this shall change soon because professional investors are searching for better alternatives, such as mezzanine capital, private equity, equity-like forms, issue corporate bonds, etc<sup>361</sup>. In CH there is currently no state promotion for either profit-oriented professional or commercial landlords or for private landlords, because early withdrawal or pledging of pension fund assets is only possible for self-inhabited property<sup>362</sup>.

In AU and in LU, on the other hand, there are some subsidies to private landlords. These are the cases of interest subsidy in LU<sup>363</sup> and subsidies for construction and modernization of dwellings in AU<sup>364</sup>.

<sup>357</sup> Cornelius & Rzeznik – National Report for DE, sec. 4.3. Data so far not available for AU in the national report.

<sup>358</sup> Cornelius & Rzeznik – National Report for DE, sec. 4.3.; Santos Silva – National report for LU, 2014, sec. 1.2.

<sup>359</sup> Cornelius & Rzeznik – National Report for DE, sec. 4.3.

<sup>360</sup> *Ibid.* WiP: collection of material to analyse the effectiveness.

<sup>361</sup> Bettink – Immobilien finanzierung ändert sich gravierend, Börsen-Zeitung 05.10.2013, available online. See Cornelius & Rzeznik – National Report for DE, sec. 4.2.

<sup>362</sup> Wehrmüller – National report on CH, 2014, sec. 4.2.

<sup>363</sup> Santos Silva – National report for LU, 2014, secs 3.6. and 4.2.

Besides own equity, inheritance, endowments of family members or friends, which represent in most cases a small part of the investment in housing, most of the landlords resort to mortgage loans<sup>365</sup>, personal loans<sup>366</sup>, fixed-term loans<sup>367</sup>, etc.

As compared to LU, in CH and DE one may generally consider that investors feel less willing to invest in the letting of a dwelling. In the first case, this is because the risks and efforts associated with the investment in non-owner occupied dwellings for private, small investors are considered high when compared to the expected net return<sup>368</sup>. In the latter case, this is especially because it is no longer possible (since 2006) to make tax deductions in the first years of the investment<sup>369</sup>.

In LU, on the other hand, investors are allegedly positive about the attractiveness of their market as a location for real estate investment<sup>370</sup>. In case the dwelling is rented for private aims, the owners are allowed to amortize it, i.e., they benefit from a tax reduction connected to the depletion caused by normal use (which ranges between 2% and 7%)<sup>371</sup>.

### 4.3. Evaluative criteria for the tenant

#### 4.3.1. Access

The lack of affordable dwellings to meet demand seems to be a problem in all of the countries under analysis except AU. In DE there is a massive shortage of affordable dwellings in the conurbations<sup>372</sup>, and this is also the situation in LU<sup>373</sup>. In 2011 the supply was lower than demand in CH, as well<sup>374</sup>.

The criteria of access to housing with a public task vary according to the national regulations, but low income<sup>375</sup> is apparently one criterion which is present in all four countries.

Besides low income, in LU and DE there is a system of points which provides that certain applicants will be given *priority* over other applicants. In DE, although no such system exists, certain categories have priority in accessing housing with a public task: low income households, children, single parents, pregnant women, elderly, handicapped, homeless and other people in need. The targets of housing with a public task are households who are incapable of supplying themselves with an adequate living space and those households who are dependent from public aid<sup>376</sup>.

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<sup>364</sup> Hofmann – National report for AU, 2014, se. 1.4.

<sup>365</sup> Wehrmüller – National report on CH, 2014, sec. 1.4.

<sup>366</sup> Hoffmann – National report for AU, 2014, sec. 1.4.

<sup>367</sup> Cornelius & Rzeznik – National Report for DE, 2014, sec. 1.4.

<sup>368</sup> Wehrmüller – National report on CH, 2014, sec. 2.3.

<sup>369</sup> Cornelius & Rzeznik – National Report for DE, sec. 4.3.

<sup>370</sup> Ernst & Young – European real estate assets, 2013, p. 24.

<sup>371</sup> Santos Silva – National report for LU, 2014, sec. 2.3. WiP: “typical contractual arrangements and regulatory interventions into rental contracts” (national reports).

<sup>372</sup> Cornelius & Rzeznik – National report for DE, 2014, sec. 2.1.

<sup>373</sup> See Santos Silva – National report for LU, 2014, sec. 2.1 and BIPE – Les politiques publiques, 2000, p. 541 and 559; Norris & Shields – Housing Developments, 2012, p. 91.

<sup>374</sup> Wehrmüller – National Report for CH, 2013, sec. 2.1.

<sup>375</sup> For CH see Blumer – Vermietungs Kriterien der gemeinnützigen Wohnbauträger, 4.

<sup>376</sup> S. 1 (II) WoFG.

In LU at least two aspects might be envisaged as unfair in terms of allocation of housing with a public task. The first relates to the allocation of social dwellings to homeless people, which cannot happen unless the homeless person is accompanied by an association. The second relates to the fact that the dwellings of the AIS are allocated for a fixed period of three years, which has two potentially worrying consequences. On the one hand, when the household dramatically improves its financial condition, it would still be able to live in a dwelling of the AIS, thus “taking the place” of another household that is really in need. On the other hand, if the household does not manage to improve its financial condition by the end of the three years, it will be forced to leave, which may ultimately result in a situation of homelessness<sup>377</sup>.

#### 4.3.2. Affordability

Rental housing with a public task involves, by nature, more affordable rents. Nevertheless, the calculation method varies according to the country.

In DE, the Law on commitments regarding rent and rent increases and occupancy (WoBidG) applies. The landlord can only demand a rent which covers the current expenditures or a rent with a maximum permitted amount determined by the promise to grant public funds<sup>378</sup>.

In AU one must distinguish between rental agreements where the MRG does not apply and those where the MRG applies partially or fully. As for the former, only general restrictions from the ABGB apply. As for the latter cases, a further distinction must be made, namely between limited-profit rental housing in dwellings owned by limited-profit housing associations and municipal rental housing in dwellings owned by municipalities or non-profit municipal bodies. In the first, rent is limited by provisions of the WGG, and the criteria for subsidies for construction and modernization of dwellings, which had been in force at the time of application for the subsidies. In the second, rent is limited by provisions of the MRG or former MG. Municipalities often provide tenants with a rent level below rent limits<sup>379</sup>. As the MRG is strongly tenant-protective, some landlords try to circumvent its norms to increase income<sup>380</sup>.

In LU social rents and charges are calculated according to the available annual net income and main surface area of the dwelling (Art. 18 of the amended RGD 16 November 1998). The limits on rent and charges provided for in the LBUH do not apply to these agreements except for rental dwellings provided for in art. 28 (4) of the amended Law 25 February 1979. As far as rents of the rental agreements concluded by the AIS, they are agreed upon between the AIS and the landlord and are always lower than the private rent which would have been sought for the same dwelling<sup>381</sup>.

Finally, in CH public authorities will authorize the rents admissible for a certain apartment according to the actual costs<sup>382</sup>. Residential premises made available with public sector support – for which rent levels are set by a public authority – are not subject to the provisions governing challenges to unfair rents (253 b s. 3 CO).

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<sup>377</sup> WiP for analysis of selection procedure and whether it is fair, transparent and effective.

<sup>378</sup> Cornelius & Rzeznik – National report for DE, 2014, sec. 6.4.

<sup>379</sup> Hofmann – National report for AU, 2014, sec. 6.4.

<sup>380</sup> See Hofmann – National report for AU, 2014, sec. 6.4.

<sup>381</sup> Santos Silva – National report for LU, 2014, sec. 6.4.

<sup>382</sup> For further references see Wehrmüller – National report for CH, 2014, sec. 6.5.

As in the private sector, there is a possibility for social landlords to increase the rent amount under certain conditions.

In DE increases in rent due to increases in the current expenditures or due to structural alterations may be based on a new calculation of profitability. Dwellings promoted by public funds before and after 31 December 2012 must be distinguished: The BGB provisions apply only to those promoted after that date<sup>383</sup>.

In AU, as for the determination of the level of rents and for rent increases, one must distinguish between municipal housing and limited-profit housing. In the first, the MRG is fully applicable, and therefore the rent increase is valid only under the limits of § 16 MRG. Regarding limited-profit housing, § 14 of the WGG and 16 s. 12 MRG apply<sup>384</sup>.

In LU the RGD governs the increase of rents. According to art. 33, the public promoter calculates the annual rent to be paid by the tenant based upon the presentation by the tenant of a certificate of income from the previous year. Based on this certificate, a new rent is established. In case the tenant does not provide proof of income, the landlord will increase the rent by up to 10% of the invested capital. In the rental agreements concluded by the AIS (private renting with a public task) the rent will stay the same during the three years that the rental agreement lasts<sup>385</sup>.

Regulations on deposits apply almost uniformly both to private and social rental agreements. Indeed, they are equally regulated<sup>386</sup>, and in both kinds of rental agreement the deposit is aimed at guaranteeing the landlord against damage to his property or non-performance of obligations related to the rental agreement. Here, the landlord can subtract the tenant's arrears from and up to the amount of the deposit, but the tenant cannot use the deposit for the purpose of paying the rent or other charges<sup>387</sup>.

As far as the regulation of the deposit's amount is concerned, whereas in LU it is in the private rental market (albeit in luxury housing only) that we find that the amount can be freely determined by the landlord, in AU the tendency is the contrary, as it is in the private rental market where an average, case-law defined<sup>388</sup>, limitation to six months of rent is to be found<sup>389</sup>.

Also, in the management of the deposit, regulations in both the private and social rental markets are similar. In AU, whenever MRG applies, security deposits may be legally paid in cash or in the form of a savings account<sup>390</sup>.

As for the return of the deposit upon regular performance of the rental agreement, the same regulations as in the private rental agreement apply. However, in DE the guarantee is narrower within social rental agreements, where the deposit is aimed at covering only damage in the dwelling or forborne cosmetic repairs<sup>391</sup>. This means that in case of non-payment of rent social landlords cannot subtract the overdue rent payment from the amount of the deposit.

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<sup>383</sup> Cornelius & Rzeznik – National report for DE, 2014, sec. 6.5.

<sup>384</sup> Prader, MRG<sup>4.01</sup> § 16 E164.

<sup>385</sup> Santos Silva – National report for LU, 2014, sec. 6.5. WiP for procedure to be followed by rent increases.

<sup>386</sup> See fig. 10.

<sup>387</sup> See table 11.

<sup>388</sup> See Hofmann – National report for AU, 2014, sec. 6.4.

<sup>389</sup> See table 12.

<sup>390</sup> § 16b par. 1 sentence 1 MRG.

<sup>391</sup> See sec. 9V WoBindG and Cornelius & Rzeznik – National Report for DE, sec. 6.4.

Table 11 - Existence of regulation

	Social rental agreement	Private rental agreement with a public task
DE		Regulated
CH		Deposit in cash or negotiable securities is regulated
LU		Regulated
AU	Rental tenancies with a public task	
	Limited-profit rental housing tenancies	Municipal rental tenancies
		Regulated

Table 12 - Advance payment?

	Social rental agreement	Private rental agreement with a public task
DE		No advance payment
CH		No advance payment
LU		No advance payment
AU	Rental tenancies with a public task	
	Limited-profit rental housing tenancies	Municipal rental tenancies
		No advance payment

Table 13 - Regulation of amount

	Social rental agreement	Private rental agreement with a public task
DE	3 months of rent / Instalments possible	
CH	3 months (including charges) / "security deposit insurance"	
LU	3 months	
AU	Rental tenancies with a public task	
	Limited-profit rental housing tenancies	Municipal rental tenancies
		None

Table 14 - Preservation of amount

	Social rental agreement	Private rental agreement with a public task
DE	Investment in savings account in name of tenant (separated from remaining assets)	
CH	Investment in savings account in name of tenant	
LU	Freedom of contract	
AU	Rental tenancies with a public task	
	Limited-profit rental housing tenancies	Municipal rental tenancies
		Investment in name of landlord (separated from remaining assets)

Table 15 - Return deposit: timeframe

	Social rental agreement	Private rental agreement with a public task
DE	No time limit (usually <6 months)	
CH	One year	
LU	No time limit	
AU	Rental tenancies with a public task	
	Limited-profit rental housing tenancies	Municipal rental tenancies
		Immediately

Table 16 - Further possible kinds of guarantee

	Social rental agreement	Private rental agreement with a public task
DE		Yes
CH		Yes
LU		Yes
AU	Rental tenancies with a public task	
	Limited-profit rental housing tenancies	Municipal rental tenancies
		No

The regulation of expenses, such as utilities and repairs is in DE and CH the same for rental agreements with a public task.

Indeed, in DE also within social rental agreements (as agreements celebrated by cooperatives) the landlord must bear the costs for utilities and is responsible for all maintenance work and repairs, even though these costs are transferred to the tenant through rent<sup>392</sup>. In CH all services defined as “accessory charges” can be charged to the tenant in addition to the rent, and any charge which is not provided for in the contract is considered to be covered by the rent. Moreover, the costs for keeping the dwelling fit for the designated use must be borne by the landlord and are thus covered by the rent. Tenant must only repair defects that are attributable to him and minor defects.

In AU and LU, on the other hand, different rules apply to rental agreements with a public task.

In AU, for the rental agreements where the MRF fully applies, rent includes general expenses (21 par 1. 1 MRG) and public charges (15 § 1 fig. 1 and 2 MRG). As far as maintenance works are concerned, § 3 of the Austrian MRG defines them as works which keep the condition of the building, the rented dwelling and the plants serving the common use of the residents of the building unchanged and prevent severe damage. Improvement works, on the other hand, are, under sec. 4 par. 1 MRG, works that lead to useful improvements of the building or the rented dwelling. Both of the works are responsibility of the landlord<sup>393</sup>.

<sup>392</sup> Cornelius & Rzeznik – National report on DE, sec. 6.4.

<sup>393</sup> Hofmann – National report on AU, sec. 6.1.

In LU, as far as public housing with a public task is concerned, wear and tear shall be paid by the landlord, whereas damage caused by the tenant should be at his expense. For private housing with a public task, it is the AIS which supports the expenses related to maintenance works and repairs.

It is not always clear who – the landlord or tenant – shall support other expenses. In AU public charges (namely, taxes on land and buildings and taxes on the states), as well as extraordinary costs, are expenses which shall be borne by the landlord (21, § 1) but which, according to § 21 § 2 MRG, may be passed on to the tenant<sup>394</sup>. In LU the question often arises in this regard of whether the administrative expenses may be included in the costs charged to the tenant, even though it is generally considered that the landlord shall support them. On the other hand, it appears to be undisputed that expenses for technical assistance can be included in the costs charged to the tenant.

### **5.2.2. Stability**

One may consider that the position of the tenant in the rental agreement concluded with a provider of housing with a public task is relatively stable. Nevertheless, in LU, as far as rental agreements celebrated by the AIS are concerned, this stability lasts only for the period of three years. This means that for as long as three years, the tenant has a guarantee to stay as long as he respects the contract. However, after that period expires, he must leave the dwelling, even if he regularly performed his contractual obligations and also even if he proves that he has no possibility of affording a rental dwelling in the private rental market, as is expected after that period expires. For such reason, the tenant cannot buy the dwelling in any circumstance.

In DE, besides the possibility of providing for such right in the contract, there is a statutory pre-emption right for tenants under 577 (1) BGB, which the tenant can exercise within two months after the notice of the intention of sale of the rental dwelling (577 (I 3), 469 (II) BGB). In AU, within limited-profit housing and whenever the WGG is applicable, the tenant has a statutory right of subsequent transfer of ownership for dwellings in condominiums. CH is the only country which does not allow for a right of pre-emption, and in this regard, the tenant's position is less stable compared to the position of tenants in the other three countries.

### **5.2.3. Flexibility**

Tenants envisage housing with a public task as a good housing option when they cannot afford the costs of dwellings in the private rental sector. Nevertheless, there might be the case that, provided that their condition is improved, they would like to move to another dwelling, namely a private rental dwelling, and the question is whether the regulations allow them the flexibility to do so.

An interesting particularity in the regulation of the notice period required of tenants who wish to terminate their rental agreement is found in AU. There, whenever the MRG

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<sup>394</sup> Lurger/Haberl/Waß, EUI Tenancy Law Project – AUn eport (2004), 36 et seq. WiP for other fees in CH and DE. WiP for “Rent subsidies for poor tenants [if relevant, a reference to the above findings is sufficient]”

applies partially or fully, 560 ZPO also applies for contracts limited in time. This means that the notice period provided for in the contract applies, and in the case that no such period is provided for, the notice period for the tenant is one month in case rent is paid every month. Whenever the contracts are unlimited in time, the notice period should be three months, according to 2, par. 3, par. 3 lit. b and par. 4 MRG.

Another important aspect related to flexibility is the right of subletting the dwelling. First, it should be highlighted that whenever the MRG applies in AU, an agreement restricting the subletting capacity of the tenant is only valid if the “important reasons” described in § 11, par. 1, figs. 1-4 are present. Subletting of dwellings with a public task is expressly prohibited in LU and may lead to immediate termination of the contract.

## 5. Conclusion

As preliminary conclusions we may say that as far as regulatory aspects are concerned, the MRG in AU brings a particular complexity to the regulation of tenancy law cases and has no equivalent in either the countries under comparison or, apparently, any other European state.

As far as effective practices, the example of the AIS in LU should be highlighted. It has been an effective mechanism in allocating housing to people who are not eligible for social housing but cannot rent in the private market, and it is expected to expand in numbers in a near future. Its legal regulation, which is currently being prepared by the Housing Ministry, will promote expansion and contribute for more equal security as far as these contracts are concerned<sup>395</sup>.

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<sup>395</sup> WiP: Selective interesting features of the countries under review at the choice of the author of the comparative report; In particular: legal solutions and factual practices working particularly well or badly; Statement on which countries perform best and/or have promising solutions in the various large fields (i.e. housing with and without a public task etc).

## Abbreviations (to be completed)

<b>AIS</b>	<i>Agence Immobilière Sociale</i> , social rental agency	LU
<b>AU</b>	Austria (country code)	AU
<b>BBV I Zürich</b>	<i>Besondere Bauverordnung I Zürich</i> (Special Building Regulation of Zürich)	CH
<b>BGB</b>	<i>Bürgerliches Gesetzbuch</i>	DE
<b>BMVBS</b>	Federal Ministry of Transport, Building and Urban Development	DE
<b>BPG Basel</b>	<i>Bau- und Planungsgesetz Basel</i> (Planning and Building Regulation of Basel)	CH
<b>BV Berne</b>	<i>Bauverordnung Berne</i> (Building Regulation of Bern)	CH
<b>CH</b>	Switzerland (country code)	CH
<b>CO</b>	Code of Obligations	CH
<b>Const.</b>	Federal Swiss Constitution	CH
<b>DE</b>	Germany (country code)	DE
<b>GBV</b>	<i>Gemeinnützige Bauvereinigungen</i>	CH
<b>LBUH</b>	<i>Loi du 21 septembre 2006 sur le bail à usage d'habitation</i> (Law of 21 September 2006 on residential rental agreements)	LU
<b>LU</b>	Luxembourg (country code)	LU
<b>MRG</b>	<i>Mietrechtsgesetz 1982</i> (Law on rental agreements)	AU
<b>OGH</b>	<i>Oberster Gerichtshof</i> (Supreme Court of Judicature)	AU
<b>PBG Zürich</b>	<i>Planungs- und Baugesetz Zürich</i> (Planning and Buildung Act)	CH
<b>RGD</b>	<i>Règlement Grand-Ducal</i> (Grand-Ducal Regulation)	LU
<b>sec.(s)</b>	section(s)	
<b>STATEC</b>	<i>Institut national de la statistique et des études économiques du Grand-Duché du Luxembourg</i> (National Institute of Statistics and Economic Studies of the Grand-Duchy of Luxembourg)	LU
<b>v.</b>	version	
<b>WoBindG</b>	<i>Wohnungsbindungsgesetz</i> (Law on Commitments regarding Rent Increases and Occupancy)	DE
<b>WoFG</b>	<i>Wohnraumförderungsgesetz</i> (Law on State Funding of Housing and Housing Construction)	DE
<b>WW</b>	World War	

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

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### **Intra-team Comparison Report for BELGIUM, FRANCE, THE NETHERLANDS**

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Deliverable number 4.1

Lead beneficiary: Technische Universiteit Delft

**NOTICE.** This comparative report discusses various aspects of housing policies and legal framework of rental market in Belgium, France and the Netherlands. Substantial part of this report is based on the national reports available at <http://www.tenlaw.uni-bremen.de/reports.html>. For full list of sources please see respective national report.

## **1. The current housing situation**

### **1.1. General Features**

#### **1.1.1. Historical evolution of the national housing situation and housing policy**

In Belgium, since the first Housing Act came into force in 1889, the aim of the central government and regional policies is to stimulate owner-occupation.<sup>1</sup> Therefore, nowadays home ownership dominates the market with 59% of houses being owner occupied.

After World War II, Belgium was confronted with a housing shortage. The 1949 Brunfaut Act made it easier to provide rental housing for households with a low income. Increases in the rate of construction failed to occur causing renting to become a preferred option. As some of the buildings constructed were of poor quality, the priority was to eliminate slums and to rebuild. In 1956 the National Institute for housing was created. In 1970 a Housing Code (*Huisvestingswet*) was established. After the introduction of the 1989 Housing Act<sup>2</sup>, policies encouraged the move from home ownership to social housing and from indirect to direct involvement. The specificities of Belgium are linked to the fact that it is a federal state<sup>2</sup> and therefore the responsibilities for housing were at different levels of government: the national level, but also the Administrative Regions of Flanders, Brussels and the Walloon Region.

Between 1948 and about 1988 total immigration more or less balanced total emigration with numbers lying between 40,000 and 80,000 persons.<sup>3</sup> Since that year immigration numbers (about 166,000 in 2010) increasingly surpassed emigration numbers (about 80,000 in 2010). Population growth in the last two decades was helped along by immigration.<sup>4</sup> The members of the population with EU-nationality is about twice as big as those with non-EU nationality. Nationalities that are called Ex-Yugoslavia are considered a minority.

The specificity of the system in the Netherlands is the importance of the social rental sector, which is the biggest in Europe at 34% of the market. Home ownership reached a market share of almost 60% in 2010. As a consequence, the private rental sector – renting without a public task – has been squeezed with its share being less than 10% in 2010.

In the 1980s government spending for ‘social engineering’ in housing continued to increase and was considered to be increasingly unaffordable. In the 1990s, the financial ties between the government and the landlords were cut and thus, the social rental sector became financially independent. Landlords were to operate as social entrepreneurs from then on running the risks of investment themselves while using the societal capital for the public task. Home-ownership grew strongly and became the largest tenure type in the Dutch housing market in 1981. The second oil crisis in 1978-

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<sup>1</sup> Peter Boelhouwer & Harry Van der Heijden, *Housing Systems in Europe: Part I. A Comparative Study of Housing Policy* (Delft: Delft University Press, 1992), 84 and 85.

<sup>2</sup> Boelhouwer & Van der Heijden, *Housing Systems in Europe: Part I. A Comparative Study of Housing Policy*, 96 et seq.

<sup>3</sup> Belgium Federal Government, ‘Internationale migratie’, <<http://statbel.fgov.be/nl/statistieken/cijfers/bevolking/migraties/internationaal/>>, 17 January 2013.

<sup>4</sup> KBC, ‘De Belgische vastgoed- en hypothekmarkt. Ontwikkeling, waardering & toekomstvisie’, *Economic Research Notes* (23 juli 2012), 12.

1982 brought a halt to the construction of new owner-occupied housing. Better economic times allowed for a further growth of the number of home owners. As a result of the Internet bubble at the turn of the century, the prices of existing owner-occupied dwellings stagnated and turnover time increased. The demand for expensive owner-occupied dwellings fell sharply, hampering upward mobility. Production collapsed, and in 2004 it had not returned to pre-2000 levels. After a slight housing market stabilization, house prices have continued to rise up until the end of 2008 when the effects of the Global Financial Crisis (GFC) hit the housing market.

In the Netherlands, in the period between 1980-2000 the population had grown from 14.1 million persons to 15.9 million persons (+13%). On the 1st January 2013 the population almost totalled 16.8 million. Since 2005 the positive migration balance has been making a contribution, accounting for a little more than one quarter of estimated growth in 2012. The migration balance from the EU-26 (+19,300) in addition to the middle and East-European countries (+12,000) is affecting the positive migration balance (+12,900). The natural population growth is at an all-time low. By 1st January 2012 migration has contributed to almost five per cent of non-Dutch within population (786,057 persons). The members of the population with EU-nationality (EU-26) amount to almost 46% (360,847) of the non-Dutch population.

In France, in order to deal with the housing shortage, housing was included in the post-war national plans. Central government provided substantial subsidies and low-interest loans to builders of new homes, resulting in a building boom. Thus, a large social rental-housing sector has developed and home ownership was promoted through both production and personal subsidies. In the mid-1960s, the French government gradually reduced its interventions in housing. The market sector therefore started to take on a greater role. The production of dwellings for the owner-occupied sector decreased substantially in the 1980s. At the same time, the tightening of rent controls in the 1980s made it less attractive to invest in the private rental sector. Consequently, there was a clear fall in the rate of house building (from 500,000 building permits in 1980 to 356,000 in 1986). Thus, the government introduced a series of tax benefits that aimed to improve investment conditions for private rental landlords. These tax benefits are still in place, although the specific conditions have been changed regularly. In the 1990s French housing policy had a strong focus on urban renewal and restructuring but the basic characteristics of the housing finance system remained unchanged. After 2000, social rental landlords have become increasingly active in the urban renewal process. The principal housing aims are to improve housing quality, encourage the production of affordable rental dwellings and ensure that empty homes are put on the market. In recent years, the loans and fiscal concessions to promote investment in this sector have been improved<sup>5</sup>. Furthermore, there has been a general trend towards decentralization of housing policy. Since 2004, local authorities such as *départements* and groups of communities (*groupements intercommunaux*) were given more responsibility.

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<sup>5</sup> Ministère de l'emploi, de la cohésion sociale et du logement, 2006, *Aides Financières au logement*, [Financial support for Housing] (Paris: Ministère de l'emploi, de la cohésion sociale et du logement, 2006).

In France, the population growth was relatively high in the 1950s and 1960s. This is a specificity of France that is a result of the immigration of citizens from the former colonies (particularly in 1962; the year of Algerian independence). Since the 1970s, both the natural population growth and the migration balance have remained relatively stable. Immigrants constitute a significant proportion of tenants in social housing. Among them, there is a high proportion of large low-income families who experience some of the worst housing conditions.<sup>6</sup>

### *Conclusion*

In the three countries, but particularly in France and Belgium, there was a shortage after WWII and policies were focused on housing. First, policy has encouraged home ownership and the percentage is high. Second, policy moved to the social rental sector. There was also a tendency to reduce the risks for the central government. Whereas in Belgium and in France responsibilities were transferred to local authorities, in the Netherlands the risk for the social sector was transferred to the housing associations themselves.

In the three countries, immigration contributes to the increase of the population. In Belgium and in the Netherlands there is significant migration from people coming from other European countries, whereas in France, many people come from the former colonies.

#### **1.1.2. Current situation**

In Belgium, between 1991 and 2001 the stock of occupied private dwellings increased to 9% at the national scale. Within the regions, there was an increase of 9,6% in Flanders, 9,5% in the Walloon Region and only 3,7 % in Brussels. In the period 1981-2009 the total housing stock is estimated to have increased by about 40%.

In the Netherlands, total occupied housing stock has grown from 5.3 million dwellings in 1985 to 7.2 million dwellings in 2010 (+36%). This growth has been brought about by the substantial increase in home ownership from 2.3 to 4.3 million dwellings (+89%), while the private rental sector decreased from slightly under one million dwellings to 646,000 dwellings (-34%) and the social rental sector slightly increased from 2.1 to 2.3 million dwellings (+11%).

In France, in 2011 there was a total of 33.8 million dwellings. Among those 28.2 million were principal residences, 3.2 million were secondary homes and 2.5 million were vacant.

Even if the data does not exactly correspond to the same period, one can see that the housing stock had increased by around 40% in Belgium and in the Netherlands between 1981 and 2009. The situation varies in each country and from one region to another resulting in market tension in the main cities: Amsterdam, Brussels and Paris.

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<sup>6</sup> J. Ball, *Housing disadvantaged people? Insiders and outsiders in French social housing* (London/New York: Routledge, 2012).

### 1.1.3. Types of housing tenures

In Belgium the type of landlord mainly determines whether social or private renting is being referred to.<sup>7</sup> If private people or companies let dwellings they belong to the private rental sector. If registered or accredited social housing landlords<sup>8</sup> let dwellings it is considered to be ‘social rental dwellings. Local authorities and municipal welfare organisations such as OCMWs (*Openbaar Centrum voor Maatschappelijk Welzijn*) or groups of local authorities and OCMWs are also considered to be social landlords.<sup>9</sup>

In 2009 the main housing tenures are owner-occupation (59%), social renting or renting with a public task (34%) and private renting or renting without a public task (8%).

Concerning the quality of the housing stock, there is a discrepancy among the regions. The newest and biggest dwellings are over represented in Flanders, although the biggest ones are in the Walloon region. Smaller dwellings can be found in Brussels. The oldest dwellings (pre-1945) are over represented in the Walloon Region<sup>10</sup>.

The basic facilities (bath/shower, toilet with flush, running water) are generally available inside the home. This is much less the case with central heating; especially in the Walloon Region where homes are lacking this facility. Also in the Walloon Region and in Brussels almost one in five homes seems to have problems with leaking, dampness or rot. The Flemish dwellings score better on these quality indicators, probably mainly because its stock is slightly newer.

In all regions the quality of owner-occupied dwellings on average is better than for tenants.<sup>11</sup> Specifically housing quality for the population living in private rental dwellings is worse than for those living in the other tenures.

One specificity of the Netherlands<sup>12</sup> compared to France and Belgium is the share of residential mortgage debt outstanding compared to GDP, which scores more than 100%. About 86% of home owners have mortgage debt outstanding. Cooperatives have not developed, as the fear was that as the tenant is also part owner and has more power than a normal tenant, the organization might be steered by individuals instead of societal preferences<sup>13</sup>.

Social landlords –with a public task – dominate the rental sector (34% of all dwellings). Within the private rental sector –without a public task – the group of private person landlords (more than 225,000 dwellings amounting to 3% of total housing stock) is slightly larger than an organisation being landlord (more than 189,000 dwellings also amounting to 3% of total housing stock). The last group is composed of people renting dwellings owned by the government, but also those rented from family or with an

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<sup>7</sup> This is taken from Haffner et al., *Bridging the gap*, 64.

<sup>8</sup> *Sociale Huisvestingsmaatschappij*; SHM in Flanders and Brussels; or *Openbare Vastgoedmaatschappij* (OVM) in Brussels; or *Sociétés de Logement de Service Public* (SLSP) in the Walloon Region.

<sup>9</sup> Vanneste, Thomas & Goosens, *Woning en woonomgeving*, 124.

<sup>10</sup> Dol & Haffner, *Housing Statistics*, 54.

<sup>11</sup> Winters & Heylen, *Kwaliteit en betaalbaarheid*, 24. See also: Heylen & Winters, *Woonsituatie in Vlaanderen*, 24 and 27.

<sup>12</sup> European Mortgage Federation, *Hypostat 2010* (Brussels: European Mortgage Federation, 2010), 69. Any savings in a savings account in the case of an endowment loan, are not deducted from the total; therefore, the total can be regarded as an overestimation of residential mortgage debt outstanding.

<sup>13</sup> Leo Gerrichhauzen, *Het woningcorporatiebestel in beweging; Volkshuisvesting in theorie en praktijk* 25, (Delft: DUP, 1990) 24.

unknown status (possibly including dwellings for which no rent is paid). Home-ownership represents 60% of the households.

All dwellings have a bath/shower (2009) and hot running water (2005). Heating which could be central heating and district heating among others is available in 94% (2009) of dwellings.<sup>14</sup> Generally, the characteristics of the rental dwellings of different owners are more alike than those of owner-occupied dwellings. The latter tenure generally is of better quality: more single-family dwellings, relatively new stock, more dwellings with more rooms and a larger surface area. The social rental stock is also relatively new compared to the stock of other landlords, while of the dwellings owned by private person landlords, almost half are from the pre-war period.

In France, owner-occupation is the largest tenure category (58%), followed by private renting (23%)<sup>15</sup> and social renting (19%).

A form of intermediate tenure used to exist with the pass-foncier<sup>16</sup> from January 1<sup>st</sup> 2007 to January 1<sup>st</sup> 2011. Furthermore, in the French social rental sector there is a scheme that allows tenants to (partly) become home owners: *Prêt Social Location Accession*<sup>17</sup>. France also has a small co-operative sector that consists of about 42.000 dwellings<sup>18</sup>. In terms of property rights, co-operative housing is usually placed somewhere on the continuum between full home ownership and renting.

On average, the biggest dwellings can be found in the owner-occupancy sector. Dwellings are relatively small in the social rental sector and particularly in the private rental sector (half of the dwellings have one or two rooms). Generally speaking, social rental dwellings are considerably ‘newer’ than owner-occupancy dwellings and private rental dwellings. Owner-occupancy dwellings are over represented in smaller municipalities whereas social and private rental dwellings are over represented in bigger cities. Most owner-occupancy dwellings are individual dwellings, whereas most social and private rental dwellings are located in a bigger block of apartments.

In the three countries, information about condominiums has not been found.

### *Conclusions*

The quality of houses is generally considered equally good in the three countries. However, in Belgium, the quality of dwellings is better for homeowners, while in the Netherlands, it is better for tenants. The size of the dwellings is bigger in owner occupancy in France and in the Netherlands. In the three countries, co-operative housing is not developed, even though in France it comprises a small sector. In all of the three countries, homeowner occupancy prevails with rates from 50 to 60%. In Belgium and the Netherlands, the social rental sector is more important than the private rental sector whereas in France the private sector prevails.

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<sup>14</sup> Dol & Haffner, *Housing Statistics in the European Union 2010*, 53.

<sup>15</sup> In this report, renting without a public task is either called private renting or market renting.

<sup>16</sup> See:<<http://www.anil.org/profil/vous-achetez-vous-construisez/achat-et-vente/accession-progressive/pass-foncier/pass-foncier/>>

<sup>17</sup> <<http://www.developpement-durable.gouv.fr/AC00001-Dispositif-PSLA-Pret.html>>

<sup>18</sup> See: <<http://www.chfcana.ca/coop/icahousing/pages/membersearch.asp?op=country&id=6>>

#### **1.1.4. Other general aspects of the current housing situation in comparative perspective**

##### *Vacancy*

As far as vacancy of dwellings is concerned, in Belgium, there is no data. In Flanders and Brussels, levies are used to stimulate building and non-vacancies.

In the Netherlands<sup>19</sup>, on the 1<sup>st</sup> January 2010, the official vacancy rate is 6% (417,000 dwellings), however only for 290,000 dwellings it was certain that they were vacant.<sup>20</sup>. These are often found in typical tourist areas where they will most likely be rented out to tourists. In inner cities of the larger cities, dwellings above shops are often vacant.

Of these 290,000 vacant dwellings, 110,000 are designated as owner-occupied, the remainder as rental property. About half of the rental dwellings are owned by housing associations. Presumably this distinction refers to the situation that either an owner-occupier or a landlord is not able to find a new owner-occupier or new tenant to occupy the dwelling.

As in the Netherlands, in France, the vacancy rate (7.15%) is rather high, which can be explained by the continued rural to urban migration and the population decline in older industrial areas<sup>21</sup>. However, some homeowners also keep their dwelling(s) vacant for speculative reasons. No specific policy to reduce these rates can be highlighted.

##### *Black-market*

In Belgium and in the private sector of the Netherlands there is no information concerning the black market. However in the Netherlands<sup>22</sup>, there is data concerning a black market phenomenon in social renting. In the bigger cities with scarcity of dwellings, especially Amsterdam, social tenants rent out their social rental dwelling illegally for a high rent and live elsewhere where they pay cheaper rent. The Supreme Court confirmed in 2010 that this type of subletting must be considered as illegal.<sup>23</sup>

In France, a black market is associated with the rental of premises that do not meet the legal requirements to be considered suitable regarding health, safety and housing quality. The phenomenon concerns people called '*marchands de sommeil*' who rent small rooms or beds to people who have no other options in the housing market.

The phenomena are different in the two countries where there is data, but in both cases one can notice that the contracts do not abide by the law. In both cases, the targets might be weak tenants that cannot access the regular market or the social rental market as they agree to such conditions.

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<sup>19</sup> Centraal Bureau voor de Statistiek, 'Zes procent van woningen officieel niet bewoond', <<http://www.cbs.nl/nl-NL/menu/themas/bouwen-wonen/publicaties/artikelen/archief/2012/2012-3612-wm.htm>>, 22 February 2013.

<sup>20</sup> Of the 417,000 dwellings mentioned, 80,000 were vacant because they were used for other purposes (e.g. a day-care-centre) and for 50,000 it was not possible to determine whether they were vacant.

<sup>21</sup> Ball, *Housing disadvantaged people?*, 24

<sup>22</sup> Amsterdam.nl, 'Zoeklicht', <<http://www.amsterdam.nl/wonen-leefomgeving/wonen/opsporing-woonfraude/zoeklicht/>>, 22 February 2013.

<sup>23</sup> NRC, 'Uitspraak Hoge Raad 'doorbraak' in strijd verhuurders tegen illegale onderhuur', <<http://www.nrc.nl/rechtenbestuur/2010/06/25/uitspraak-hoge-raad-doorbraak-in-strijd-verhuurders-tegen-illegale-onderhuur/>>, 22 February 2013.

### *Tenant associations*

In all three counties exists a number of associations to represent and protect the tenants. In Belgium there are at least twelve umbrella organisations dedicated to the protection of tenants. Each of them can protect or defend or give advise to a specific type of tenant(s), even some only to associations of tenants, located in a specific place. As a result, the system is rather complex and it is not easy to understand what is the role of each association.

The system in the Netherlands and in France seems less complex than in Belgium. There is a limited number of umbrella associations (in France just four, and in the Netherlands five), each targeting a specific group: home owners, investors and housing associations.

## **1.2Economic factors in comparison**

### **1.2.1. Comparative view of the housing market**

In Belgium, there is a strong pressure to become a homeowner, which has an impact on the rental market.<sup>24</sup> In Flanders, there is an issue with an increase of households with a weak social-economic profile in private rental sector that can neither find a home in the social rental nor the owner-occupied sector.<sup>25</sup> Therefore there is a demand for private rental dwellings. Another source states that the number of tenants is increasing in comparison with homeowners<sup>26</sup>, which can be explained by the larger numbers of immigrants and the strongly increasing house prices in the past fifteen years.

Data is only known for Flanders where on average 15,000 new households will be looking for a dwelling each year. Concerning the social housing need, the Flemish government estimated that it amounted to around 70,000 candidates in 2011.<sup>27</sup> Thus, they adopted rules<sup>28</sup> for the municipalities on how to determine the gap and to fight the undersupply of dwellings.<sup>29</sup>

In the Netherlands, in 2009 the number of dwellings being constructed (80,000) was enough to cover household growth.<sup>30</sup> Mostly as a result of the impact of the Global

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<sup>24</sup> De Decker, ‘Belgium: Between confidence and prudence’, 39.

<sup>25</sup> Winters, *Huurprijzen en richthuurprijzen*, 1. And: Pascal de Decker, ‘Jammed between Housing and Property Rights: Belgian Private Renting in Perspective’, *European Journal of Housing Policy* 1, no. 1 (2001): 20.

<sup>26</sup> KBC, ‘De Belgische vastgoed- en hypotheekmarkt. Ontwikkeling, waardering & toekomstvisie,’ 14.

<sup>27</sup> Vlaamse Maatschappij Voor Sociaal Wonen, *Statistisch bulletin kandidaat-huurders editie 2011. Versie 1.1* (Brussel: VMSW, 2011), 18 et seq.; Sien Winters *et al.*, *Op weg naar een nieuw Vlaams sociaal huurstelsel?* (Brussel: Ministerie van de Vlaamse Gemeenschap, Departement RWO-Woonbeleid, 2007), 85.

<sup>28</sup> Departement RWO, ‘Decreet Grond- en Pandenbeleid’, <<http://www.rwo.be/Portals/100/PDF/Publicaties/decreet-grond-en-pandenbeleid.pdf>>, 26 January 2013; Staatsblad Moniteur, ‘Vlaamse overheid’, <<http://staatsbladclip.zita.be/staatsblad/wetten/2009/10/06/wet-2009035802.html>>, 26 January 2013.

<sup>29</sup> Ruimtelijke ordening, Woonbeleid, Onroerend erfgoed, ‘Veelgestelde vragen’, <<http://www.rwo.be/NL/RWOnieuwsbrief/Hoofdmenu/Veilgesteldevragen/Voorgemeenten/Activeringslenegstandsheffing/tabid/12422/Default.aspx>>, 28 January 2013.

<sup>30</sup> ABF Research, ‘Malaise in de woningbouw: woningtekort verdubbelt’, <<http://www.abfresearch.nl/nieuws/woningtekort-verdubbelt.aspx>>, 22 February 2013.

Financial Crisis (GFC) on the housing market, construction has plummeted since then. For 2013 no more than 50,000 new dwellings were forecast to be built. The number of households, however, is still increasing. The housing shortage has increased to about 50,000 dwellings in the past three years and the shortage will reach about 300,000 dwellings in 2020; this means a shortage of 4%. In cities like Utrecht and Amsterdam, the shortage is estimated to reach even 7% and more. In the long term, the national statistical office of the Netherlands expects the number of households to keep growing from about 7 million in 2013 to 8.0 to even 9.1 million in 2040.<sup>31</sup> Growth however will diverge across regions.<sup>32</sup> The central area – the so-called Edge City (*Randstad*) with the four largest cities of the Netherlands (Amsterdam, Rotterdam, Utrecht, The Hague) – is expected to maintain more than average growth at the cost of more peripheral regions.

In France, the effects of the GFC have been relatively limited. Although house prices have decreased somewhat between the end of 2008 and the beginning of 2010, they have been increasing again since then. In nominal terms, current house prices are already higher than the pre-GFC peak level<sup>33</sup>. However, since 2012 house prices are slowly decreasing again, due to deteriorating economic and credit conditions. The housing market situation in France strongly differs between areas. The pressure on this market is high in the Paris region and most of the major cities, whereas it is considerably lower in much of the countryside. The population of France is still growing. Between 2010 and 2020, the number of households is expected to increase by about 3 million, which implies that at least 3 million new dwellings are needed to house these households. It is estimated that 320.000 to 370.000 new dwellings a year will be needed up to 2020<sup>34</sup>.

### Conclusion

In the three countries, the need for new dwellings in the coming years is evident. Before the GFC the Netherlands appears to be the market that works the best in terms of supply and demand, as in 2009, the number of dwellings being constructed (80,000) was enough to cover household growth. The impact of the GFC has differed, being significant in Belgium and the Netherlands but with few effects in France. However, the three countries will face a housing shortage in the coming years and need to find specific policies such as subsidisation schemes in order to face it.

#### • 1.2.2. Comparative view on price and affordability

In Belgium, two gaps can be observed. First, in Brussels rents on average are significantly higher than in the other two Administrative Regions. Second, rents in social renting are significantly lower than in private renting. The Belgian rent-to-income-ratio

<sup>31</sup> Centraal Bureau voor de Statistiek, Statline, ‘Regionale prognose huishoudens; 2013-2040’, <<http://www.cbs.nl/NR/rdonlyres/54C923ED-5A6B-4B0C-8380-DC8F0A37FBC9/0/2013Regionaleprognose20132040art.pdf>>, 21 January 2014 ..

<sup>32</sup> Centraal Bureau voor de Statistiek, ‘Forse bevolkingsgroei in de Randstad tot 2025’, <<http://www.cbs.nl/nl-NL/menu/themas/bevolking/publicaties/artikelen/archief/2011/2011-064-pb.htm>>, 22 February 2013.

<sup>33</sup> Ball, *European Housing Review* 2012, 22.

<sup>34</sup> Ball, *European Housing Review* 2012, 30.

(corrected for housing allowances) averaged almost 29% in 2007/2008.<sup>35</sup> If unaffordability is defined as housing expenses taking a larger share than 30% of disposable household income (after housing allowances have been deducted from rent), 34% of Belgian tenants would pay an unaffordable rent in 2007/2008.<sup>36</sup>

The increase in house prices has driven potential candidates towards the rental sector where rents have been rising relatively little between 2007 and 2010.

In the Netherlands, housing on average is more affordable in the owner-occupied sector than for the rental sector. The explaining variable is income and not the level of housing expenditure. For a tenant income is on average almost half (23,220 Euro per year) of the income of the owner-occupier (43,580 Euro per year). Average basic rent amounts to 441 Euro per month, while gross housing expenditure for owner-occupiers amounts to 692 Euro per month. Years of housing policies have slowly resulted in the marginalization by income of the rental sector.<sup>37</sup> Housing allowance has been attractive for tenants with a lower income and favourable income tax treatment has been attractive for home owners, especially for those home owners with a higher income. Home ownership has grown strongly since about 1990, due to stable economic growth, low interest rates and the favourable tax treatment of home ownership.<sup>38</sup> The GFC has had a strong impact on the owner-occupied market. Generally, construction numbers are not in line with increasing demand,<sup>39</sup> in addition, the sales of new dwellings have fallen, which has had an impact on the rental market.

In France, the highest housing costs can be found among tenants in the private rental sector and home owners with a mortgage. Home owners without a mortgage have the lowest housing costs. Housing costs are lower in higher income brackets than in the lower income brackets. In 2006, tenants in the French social rental sector paid on average 55 Euros annual rent per square meter and a monthly rent of a little more than 300 Euros. Tenants in the private rental sector on average pay much more: 90 Euros per square meter per year and a monthly rent of a little more than 500 Euros<sup>40</sup>. The differences in rental costs between the social rental sector and the private rental sector are greater in regions with considerable pressure on the housing market such as Ile de France.

The political stance towards social housing strongly depends on the political ideology of the government that is in charge. Whereas the Sarkozy government favoured the owner-occupancy sector above the rental sector, the current Hollande government wants to revive the social rental sector.

<sup>35</sup> Marietta Haffner & Kees Dol, *Internationale Vergelijking van woonuitgaven met EU-SILC* (Delft: TU Delft, Onderzoeksinstiut OTB, 2011), 12.

<sup>36</sup> Haffner, Marietta, Christian Lennartz & Kees Dol. 'Housing'. In *Countries compared on public performance. A study of public sector performance in 28 countries*, ed. Jedid-Jah Jonker, (The Hague: The Netherlands Institute for Social Research, 2012b), 250.

<sup>37</sup> Marietta Haffner & Harry Boumeester, 'The Affordability of Housing in the Netherlands: An Increasing Income Gap Between Owning and Renting?' *Housing Studies* 25, no. 6 (2010): 818.

<sup>38</sup> Mostly from: Haffner & De Vries, 'Dutch house prices and tax reform', 158 and 159.

<sup>39</sup> ABF Research, 'Malaise in de woningbouw: woningtekort verdubbelt', <http://www.abfresearch.nl/nieuws/woningtekort-verdubbelt.aspx>, 22 February 2013.

<sup>40</sup> Commissariat Général au Développement Durable, *Compte du logement 2011. Premiers résultats 2012*, (Paris : Commissariat Général au Développement Durable, 2012), 134

In comparison, in Belgium, the percentage of people who pay rent that would be considered unaffordable is relatively high compared to other EU-countries, such as the Netherlands where the percentage is a little more than 20% of tenants. One can also note that in the three countries, home ownership was favoured and that in the social rental sector prices are lower than in the private sector. Housing costs are lower in France and in the Netherlands for home owners.

- **1.2.3. Tenancy contracts and investment**

In Belgium, the private rental sector is mostly run by landlords who can be described as amateur landlords – private persons (and not businesses)–, which must be regarded as an indication of the unprofitability of the sector. Therefore, the return on investment is estimated as being relatively low for Flanders.<sup>41</sup> The GFC will not have affected the situation drastically as rising house prices indicate a continuing demand for owner-occupation (and a continuing indirect return on investment), instead of an abrupt switch in demand towards the rental sector.

As most landlords are private person landlords with small portfolios, the expectation is that Real Estate Investment Trusts (REIT's) based on or securitization of tenancy contracts will not play a role on the rental market.

In the Netherlands, by 2009 total returns on residential investment have plummeted to the lowest return since 1995. Since 2007 they have become negative.<sup>42</sup> Capital losses (negative indirect return) caused this outcome, while return from operation (direct return) stayed stable. However, when the trend is considered, direct return on average has decreased since 1995 as well. One technical explanation may be that it decreased only because of strongly increasing house prices at that time. But rent control largely based on inflation may also have contributed to decreasing direct returns. Decreasing direct returns will have made investors more dependent on returns from capital gains, possibly stimulating (precipitating) investors to sell off their property in order to make their desired return. Their business model would normally involve a sale of individual private rental dwellings after 15 to 20 years of operation, before large investments for renovation and modernisation became necessary.<sup>43</sup> A type of REIT's, called the "tax-free" investment trust (*fiscale beleggingsinstelling; fbi*) exists and can be quoted or not on the stock exchange.<sup>44</sup> The advantage of the trust as an organization is the zero tariff in corporate tax (no payment of corporate tax).

There are three main investors in the French rental sector: social landlords, individual private rental landlords, and institutional private rental landlords. After the start of the

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<sup>41</sup> Pieter Vandenbroucke et al., *Naar een aanbodbeleid voor de Vlaamse private huurmarkt* (Brussel: Ministerie van de Vlaamse Gemeenschap, Departement Ruimtelijke Ordening, Woonbeleid en Onroerende Erfgoed - Woonbeleid, 2007), 94.

<sup>42</sup> Vereniging van Institutionele Beleggers in Vastgoed, Nederland, *De vastgoedbeleggingsmarkt in Nederland 2008*, 9. And: Vereniging van Institutionele Beleggers in Vastgoed, Nederland, *Vastgoedwijzer*, 19.

<sup>43</sup> Priemus, 'Commercial rented housing: two sectors in the Netherlands', 275.

<sup>44</sup> Vastgoedvergelijker, written by Nick Blom, 'Niet beursgenoteerde fiscale Beleggingsinstelling (fbi)', <<http://www.vastgoedvergelijker.nl/nieuws/niet-beursgenoteerde-fiscale-beleggingsinstelling>>, 24 February 2013.

economic crisis in 2008, investment in the social rental sector, which is related to government incentives, has increased, whereas investment in the private rental sector has decreased. Social rental landlords do not have to make a commercial rate of return. Investment in the private rental sector<sup>45</sup> can be done by both individual and institutional private rental landlords. Traditionally, individual investors expected a rental yield of 5% per year, but recently, it has decreased by 3,5% to 4%. Potential capital yields (as a result of growth in property prices) may also be a strong incentive. Furthermore, investing in rental property can also be a way to prepare financially for retirement. Also for individual private rental landlords, the government provides financial incentives that aim to promote investment, mainly in the form of fiscal subsidies. The importance of institutional private rental landlords has significantly decreased in recent decades. The returns are dependent on both the returns from renting and the returns from capital growth (increase in property prices). The returns from letting were 3,3% in 2011, whereas the return from capital growth was no less than 8,2%, thus resulting in a total return of more than 11%. Over a longer time period the total returns show a positive picture as well; they were 9,8% over the last 10 years.

France has recently developed specific fiscal regulations for REIT's. However, until now, the impact of such REIT's seems to be rather limited<sup>46</sup>. No information on securitization of rental incomes has been found.

### **Conclusion**

In the three countries, the return on investment has decreased in the past year, even though in Belgium it has always been low. In the Netherlands, the return from capital has plummeted whereas in France it is still higher than the return from letting. In the Netherlands and in France, Real Estate Investment Trusts have been created. The system is quite efficient in the Netherlands as they do not have to pay corporate taxes, which makes it rather attractive.

#### **1.2.4. Other economic factors**

In Belgium, almost 30% (2005/2006) of Flemish tenants rented a dwelling from a private person landlord via an intermediary responsible for the management of the rental dwelling.<sup>47</sup> Almost 29% make use of the services of a commercial estate agent; the remainder 1%, are rented via Social Rental Agencies (*Sociale Verhuurkantoren*; SVK), which offers social rental houses or apartments to vulnerable households as an intermediary between private owner-landlords and these households. In the Walloon Region and in Brussels, Social Rental Agencies (*Agences Immobilières Sociales*; AIS) are also active<sup>48</sup>. In Brussels, 12 Social Rental Agencies active in 2001, were renting out 650 dwellings. For the Walloon Region 28 of these agencies are mentioned.

In the Netherlands, little is known about the utilization of the services of real estate agents in the rental market. One can assume that the smaller and part-time landlords

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<sup>45</sup> This paragraph is mainly based on: Hoekstra, *Country report France*, 9-10.

<sup>46</sup> Hoekstra, *Country report France*, 20

<sup>47</sup> Marja Elsinga et al., *Beleid voor de private huur*, 14. And: Pascal de Decker et al., *Eigenaars die woningen verhuren aan een sociaal verhuurkantoor. Profiel, motieven en tevredenheid* (Heverlee: Steunpunt Ruimte en Wonen, 2009), 20.

<sup>48</sup> Les Agences immobilières sociales, ‘Les Agences immobilières sociales’, <<http://www.arianet.irisnet.be/legislat/ais.htm>>, 27 January 2013.

tend to make use of the services of real estate agents.<sup>49</sup> Real estate investors would probably not manage their properties themselves, as their business would be to invest the funds they receive via their main business from their clients.

In France, in the last ten years a network of developers (often tied to banks and/or real estate agents) has emerged that sells dwellings (mainly apartments) that are meant to be let by individual private landlords (buy-to-let). They are sold as a package that includes management of the apartments and insurances for covering damage or rent arrears. The usual fee for such services is about 8% of the yearly rent but fees may range between 4,5% and 12%, depending on the kind of services included in the package. Management fees can be deducted from the rental income for taxes. It is difficult to estimate which percentage of the private rental dwelling stock owned by individual landlords is managed by professionals. It is clear however, that this phenomenon is especially visible in the larger cities where it could reach up to one third of the market<sup>50</sup>.

### *Conclusion*

Due to the lack of data for the Netherlands and Belgium, a comparison between the three countries is hardly possible. In Belgium, one can note the importance of agencies for the social rental sector whereas in France and the Netherlands they seem more important in the private sector as an intermediary between potential tenants and smaller or part-time landlord.

### **1.2.5. Effects of the current crisis in comparative perspective**

In Belgium<sup>51</sup>, even if the economy was affected by the GFC, the housing market appeared relatively unaffected. One of the indicators is the continuously rising house prices during the past fifteen years.<sup>52</sup>

The housing market will also have been steadily growing due to government intervention to avoid bankruptcy of the bank but also due to a risk-averse mortgage market and a limitation of the variable interests.

The structure of the housing market also plays an important role.<sup>53</sup> Households stay put once they become owner-occupied instead of moving along a housing ladder from a smaller to a larger dwelling. The market is therefore less prone to changing economic environments as house building will not be speculative but based on demand.

However, jobs have been lost in the construction sector and in an effort to overcome the crisis, the government decided to lower the VAT applicable to new constructions, from 21% to 6%. In Flanders the government promised to invest an extra 85 million Euro in social rental dwellings based on an earlier conclusion that the social rental sector was too small.<sup>54</sup> Furthermore, the requirements to be able to receive the free Flemish

<sup>49</sup> Christian Lennartz, *Competition between social and private rental housing* (Amsterdam: IOS Press BV, 2013), 51 and 71.

<sup>50</sup> Hoekstra, *Country report France*, 9-10

<sup>51</sup> No information has been found concerning repossession in Belgium and the Netherlands.

<sup>52</sup> Winters & Heylen, *Kwaliteit en betaalbaarheid*, 5.

<sup>53</sup> Van der Heijden, Dol & Oxley, 'Western European housing systems and the impact of the international financial crisis', 302 et seq. And: Dol, Van der Heijden & Oxley, *Economische crisis*, 81-84.

<sup>54</sup> Dol, Van der Heijden & Oxley, *Economische crisis*, 21.

housing expense insurance were relaxed, such as the elimination of most of the income requirements.

In the Netherlands, the banks were affected by the GFC resulting in less availability of credit which will also affect a new supply of private rental dwellings, when the supply is dependent on debt capital. Distress sales have been falling again (less than 200/month) after peak values were reached in January and December of 2011 where the number of sales almost reached 400 per month.<sup>55</sup> In 2009 the government intervened in the housing market with six types of measures; two of those did not need government funds as they involved the increase of the guarantee limits for home ownership and social renting.<sup>56</sup> The third measure was the Temporary Stimulating measureHousing Construction Projects (*Tijdelijke Stimuleringsregeling Woningbouwprojecten*) which involved a budget of 351 billion Euro to aid the realization of promised projects that were stopped because of the crisis. Three other measures which focused on energy investments were allocated a budget of more than 350 billion Euro. Other measures were also taken, such as the facilitation of building procedures, the decrease of transaction tax, and allowing for the temporary renting out of owner-occupied dwellings which could not be sold. In the end, it must be concluded that the measures have not helped to prevent a crisis in the housing market.

In France, the GFC has had a relatively small impact on the mortgage credit provision . However, there are signs that lending conditions have worsened somewhat in 2012.<sup>57</sup>

Repossessions are not a big issue in France. Between 2008 and 2010, the number of doubtful loans increased from 0,92% to 1,28% of the total outstanding residential lending, which can be considered as low. In December 2008 the financial crisis prompted the French government to invest much more money in housing. About 100,000 extra new dwellings were financed, most of them in the social rental sector (30,000 dwellings) and the intermediate rental (40,000 dwellings) sector. Additionally, more money was invested in renovation and in the financial support for first-time buyers. The tax incentives for individual investment in the private rental sector were made more generous. Finally, a new scheme has also been launched to aid private rental projects being transformed into social rental programs and more money has become available for renovations in the existing housing stock<sup>58</sup>. Since the end of 2010 most of the crisis measures have been withdrawn or have expired, whereas others have been made less generous. Nowadays fiscal austerity is the order of the day, capital gains taxes and VAT have been increased and housing subsidies have been diminished<sup>59</sup>.

### Conclusion

The effects of the crisis seem to be stronger in the Netherlands than in the two other countries. This is due to the link between the Dutch and the American banks. Thus, the Dutch government had to adopt additional measures to deal with the crises, even if in

<sup>55</sup> Kadaster, 'Scorecard: Executie Veilingen', <[http://www.kadaster.nl/web/pagina/Vastgoed-  
Dashboard.htm](http://www.kadaster.nl/web/pagina/Vastgoed-Dashboard.htm)>, 31 July 2013.

<sup>56</sup> Martin Koning & Michiel Mulder, *Evaluatie stimuleringspakket woningbouw* (Amsterdam: Economisch Instituut voor de Bouw, 2012), 7 and 37. And: Van der Heijden, Harry, Kees Dol & Michael Oxley. 'Western European housing systems and the impact of the international financial crisis'. *Journal of Housing and the Built Environment* 26, no. 3 (2011): 300.

<sup>57</sup> Ball, *European Housing Review* 2012, 23

<sup>58</sup> Dol et al., *Inventarisatie crisismaatregelen op de woningmarkt in negen West-Europese landen*

<sup>59</sup> Ball, *European Housing Review* 2012, 23.

the end they were not considered as efficient. In France and in Belgium, the GFC has had a relatively low impact on the market. However investments were made by the government in order to overcome some effects of the crisis.

### **1.3.Urban and social aspects of the housing situation in comparison**

#### **1.3.1. Urban aspects in comparative perspective**

In Belgium<sup>60</sup> the largest share of dwellings was found in the agglomerations in 2001. Though the growth in the period 1991-2001 took place in the suburbs (+15%) and not in the agglomerations (+5%). Single people are concentrated in agglomerations, while families with children were choosing less urbanized areas.

Most apartments can be found in large urban environments: five of six rental apartments and almost all owner-occupied apartments. The latter group of dwellings constitutes a clear minority in the housing market in Belgium.

The influence of gentrification on residual living is unclear. Apparently, concentrations of problems within vulnerable groups and housing will be found in cities. They are also confronted with the pressure that immigration<sup>61</sup> is causing on the housing market.

In The Netherlands, renting is relatively popular in the larger municipalities, while home ownership has a relatively stronger position in rural areas. To avoid gentrification urban policies<sup>62</sup> have generally consisted of diversification of housing stock by demolishing, upgrading, etc. of dwellings in order to achieve a tenure and population mix in city neighbourhoods.<sup>63</sup>

Even though squatting became illegal in 2010,<sup>64</sup> it seems that the new law has not yet had much effect.<sup>65</sup>

In France social rental dwellings are mainly concentrated in the medium-sized and larger cities and agglomerations. The market share of social rental housing is particularly high in formerly heavily industrialised areas, notably around Paris and in the north and the east of France. In the ZUS-areas (*Zone Urbaine Sensible*), social rental dwellings have a market share of about 60%.<sup>66</sup> The proportion of social rental dwellings is considerably lower in the south-east and west of the country, especially in the more rural areas. In many small municipalities there are simply no social rental dwellings

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<sup>60</sup> Statistics on the topics of gentrification and ghettoization and on the topic of squatting have not been encountered.

<sup>61</sup> T. Bircan, M. Hooghe & A. Kayaoglu, 'Inkomensongelijkheid, migratiepatronen en sociale ongelijkheid in Vlaanderen', in *De sociale staat van Vlaanderen*, ed. L. Vanderleyden, M. Callens & J. Noppe (Studiedienst Vlaamse Regering, 2009), 363-381.

<sup>62</sup> For data concerning the liveability of neighbourhoods, see <http://www.leefbaarometer.nl/>.

<sup>63</sup> Reinout Kleinhans, 'Social implications of housing diversification in urban renewal: A review of recent literature, *Journal of Housing and the Built Environment* 19, no. 4 (2004): 368. Citation on p. 371.

<sup>64</sup> Overheid.nl, 'Wet kraken en leegstand', <[http://wetten.overheid.nl/BWBR0028053/geldigheidsdatum\\_26-02-2013](http://wetten.overheid.nl/BWBR0028053/geldigheidsdatum_26-02-2013)>, 26 February 2013.

<sup>65</sup> NRC, 'Een jaar kraakverbod: wat heeft het opgeleverd?', <<http://www.nrcnext.nl/blog/2011/10/03/een-jaar-kraakverbod-wat-heeft-het-opgeleverd/>>, 31 July 2013.

<sup>66</sup> J.C. Driant, Social housing in France: a sector caught between inertia and changes. The HLM system in the early 2010s. In Houard, N. (ed.) *Social Housing across Europe*, (Paris : Ministère de l' écologie, du développement durable, des transports et du logement, 2011).

available. By requiring each municipality (*commune*) of a certain size to have at least 25% social rental housing the government is attempting to counterbalance the uneven geographical distribution of social rental dwellings.

Since the urban riots in 2005 preventing segregation is an important policy goal. The government strives for neighbourhoods that are mixed, both in economic and in ethnic terms. However, despite these policy efforts, segregation still persists in France.

Squatting certainly exists in France, especially in the bigger cities. It can be both politically or economically motivated. Even though squatting is illegal squatters also have particular rights and the expulsion of squatters has to be ordered by a judge<sup>67</sup>.

### *Conclusions*

In the three countries, home ownership is very popular in rural areas, whereas renting is relatively popular in the cities. France and the Netherlands try to fight gentrification by using several measures such as, obliging cities to have a minimum percentage of social housing or trying to mix the population. The various policies do not seem that efficient, especially in France where segregation still persists. Both in France and the Netherlands squatting is illegal but there seems to be no specific policy to oppose this phenomena.

#### **1.3.2. Social aspects**

In Belgium, since the first Housing Act of 1889, the main objective of the central government has been to encourage owner-occupation, regardless of the political party in power.<sup>68</sup> Due to its dominant share of the market, it seems to be that home ownership, can almost be forced onto households, who can afford it, because of social pressure.<sup>69</sup> Renting is seen as ‘throwing away money’<sup>70</sup> and is considered an unstable situation<sup>71</sup>. On the contrary, buying is seen as an investment and a security in times where welfare states and pension systems are under pressure.

In the Netherlands, research conducted in Breda in 2011 shows that the present tenure plus income explained preferences for social or private renting: the higher the income the better the attitude towards private renting and the less the likelihood of a move towards social renting. The lower the income the better the attitude towards social renting will be, and if living in a private rental dwelling, there is more likelihood to change tenure.<sup>72</sup> The views of social renters were similar but with stronger negative perceptions about private renting than the other way around. On average, both forms of renting were perceived to be socially accepted, though the housing associations were perceived to be the better landlords providing better services. The majority of people entering the housing market will prefer a rental apartment (more than 250,000 households), while a majority of those moving to subsequent dwelling state a preference for owner-occupied

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<sup>67</sup> <<http://www.macsf.fr/vous-informer/vie-pratique-professionnel-sante/immobilier-professionnel-sante/expulsion-d-un-squatter.html>>

<sup>68</sup> From Haffner et al., *Bridging the gap*, 63 et seq.

<sup>69</sup> De Decker, ‘Belgium: Between confidence and prudence’, 39.

<sup>70</sup> Vicky Palmans & Pascal de Decker, *Households’ perceptions of old age and housing equity: the case of Belgium* (Hogeschool Gent, 2009), 48 and 41.

<sup>71</sup> De Decker, ‘Jammed between Housing and Property Rights: Belgian Private Renting in Perspective’, citations on page 17 and page 20.

<sup>72</sup> Lennartz, *Competition between social and private rental housing*, 28, 192, 201 and 202.

single-family dwelling (more than 600,000). Research showed that in 2008 households between the ages of 50 and 64 were more likely to have used mortgage products to increase consumption in retirement than in the 90's.<sup>73</sup>

In France, the majority of households have a preference for buying a dwelling rather than renting one. As for Belgium, renting is often considered as throwing away money. Research has shown that 74% of all owner-occupiers and 41% of all tenants have a preference for an owner-occupied dwelling. Being the owner of their principal residence is also a way to improve the standard of living of retired people. Some of them are also owners of rental dwellings in order to increase their incomes.

### *Conclusions*

In the three countries, even if renting is not considered as socially inferior, many people regard home ownership as a goal. In Belgium, becoming an owner seems to be particularly important due to the social pressure. Both in France and in Belgium, renting is considered as a waste; moreover, in Belgium it is also considered as an unstable situation. In the Netherlands, due to their work, housing associations are considered to be better landlords than private ones and social housing is not stigmatised.

## **2. Housing policies and related policies in comparison**

### **2.1. Introduction**

Belgium's welfare state<sup>74</sup> is classified as a corporatist welfare regime.<sup>75</sup> It means that households can largely provide for their own social welfare via social policies of the state, independent of labour market income. It also is associated with a relatively high degree of stratification implying that the position of citizens and the differences between (hierarchies) them will remain. The mix of state, market and family in the provision of and intervention in housing will be based on consensus, cooperation and coordination between social partners and the government. Policy will thus have an incremental, problem-solving and framework type of character. The starting point of social policy is the so-called equivalence principle – the preservation of the standard of living – basing social rights and amounts on salary earned.<sup>76</sup> The aim was that income inequalities among groups of beneficiaries would be reduced. Furthermore, as in France, the Belgian welfare system is differentiated according to occupational groups and is based on the family with increased rights for the recipients because of dependents. On the other hand, the share of Belgian home owners is relatively high as it has always been encouraged.

In the Netherlands,<sup>77</sup> housing policy can be considered as a mix between corporatist and social democratic welfare state regime at the end of the 1980s.<sup>78</sup> The traits relating

<sup>73</sup> Janneke Toussaint & Marja Elsinga, 'Mortgage-equity release: the potential of housing wealth for future Dutch retirees', *Journal for Housing and the Built Environment* (2012 on I-first): no page numbers.

<sup>74</sup> Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Cambridge, Polity Press, 1990), 1 et seq.

<sup>75</sup> Winters & Heylen, *Kwaliteit en betaalbaarheid*, 2.

<sup>76</sup> Winters & Heylen, *Kwaliteit en betaalbaarheid*, 6.

<sup>77</sup> Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Cambridge, Polity Press, 1990). Own elaboration based on: Joris Hoekstra, 'Housing and the Welfare State in the Netherlands: an Application of Esping-Andersen's Typology', *Housing, Theory and Society* 20, no. 2 (2003): 58 et seq.

to the former regime were mainly based on the types of subsidies for the owner-occupied sector, which were aimed at starters in owner-occupation with certain income levels. In the 1990s, many of the social-democratic traits of the housing system had disappeared, while the corporatist characteristics had gained importance. The main instruments were kept largely intact though, and the country still had the largest social rental sector in the European Union. The direct involvement of the government in housing, however, faded with the abolition of all periodic bricks-and-mortar subsidies for new construction and the paying off of the annual future operation subsidies in the 1990s. Direct involvement switched to a more indirect governance of housing by defining the policy framework within which local governments, social landlords and private actors have to operate.

France is known as a corporatist welfare state. However, the government interventions are more extensive and directly related to the general economy. One could say that housing policy is being used in a deliberately Keynesian manner to manage demand in the economy, which is a stated goal of housing policy in a way that is rare elsewhere<sup>79</sup>. French housing policy not only houses people on the fringes of the property market, but also serves urban planning strategies and irons out economic cycles by protecting jobs in the construction sector.<sup>80</sup>

The three countries are considered as corporatist welfare states, even though in the 80s the Netherlands was a mix between a corporatist and social-democratic state. In a corporatist welfare state, the State has very little influence in the field of housing and intervenes to correct undesirable consequences of the market.<sup>81</sup>

In Belgium and in the Netherlands, the Constitution contains provisions related to the right to housing: Right to decent housing, art. 23 of the Belgian Constitution<sup>82</sup> and the responsibility of the government to encourage adequate housing supplies, art 22.2 of the Dutch Constitution, *Grondwet*.<sup>83</sup> In both cases, the provision has no direct effect but has an influence on the tenancy law. On the contrary, France has no provision in its Constitution but created an enforceable right to housing (*Droit au logement Opposable: DALO*). The DALO can be considered a real improvement in the rights of home seekers as it has direct effects. It implies that people who are not offered decent housing have the option of going to a mediation committee, or ultimately, to court. Since 2008, more

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And: Joris Hoekstra, 'Is there a Connection between Welfare State Regime and Dwelling Type? An Exploratory Statistical Analysis', *Housing Studies* 20, no. 3 (2005): 475 et seq.

And: Joris Hoekstra & Agnes Reitsma, *De zorg voor het wonen. Volkshuisvesting en verzorgingsstaat in Nederland en België* (Delft: DUP Science, 2002), 1 et seq.

<sup>78</sup> Text mostly taken from: Haffner, 'The Netherlands', 49-50.

<sup>79</sup> Ball, *European Housing Review 2008*, 32.

<sup>80</sup> Driant, *Social housing in France : a sector caught between inertia and changes*.

<sup>81</sup> J. Hoekstra, Housing and the welfare state in the Netherlands. An application of Esping-Andersen's typology (*Housing, Theory and Society*, Vol. 20, No.1, pp. 58-71, 2003)

<sup>82</sup> M. Dambre, B. Hubeau & S. Stijns (eds), *Handboek Algemeen Huurrecht*, Reeks Huurrecht, vol. 1 (Brugge: die Keure, 2006), 76; B. Hubeau & R. de Lange (eds), *Het grondrecht op wonen, De grondwettelijke erkenning van het recht op huisvesting in Nederland en België*, (Antwerpen – Apeldoorn: Maklu Uitgevers, 1995), 40.

<sup>83</sup> Rijksoverheid, 'Grondwet', <[http://wetten.overheid.nl/BWBR0001840/geldigheidsdatum\\_13-02-2013#Hoofdstuk1](http://wetten.overheid.nl/BWBR0001840/geldigheidsdatum_13-02-2013#Hoofdstuk1)>, 13 February 2013.

than 140.000 households have demanded decent housing on the basis of this new law<sup>84</sup>. However, despite the DALO, some of these households did not receive a housing offer within the appropriate legal term due to housing shortages<sup>85</sup>.

## 2.2. Policies and actors

### 2.2.1. Governmental actors

In Belgium, the 1970 National Housing Code (*Huisvestingscode*) established the legal basis for housing policy.<sup>86</sup> Since then, regionalisation has taken place and the three regions (Flanders, Walloon and Brussels) are now mainly responsible for housing policies; especially since the 1<sup>st</sup> of July 2014 when a part of the federal government's responsibilities were transferred to the regions. In addition to these levels<sup>87</sup>, there are also two other levels of government, the provincial level (five Flemish and five in the Walloon Regions) and the local (municipalities) level.<sup>88</sup> The 589 municipalities and cities (308 in Flanders, 262 in the Walloon Region and 19 in Brussels) also have some housing responsibilities.

In the Netherlands, central government steers housing policy via the policies of rent regulation, housing allowances and tax relief for owner-occupiers. Local governments (425 municipalities in 2012) are still able to promote affordable rental housing supplied by social landlords via the provision of favorably-priced development sites.

The local housing policies will often be in agreement on "co-governance" between local governments with the housing associations.<sup>89</sup> Therefore it allows municipalities to have a relatively strong influence in the implementation of national housing policies. Municipal legislation is sometimes also created with the cooperation of the local tenant association. The tier of government in-between the central and local level consists of twelve provinces. One of their key tasks is the responsibility for a sustainable spatial development, which includes housing and urban renewal.<sup>90</sup>

France is known for its rather centralised administration and the far-reaching powers of its central government<sup>91</sup>. Since 1983 some decentralisation has occurred and this process has continued to make steady progress<sup>92</sup>. At present France comprises 22 régions, 96 départements and over 36,000 municipalities. Recently, many municipalities have entered into partnerships (*établissements publics de coopération intercommunale*) and currently there are about 2,500 of them. The municipalities or the partnerships in

<sup>84</sup> B. Rolland, *Les Politiques du logement en France* [Housing policy in France], OECD Economics Department Working Papers, No. 870 (Paris : OECD, 2011).

<sup>85</sup> Rolland, *Les Politiques du logement en France*, 7.

<sup>86</sup> Winters, 'Belgium-Flanders', 61. And: Haffner et al., *Bridging the gap*, 74-75.

<sup>87</sup> There are also three communities (the French-speaking community, the Flemish-speaking community and the German-speaking community) but without responsibilities concerning housing.

<sup>88</sup> Portaal Belgium.be, 'de gemeente', <[http://www.belgium.be/nl/over\\_belgie/overheid/gemeenten/](http://www.belgium.be/nl/over_belgie/overheid/gemeenten/)>, 8 February 2013.

<sup>89</sup> Marja Elsinga & Gerard van Bortel, 'The future of social housing in the Netherlands', in *Social Housing across Europe*, ed. Noémie Houard (Paris: La Documentation française, 2011), 100.

<sup>90</sup> Interprovinciaal Overleg, 'De zeven kerntaken van de provincies', <<http://www.ipo.nl/over-de-provincies/de-zeven-kerntaken-van-de-provincies>>, 8 February 2013.

<sup>91</sup> Blanc, *The changing role of the state in French housing policies: a roll-out without roll-back*.

<sup>92</sup> A. Cole, Decentralization in France: Central Steering, Capacity Building and Identity Construction, (*French Politics*, No. 4, 31-57).

which they are involved, have been charged with responsibility for local housing and building plans and the provision of building permits.<sup>93</sup> Central government is still the main influence on housing policy as providing funding for housing (production subsidies, housing allowances, fiscal concessions) is still predominantly its task<sup>94</sup>.

In the three countries, housing policy is divided between national and regional level and it seems that the regional level is getting a greater amount of responsibility. France is the most centralised one as the central government still has important responsibilities concerning housing. In Belgium on the contrary, the responsibilities of the central government were transferred to the regions. The system in the Netherlands seems more balanced as responsibility is shared between the regional and the national levels.

- **2.2.2. Housing policies**

In Belgium, the aim of housing policy has been to aid as many households as possible and not only the neediest households, which can be demonstrated by the focus on facilitating home ownership. Mostly, housing policy has been characterised by a relatively low financial commitment from the government.<sup>95</sup> The housing policies of the regions only differ slightly from each other, even nowadays,<sup>96</sup> as the regions continue using the procedures that were applied at the time of regionalization, but with varying degrees of implementation.<sup>97</sup> Thus an important part of the housing market is market-dominated. Concerning the targeting of specific populations, at a regional level, the Flemish policy<sup>98</sup> aims to protect the elderly from adverse economic issues and discrimination.

In the Netherlands policy concerns the rental sector and its priority is implementing a framework that stimulates (the privatized) housing associations to provide affordable housing and liveable neighbourhoods. It aims also to provide housing allowances to lower-income tenants. Finally, housing policy is about protecting tenants and giving them a stronger position in negotiations with landlords. In more recent years the government has tried also to create a balance in the rental market.

Concerning the targeting of specific populations, since 2007 the National Program for the Care of the Elderly (*Nationaal Programma Ouderenzorg*)<sup>99</sup> has been implemented to help the elderly to live independently. But an umbrella organisation indicated in 2012

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<sup>93</sup> Van der Heijden, Haffner and Reitsma, *Ontwikkeling van de woonuitgaven in zes West-Europese landen*, 123 ; Tutin, *Social Housing: another French Exception?*.

<sup>94</sup> Kirchner, *Wohnungsversorgung für unterstützungsbedürftige Haushalte. Deutsche Wohnungspolitik im Europäischen Vergleich*, 175.

<sup>95</sup> De Decker, 'Belgium: Between confidence and prudence', 35.

<sup>96</sup> Winters & Heylen, *Kwaliteit en betaalbaarheid van wonen: een vergelijking tussen de drie Belgische gewesten als case voor het testen van de samenhang tussen huisvestingssystemen en woonsituatie van huishoudens met een laag inkomen*, 2. And: Vanneste, Thomas & Goossens, *Woning en woonomgeving*, 21.

<sup>97</sup> Vanneste, Thomas & Goossens, *Woning en woonomgeving in België* (Brussel: FOD Economie, 2007), 20.

<sup>98</sup> Departement Welzijn, Volksgezondheid & Gezin, *Het Vlaams Ouderenzorgbeleid* (place of publication not given, 2012), 1 et seq.

<sup>99</sup> Overheid.nl, 'Ouderenzorg', <<http://www.rijksoverheid.nl/onderwerpen/ouderenzorg/kwetsbare-ouderen>> 3 March 2014.

that this policy was considered inefficient as it was missing strategy and active government policy.<sup>100</sup> To assist the integration of immigrants that have received a residence permit<sup>101</sup> central government will set a task biannually for each municipality of estimating the number households to be housed. Municipalities will usually make use of the social rental stock to house them.

French housing policy aims first to ensure that all households are housed in accommodation that corresponds with their needs and financial means. Second, the French government encourages home ownership by offering financial support or advantageous fiscal regime, for example the so-called ‘imputed rent’ that homeowners enjoy is not taxed in France<sup>102</sup>. However, homeowners do have to pay the local property tax (*taxe foncière*).

### *Conclusion*

Contrary to Belgium and the Netherlands where there is policy targeting the elderly, and in the case of the Netherlands some migrants, there is no such policy in France. Whereas Dutch policies aims to protect the tenant, French policy is more favourable to home owners than to tenants. Belgium appears to have a more balanced system even if home ownership is strongly encouraged.

- **2.3. Urban policies**

Belgium is well known for its ribbon development along the roads<sup>103</sup>. However there are also efforts by municipalities to increase density with the support of the government.<sup>104</sup> Generally, urban policies consist of diversification incurring the change of tenure mix in neighborhoods by demolishing, upgrading, etc. the stock.<sup>105</sup> Flemish cities usually still have plots of land to be filled by the process of urbanization.<sup>106</sup> This is also the case for the land behind the “ribbons”. The regions also actively stimulate urban policies. The term ghettoization has not been used in the documents that have been consulted and policies seem to be about achieving a pleasant living environment.<sup>107</sup>

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<sup>100</sup> Algemeen Nederlandse Bond voor Ouderen, ‘Nederland mist actief ouderenbeleid’, <<http://www.anbo.nl/belangenbehartiging/participatie/nieuws/nederland-mist-actief-ouderenbeleid>>, 3 March 2014.

<sup>101</sup> Overheid.nl, ‘Huisvesting vergunninghouders’, <<http://www.rijksoverheid.nl/onderwerpen/asielbeleid-en-immigratie/huisvesting-vergunninghouders>>, 12 February 2013.

<sup>102</sup> Rolland, *Les Politiques du logement en France*, 18.

<sup>103</sup> Joost Tennekes & Arjan Harbers, *Grootschalige of kleinschalige verstedelijking? Een institutionele analyse van de totstandkoming van woonwijken in Nederland, Vlaanderen en Noordrijn-Westfalen* (Den Haag: Planbureau voor de Leefomgeving, 2012), 62.

<sup>104</sup> Freya van den Bossche, *Wonen in Vlaanderen 2050. Krijtlijnen van een toekomstvisie* (Brussel: Wonen, Energie, Sociale Economie en Steden, 2012), 6-7.

<sup>105</sup> Reinout Kleinhans, ‘Social implications of housing diversification in urban renewal: A review of recent literature’, *Journal of Housing and the Built Environment* 19, no. 4 (2004): 368.

<sup>106</sup> Joost Tennekes & Arjan Harbers, *Grootschalige of kleinschalige verstedelijking?*, 42 and 63.

<sup>107</sup> Freya van den Bossche, *Wonen in Vlaanderen 2050. Krijtlijnen van een toekomstvisie* (Brussel: Wonen, Energie, Sociale Economie en Steden, 2012), 6-7.

As the housing stock is relatively old, concerns about the quality of the stock can be found in the policies of the regions. In the 1991 the Belgian Housing Rent Act contained for the first time the concept of a level of quality so ‘that a rental dwelling must satisfy some basic requirements with regard to safety, health and habitability.’<sup>108</sup>. Each region has its own policy. For example, in Flanders, administrative procedures to carry out checks on the dwellings as well as criminal prosecutions are among the main measures that have been implemented.

In the Netherlands, urban policies generally consist of diversification of housing stock by demolishing, upgrading, etc. of dwellings in order to achieve a tenure and population mix in city neighbourhoods.<sup>109</sup> In order to improve diversity in a neighbourhood, the 2006 Law on Special Measures for Metropolitan Problems offers the opportunity to give priority to households with a higher income instead of giving priority to households with a lower income when allocating social rental housing (in urban renewal areas). The law allows a municipality to develop rules with central government consent. Up until now, only the city of Rotterdam has applied this law in four neighbourhoods and will extend its application to five new ones for four more years.<sup>110</sup>

In relation to housing quality generally, it is the Building Decree (*Bouwbesluit*) together with the Building Regulation that regulates the minimum quality of construction, renovation and demolition of buildings.<sup>111</sup>

In France, a significant urban policy objective is the encouragement of social diversity and to increase social cohesion and economic integration of disadvantaged households, especially since the urban riots of 2005<sup>112</sup>. The goals of these policies are twofold. First, they try to limit the concentration of disadvantaged people in particular neighbourhoods by attracting better-off people to these neighbourhoods. Second, they try to aim for the possibility of disadvantaged people finding a suitable and affordable dwelling in more affluent areas (*Loi SRU*). Amongst other things, the policies that are developed within this framework focus on the building of new dwellings, the demolition of the worst social housing and the renovation of the remaining dwellings. These physical operations are integrated into a broader urban strategy that also includes socially oriented projects in the field of job creation and the improvement in the quality of education<sup>113</sup>. Many of the urban renewal projects are managed by *Agence Nationale pour la Rénovation Urbaine* (ANRU); the national agency dedicated to urban renewal.

Concerning the quality of the dwelling, the government tries to combat the so-called “Marchand de sommeil” who are renting rooms or very small apartments that do not

<sup>108</sup> De Decker, ‘Jammed between Housing and Property Rights: Belgian Private Renting in Perspective’, 30; And from: Haffner et al., *Bridging the gap*, 74-75.

<sup>109</sup> Kleinhans, ‘Social implications of housing diversification in urban renewal: A review of recent literature’, 368. Citation on page 371.

<sup>110</sup> Liesbeth Spies, *Evaluatie en wijziging Wet bijzondere maatregelen grootstedelijke problematiek* (Den Haag: Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, Kamerstukken II, 2011-2012, 33 340, nr. 1), 2.

<sup>111</sup> BRISbouwbesluit online, ‘Bouwbesluit 2012’, <<http://www.bouwbesluitonline.nl/Inhoud/docs/wet/bb2012>>, 12 February 2013.

<sup>112</sup> Rolland, *Les Politiques du logement en France*, 14

<sup>113</sup> C. Droste, C. Lelevrier, and F. Wassenberg, Urban Regeneration in European Social Housing Areas, in *Social Housing in Europe II. A review of policies and outcomes*, ed. K. Scanlon and C. Whitehead (London: London School of Economics and Political Science, 2008).

meet the minimum standards for decency, for a very high rent. These landlords can be prosecuted and sentenced to jail or be fined. Minimum requirements concern the size of the dwelling, the access to water, electricity and central heating for example. Various controls are possible to combat the non-compliance with minimum standards. Lots of abuses are made public through associations who denounce them in the newspapers.

#### *Conclusion*

In the three countries, policies aim to create diversity among the households and use the same means, such as demolition of buildings, changes in the allocation of social housing etc.

It is not possible to determine if one of the countries achieved their targets better than the others in this respect as in the three countries lots of changes are being made. Each country has regulations concerning the quality of the dwellings, even if in France it seems that many abuses are denounced publicly and that the government is making an effort to fight against the black market.

### **2.4. Energy policies**

In the three countries, it is not known to what extent European energy policies affect housing. However, each of them has adopted policies, which aim to stimulate environmentally-friendly behaviour. In Belgium, rules have been implemented to encourage such behaviour. In the Netherlands, agreements have been signed between the government and actors in the housing market to improve the sustainability of existing dwellings and of newly built ones. In France, promoting sustainability and enhancing energy-efficiency have become significant policy goals in housing policy, not only for environmental reasons but also to dampen the energy costs that French households pay.

### **2.5. Subsidisation**

In the three countries, the system of subsidisation is very complex and there is a broad variety of subsidies.

Subsidies can be focused on demand or on supply, they can target the occupier or the owner, and they can be connected to the dwelling or to persons.

They can be given as deductions on interest or price, as a reduction on loan interest rates, as grants, as a monthly income supplement or via the tax system. They can be given by different levels of government.

In Belgium, the regions are responsible for subsidizing housing, as housing is under their management. The system is rather complex as there are a huge number of subsidies, each with different conditions, different aims and they are not delivered by the same authority. For details see tables 1, 2 3.

- **Table 1 Typology of subsidization of landlord in Belgium\*, 2013**

	Social renting	Private renting
Subsidy before start of contract (e.g. savings scheme)	Aid with pre-financing	Aid with pre-financing for social dwellings
Subsidy at start of contract (e.g. grant)	Subsidization for production of social rental dwelling	<ul style="list-style-type: none"> <li>• Subsidization for production of social rental dwelling</li> <li>• Renovation, improvement, adaptation subsidies for private person landlords with contract with Social Rental Agency</li> </ul>
Subsidy during tenancy (e.g. lower-than market interest rate for investment loan, subsidized loan guarantee)		

\* Differences between Administrative Regions; not all subsidies exist in all regions.

- **Table 2 Typology of subsidization of tenant in Belgium\*, 2013**

	Social renting	Private renting
Subsidy before start of contract (e.g. voucher allocated before find a rental dwelling )	None	None
Subsidy at start of contract (e.g. subsidy to move)	None	None
Subsidy during tenancy (in e.g. housing allowances, rent regulation)	Income-based rent Grants for renovation, etc.	<ul style="list-style-type: none"> <li>• Housing allowance for low-income tenant for move to better suitable dwelling or to dwelling let out by Social Rental Agency</li> <li>• Grants for renovation, etc.</li> </ul>

\* Differences between Administrative Regions; not all subsidies exist in all regions.

- **Table 3 Typology of subsidization of owner-occupier in Belgium\*, 2013**

Subsidy before start of contract (e.g. savings scheme)	None
Subsidy at start of contract (e.g. grant)	Grants for renovation, etc.
Subsidy during tenancy (e.g. lower-than market interest rate for investment loan, subsidized loan guarantee, housing allowances)	Social loans Social owner-occupied dwelling Free regional loan insurance Social land plot Grants for renovation, etc.

\* Differences between Administrative Regions; not all subsidies exist in all regions.

In the Netherlands, compared to the situation up to the 90s little is left nowadays of the supply side subsidization in the rental sector and the owner-occupied sector.<sup>114</sup> Generally, a subsidy before the start of the tenancy contract or the acquisition of the dwelling is not available, except in the social rental sector where the municipality will usually lower the price for land. Housing allowances for tenants are the only type of subsidy that is directly paid for by central government. In 2010, 1/3 of tenants (15% of Dutch households) received housing allowances.<sup>115</sup> On average the amount per recipient of housing allowances was 173 Euro per month; implying an average reduction of 41% of rent.

The other types of subsidies are indirect subsidies, i.e. not directly paid for by government. For example, the government and the local authority can act as a safety net of funds by offering loans with reduced interest rates or putting rent regulation into effect limiting the amount of rent that can be charged. These can be considered an indirect subsidy. For details see tables 4,5,6.

**Table 4 Typology of subsidization of landlord in the Netherlands, 2013**

	Social renting	Private renting
<b>Subsidy</b> before start of contract (e.g. savings scheme)	Cross-subsidization of land costs within project development may take place No	No
<b>Subsidy</b> at start of contract (e.g. grant)	No	No
<b>Subsidy</b> during tenancy (e.g. lower-than market interest rate for investment loan, subsidized loan guarantee)	Lower debt interest rate than market interest rate possible because of guarantee on loan	No

**Table 5 Typology of subsidization of tenant in the Netherlands, 2013**

	Social renting	Private renting
<b>Subsidy</b> before start of contract (e.g. voucher allocated before finding a rental dwelling )	No	No
<b>Subsidy</b> at start of contract (e.g. subsidy to move)	Possible in the case of forced move in the case of urban renewal	No
<b>Subsidy</b> during tenancy (e.g. housing allowances, rent regulation)	Housing allowance possible for tenant in regulated rental sector	Housing allowance possible for tenant in regulated rental sector

**Table 6 Typology of subsidization of owner-occupier in the Netherlands, 2013**

<b>Subsidy</b> before the purchase of the house (e.g. savings scheme)	No
<b>Subsidy</b> at start of the tenancy (e.g. grant)	No
<b>Subsidy</b> during tenancy (e.g. lower-than market interest	No general subsidies Lower interest rate than market interest rate possible because of

<sup>114</sup> Haffner et al., *Bridging the gap*, 205, 214-219.

<sup>115</sup> Marion van den Brakel & Linda Moonen, 'Huurtoeslag: wie krijgt hoeveel?', *Socialeconomische trends* (1<sup>e</sup> kwartaal 2012), 10, 11, 15. Estimates, as income data were not final at the time of publication.

rate for investment loan, subsidized loan guarantee, housing allowances) <b>Subsidy</b> at end of tenancy	mortgage loan guarantee Starter's loan possible in some municipalities  Negative equity may be waived in the case of a mortgage loan guarantee
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In France, loans and subsidies have always played a major role in housing policy. One specificity of French policies concerns the support for social rental landlords that is provided through an unusual financial system in which household savings (accumulated in the state-regulated *Caisse d'épargne*) are used to provide loans to landlords who build social rental housing<sup>116</sup>. There are currently four different loans that can be used for the construction, acquisition, or renovation of social rental dwellings<sup>117</sup>: Prêt Locatif à Usage Social (PLUS), Prêt locatif aidé d'intégration (PLA-I), Prêt locatif social (PLS) and Prêt Locatif Intermédiaire (PLI). Each loan focuses on a specific segment of the social rental market.

Some subsidies are also dedicated to the improvement of the quality of the rental housing stock: Prime à l'amélioration des logements locatifs sociaux (Palulos)<sup>118</sup>, Prêt à l'Amélioration (PAM),<sup>119</sup>, grants for refurbishment granted by the Agence Nationale de l'Habitat (ANAH)<sup>120</sup>:

- **Table 7 Overview of the different loans and subsidies that are available for landlords**

Subsidization of landlord	Social rental landlords	Private rental landlords
Subsidy before start of contract (e.g. savings scheme)	PLUS, PLA-I, PLI, PLS, PAM	PLI, PLS
Subsidy at start of contract (e.g. grant)	PLUS, PLA-I, PLI, PLS, Palulos	ANAH-grant
Subsidy during tenancy (e.g. lower-than market interest rate for investment loan, subsidized loan guarantee)	PLUS, PLA-I, PLI, PLS, PAM	Fiscal measures (see also section on taxation)

Concerning subsidies for the tenant, the housing allowances are called aides à la personne and are paid by an organisation called Caisse d'Allocations Familiales. They are available to both tenants and owner-occupiers. There are different allowances but all are based on the income of the household combined with the composition of the family and the housing costs: Aide personnalisée au logement (APL), Allocation de logement familiale (ALF) or allocation de logement sociale (ALS). In 2011, about 6.12 million French households were receiving a housing allowance (5,03 million tenants, 540,000 households in foyers and 550,000 owner-occupiers). In total, these households received a sum of € 16,350 billion, or an average of €2,670 per household<sup>121</sup>.

<sup>116</sup> M. Amzallag and C. Taffin, *Le logement social* [Social Housing] (Paris: Collection Politiques Locales, 2003).

<sup>117</sup> A new loan that is not dealt with in this discussion is the *Prêt Social de Location-Accession* (PSLA).

<sup>118</sup> Although in specific cases, this percentage can be much higher (up to 40% of the renovation costs).

<sup>119</sup> Ministère de l'égalité des territoires et du logement, *Les aides financières au logement*, 24-25.

<sup>120</sup> Agence nationale de l'habitat (Anah), *Les aides de L'Anah. Le Guide*, (Paris: Anah, 2013).

<sup>121</sup> Commissariat Général au Développement Durable, *Compte du logement 2011. Premiers résultats 2012*.

**Table 8 Overview of the subsidies for tenants that are available**

<b>Subsidization of tenant</b>	Rental dwellings with a contract	Rental dwellings without a contract	Owner-occupiers
Subsidy before start of contract (e.g. voucher allocated before find a rental dwelling )	No	No	No
Subsidy at start of contract (e.g. subsidy to move)	No	No	No
Subsidy during tenancy (in e.g. housing allowances, rent regulation)	APL	ALF (ALS in case of social housing)	ALF (APL in the case of an PC or PAS-loan)

Concerning the subsidies for owner-occupiers, the most important financial incentive for starters in the homeownership market is the zero interest loan (*Prêt à taux zéro*: formerly PTZ, now PTZ+). It can be used for the acquisition of new dwellings or existing dwellings that social rental landlords sell to their tenants.<sup>122</sup> In addition, there are also other loans that can be used for the purchase of, or the renovation of, existing dwellings, as well as for the acquisition of new dwellings (*Prêt Accession Sociale*, *Prêt Conventionné*). These loans are designed for lower-income groups and can be taken out as principal loans. They give entitlement to the APL housing allowance<sup>123</sup>. Homeowners that do not qualify for the APL housing allowance may still apply for the AL housing allowance. Furthermore, future homeowners may save for their down payment with the help of subsidized loans (*prêts épargne-logement*)<sup>124</sup>.

**Table 9 Overview of the subsidies for tenants that are available**

<b>Subsidization of owner-occupier</b>	
Subsidy before start of contract (e.g. savings scheme)	prêts épargne-logement
Subsidy at start of contract (e.g. grant)	ANAH-subsidies
Subsidy during tenancy (e.g. lower-than market interest rate for investment loan, subsidized loan guarantee, housing allowances)	PTZ+, PC, PAS, AL, APL

### Conclusion

Concerning subsidization, the primary conclusion is the complexity of the various systems in the three countries. There are many different subsidies making it impossible to have a complete overview. The systems of all three countries seem to stimulate home ownership and tenants with lower incomes. They use different mechanisms such as loans and direct grants. In the Netherlands, indirect subsidies such as implementing rent

<sup>122</sup> Ministère de l' égalité des territoires et du logement, *Les aides financières au logement*, 30-37.

<sup>123</sup> Ministère de l' égalité des territoires et du logement, *Les aides financières au logement*, 38-39.

<sup>124</sup> Rolland, *Les Politiques du logement en France*, 17-18.

regulation to support households with a lower income appears to be more common than in the other countries.

## 2.6. Taxation

In Belgium, owner-landlords or owner-investors are the actors in the housing market that owe taxes. This implies that tenants do not pay any taxes at any moment in time related to the tenancy contract, but only related to maintenance and improvement.

Taxation at the point of acquisition of real estate (thus also a dwelling) is focused on the purchaser or builder (investor in) of the dwelling. The investor, regardless of whether it will be the owner-landlord, the owner-occupier or the owner-builder, will have to pay either VAT or a tax called registration rights or duties (*registratierechten*).<sup>125</sup> If the acquisition concerns a new social dwelling, lower VAT-rates are applicable. A lower rate is also applicable when a dwelling is bought for the purpose of demolition and rebuilt as a privately-used dwelling in one of thirty-two designated cities in Belgium. Finally, a lower rate is also applicable to construction on dwellings that are older than five years.<sup>126</sup> Registration duties, which are regional taxes and differ by region,<sup>127</sup> are to be paid, usually effectively by the buyer, in the case of the purchase of land or of an existing dwelling. They are calculated based on the purchase price and a certain number of purchase costs.

During the period of occupation, owners of dwellings may be liable for income, wealth and property taxes.<sup>128</sup> Belgian tax authorities are responsible for personal income tax and corporate income tax. Owners of immovable property are liable for national income tax and regional immovable property tax on the income that the dwelling earns.<sup>129</sup> For private person owners (owner-occupiers and private person landlords), this income is called cadastral income (*kadastraal inkomen*) and is an imputed rent income that the dwelling would deliver, if it were rented out. As of 1 January 2005, the owner-occupied dwellings are exempted, except for dwellings for which a loan has been taken out before that date (i.e. most of them). Owner-occupiers can also benefit from an income tax deduction<sup>130</sup> based on mortgage payments (both interest and repayment), referred to as the ‘housing bonus’ (*woonbonus*). For owner-occupied dwellings that do not qualify for the *woonbonus*, the previous system of mortgage interest and capital repayment deductions is still applicable (i.e. most of them). Certain tax deductions are also available for works concerning safety and security, in addition to the interest costs of a ‘green’ loan and costs for the roof insulation. These deductions are for the owner or the landlord, depending on who has had the work done in his name.<sup>131</sup> Finally, note that for owners organized as firms (*vennootschappen*) actual rent income is always taxed as

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<sup>125</sup> Federale Overheidsdienst FINANCIËN, *Wegwijs in de fiscaliteit van uw woning*, 9 et seq.

<sup>126</sup> Information provided by country expert.

<sup>127</sup> Haffner et al., *Bridging the gap*, 93.

<sup>128</sup> Haffner, ‘Fiscal treatment of owner-occupiers in six EC-countries: A description’, 50-52.

<sup>129</sup> Federale Overheidsdienst FINANCIËN, *Wegwijs in de fiscaliteit van uw woning*, 101 et seq.

<sup>130</sup> Federale Overheidsdienst FINANCIËN, *Wegwijs in de fiscaliteit van uw woning*, 61 et seq.

<sup>131</sup> Federale Overheidsdienst FINANCIËN, *Fiscaal Memento Nr. 25* (Brussel: Stafdienst Beleidsexpertise en –Ondersteuning, 2013), 17, 41 et seq.

corporate income tax<sup>132</sup> and that the rate is lower for social landlords than the standard rate.

The Administrative Regions are responsible for the taxation of the ownership of immovable property (*onroerende voorheffing*)<sup>133</sup> that all owners of immovable property have to pay. The basic regional levies are increased with the levies (*opcentiemen*) of the provinces, agglomerations and municipalities. The tax amount cannot legally be charged to the tenant.<sup>134</sup>

Generally no transaction taxes are due on a sale by the seller of the dwelling, but only by the buyer at the point of acquisition. Any gains (and losses) linked to the sale are to be included in the total income of the taxpayer. Owner-occupied dwellings are exempted from capital gains tax.

Finally, one can note that tax evasion is regarded as a problem in Belgium mainly because tax authorities often are not able to check the data that they get from taxpayers.<sup>135</sup>

In the Netherlands, as in Belgium, tenants do not pay any taxes at any time related to the rental agreement; there may be costs, like administration costs, but no taxation.

At the point of acquisition of real estate taxation is focused on the purchaser or builder (investor in) of the dwelling. He first has to pay either VAT or a tax called transfer tax (*overdrachtsbelasting*). A reduced rate is applicable to painting, plastering and insulation works<sup>136</sup> of immovable property where it is older than 15 years. A transfer tax is applicable to the acquisition of existing dwellings (only dwellings) with land. This rate has been 2% since 15 June 2011<sup>137</sup>.

During the period of occupation, income and property taxes may be relevant for owners of dwellings.<sup>138</sup> Dutch tax authorities are responsible for the personal income tax and the corporate income tax, while the municipalities are responsible for the property taxation within the national framework.<sup>139</sup> The income tax paid by private landlords differs, according to the type of landlord.<sup>140</sup> Professional landlords, including social ones, pay corporate income tax, with a deduction of costs. Two kinds of organizations are exempt from corporate income tax: pension funds and institutions called Fiscal Investment Institutions (FBIs), which invest exclusively in real estate (provided they pay a dividend to the shareholders).

Private individual landlords can be first taxed on their income more or less as a professional entrepreneur.<sup>141</sup> If they are considered as a professional (under 65 and a

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<sup>132</sup> Elsinga, et al., *Beleid voor de private huur*, 20.

<sup>133</sup> Haffner et al., *Bridging the gap*, 93.

<sup>134</sup> According to Art. 5 of the Housing Rent Law or art. 29 of the Lease Law. Information provided by country expert.

<sup>135</sup> HUMO.be, The Wild Site, 'Belastingontduiking in België', <<http://www.humo.be/humo-archief/72083/belastingontduiking-in-belgie>>, 28 January 2013.

<sup>136</sup> Rijksoverheid, 'BTW-tarieven en btw-vrijstellingen', <<http://www.antwoordvoorbedrijven.nl/regel/btw-tarieven>>, 5 February 2013.

<sup>137</sup> Frans Weekers, *Overdrachtsbelasting. Verlaging tarief bij verkrijging woningen. Besluit van 25 mei 2012, nr. BLKB 2012/863M*, (Den Haag: Ministerie van Financiën, 2012), 1.

<sup>138</sup> Marietta Haffner, 'Fiscal treatment of owner-occupiers in six EC-countries: A description', 50-52.

<sup>139</sup> Oxley & Haffner, *Housing taxation and subsidies*, 49-68.

<sup>140</sup> From: Haffner, 'The Netherlands', 71 and 72.

<sup>141</sup> For director-large shareholders, there would be a different personal income tax treatment.

certain number of hours to run the business), they will benefit from entrepreneurs' deduction depending on the profits achieved. Second, they can be considered as an investor and thus taxed on the income from their properties in the same way as owners of other personal wealth. The tax liability is calculated regardless of the actual income and costs to the landlord in relation to wealth components. There is no separate capital gains tax.

For home owners an imputed rent is taxed in income tax for as long as mortgage interest is being deducted (maximum of thirty years). The amount of imputed rent taxed can never be higher than the amount of interest deducted.

Municipal property tax is payable by the owner of the dwelling on the estimated market value of a dwelling.<sup>142</sup> Municipalities can determine the rates but need to take the total increase of local levies into account.

No transaction taxes are due on a sale by the seller, only by the buyer at the point of acquisition. Any gains (and losses) are to be included in the total income of the taxpayer. Capital gains from owner-occupied dwellings are not included as income in determining income tax.

In France, as in Belgium and the Netherlands there are no specific taxes for tenants. However, households that live in a social rental dwelling and who have an income that is at least 120% above the income ceiling have to pay a supplement (*supplément de loyer de solidarité*: SLS) on their rent in order to 'compensate' for their good financial situation, unless they live in vulnerable area (*Zones Urbaines Sensibles*: ZUS or *Zones de Revitalisation Rurale*: ZRR)<sup>143</sup>.

Owner-occupiers have to pay local land and property taxes such as the *taxe foncière* (only to be paid by property and land owners) and the *taxe d'habitation* (to be paid by all residents, i.e. tenants as well). These taxes are based on the rental value of the dwelling (*valeur locative cadastrale*)<sup>144</sup>. Furthermore, owner-occupiers with assets that exceed € 800.000 have to pay a wealth tax: *l'Impôt de Solidarité sur la Fortune* (ISF).

A transfer tax has to be paid when a home owner buys an existing dwelling. Finally, France has a capital gains tax that taxes capital gains on both moveable and immovable possessions. However, capital gains that are made on the primary dwelling of owner-occupiers may often be exempt from this rather complex tax<sup>145</sup>.

Social rental landlords are not required to pay corporation tax or local business taxes (*contribution foncière des entreprises*). They also pay a lower VAT rate than the standard rate and they may be exempt from land and property tax.<sup>146</sup>

Private companies doing business are subject to corporation tax<sup>147</sup> (*impôt sur les sociétés*). Depending on their legal status, certain types of companies are (partially) exempt from corporation tax, including the *Sociétés d'Investissement Immobiliers*

<sup>142</sup> Rijksoverheid, 'Wat is de onroerendezaakbelasting (OZB)?', <<http://www.rijksoverheid.nl/onderwerpen/koopwoning/vraag-en-antwoord/wat-is-de-onroerendezaakbelasting-ozb.html>>, 5 February 2013.

<sup>143</sup> <[www.anil.org](http://www.anil.org)>

<sup>144</sup> Elsinga, Marja, et al., *Beleid voor de private huur. Een vergelijking van zes landen*. [Policies for the private rental sector. A comparison of six countries] (Ministerie van de Vlaamse Gemeenschap, 2007).

<sup>145</sup> <<http://www.french-property.com/guides/france/finance-taxation/taxation/capital-gains-tax>>

<sup>146</sup> In the first 25 years after they have taken up a PLUS, PLA-I or PLS loan ; Donner, *Housing Policies in the European Union*, 272, Amzallag and Taffin, *Le logement social*, 9

<sup>147</sup> C. Parkinson, *Taxation in France 2004. A foreign perspective* (Guersney: PKF Limited, 2004), 41.

Cotées: Real Estate Investment Trusts. In addition to corporation tax, companies of which 50% or more of their total assets in France consist of real estate, also have to pay a tax of 3% on the market value of this property<sup>148</sup>. French institutional market rental landlords also have to pay capital gains tax on their real estate sales, even if certain exemptions exist.<sup>149</sup>

Finally, both institutional and individual rental landlords have to pay the *taxe d'enlèvement des ordures ménagères*. This tax, which is based on the rental value of the dwelling (*valeur locative cadastrale*), is used for garbage collection and cleaning of public spaces. The landlord may charge this tax to the tenants by including it in the rent<sup>150</sup>.

Individual market landlords have to pay income tax on rental income (with the deduction of some costs). They also have to pay capital gains tax on their house sales unless they have possessed the dwelling concerned for more than 22 years<sup>151</sup>.

The French governments have the tendency to use tax as an incentive or disincentive. The incentives generally entail a yearly deduction of a percentage of the rental income and of the investment costs (depreciation).

Tax incentives aim to provide more, better and affordable rental housing and some of them target middle-class households (with criteria regarding the income of the tenant and a maximum rent). According to the French government<sup>152</sup> the tax incentives have clearly had a positive effect on the production of private rental housing, making the private rental housing market less tight.

Other incentive taxes exist in France: tax relief on home improvement for individual private rental landlords (deduction of the cost of refurbishment), Lower VAT (taxe sur la valeur ajoutée) on home improvements, deduction in the case of investment in energy efficiency, and reduced VAT on the purchase of newly built dwellings in vulnerable areas.

### Conclusion

In Belgium, home owners and social landlords receive more favourable treatment than private landlords as tax rates are lower and there are more exemptions or deductions. In the Netherlands, home owners benefit from a tax deduction, which does not exist for renters. There is no clear advantage in this country for a particular segment of the population. However, we can note that pension funds and FBIs do not pay corporate taxes. In France, there is a more favourable regime for social landlords that do not pay taxes and benefit from reduced VAT rates.

The specificity of the French system is the use of taxes as incentive or disincentive to stimulate the construction sector, the market or to avoid vacancy.

The three tax systems seem to be neutral towards tenants. Tenants do not have to pay specific taxes and do not benefit from tax incentives because they are not investors.

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<sup>148</sup> European Property, Freeman Business Information plc (<www.efreeman.co.uk>)

<sup>149</sup> Elsinga et al., *Beleid voor de private huur. Een vergelijking van zes landen*, 58.

<sup>150</sup> Elsinga et al., *Beleid voor de private huur. Een vergelijking van zes landen*, 60.

<sup>151</sup> <[http://www.french-property.com/news/tax\\_france/capital\\_gains\\_tax\\_proposals\\_sept\\_2013/](http://www.french-property.com/news/tax_france/capital_gains_tax_proposals_sept_2013/)>

<sup>152</sup> République Française, *Rapport évaluant l'efficacité des dépenses fiscales en faveur du développement et de l'amélioration de l'offre de logements* [Report evaluating the efficiency of fiscal expenditures that seek stimulate and improve the supply of dwellings] (Paris : République Française, 2012), 17.

### **3. Comparison of tenures without a public task**

#### **3.1. Evaluative criteria for the landlord**

##### *3.1.1 Profitability*

In Belgium, the fact that the private rental sector is mostly run by landlords who can be called amateur landlords – private persons (and not businesses) with an average of a little more than two dwellings – must be regarded as an indication of the unprofitability of the sector. Therefore the return on investment is estimated as relatively low.

In the Netherlands, by 2009 total returns on residential investment had plummeted to the lowest return since 1995 and have even become negative since 2007.<sup>153</sup> With the GFC there has been a significant effect on the Dutch market, lots of owners, especially investors tried to sell off their properties. The situation shows that investment is not really profitable due to rent control based on inflation and a decrease in house prices during the crisis.

In France,<sup>154</sup> traditionally, individual investors in the French private rental sector expect a rental yield of 5% per year. Recently, however, rental yields of 3,5% to 4% are mentioned in the advertisements of developers that are trying to encourage individuals to invest in the private rental sector. Potential capital yields (as a result of growth in property prices) may also be a strong incentive. For institutional investors in the private rental market the returns are dependent on both the returns from renting and the returns from capital growth (increase in property prices). According to the IPD France Annual Property Index, the returns from letting were 3,3% in 2011, whereas the return from capital growth was no less than 8,2%, thus resulting in a total return of more than 11%. Over a longer time period, the total returns show a positive picture as well; they were 9,8% over the last 10 years.

The costs that the landlord has to bear are explained in question 3.2.1 affordability for the tenant and the taxation advantages/disadvantages in question 2.6.

##### *Conclusion*

In all three countries, profitability seems quite low and is even considered unprofitable in Belgium. The GFC has had an impact in the Netherlands and in France, even in the latter it is still worth investing as the return from capital growth is still significant.

##### *3.1.2. Property rights respected de iure and de facto*

##### *Non-payment of the rent/ Eviction procedure/ delays in payment*

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<sup>153</sup> Vereniging van Institutionele Beleggers in Vastgoed, Nederland, *De vastgoedbeleggingsmarkt in Nederland 2008*, 9. And: Vereniging van Institutionele Beleggers in Vastgoed, Nederland, *Vastgoedwijzer*, 19.

<sup>154</sup> This paragraph is mainly based on: Hoekstra, *Country report France*, 9-10.

In all three countries the landlord has to follow specific procedures that are quite formal to evict a tenant, to obtain unpaid rent or to cover the cost of repairs due to damages caused by the tenant.

In Belgium, in the case of non-payment of rent, the landlord must first demand payment. Then, if the tenant still fails to pay he can bring a lawsuit either to obtain a reconciliation procedure or a judge statement. The landlord may request: payment of the overdue amount, termination of the tenancy contract, payment of compensation and interest, unblocking the deposit and the tenant's eviction. The relevant justice of the peace is, by law, obliged to first make an attempt to have the parties reach a settlement.<sup>155</sup> Each Public Centres for Social Welfare<sup>156</sup>, i.e. OCMW has to help in order to avoid an eviction. The OCMW will be informed as soon as a claim for eviction is requested in court. It must be notified of any claim of judicial eviction and provides, in the most appropriate manner, help within its legal mandate.<sup>157</sup> The period within which the tenant is supposed to leave can be extended or reduced at the request of the tenant or the landlord based on exceptional circumstances. The judge has to take into account the possibility for the tenant of finding a new residence, his financial means and his family's needs.<sup>158</sup> Regional funds against evictions were created for the purpose of paying a tenant's rent temporarily, (e.g. *Fonds ter bestrijding van de uitzettingen*).<sup>159</sup>

According to Dutch law, the landlord can have the lease terminated if the tenant does not pay the rent for three months or more, but not if payments are delayed. In the contract, provisions stating that the tenant has to pay a penalty if he does not pay the rent or if he is late are legal. If the landlord wants to evict the tenant he has to go to court. The local government can also evict tenants if they are causing a severe nuisance (either related to drugs or criminal behaviour) or if it is dangerous to live in the house. The sole legal basis for the eviction is that the tenant no longer has a legal right to live in the dwelling. Obtaining a court decision to terminate the contract is the only way for a landlord to terminate a contract that the tenant does not want to end, this because of the general rule of Dutch tenancy law that leases for living space are closed for an unlimited period.

As in the other countries, in France, if the tenant does not pay the rent or is late, the landlord has to follow a specific procedure. He has a choice between going to the *Commission départementale de conciliation* or to the judges (*Tribunal d'Instance*). A notice of payment must be sent to the tenant. If after two months the tenant does not pay, the landlord can go to court. Article 24 of the 1989 Act allows the parties to introduce in the contract a provision stating that if the tenant does not pay the rent he can be evicted, before going to court. The landlord has to serve through a bailiff a demand of payment (in French: "*Commandement de payer*") giving the tenant a two months to pay. If there is a guarantor, the bailiff has to notify him of the demand of payment. If the tenant does not pay he can go to court. If there is no provision in the

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<sup>155</sup> Art. 1344*septies* (Art. 2 Wet of 18 June 2008), Belgium Official Journal 14 July 2008.

<sup>156</sup> Wet van 30 november 1998 ter humanisering van de uitdrijvingen, Belgium Official Journal 29 January 2001.

<sup>157</sup> Art. 1344*ter* Judicial Code.

<sup>158</sup> [http://www.belgium.be/nl/huisvesting/huren\\_en\\_verhuren/geschillen/uithuiszetting/](http://www.belgium.be/nl/huisvesting/huren_en_verhuren/geschillen/uithuiszetting/), 19 May 2013.

<sup>159</sup> 4 October 2013 Besluit van de Vlaamse Regering houdende instelling van een tegemoetkoming van het Fonds ter bestrijding van de uithuiszettingen, Belgium Official Journal 25 November 2013.

contract, the landlord can immediately bring the dispute before the judges to ask for the termination of the contract and the expulsion of the tenant. The landlord can ask the tenant before taking him to court but he is not obliged to do so. The tenant can take the dispute to tribunal to ask for more extensions or apply to the special fund (in French: “*Fond de solidarité pour le logement*”),. Before ordering the expulsion and the termination of the contract, the tribunal checks if the tenant is seriously enough at fault to justify this action. If the judge considers that the tenant is able to pay, he can decide a payment deadline. Otherwise, the judge has to terminate the contract. After the judgement, the landlord has to appoint a bailiff to send the tenant an order to leave the dwelling within two months.

If a notary wrote the lease agreement, there is no need for the landlord to go to court as the contract is directly enforceable. If the tenant does not pay the rent the landlord can directly appoint a bailiff for the execution of the contract.

According to the law, no expulsion is allowed (except in the case of squatting, if the building is dangerous or in the case of rehousing) during a period called “*trêve hivernale*”, from the 1st November to the 31th March. The landlord is permitted to start a procedure but he will have to wait until the end of the period for the execution.

If the tenant is late in paying the rent, the landlord may not be able to ask for eviction. But the landlord is also allowed to include in the contract a provision called in French “*clause pénale*” which determines the penalty for the tenant if he does not pay on time. However, if the amount of the penalty is too high the judges may reduce it<sup>160</sup>.

### **Conclusion**

In the three countries, specific procedures have to be followed to evict a tenant and most of the time the landlord has to go to court. Only in France is eviction without the intervention of a judge possible and only in limited cases. But at the same time, the French procedure seems to be the lengthiest as it takes at least months to evict a tenant, especially if the procedure starts in the winter. All the procedures are very formal in order to protect the tenant's rights. The Belgian procedure seems to be the more balanced one, as there is first an attempt is to reach an agreement between the parties.

### **The deposit**

The deposit is one of the safeguards for a landlord. In Belgium, according to Article 10 of the Housing Rent Act parties may agree that the tenant pays a security deposit at the beginning of the tenancy. Most landlords do, in fact, require such a deposit. The payment can be made in cash (maximum of two months' rent)<sup>161</sup> or be a bank guarantee, (maximum of three months' rent)<sup>162</sup> or a deposit in kind (such as jewelry, shares, gold, without any maximum). The tenant can also have access to social assistance (*sociale bijstand*) through the local OCMW (i.e. the Public Centre for Social Welfare).<sup>163</sup> The bank can issue a bank guarantee (maximum three month's rent) through the intermediary of the OCMW and it will stand surety for the tenant. The

<sup>160</sup> For a reduction of the amount: CA Paris 28 June 1994, *Loyer et copr.* 1994 n°464; CA Paris, 26 June 2008 AJDI 2008 p. 932; CA Angers 12 April 2011 AJDI 2012 p. 108. For a refusal to reduce the amount: Civ. 3rd 27 November 2007 Rev. *Loyer* 2008 p. 100; CA Paris, 22 September 2004 AJDI 2005 p. 25.

<sup>161</sup> Art. 10 § 1 Housing Rent Act.

<sup>162</sup> Art. 10 § 1 Housing Rent Act.

<sup>163</sup> See for the tasks of the OCMW: [http://en.wikipedia.org/wiki/Public\\_Centre\\_for\\_Social\\_Welfare](http://en.wikipedia.org/wiki/Public_Centre_for_Social_Welfare)

deposit has to be managed by the landlord following specific rules. The deposit may be used to restore personal property or repair damage beyond normal wear and tear. It may also be used in case the tenant is in breach of contract. Furthermore, it can be used in settlement of the rent due and payable.

In the Netherlands, the landlord usually requires a security deposit at the beginning of the contract. An agreement concerning a security deposit is valid unless the amount is unreasonably high, generally it is one month's rent.<sup>164</sup> It can be used to cover future claims of the landlord or even against the outstanding rent.

In France, there is no mandatory deposit. If there is no provision requesting a deposit in the contract, the landlord does not have any rights to ask for a deposit. If there is a provision in the contract, conditions are fixed by the law. The amount cannot exceed one month of the rent.<sup>165</sup> The amount is transferred either by the tenant himself or by a specific organisation (e.g. *Avance loca-pass*<sup>166</sup> or the "*Fond de solidarité pour le logement*") to the landlord when the lease agreement is signed. There is no provision in the law stating what the landlord is supposed to do with the deposit. When the contract terminates, the deposit is given back to the tenant within a maximum of two months after the return of the key. The reimbursement by the landlord at the end of the lease is calculated using the inventory but also taxes and charges the landlord has to pay in the name of the tenant. The landlord has to give a justification for the amount deducted from the initial amount.

### *Conclusion*

In the three countries, the landlord can ask the tenant for a deposit. Whereas in Belgium and in France it is very regulated to protect tenants, in the Netherlands, landlords seem to have more freedom. In Belgium, rules are very strict about the management of the deposit by the landlord, whereas in France they are stricter about the return of the deposit. In all cases, the landlord can use the deposit in order to pay for repairs due to damages caused by the tenant.

### *The liens and pledges/the existence of personal securities*

In Belgium as well as in France, the tenant is obliged to furnish the rented dwelling.<sup>167</sup> It serves as a security for the rent payment. In France the landlord is required to go to court to obtain a decision to seize the furniture, whereas in Belgium it is not necessary.

<sup>168</sup> In Belgium, this obligation lapses if the tenant pays the full rent for the entire rental period in advance or pays it over the course of the lease.<sup>169</sup>

This lien might not be really efficient as the procedure to seize goods is expensive and the value of furniture may not be high enough. It might be easier for a landlord to go to court to terminate the contract and to ask the tenant to pay the amount due.

In the Netherlands, the landlord has no lien.

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<sup>164</sup> Art. 7:264 CC; S. Rueb, H.E.M. Vrolijk & E.E. de Wijkerslooth Vinke, *Memo Huurrecht 2013-2014*, (Deventer: Kluwer, 2014), No. 11.11

<sup>165</sup> Act 2008-111 of the 8 February 2008 concerning buying power, (in French: "Loi n°2008-111 du 8 février 2008 pour le pouvoir d'achat").

<sup>166</sup> Art. R441-20 to R441-30 and Art. R313-19-1 IV and V Building and Housing Code.

<sup>167</sup> Art. 1752 of the Belgium Civil code; art. 2332 of the French civil code

<sup>168</sup> Art. 1461 Judicial Code; M. Dambre, B. Hubeau & S. Stijns (eds), *Handboek Algemeen Huurrecht*, 381.

<sup>169</sup> M. Dambre, B. Hubeau & S. Stijns (eds), *Handboek Algemeen Huurrecht*, 402.

The French law contrary to Dutch and Belgian law organises a system of surety. The landlord can ask, only in specific cases, the tenant to find someone to act as a guarantor<sup>170</sup> for the payment of the rent. The landlord is not allowed to ask for a guarantor if he subscribes to a special insurance that can be private or the “garantie des risques locatifs”, a guarantee against rental risks, unless the tenant is a student or an apprentice. In fact if the landlord decides to ask a guarantor to pay in the tenant's name the procedure will be easier for him than to seize his furniture for the purpose of selling it. Therefore, the French law appears to be more protective of the rights of the landlord, whom can be compensated due to the fact that the eviction procedure seems to be more complicated.

### *Insurance*

Contrary to France, in Belgium and in the Netherlands it is not mandatory to have insurance for the dwelling. However, fire insurance, theft insurance, insurance against flood damage and third-party liability are the most used ones.

In France, insurance of the dwelling is mandatory (article 7, g of the 1989 Act). This insurance covers at least all of the risks that the tenant is liable for, such as fire or water damage. In the case of absence of insurance, the lease agreement can be considered null and void. French private landlords can insure themselves against non-payment by tenants by means of a government-backed insurance scheme: ‘La Garantie universelle des Risques Locatifs: GRL’<sup>171</sup>.

### *Termination of the contract by the landlord*

In Belgium, for standard privacy contracts (9 years), and for longer term contracts (more than 9 years), the landlord can terminate the contract early for his own or his family's use (Article 3 § 2 Housing Rent Act.) The list of the family members concerned is identified precisely by the law. A termination in the first three years is only possible for relatives in the first and second degree. The termination is subject to specific conditions (6 months notice with information concerning the identity kinship with the landlord and an explanation, otherwise the termination is null and void<sup>172</sup>). If the dwelling is not occupied within a year, or if the conditions are not met, the tenant is entitled to compensation of 18 months' rent, unless there are exceptional circumstances<sup>173</sup>. The second possibility to terminate a private tenancy contract early in Belgian law is if the landlord wishes to refurbish (*renoveren*), rebuild (*verbouwen*) and/or reconstruct (*wederopbouw*) (a part of) the dwelling.<sup>174</sup> For short-term contracts (less than 3 years), early termination is excluded by law.<sup>175</sup> However, in the literature it is still disputed whether it is possible to stipulate this by contract.<sup>176</sup> Some contracts can last for the tenant's life. In such cases, termination by the landlord is possible only if stipulated in the contract.

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<sup>170</sup> B. Vial-Pédroletti, “Cautionnement : étendue de l'engagement de caution”, *Loyers et copr.*, p. 17.

<sup>171</sup> Hoekstra, *Country report France*.

<sup>172</sup> Federale overheidsdienst Justitie, ‘De huurwet’, [http://justitie.belgium.be/nl/binaries/Loyer-2012-NL\\_BD-DEF\\_tcm265-138431.pdf](http://justitie.belgium.be/nl/binaries/Loyer-2012-NL_BD-DEF_tcm265-138431.pdf), 14 February 2013, 22.

<sup>173</sup> Art. 3 § 2 Housing Rent Act.

<sup>174</sup> Art. 3 § 3 Housing Rent Act.

<sup>175</sup> Art. 3 § 6.

<sup>176</sup> A. van Oevelen (ed.), *Woninghuur*, 155.

In the Netherlands, the general rule is that a lease contract can only be terminated by the landlord under specific and very limited grounds. If the contract has a clause called a diplomat clause<sup>177</sup>, this states that the landlord can have his flat back if he wants to move in. The tenant might have to leave in case of an emergency<sup>178</sup>, i.e. if the landlord needs the dwelling for such an urgent reason for his own needs that his interest should prevail over that of tenants or sub-tenants. In this situation he will have to provide an alternative for his tenant.

In France, the landlord can only terminate the contract at its end (3/6years) and for specific reasons. One of the reasons can be the fact that he wants to occupy the dwelling as his main residence or to have one of his relatives live in the dwelling. As for Belgium, the law defines which relatives are concerned. The notice must be served to the tenant at least 6 months before the end of the lease either by registered letter with acknowledgement of receipt, by a judicial officer, or hand-delivered against a signature. It must specify the reasons and include the names and addresses of the beneficiaries. Otherwise, the termination is not valid and the lease is renewed. After leaving the dwelling, the tenant may contest the reasons given by the landlord but has to be proven that the conditions were not met.

### *Conclusion*

In the three countries, the faculty of the landlord to terminate the lease is very limited and subject to a series of conditions in order to protect tenants. In the Netherlands it is very hard, even sometimes impossible for a landlord to terminate the lease agreement. Therefore, this country does not protect the property rights of the landlord, whereas the France and Belgium seem to have a more balanced system.

### *Payment in kind*

In the three countries, payments in kind are allowed but the tenant does not have a statutory right to replace the rent by a payment in kind. In France and the Netherlands it has to be precisely defined in the contract (kind of repairs, amount of reduction of the rent etc.) In France, if the tenant performs improvements in the dwelling without the agreement of the landlord, he may be obliged to restore the dwelling as it was at the date of the inventory. In the Netherlands if after being asked by the tenant, the landlord does not perform required repairs, the tenant can have the defects repaired and settle the reasonable costs against the rent. If he chooses to do so without court-order, the tenant risks a procedure by the landlord who may claim that there wasn't any defect to be repaired or that the costs claimed by the tenant were unreasonably high.

## **3.2. Important evaluative criteria for the tenant**

### *3.2.1. Affordability*

#### *Determination and increase of the rents*

In Belgium, the rent is freely determined among the parties for standard contracts (9 years). It is not the case for short-term contracts (less than 3 years). The purpose is to

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<sup>177</sup> Art. 7:274 §1 sub b CC.

<sup>178</sup> Art. 7:274 §1 sub c CC.

prevent systematic new short-term tenancy contracts that are concluded between the same parties or with another tenant, each time at a higher rent.<sup>179</sup>

Concerning the increase of the rent, there is no distinction between open-ended contracts and time-limited contracts. If the contract is in writing, the landlord may index the rent every year.<sup>180</sup> Contrary to France and the Netherlands, there is no need for a specific provision in the contract but an automatic indexation is not allowed. The possibility to index the rent should be requested in writing by the landlord and it has a retroactive effect limited to three months. This means that the landlord's request may be carried out after the date on which the rent can be indexed, but it will only have an effect for the last three months. According to Article 2273 CC, rents will be time-barred (*verjaren*) after one year. The time limit will begin on the day on which the request has been sent to the tenant.

Dutch tenancy law qualifies living space in an objective manner. The government applies a quality points system to determine the maximum price that is applicable to all rentals that fall within the regulated regime. This means that the applicability of the legal regime depends on the qualities of the object (such as the floor space, the availability of central heating, the EU energy class, but also access to local amenities like public transport, shops, etc.). Therefore the nature of landlord is irrelevant. As a result, most of the rents are regulated by the national government. Only if a dwelling that is qualified as an independent living space has more than 142 points, it falls in the liberalised category. An excessive rent in Dutch tenancy law can have two definitions. The first definition would be rent that is more than the maximum rent (€ 681,02 in April 2013) based on the points system, whereas the quality of the house does not reach the 142-points benchmark. Another definition of an excessive rent could be a rent that is more than what can be asked for based on the points system while not exceeding the maximum rent. In such a situation, the rent would (for example) be € 500 whereas it should be € 400, based on the points system. Initially when parties agree to an excessive rent, the tenant has six months to go to the Rental Commission. If he does, the Rental Commission will set the rent for the apartment. If he fails to do so, the excessive rent stands as it is. In the second situation, the tenant can go to the Rental Commission whenever he wants.

In the regulated sector, the rent can be increased once per year (normally July 1<sup>st</sup>)<sup>181</sup>, but in the first year of the contract it can be increased twice<sup>182</sup>. The Ministry of Housing sets the maximum amount. The proposal for the rent increase has to be sent two months in advance and should contain the present price, the percentage of increase, the date of increase and the way in which the tenant can object to the increase.<sup>183</sup> Since 2013, the landlord is allowed to increase the rent of their tenants because of their income. If specific facilities have been added to the dwelling by the landlord, the rent can be increased in accordance with the costs of those facilities.<sup>184</sup> The tenant can object to all of the increases before the Rental Commission following specific procedures.

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<sup>179</sup> A. van Oevelen (ed.), *Woninghuur*, 194.

<sup>180</sup> Article 1728bis CC and Article 6 Housing Rent Act

<sup>181</sup> Art. 7:250 CC.

<sup>182</sup> Art. 7:250 §1 sub a CC.

<sup>183</sup> Art. 7:252 CC.

<sup>184</sup> Art. 7:255 CC.

For houses that fall within the liberalized regime, there are no general rules for the maximum price increase or the way in which the tenant has to be notified of the increase. The rule of one price increase per year does apply to dwellings that fall within the liberalized regime in addition to the exception that an extra price increase is allowed when the quality of the dwelling is improved by the landlord.

In France as in Belgium, in principle, the rent is freely determined by the parties (article 17 of the 1989 Act). However, in some areas where the market is tense, the price of the rents is regulated in order to protect the tenant from abuse. In practice, this concerns the cities of the thirty-eight conurbations with more than 50,000 inhabitants located in France (twenty seven of them) and overseas (eleven of them). It means that approximately 40% of the French population is protected by rent regulation.

The revision of the rent is only possible if there is a provision in the contract allowing for the increase of the rent<sup>185</sup>. If there is no provision, the rent stays unchanged for the complete duration of the contract. The conditions for increasing the rent are limited: once a year an increase shall be based on a benchmark index for rent (In French: "IRL" for "*Indice de référence des loyers*").

### *Conclusion*

In Belgium and in France, the determination of the rent is free, except for certain areas in France. In the Netherlands, the quality points system seems more objective and in that sense more favourable to the tenant. The regulated sector in the Netherlands offers strong protection for tenants, but not the liberalized sector concerning rent and rent increase. On the contrary, the rules concerning the increase of rent appears more favourable to the tenant in France and in Belgium (e.g. increase of rent being allowed only once a year).

### *Utilities*

In Belgium, the usual kinds of utilities are water, gas, electricity, lighting and heating. Other types of utilities can be: maintenance, Internet, waste collection and anti pollution tax. Both the tenant and landlord can conclude contracts for water, gas, electricity and Internet, which are governed by private law.

Taxes concerning the use of property, such as waste collection, and anti pollution tax are payable by the tenant. Owner's charges, such as property tax must be paid by the landlord.<sup>186</sup> There is no legal provision that specifies a complete list of services, which the landlord should provide to his tenant.

The general utilities category of Dutch tenancy law is referred to as service costs; they consist of the reasonable costs that are related to a dwelling and concern goods or services for which the landlord has to be reimbursed. Utilities are costs and expenses associated with a service or performance of advantage to the tenant, mainly heating, electricity and gas. Common practice is that the tenant concludes a contract of supply with a utility company. But in some cases it happens that the landlord concludes a contract and charges these costs to the tenant. In 2014 a new statute came into force,

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<sup>185</sup> Art. 3 of the 1989 Act, Civ. 3rd 4 October 1995, dealing with the 1986 Act but the same article is also in the 1989 Act.

<sup>186</sup> Art. 5 Housing Rent Act.

the Heating Act (*Warmtewet*),<sup>187</sup> which determines the prices that landlords (mostly housing corporations) can charge to tenants that are connected to a shared heating system. Sewerage charges (*rioolrechten*), pollution levy (*verontreinigingsheffing*), waste collection levy (*afvalstoffenheffing*), refuse collection charges (*reinigingsrechten*), and immovable property tax (*onroerende-zaakbelasting*) are not considered to be a cost for which the landlord has provided a service but as levies. These costs are directly charged to the landlord or user of the dwelling. The landlord may charge the tenant these costs separately, if the tenant hasn't received an assessment (*aanslag*) and paid the amount due. The landlord can charge the tenant for the costs that are concerned with the provision of services.

In France, the division of the cost between the tenant and the landlord is organized by a Decree adopted the 26th August 1987<sup>188</sup>. The list of charges is limited and fixed by this decree. Expenses, which are not mentioned in this text, shall be paid by the owner and cannot be charged to the tenant. The rules concerning the division of costs are different regarding if the apartment is in a building where there are several owners or just one, in order to respect the specific rules concerning co-ownership. To justify the amount of the charges, a statement of charges is sent to the tenant one month prior to the annual adjustment. The statement indicates the different categories of expenditure, which the charges are related to and where relevant, the amount consumed, for example, water and energy. The landlord can ask the tenant to pay an advance for the charge regularly, e.g. monthly or quarterly and an adjustment is done every year to adjust the payment to the real expenditure. The landlord can also ask the tenant to reimburse him for expenses that he has incurred. Every year, the landlord makes what is called a regularization of expenses. It means that the landlord has to make a comparison between the money he received from the tenant for the payment of service costs and the actual expenses. If the tenant paid too much, the landlord has to reimburse him. If he did not pay enough, the landlord can claim for the difference.

In the three countries, the utility cost contracts are the same and if the landlord pays for the utilities he can ask the tenant to reimburse him. The proceedings vary from one country to another but the idea is the same.

### *Repairs*

In Belgium, the tenant must, by nature of the contract and without the need of any particular stipulation, maintain the dwelling in order so that it can serve the use for which it has been let.<sup>189</sup> Legal provisions concerning maintenance, repairs and improvements are regulatory provisions. Parties may conclude otherwise, but if not, both are responsible for certain repairs and maintenance as described below.<sup>190</sup> During the term of the contract, the landlord is responsible for damages due to normal wear and tear, including normal use, old age, major repairs, major maintenance, force majeure and

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<sup>187</sup> Warmtewet, 17 June, 2013, Stb. 2013, 325

<sup>188</sup> See Decree n°87-713 of the 26th August 1987 establishing the list of recoverable costs, (in French: "Décret n°87-712 du 26 août 1987 pris en application de l'article 7 de la loi n° 86-1290 du 23 décembre 1986 tendant à favoriser l'investissement locatif, l'accession à la propriété de logements sociaux et le développement de l'offre foncière et relatif aux réparations locatives")

<sup>189</sup> Art. 1719 CC.

<sup>190</sup> The regions may have additional regulations. A. Hanselaer, B. Hubeau (eds), *Sociale Huur*, 117-122 and 261.

hidden defects.<sup>191</sup> Furthermore, he must make all necessary repairs, other than those incumbent upon the tenant.<sup>192</sup> Finally, keeping the wells and cesspools clean is also the landlord's responsibility.<sup>193</sup> The tenant is responsible for day-to-day repairs and routine maintenance, which is not considered to be major repairs or major maintenance.<sup>194</sup> He is also responsible for a list of repairs included in the code.<sup>195</sup>

In the Netherlands, the tenant can only be held responsible for small repairs.<sup>196</sup> This rule cannot be set aside. If the tenant carries out any work other than small repairs this must be considered as in-kind payment of rent. There is a Decision on Small Repairs (*Besluit Kleine Herstellingen*) that comes under the Minister of Housing<sup>197</sup>. The appendix to this document contains a list outlining the limits to small repairs that the tenant can carry out or for which he can be charged.

In France, according to article 7 d) of the 1989 Act "The tenant is obliged (...) to deal with the maintenance of the dwelling, with the equipment specified in the contract and with minor repairs as well as all the rental repairs defined by a decree (*Décret en Conseil d'Etat*), unless they are caused by decay, defect, construction defect, unforeseen events or "force majeure"". A very precise list of what can be considered as rental repairs, i.e. in French "*reparations locatives*", is given by a Decree adopted on the 26<sup>th</sup> of August 1987<sup>198</sup>. This list is divided into six sections: External areas exclusively for the use of the tenant, Openings, Interior parts, Plumbing, Electrical equipment, and other equipment mentioned in the lease.

### *Conclusion*

The three countries have rules concerning the division of repairs to be performed by the tenant and the landlord. The idea is to protect tenants against significant cost and in all cases the tenant is only responsible for small repairs. Where the French law makes a very precise distinction, the Dutch law only refers to small repairs elaborated by the Minister of housing in the Decision on Small Repairs.

The regulations concerning the deposit, taxes and subsidies were dealt with in previous questions.

### *3.2.2. Stability*

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<sup>191</sup> Arts 1755 and 1721 CC F. Tollenaere, *Huren op de private huurmarkt, Eindelijk een droom of eerder een nachtmerrie*, Cahiers voor de welzijnswerker, (Mechelen: Kluwer), 39.

<sup>192</sup> Art. 1720 CC.

<sup>193</sup> Art. 1756 CC.

<sup>194</sup> Art.1754CC; [http://www.belgium.be/nl/huisvesting/huren\\_en\\_verhuren/herstellingen\\_en\\_onderhoud/](http://www.belgium.be/nl/huisvesting/huren_en_verhuren/herstellingen_en_onderhoud/), 28 April 2013.

<sup>195</sup> Art. 1754 CC.

<sup>196</sup> Art. 7:217; Art. 7:240 CC

<sup>197</sup> Besluit Kleine Herstellingen (*Minor Repairs (Tenant's Liability) Decree*) (8 April 2003), Stb. 2003, 168

<sup>198</sup> Decree 87-712 of the 26th August 1987 adopted in application of 7 of the Act 86-1290 of the 23th December 1986 aimed at boosting rental investment, home ownership and social housing development of land supply and determining the list of recoverable costs, (In French: "Décret n°87-712 du 26 août 1987 pris en application de l'article 7 de la loi n° 86-1290 du 23 décembre 1986 tendant à favoriser l'investissement locatif, l'accession à la propriété de logements sociaux et le développement de l'offre foncière et relatif aux réparations locatives"), Art. 1756 of the Civil Code added an obligation concerning the cleaning of cesspools and wells.

### *Duration*

In Belgium, the standard duration of private tenancy contracts is 9 years<sup>199</sup>. Standard private tenancy contracts end after a period of nine years has expired, if at least six months before the due date one of the parties has given notice to terminate the contract.<sup>200</sup> Otherwise, the contract is automatically extended for three years under the same conditions.<sup>201</sup> The landlord can only terminate the contract (before the end of the 9 years) under very strict conditions<sup>202</sup>: if he wants to have his flat back for himself or for a member of his family, to perform work on the premises or without a specific reason but in this case the tenant must be compensated. Short-term contracts can also be concluded for three years or less<sup>203</sup>. To avoid the conclusions of chain short-terms contracts with an increase of rent at each renewal<sup>204</sup>, the possibility to renew the contract is limited to once for one year. A short-term private tenancy contract ends after a period of three years has expired, if at least three months before the due date one of the parties has given notice to terminate the contract.<sup>205</sup> Otherwise, the contract is supposed to be a standard 9 years contract except in specific cases<sup>206</sup>.

Contracts can also be concluded for a longer period with a maximum of 99 years<sup>207</sup>. Such contracts end at the expiration date, if at least six months before the due date one of the parties has given notice to terminate the contract.<sup>208</sup> If not, the contract will be extended for three years under the same conditions.<sup>209</sup> The conditions for terminating a long-term private tenancy contract early comes under the same termination conditions as standard private tenancy contracts (9 years contracts).

Contracts can also be concluded for the duration of the tenant's life.<sup>210</sup> The (early) termination of a private tenancy contract for the duration of the tenant's life by the landlord is only possible if it is stipulated in the contract.<sup>211</sup>

In the Netherlands and in France, the situation is a lot simpler concerning the duration of contracts. In the Netherlands the general rule is that contracts are open-ended. There are some exceptions, based on the Vacancy Act. These contracts have to be closed for a minimum period of six months.<sup>212</sup> The civil code specifically mentions the situation in which the landlord wants to live in a house that he did not previously occupy, for example when he had not sold his previous house or for other reasons had to wait

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<sup>199</sup> Art. 3 § 1 Housing Rent Act.

<sup>200</sup> Art. 3 § 1 Housing Rent Act.

<sup>201</sup> Art. 3 § 1 Housing Rent Act.

<sup>202</sup> Article 3 §§ 2 through 4 Housing Rent Act.

<sup>203</sup> Art. 3 § 6 Housing Rent Act.

<sup>204</sup> A. van Oevelen (ed.), *Woninghuur*, 194.

<sup>205</sup> Art. 3 § 6 Housing Rent Act.

<sup>206</sup> It is possible to avoid a short term contract converting into a standard nine year contract. The following has to be done: the extension of the contract has to be in writing, the rent has to be the same or less, the tenant has to be the same party, the extension is only allowed once, the contract period of the original and new lease combined may not exceed three years, and it is allowed that the duration of the second contract is not the same as the duration of the first contract.

<sup>207</sup> A. van Oevelen (ed.), *Woninghuur*, 160.

<sup>208</sup> Art 3 § 7 Housing Rent Act.

<sup>209</sup> Art 3 § 7 Housing Rent Act.

<sup>210</sup> Art. 3 § 8 and A. van Oevelen (ed.), *Woninghuur*, 162-163.

<sup>211</sup> Arts 3 §§ 2-4 in conjunction with art 3 § 8 Housing Rent Act; L. Machon et al., *101 vragen en antwoorden over de nieuwe wet*, 53.

<sup>212</sup> Art. 16 § 4 Leegstandswet.

before he moved into his house. The tenant may not already be living there. If the landlord wants to move back into his house (for example after he spent some time working abroad) or wants to allow his previous tenant to move back in, the contract can be closed for a limited time.<sup>213</sup> In all these cases the contract must explicitly state that the tenant has to vacate the house at the end of the agreed upon term. The landlord cannot terminate the contract early.

In France, according to article 6 of the 1989 Act<sup>214</sup> if the landlord is a corporate body (In French: “*personne morale*”) the duration of the contract is six years and if the landlord is a natural person (in French “*personne physique*”) the duration of the contract is three years. There is no possibility for the landlord to terminate the contract early. Article 10 of the 1989 Act organises an automatic right to renewal<sup>215</sup>. At the end of the contract, it is renewed for the same duration as the first time, and it can be renewed an indefinite number of times. In some limited cases, the landlord is allowed to offer a shorter lease (minimum one year) according to article 11 of the 1989 Act. The landlord must prove that a specific event justifies that he takes back the dwelling for personal or professional reasons. If the event does not occur, the contract is considered to last three years. If the completion of the event is only delayed, the landlord can, only once, postpone the termination of the contract if the tenant agrees.

### *Conclusion*

The three laws aim to protect the tenant. The Netherlands and France choose an easy way to do so by limiting the options concerning the duration. Moreover, even if there is duration in the French law, the automatic renewal and the impossibility of terminating the contract early ensures extra protection for the tenant. On the contrary, the situation in Belgium is very complex due to the large number of applicable rules. If the landlord only agrees on a short-term contract, there is more risk that the rights of the tenant is unprotected. However, the options for the landlord to terminate the contract or to offer a short-term contract are limited. Stability for the tenant seems to be one of the goals of each of these laws.

### *Pre-emption right*

In Belgium and in the Netherlands, there is no pre-emption right. In the Netherlands, in practice, tenants of housing corporations are offered to buy their house when the housing corporation decides to sell some of its stock.

On the contrary in France, if the landlord wants to sell the dwelling, the tenant has a pre-emption right strictly defined according to article 15 II of the 1989 Act<sup>216</sup>. Not only does there have to be an offer of the possibility to buy the dwelling, but also, another offer must be made to the tenant if the price is reduced or there are changes in the conditions of the sale. The French law is thus more protective to the tenant in creating an option for him to buy the flat.

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<sup>213</sup> See Art. 7:274 §2 CC.

<sup>214</sup> The 1948 Act which is still applicable to very few contracts. The specificity of the regime is that after the first contract (of a minimum of six years), the tenant has a right to stay in the dwelling (in French: “*maintien dans les lieux*”). He can only loose the benefit of his right for very specific reasons.

<sup>215</sup> Vial-Pédroletti, “ Tacite reconduction : durée du bail tacitement reconduit”, *Loyers et copr.* 2013 p. 22.

<sup>216</sup> This article also stated that for each notice its content must be copy otherwise, the notice are considered null.

### 3.2.3. Flexibility

#### *Termination of the contract*

In Belgium, the tenant can terminate standard contracts (9 years) and long-term contracts (more than 9 years duration or the life of the tenant) at its end but also at any time during the lease with a notice period of three months.<sup>217</sup> The tenant must pay the landlord a fixed compensation (from 1 to 3 months rent), if he ends the contract during the initial three years period. For a short-term contract (less than 3 years), tenants do not have a right to terminate the contract early.

Dutch tenancy law accepts three grounds for termination of contracts: a) notice, b) rescission and c) termination by mutual agreement. As there are no terms, if the tenant wants to give notice, he must respect a period: the length of the period between two payments of at least one month and a maximum of three months. In addition, the termination has to take place on the date when normally the rent would be due. Thus, if he normally pays his rent on the first day of the month, his contract will end on the first of the month.<sup>218</sup> If tenancy contracts are closed for a fixed period, the tenant will have to respect that period and cannot terminate the contract unless agreed otherwise.<sup>219</sup> In (very) exceptional circumstances, general principles of contract law, such as unforeseen circumstances or rules of good faith, may lead to a different result. If the tenant keeps using the dwelling after the fixed period, the general rules will apply.

In France, the tenant can leave at any time, subject to respecting certain formal requirements. The leave is effective at the expiration of a period of three months' notice. In specific cases, the notice can be only one month<sup>220</sup>: if the tenant finds his first job, if his job is transferred, if he loses his job, if he finds a new job after losing the previous one, if the tenant is over sixty years old and his health justifies his move, or if he benefits from social allowance (in French: *Revenu minimum d'Insertion* or *Revenu de solidarité active*). The period starts from when the landlord receives the notice letter. The tenant has to pay the rent during the full period, one or three months, except if he reached an agreement with the landlord or if another tenant enters the dwelling before the end of the period. To inform the landlord that he wants to leave, the tenant has to send him a registered letter with acknowledgement of receipt or to have the notice served by a bailiff. There is no provision in the law concerning the content of the letter but if the tenant benefits from a shorter notice, he should inform the landlord. Once the tenant sends his notice, he has to leave the dwelling at the end of the period, except if he reached an agreement with the landlord to stay or to extend the notice.

#### *Conclusion*

The three laws offer the opportunity for the tenant to leave the dwelling with a short notice from one to three months. Nevertheless, Belgian law can be considered as less

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<sup>217</sup> Art. 3 § 5 Housing Rent Act.

<sup>218</sup> Art. 7: 272 § 2 CC.

<sup>219</sup> Aerts v Kneepkens, Hoge Raad 10 August 1994, NJ 1994/688; S. Rueb, H.E.M. Vrolijk & E.E. de Wijkerslooth Vinke, *Memo Huurrecht 2013-2014*, (Deventer: Kluwer, 2014), No. 16.3

<sup>220</sup> Damas N., "Préavis réduit : des limites à la valse-hésitation du bailleur", AJDI 2013, p. 9; Civ. 3rd 19 September 2012, n°11-21.186

flexible for the tenant as in some cases he has to pay compensation to the landlord and for short-term contracts he is not allowed to terminate the contract earlier.

#### *Sublease contracts*

In Belgium, under private tenancy law, a tenant who rents a dwelling and uses it as his principle residence is not allowed to sublet the dwelling completely. This is mandatory law and the tenant can only sublet a part under the conditions that the remainder part of the dwelling remains assigned as his principal residence and only with the permission of the landlord, which can be also given tacitly or afterwards.<sup>221</sup> The Housing Rent Act prescribes the legal relationship between the tenant and his subtenant, if the dwelling is the subtenant's principle residence. This means that the subtenant enjoys the same legal protection as the tenant.<sup>222</sup> The term of the sublease's contract period may not exceed the remaining term of the main lease contract period.<sup>223</sup>

In the Netherlands, a tenant is not allowed to sublet the dwelling without consent of his landlord.<sup>224</sup> However, he is allowed to sublet a part of his dwelling as long as he stays and has his 'main-residence' in that dwelling.<sup>225</sup> The consent for subletting can be tacit. However, this has to be shown by the main tenant, as consent is not presumed. When the relation between the main tenant and the landlord ends, the law provides a rule that allows the subtenant (of independent living space) to become the main-tenant. He will have to notify the landlord that he wants to continue the tenancy.<sup>226</sup> It is irrelevant whether the landlord has previously agreed to the situation. In practice this means that tenant has to start paying the rent to the landlord. If the landlord does not refuse the rent within six months, he will have to accept the new tenant.<sup>227</sup>

In France, according to article 8 of the 1989 Act, subletting is in principle not allowed. However, the landlord can give his approval to the tenant. In such a case he must agree to the principle of subletting but also on the price of the rent (which cannot exceed per square meter the price paid by the main tenant). If the main contract terminates, the sub-tenant has no rights from the landlord. The subtenant does not benefit from the provisions of the law that protect tenants.

#### *Conclusion*

In the three laws, subletting is in principle not authorised without the agreement of the landlord. The subtenant is more protected in Dutch law than in French law as he can benefit from an extension of his contract. In terms of subletting, tenants do not benefit from any flexibility, even if it not abusive.

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<sup>221</sup> Art 4 § 2 Housing Rent Act; M. Dambre, *Bijzondere overeenkomsten*, Syllabus (Brugge: Die Keure), 265.

<sup>222</sup> Art. 4 § 2 Housing Rent Act.

<sup>223</sup> Art. 4 § 2 Housing Rent Act.

<sup>224</sup> Art. 7:221 CC.

<sup>225</sup> Art. 7:244 CC; S. Rueb, H.E.M. Vrolijk & E.E. de Wijkerslooth Vinke, *Memo Huurrecht 2013-2014*, (Deventer: Kluwer, 2014), No. 5.9, 14.1

<sup>226</sup> Art. 7:270a CC.

<sup>227</sup> Art. 7:269 CC.

## 4. Comparison of tenures with a public task

### 4.1. Generalities

In Belgium it is the type of landlord that largely determines whether one can speak of social or private renting.<sup>228</sup> If private persons or companies let the dwellings, they belong to the private rental sector. If a registered or accredited social housing association lets the dwellings, they are considered to be social rental dwellings. The regional housing societies are responsible for the accreditation of the social landlords.<sup>229</sup>

The system is very complicated due to regionalisation. In each region, social landlords follow different rules and have different names as follows: in Flanders, *sociale huisvestingsmaatschappij* (SHM, in total 102)<sup>230</sup>, in the Walloon Region 70 Sociétés de Logement de Service Public (SLSP)<sup>231</sup> and in Brussels 38 associations called SHM<sup>232</sup> like in Flanders or *Openbare Vastgoedmaatschappij* (OVM).<sup>233</sup> The social landlords are stimulated, supported, coached and financed by their respective regional organization. Local authorities and municipal welfare organisations known as OCMWs (*Openbaar Centrum voor Maatschappelijk Welzijn*, as they are called in Dutch) or groups of local authorities and OCMWs are also considered to be social landlords.<sup>234</sup>

Social Rental Agencies are responsible for administration and minor renovations . This is currently their primary function. They also offer individualized support for tenants with problems as part of their aim of preventing homelessness. Originally, they also aimed to provide a strong link between housing and welfare aims and to develop local policy networks on affordable housing.

In the Netherlands, within the rental sector, social renting with a share of 82% dominated in 2009. Any landlord – social or not – could own stock with regulated rent. Social landlords are the Dutch housing associations, which are non-profit legally private organisations that are accredited by Dutch government according to the Housing Act in order to fulfil a public task.

Since the mid-1990s they have been financially independent from the government and almost all municipal housing companies have been turned into social landlords.<sup>235</sup> They

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<sup>228</sup> Haffner et al., *Bridging the gap*, 64.

<sup>229</sup> Portaal Belgium.be, ‘De sociale huisvestingsmaatschappijen’, <[http://www.belgium.be/nl/huisvesting/sociale\\_huisvesting/sociale\\_huisvestingsmaatschappijen/](http://www.belgium.be/nl/huisvesting/sociale_huisvesting/sociale_huisvestingsmaatschappijen/)>, 13 January 2013.

<sup>230</sup> VMSW, ‘Historiek. Van NMH en NLM over VHM tot VMSW’, <<http://www.vmsw.be/nl/algemeen/over-vmsw/historiek>>, 31 January 2013.

<sup>231</sup> La Société wallonne du logement, ‘Het netwerk van huisvestingmaatschappijen. Een ambitie, een waardige woning voor iedereen’, <[http://www.swl.be/index.php?option=com\\_content&view=article&id=209&Itemid=341](http://www.swl.be/index.php?option=com_content&view=article&id=209&Itemid=341)>, 18 January 2013.

<sup>232</sup> BGHM Brusselse Gewestelijke Huisvestingsmaatschappij, ‘Huisvestingsmaatschappijen’, <<http://www.slrbirisnet.be/huisvestingsmaatschappijen>>, 31 January 2013.

<sup>233</sup> BGHM Brusselse Gewestelijke Huisvestingsmaatschappij, ‘Beheersovereenkomsten’, <<http://www.slrbirisnet.be/de-bghm/contrats-de-gestion>>, 31 January 2013.

<sup>234</sup> Vanneste, Thomas & Goosens, *Woning en woonomgeving*, 124 and 125.

<sup>235</sup> From: Haffner, ‘Dutch Social Rental Housing: the Vote for Housing Associations’. And: Elsinga & Wassenberg, ‘Social Housing in the Netherlands’, 135. And: Elsinga & Van Bortel, ‘The future of social housing in the Netherlands’, 99 and 100.

are also in charge of providing social rental housing to the most vulnerable households in society. In 2009 there were about a little more than 400 housing associations.<sup>236</sup>

In France, the first social housing initiatives were not taken by local or state authorities but by private actors such as companies, factory owners and philanthropists<sup>237</sup>. Initially, social rental dwellings were built by *sociétés d'Habitations à Bon Marché* (HBM), which in 1950 became *Habitations à Loyer Modéré* organisations (HLMs). Since 2008, the public HLMs have been known as *Offices Publics de l'Habitat*. These social rental landlords have a predominantly public character and are controlled by the local authorities (municipalities, groups of municipalities or departments), who are responsible for their creation and for managing their finances and their tasks<sup>238</sup>. There are also private HLMs (46% of the stock)<sup>239</sup>. These are called *Entreprises sociales pour l'habitat*. Such social rental landlords are private organisations with a non-profit objective (although they are allowed to pay a very limited dividend to their shareholders).<sup>240</sup> Private social rental landlords usually operate under the supervision of shareholders from both the private and public sectors. They not only provide social rental housing but are often also involved in the construction of subsidised owner-occupancy dwellings for lower-income groups<sup>241</sup>. Public and private social rental landlords have the same competences, expressed in the *Code de la Construction et de l'Habitation* (CCH). In 2008, there were about 560 HLM organisations in France. Specific providers of social rental housing are the *Sociétés d'Economie Mixte* (SEM), also called *Entreprises Publiques Locales*. These are partnerships between local government and private partners that may also provide social rental housing. Finally, there are various smaller providers of social rented housing. This involves local authorities (municipalities), public or semi-public companies (public hospitals and the state railway company, the SNCF, have dwellings which they let to their employees) and the co-operative housing companies (although the latter mainly focus on the owner-occupied sector).

### Conclusion

The mechanisms in the three countries are rather different but are always based on the same idea of providing housing for people who cannot access the regular market. The Netherlands has the biggest social rental sector. In all three countries various actors at a regional level are involved. Probably due to the size of the country, France has a huge number of associations and very different types of providers of social housing, even if some are very small.

## 4.2. Evaluative criteria for public/social/private subsidized landlords

In Belgium, the financial system depends on the region where the dwelling is located.. In Flanders, the Decree on Financing of Social Housing, (*Financieringsbesluit*) contains the

<sup>236</sup> Rijksoverheid, ‘Aantal corporaties en gemiddeld woningbezit’, <[http://vois.datawonen.nl/report/cow10\\_903.html](http://vois.datawonen.nl/report/cow10_903.html)>, 17 February 2013.

<sup>237</sup> Lévy-Vroelant, Reinprecht and Wassenberg *Learning from history: changes and path dependency in the social housing sector in Austria, France and the Netherlands (1889-2009)*, 33.

<sup>238</sup> *Social Housing in France*, Information from the website <[www.cecodhas.org](http://www.cecodhas.org)>

<sup>239</sup> This means that they are subject to private law (Amzallag and Taffin, *Le logement social*, 20).

<sup>240</sup> Amzallag and Taffin *Le logement social*, 21.

<sup>241</sup> Boelhouwer and van der Heijden, *Housing systems in Europe*.

rules for the financing of social housing<sup>242</sup>. Via the so-called Decree on Funding (*Fundingbesluit*) the funds of the Flemish government are paid to the regional support organization called VMSW (*Vlaamse Maatschappij voor Sociaal Wonen*) which will allocate the subsidies in three ways to the investors in social housing: assistance in the payment of debt, project subsidies and assistance in the pre-financing of those taking the initiative for social housing projects. In Brussels, investments are financed mostly with a mix of loans and subsidies paid for by the Administrative Region.<sup>243</sup> In the Walloon Region subsidies (from local actors or via the Société Wallonne du Logement, i.e. the regional support organization) are available for the acquisition, construction and renovation, etc. of social rental dwellings and of so-called modest rental dwellings (article 29 of the Housing Code).<sup>244</sup>

In the Netherlands, in 1995 the sum of the future annual subsidy obligations of the government that were agreed upon with social landlords were calculated as net present value and paid as lump sum to the social landlords.<sup>245</sup> These were traded in for outstanding government loans that were in the hands of the social sector. In other words, the social sector had to repay these government loans and take out loans from the capital market. This operation resulted in cutting the financial ties between the government (no more subsidies for new construction) and the landlords (no more government loans for activities). Therefore, the social landlords became financially independent from the government and they were to operate as social entrepreneurs from then on, running the risks of investment themselves while using the societal capital that had been built up by the subsidies for the public task. In fact, they were to operate as a revolving fund.

In France, support for social rental landlords is provided through an unusual financial system in which household savings (accumulated in the *Livret A* scheme or similar schemes at the state-regulated *Caisse d'épargne*)<sup>246</sup> are used to provide loans to landlords who build social rental housing. The interest rate on the loans for landlords is linked to this *Livret A* interest rate decided by the government based on a recommendation of the Banque de France. The system is called the *Fonds d'Epargne* and is coordinated by the state-controlled National Deposit Office (*Caisse des Dépôts*). The system limits the amount of state subsidisation required for social rental housing but also obliges the French state to find a balance between a favourable interest rate for the lenders (the social rental landlords) on the one hand, and a favourable interest rate for the capital providers (households) on the other hand<sup>247</sup>. The repayment of the *Fonds*

<sup>242</sup> Wonen Vlaanderen, ‘Hervorming financiering sociale huisvesting is rond’, <[http://www.wonenvlaanderen.be/ondersteuning\\_voor\\_professionelen/financiering\\_van\\_woonprojecten](http://www.wonenvlaanderen.be/ondersteuning_voor_professionelen/financiering_van_woonprojecten)>, 31 January 2013.

<sup>243</sup> BGHM Brusselse Gewestelijke Huisvestingsmaatschappij, ‘Investeringsplannen’, <<http://www.srb.be/de-bghm/opdrachten/plans-dinvestissements>>, 31 January 2013.

<sup>244</sup> Direction Générale Opérationnelle Aménagement du territoire, Logement Patrimoine et Energie, ‘Logement moyen locatif’, <<http://dgo4.spw.wallonie.be/DGATLP/DGATLP/Pages/Log/Pages/Aides/SOPP/Art29moyen.asp#Subvention>>, 31 January 2013.

<sup>245</sup> Haffner et al., *Bridging the gap*, 216.

<sup>246</sup> M. Amzallag and C. Taffin, *Le logement social* [Social Housing] (Paris: Collection Politiques Locales, 2003).

<sup>247</sup> Amzallag and Taffin, *Le logement social*.

*d'Epargne* loans is guaranteed by the municipalities or the guarantee fund for the social rental sector: the *Caisse de Garantie du Logement Locatif Social* (CGLLS). Whereas the *Caisse des Dépôts* is responsible for the financial supervision of the social rental sector, the general performance of social rental landlords is evaluated by a central government organisation called MIILOS: *Mission d'Inspection Interministérielle du Logement*, which is related to both the Minister of Housing and the Minister of Finance. MIILOS can advise ministers to impose sanctions on social rental landlords that do not perform well, with the dismissal of the board of directors, and in extreme cases even the dissolution of the organisation as the ultimate penalty<sup>248</sup>.

The financial systems of the three countries completely differ from one another. It is impossible to determine which one is the most efficient. One can note that in the three cases, the State tries not to be too involved financially. The data concerning subsidisation has been dealt with in point 2.5.

#### **4.3. Evaluative criteria for the tenant**

##### **4.3.1. Access**

In Belgium, each region has its own regulations and conditions concerning the registration and allocation of social dwellings.<sup>249</sup> Each regional organization publishes on their website the requirements and procedures for a candidate-tenant (house hunter or prospective tenant) to get a social rental dwelling allocated. For example, in Flanders,<sup>250</sup> the housing association will offer to send the prospective tenant's registration to other housing associations active within the municipality and in neighbouring municipalities. Each social housing association works with an individual waiting list of prospective tenants once they have registered. Waiting lists must be updated every two years. There are six eligibility rules. The first three are that applicants must be over eighteen, own no dwelling at the time of registration and be registered in the 'population' register or as foreigners. The aim of this requirement is that permanent rental agreements should not be entered into with temporary citizens. A fourth criterion is about income limits. The two last criteria concern the willingness of the prospective tenant to learn Dutch, unless there are good reasons (such as a health condition) not to, and to become a naturalised citizen, where possible. Priority rules determine the allocation sequence on the basis of a number of criteria. The first one is whether the dwelling is of a suitable size for the household. If not, a payment needs to be made for the 'oversized' dwelling. A second criterion is whether the candidate satisfies the 'absolute priority' rules (such as having a handicap, being of age, or being in urgent need of (other) housing). Relevant as third criterion is the chronological order of registration. Furthermore the landlord may prioritise 'local' candidates who have been living in the area for at least three of the previous six years and/or candidates who do not already live in a social rental dwelling or who do not have a permanent rental agreement (renting from a Social Rental Agency or OCMW).

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<sup>248</sup> Bougrain, France.

<sup>249</sup> Flemish Region: Framework Social Rent; Brussels Region: 26 September 1996 Decision of the Brussels-Capital Region; Walloon Region: 6 September 2007 Decree of the Walloon Government.

<sup>250</sup> From: Haffner et al., *Bridging the gap*, 77 et seq.

In the Netherlands, regulations that govern the distribution of housing are drawn up in a local or a regional allocation act (*huisvestingsverordening*).<sup>251</sup> The vacant social rental dwellings are advertised in a housing bulletin and/or on Internet, complete with the requirements.<sup>252</sup> Interested candidates can then apply directly for the dwelling or dwellings they would like to get. The dwelling will be offered to the candidate who best fits the selection criteria such as waiting time or length of residence in the current dwelling. The candidate also has a choice not to accept the dwelling. Waiting time varies between dwelling types, neighbourhoods and municipalities, but can be up to ten years in a tight housing market like Amsterdam, the capital city of the Netherlands.

In France, the social rental sector, laid down by the French *Code de la Construction et de l'Habitation*, is characterised by a rather complex and sophisticated housing-allocation process involving several stages and various actors<sup>253</sup>. The social rental landlords have signed agreements with the various institutions that contribute to the financing of the social rental sector. These agreements give the financing parties a say in the allocation of part of the social rental dwelling stock<sup>254</sup>. Generally a quota system with this share is used<sup>255</sup>: central state (usually *le Préfet*) 30% (25% for the most disadvantaged people and 5% for civil servants)<sup>256</sup>, local municipality (*commune*) 20%. The various local collectors of the 1% *logement* fund (the CIL: *Comité Interprofessionel du Logement* and a number of other actors involved in social housing<sup>257</sup> are responsible for the allocation of the rest of the available stock of social rental dwellings<sup>258</sup>.

The actors entitled to a reservation will usually propose three candidates when a dwelling earmarked for them falls vacant or is completed. The dossiers of these candidates are then presented to the *commission d'attribution*. This committee, following the advice of the parties, decides to which household the free dwelling is allocated. There are multiple allocation criteria such as income ceilings<sup>259</sup>. The other requirements may differ between localities, but all allocation systems prioritise people with housing problems and/or social problems. The allocation process is rather complex and somewhat lacking in transparency. This may also explain why there are often complaints that discrimination has taken place<sup>260</sup>. There can also be a conflict between the rights of local stakeholders and the rights of the disadvantaged<sup>261</sup>. Extra support for the most disadvantaged households has to come from external sources and is generally in short supply. As a result, social rental landlords are sometimes reluctant to help the

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<sup>251</sup> Haffner et al., *Bridging the gap*, 221.

<sup>252</sup> Haffner et al., *Bridging the gap*, 222.

<sup>253</sup> Ball, J. *The insider/outsider thesis and its extension to social housing in France* (paper for the ENHR 2006 conference in Ljubljana, Slovenia, 2006)

<sup>254</sup> Observatoire de l'habitat de Paris, *L'accès au logement social à Paris en 2005* [Access to social housing in Paris 2005] (Paris : Observatoire de l'habitat de Paris, 2005).

<sup>255</sup> Social Housing in France <[www.cecodhas.org](http://www.cecodhas.org)>.

<sup>256</sup> However, the state can also delegate its allocation rights to local authorities. This is a very recent development (personal communication Schaefer).

<sup>257</sup> This may include social rental landlords, ministries, chambers of commerce, and public companies such as the Post Office and the national railways.

<sup>258</sup> Ball, *The insider/outsider thesis and its extension to social housing in France*.

<sup>259</sup> Bougrain, *France*.

<sup>260</sup> Kirchner, *Wohnungsversorgung für unterstützungsbedürftige Haushalte*, 207.

<sup>261</sup> J. Ball, Property, altruism and welfare: how national legal concept affect allocation of social housing to the disadvantaged, in: K. Scanlon, and C. Whitehead (eds.) *Social Housing in Europe II. A review of policies and outcomes*, (London: London School of Economics and Political Science, 2008), 64.

neediest<sup>262</sup>. In order to solve these problems, the current French government is developing plans to make the housing allocation process in the French social rental sector more simple, transparent and efficient<sup>263</sup>. Waiting times for a social rental dwelling can vary greatly, depending on the housing market situation in the region concerned. In areas with a particularly tight housing market, such as Paris, the waiting time can in fact be very long (up to 3 or 4 years).

### Conclusion

In Belgium and in France, access to the social rental market is difficult and there are waiting lists. The lack of social dwellings has lead to investment, which is not sufficient for responding to the demand. In the Netherlands, access to the regulated market is satisfactory but not the access to the social rental market as such. In Paris and Amsterdam even the neediest have to wait few years before obtaining a dwelling. The French system is particularly obscure. None of the systems can be considered as satisfactory.

#### 4.3.2. Affordability

In Belgium, if a tenancy contract is governed by social tenancy law, there is no freedom for the landlord to determine the rent. Each region has its own regulations.<sup>264</sup> The rent in social housing in the Flemish Region is based on household income. In the Brussels Region, the complex rent calculation is subject to several factors, such as the family income and the number of children.<sup>265</sup> In the Walloon Region, the rent is calculated in accordance with specific regulations.<sup>266</sup> All regions have also their own system for increasing or decreasing the rent.<sup>267</sup> For instance, the Flemish Region has chosen a system whereby the rent is revised every year. Such a revision is recalculated on the basis of the income in the new reference year (*nieuwe referentie jaar*) and the actual number of people who depend on the tenant. In addition, among other things, the index-based rent is also taken into account.<sup>268</sup>

In the Netherlands, the quality points system is used to determine whereas a dwelling falls in the regulated sector or not. For dwellings that score less than 142 points at the beginning of the contract the rent is regulated. Based on the number of points of a dwelling in the regulated sector, a maximum rent is determined. A regulated rent can only be increased annually on the 1<sup>st</sup> of July. The government based on a decision of the Parliament determines the percentage of increase every year. Central government

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<sup>262</sup> Ball, *European Housing Review 2008*, 173.

<sup>263</sup> La ministre du logement Cécile Duflot a lancé ce mercredi une concertation sur un nouveau système d'attribution des logements sociaux, La Tribune 16-1-2013 <[www.latribune.fr](http://www.latribune.fr)>.

<sup>264</sup> Flemish Region: Framework Social Rent. Brussels Region: the 26 September 1996 Decision of the Brussels-Capital Region; Walloon Region: 6 September 2007 Decree of the Walloon Government.

<sup>265</sup> 26 September 1996 Decision of the Brussels-Capital Region.

<sup>266</sup> Art. 7 § 1 of the standard social tenancy contract, which is attached as Appendix 5 to the 6 September 2007 Decree of the Walloon Government.

<sup>267</sup> Framework Social Rent. For Brussels Region the rent revision is laid down in the 26 September 1996 Decision of the Brussels-Capital Region.

<sup>268</sup> The rules for the calculation of social rent only apply to social tenants from a legally recognized Social Housing Association (SHM), not for social tenants of a municipality, CPA's, OMCW, Association of OMCW's, social housing or the Flemish Housing Fund.

can also set an average rent increase per landlord for social landlords for the total of its portfolio.

In France, for HLM the rent is determined based on a price per square meter (decided by the organisation) multiplied by the size. The size of the dwelling is calculated taking into account several elements such as the dilapidation of the dwelling<sup>269</sup>. The maximum rent that can be asked for varies according to the financial support schemes, which have been granted to the social landlords, as well as according to the size of the dwelling. Each subsidised loan has a maximum square meter price. These maximum square meter prices differ among regions. However, notwithstanding this regional variation, social housing rents still depend mainly on cost-related factors (mainly construction costs) and not on the housing market conditions. As a result, there is a large disparity in rent levels that are uncorrelated to applicable income ceilings, not to mention the quality of the building or the convenience of their location.<sup>270</sup> Consequently, in urban areas (where housing markets are generally tight), rents in the social rental sector tend to be significantly lower than those in the market rental sector, whereas these differences are usually much smaller in the more relaxed housing markets in small and medium-sized towns<sup>271</sup>. The state also makes recommendations with regard to annual rent increases in the French social rental sector, based on the rent revision index (*indice de révision des loyers*). However, social rental landlords are not obliged to follow these recommendations<sup>272</sup> and they may also decide to apply different rent increases.<sup>273</sup>

### Conclusion

In the three countries, a dwelling with a public task is more affordable than dwelling in the regular market. The calculation of the rent is never free in the social housing market and can be based on various criteria, such as income or the cost of construction. However, the real issue concerns the accessibility to this market and not its affordability. Concerning the deposit, the utilities and the repairs, the rules are the same as those of dwellings without a public task. The rent subsidies for tenants have been dealt with in point 2.5.

#### 4.3.3. Stability

In Belgium, security of tenure in the social rented sector is indefinite after a trial period of two years for new tenants. Another property right concerns the conditional right to buy. The right to buy allows tenants to buy their social rental dwelling provided that it is not an apartment; it is more than 15 years old and the tenant has rented it for at least five years. This right to buy appears to be a genuine right to buy, since the housing association does not need to give its explicit permission for the sale of the dwelling.

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<sup>269</sup> Art. L442-1 to L442-12 of the Building and Housing Code.

<sup>270</sup> Driant, *Social housing in France*, 127.

<sup>271</sup> Amzallag and Taffin, *Le logement social*.

<sup>272</sup> Nevertheless, the rent after rent increase may not exceed the maximum rent permitted in the financial agreements by means of which the social rental dwelling has been financed. These maximum rents are reviewed annually on the basis of the index of construction costs.

<sup>273</sup> Haffner et al., *Bridging the gap*, 118.

In the Netherlands, a tenancy agreement in the rental sector is usually for an indefinite period of time.<sup>274</sup> If the dwelling is sold the tenancy is not affected, but the tenant has no priority right to buy the dwelling. Social landlords sell part of their dwellings to their tenants within the framework of their financial model. Without these sales' revenues, social landlords may not be able to realize new social rental construction.<sup>275</sup>

In France, if the tenant lives in a social housing HLM (in French: "*Habitation à loyers modérés*"), he benefits from the right to stay indefinitely in the premises, except if he fails to comply with his duty<sup>276</sup>. The landlord can only terminate the contract for specific reasons. Non-paying tenants can be evicted, but this requires relatively long and complex procedures. However, the "Boutin" law of 2009 has slightly diminished the tenant security in the French social rental sector as households with incomes that are equal or higher than twice the income ceilings for social rental housing, are required to sign non-renewable three-year leases since they clearly do not belong to the target group for the social rental sector. Moreover, social rental landlords now have to offer more suitably-sized dwellings to households that live in dwellings that are considered too large for them. In a tight housing market, tenants who decline three housing units lose their occupancy rights after a six-month period. However, this rule does not apply to tenants that are 65 years old or that have disabilities<sup>277</sup>. There is no right to buy in the French social rental sector. However, social rental landlords may sell dwellings to former tenants as part of their real estate strategy. The sale of dwellings provides equity that can be used for new investment. Only social rental dwellings older than ten years can be sold. Moreover, the local authorities must approve the sale because they lose their allocation rights for the dwellings that are to be sold<sup>278</sup>. Occupied dwellings can only be sold to sitting tenants.

### *Conclusion*

The stability of the tenant seems to be better in the social sector than in the private one, as the contracts are open-ended ones even if there is a trial period in Belgium. In France, some changes were made to improve the accessibility of dwellings for people in need. Belgium created a genuine right for tenants to buy their dwellings under conditions whereas in France and in the Netherlands it is only an option for the social landlord to sell their dwellings to tenants.

#### *4.3.4. Flexibility*

In Belgium, the regulations of the conditions of termination vary from one region to another. For example, the tenant can at any time terminate the contract with three months notice (by registered letter) in the Walloon and the Brussels region.

In the Netherlands and in France, the applicable rules are the same as for the renting without public task.

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<sup>274</sup>

Rijksoverheid,

'Huurbescherming',

<<http://www.rijksoverheid.nl/onderwerpen/huurwoning/huurbescherming>>, 13 July 2013.

<sup>275</sup> Elsinga & Wassenberg, 'Social Housing in the Netherlands', 131.

<sup>276</sup> Driant, *Social housing in France*, 129.

<sup>277</sup> Driant, *Social housing in France*, 129.

<sup>278</sup> Hoekstra, *Country report France*.

In the three countries, the tenant has the liberty to quit the dwelling with a notice of up to three months. Contrary to what was seen in the private sector, no compensation has to be paid. The tenants of the social sector have more flexibility than those in the private sector. In the three countries, subletting a social dwelling is not allowed. This solution can be justified by the lack of dwellings in this market.

## 5. Conclusion

In all three countries, homeownership has been encouraged by policies. Around half of the households are owners of their dwellings. However, renting is not considered to be socially inferior.

Since WWII there is a tendency to reduce the implication of the central government and to transfer responsibilities and risks to local authorities (France and Belgium) or to social landlord themselves (the Netherlands). Considering the increase of the households and the stabilisation or decrease of the number of dwellings built every year, the three countries will face a housing shortage in the coming years and need to develop specific policies such as subsidisation schemes in order to face it.

The impact of the GFC has differed, being significant in Belgium and even more significant in the Netherlands but with few effects in France. However, in all countries the return on investment has decreased in the recent years.

The determination of rent and its increase are different in the three countries. The Netherlands created a very peculiar system based on an objective evaluation of the dwelling, using a calculation based on quality points in order to determine whether a dwelling falls under the scope of the regulated market or not.

In Belgium and in France, the rent is freely determined between the parties. This can lead to abuse, and in France, governments had to intervene in areas where the market is tight to create regulated rent in order to avoid unreasonable prices, for example in Paris.

In all three countries, the increase of the rent is regulated and most of the time an index, for example based on the construction cost, is used. The regulation allows for the prevention of abuses in rent costs but also makes it impossible for the landlord to pressure a tenant to leave for example.

Although subsidies exist in all countries, the systems are very complex and criteria may differ per region or place, especially in Belgium. Therefore, it is impossible to draw a comparison on that topic. The taxation systems are also hardly comparable, as they are very different. The specificity of France is that it uses incentives and disincentives to stimulate the construction sector and then to offer more dwelling to rent. One can also note that none of the countries has specific taxes for tenants.

In the three countries, there is a strong protection for the tenant. Regulations concerning the content of the contracts, the rights and duties of the parties prevent tenants from abuses from landlords. One example can be the repairs tenants are supposed to perform in the dwellings. It is either limited to small repairs or a list is determined by the law and contains repairs that can be considered as small. The tenant is also protected by the duration of the contract, even when there is fixed duration, the landlord might be obliged to renew the contract (France) or might have to follow very strict procedure to

avoid renewal (Belgium, France). In the Netherlands, contracts are open-ended ones and therefore there is no right to renewal. The rules concerning termination of the contract by the tenants also shows strong protection for the tenants as they benefit from significant flexibility in all these countries, the tenant has to give a maximum of three months notice.

Concerning the protection of the landlord, the three countries have rules allowing for a deposit and an according right to the landlord and an obligation for the tenant to maintain the dwelling. The eviction procedures in the case of non payment of rent by the tenant are complicated but generally try to find a balance between the rights of both parties. However, the impossibility for a landlord to terminate the contract in the Netherlands is not satisfactory. It might lead to abuses and to a reduction of the market; owners might become reluctant to rent their properties if they cannot terminate rent contracts. The French and Belgian systems seem in this case more balanced. In France, the contract can be terminated at each of its terms (every 6 or 3 years), but only for good reasons. In Belgium, the landlord has an option to conclude short term contracts if needed.

In the three countries, the social rental sector is developed but in all of them there is a shortage of dwellings available and in Paris and Amsterdam, people have to wait years before having the chance to be allocated a dwelling. Even if the systems need to be improved to offer more dwellings to the neediest, each country has a significant social rental sector.

In Belgium, the division of the competences among the regions creates a very complicated system with very relative unity. It is impossible to have a proper overview, especially since the latest stage in the regionalisation that came into force the 1<sup>st</sup>. July 2014.

Finally, it is worth highlighting that all the systems are changing quickly. During the time of this project, several new laws were adopted in France, Belgium and the Netherlands, which shows the implication for the respective governments in this field. Some regulations were adopted to overcome the GFC, which hardly impacts the market in the Netherlands. Others, like the Duflot act in France in 2014 were adopted to offer better protection to tenants in a context in which the market is more and more tight.

Even if all the countries try to encourage home ownership, the difficulties they face can be linked to the fact that they have a significant rental market and that finding a balance between the rights of both parties in a context of a tight market is not easy.



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

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### Intra-team Comparison Report for

### BULGARIA, HUNGARY, ROMANIA

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## ZERP Tenancy Law Project

### Intra-team Comparison on Bulgaria, Hungary, and Romania

#### **Introduction**

Despite some seemingly fundamental differences – the level of post-transition decentralization, the development level of the mortgage market, and even the origins of the legal system – the housing and tenancy outcomes in Bulgaria, Hungary and Romania are surprisingly similar. This cannot be explained with post-socialist path-dependent development alone, although it clearly plays an important role. During the socialist era, all three countries showed the main characteristics of the East-European Housing Model (EEHM), where the key goal of housing policy was to create the urban housing necessary to house newly arriving workers, attracted by intensive industrialization during the period. After 1989, among the challenges of the transitional recession and the overarching reforms, housing policy did not become a central issue in any of the three countries, and their drawbacks have not been addressed to date. Currently, all three can be characterized by a distorted tenure structure, an underdeveloped mortgage market compared to old EU member states, an overwhelming predominance of owner occupied housing, and residualized social and private rental sectors. Housing availability and affordability have been becoming increasingly problematic for growing shares of the populations, despite the continuously increasing vacant housing stock in all three countries due to negative demographic growth and massive outmigration. Although some small scale experimental programmes have been launched in all three to begin treating the housing problems of vulnerable groups, these remain modest and isolated.

The actual comparison of regulation in this chapter is rather brief, simply because the regulations themselves are brief or missing in these countries. If you look at tenancy related regulations in German speaking countries, the Benelux countries or Scandinavia, you will find detailed provisions to all aspects of tenancy, to the level of the treatment of the deposit (e.g. to be put on the tenant's name on a separate account). Tenancy related regulations in Bulgaria, Hungary and Romania are very brief, often revert back to the more general legal framework (Housing law, Contract law, even the Civil Code), and sometimes important provisions are simply missing. This analysis could only make up for this lack of regulatory information if we made a detailed comparison of the practice of residential renting. However, loose regulation and low income level (in an EU comparison) pushes most of residential renting into the shadow economy, where statistical data is usually missing, and even reliable expert assessment is difficult to make.

#### **1. The current housing situation**

## **1.1. General Features**

### **1.1.1. Historical evolution of the national housing situation and housing policy (1945 to date)**

A shared state socialist past between 1945 and 1989 makes the historic evolution as well as the current state of the housing systems of Bulgaria, Hungary and Romania relatively similar (at least in a wider European comparison). The housing regimes of the three South East European countries bore the characteristics of the East European Housing Model (EEHM): they were dominated by single-party political control over the housing sector, market mechanisms played a subordinate role, market competition was replaced by housing agencies (bureaucratic coordination), and housing services were under the control of the state (Hegedüs and Tosics, 1992; Clapham, 1995). Also, during the 1950s and 1960s the single ruling party in all three channelled all available financial and human resources into forced industrialisation, and thus reinforced the mass migration of rural population into the cities. Mass urban building was centrally financed to alleviate the post-war housing crisis (which was partly inherited from the interwar period), which was exacerbated by the intensive growth of urban population due to the intensive industrialisation process. In the informal sector, people built their own home (especially detached housing in suburban and rural areas), and informal sub-tenancy markets operated side-by-side with the state controlled housing sector (Hegedüs et al., 2014b).

All three housing systems were fundamentally centrally managed, dominated by state planning, distribution and finance, where a massive share of housing construction was financed by public sector banks. Central regulatory mechanisms (e.g. rent caps) were already present since World War I, but became vastly more restrictive after 1945, when the share of state owned housing grew steeply throughout Central and Eastern Europe (now part of the newly created 'Eastern bloc'). Hungary and Romania are very clear examples of this, where state owned affordable rentals took off in the 1950s, and reached around 50 percent of the urban housing stock by the late 1970s. (Hegedüs et al., 2014a; Bejan et al., 2014) In Bulgaria, a large share of the state funded construction resulted in nominally privately owned homes, although no free market operated, and the whole sector was under strict state control. Nearly a quarter of the urban housing stock of Bulgaria was in public ownership. (Elbers and Tsenkova, 2003) Moreover, a significant part of the housing stock – typically multi-unit buildings – was nationalised in all three countries, starting in 1945 in Romania, in 1948 in Bulgaria, and in 1952 in Hungary.

To provide a lot of new housing quickly and at a reduced cost, the construction of pre-fabricated housing was widespread throughout the region, and a varying ratio – between 20 and 40 percent – of the new buildings were constructed by state companies. However, the resulting dwellings did not exclusively become state owned: many of them were sold at centrally defined prices, and through centrally managed channel, to private owner occupiers. Around 20 percent of the apartments in Hungary, and 30 percent in both Bulgaria and Romania, are in system-built ("panel" or pre-fabricated) housing blocks, which were created as a response to the pressing housing shortage in the post-

war period. However, the creation of publicly owned housing did not start with public sector constructions.

Resources and manpower available for agricultural production was toned down heavily in most communist countries (not entirely unlike the way it lost its significance in the national production in Western countries), and industrial production swiftly gained prominence, partly triggered by forced industrialisation programmes in the earlier decades of communist rule, which lead to a massive migration from rural and agricultural areas to the new industrial hubs in towns and cities. Despite the lack of official statistics in this regard, an informal private market functioned in all three countries to satisfy the high demand for urban housing, which could not be sufficiently fulfilled through official (state managed) allocation. On the one hand, a housing shortage was prevalent in all three countries throughout most of the communist era; and on the other, regulations typically did not permit the ownership of a second home, unless it is a holiday home and solely for leisure purposes. Owning and renting out a second home was therefore highly unlikely. Nonetheless, letting or sub-letting a part of one's apartment was fairly widespread. Authorities seem to have ignored this activity, despite the financial advantages stemming from private ownership, which clashed with the official state ideology. Socialist housing provision had its merits, but could not satisfy all needs, especially for a flexible rental market. Repressing the informal sublet market could have triggered social tensions the state would not have been able to solve, which is a likely explanation of why state authorities chose to look the other way. Very importantly, the tradition of an unregulated private rental market could be an explanatory factor of the current functioning of rental markets in Bulgaria, Hungary and Romania in the post-transition period: to this day, residential renting is loosely regulated in all three, which may partially be the outcome of a path dependent development route.

The post-1990 development of the three housing (and rental) markets was similar in some aspects and divergent in others. In all three, transition to multi-party democracy and market economy also meant a gradual contraction of economic redistribution and the slow replacement of the strong socialist safety net with much more moderate market correction mechanisms. It also brought about a (nearly full) withdrawal of the state from housing policy. With regard to housing policy, the collapse of the communist regime kick-started a number of processes in all three countries, particularly:

1. The **decentralisation** of housing policy and provision. Previously, a large segment of housing provision was through state owned rental housing with a public task. This responsibility was delegated to local authorities; but very importantly local authorities were not allocated sufficient funding to maintain a large rental stock fit for public task (social rental housing provision).
2. Massive **housing privatisation**, as part of an overarching market creation strategy, but also due to the decentralisation of social housing provision (delegated from the central states to local municipalities) without allocating adequate funding. The sale of previously state owned dwellings began in the 1980s, but became massive in the 1990s; sitting tenants could buy their dwellings at a heavily discounted price.

3. The gradual **deregulation of housing markets**, together with the **dissolution of limitations to property ownership**, allowed the free exchange of privately owned units at market prices, starting from the second half of the 1980s. Also, there was no restriction on the resale of newly (and cheaply) privatised apartments at a market price, so this was a very attractive option for tenants.
4. **Privatisation of the finance (banking) and construction sectors.** Before the transition, funding for construction was provided by a single, state owned commercial bank in all three countries, and large scale constructions were exclusively realized by state construction companies. They were replaced by private banking systems and construction companies in the 1990s, although at a slightly different pace in the different countries.
5. Huge **cuts in housing spending** from the state budget, which meant not only the end of state funded mass construction, but also largely leaving housing issues to the private market. Housing construction was taken over by private persons; with private companies (developers) gaining prominence later on.

These resulted in a very liberal regulatory environment in housing in these three countries compared to Western European housing systems – but also to other Central and East European transition countries.

**Table 1. Change of tenure structure (in percentage) of full housing stock, 1990, 2001**

	Year	Public rental	Private rental	Owner occupied	Other
Bulgaria	1993	9.3	0.4	89.9	0.4
	2000	8.7	1.9	88.9	0.5
Hungary	1990	23	3	74	-
	2001	4	4	91	1
Romania	1990	32.7	-	67.3	-
	2001	2.7	1.1	96.2	-

*Source: for Bulgaria, see Elbers and Tsenkova, 2003; for Hungary and Romania, see Hegedüs, 2013.*

Another similarity among the three is the lack of a consistent housing strategy. Social and income inequalities have been growing steadily after the transition (see Table 2). Housing affordability and the access to housing have become a substantial challenge to vulnerable groups, and the lack of a flexible and reliable rental sector hinders labour mobility to a large extent. A key goal of all three countries was EU accession, which set a number of ambitious goals for them. Nonetheless, housing was never a central issue of accession talks, and thus policy efforts were mostly concentrated on other issues, particularly on economic restructuring and the introduction of a functioning democracy and rule of law.

**Table 2. Gini coefficient of Income per capita**

Country	1987-1990	1996-1998	2007-2008
Bulgaria	0.23	0.41	0.45
Czech Republic	0.19	0.25	0.26
Estonia	0.23	0.37	0.36

Hungary	0.21	0.25	0.31
Latvia	0.24	0.32	0.36
Lithuania	0.23	0.34	0.38
Poland	0.28	0.33	0.34
Romania	0.23	0.3	0.31
Slovakia	0.22	0.3	0.26
Slovenia	0.22	0.3	0.31

*Source: Mitra, 2001 p.9.; Wikipedia (Gini coefficients by country)*

Nonetheless, despite all part of the EEHM, the three countries began their transition from different starting points, and there were significant differences in their post-transition development path.

In **Bulgaria**, private ownership was nominally accepted and widespread throughout the socialist period, although the housing market was under strong state control, which severely limited actors in practicing their property rights (Lowe, 2003). The transition to market economy was slower and more painful than in most other new EU member states. Outmigration from Bulgaria is by far the most significant of the three countries compared, and it began at the time of the regime change, due to the extremely heavy burden of economic readjustment, and the massive unemployment of the 1990s. The share of state owned housing was smaller than in the other two countries, and so the role of privatisation and/or restitution was also somewhat more limited; however, what public task housing Bulgaria had was sold primarily to sitting tenants, leaving less than three percent of the housing stock for public (social) rental purposes. The process of privatisation and restitution was gradual: a law on privatisation and on compensation for nationalised property was not passed until 1997.

Foreign investment played an important role in the housing development of all three countries, but its impact was particularly strong in Bulgaria. Investors buying real estate, particularly in ski and sea resorts, drove prices up steeply, which contributed to a housing price bubble by the late 1990s, which made housing very hard to afford for a large part of the local population.

Finally, a specific law was passed in 1992 to compensate members of the Turkish minority, aimed at the hundreds of thousands of Bulgarian citizens of the country's Turkish ethnic minority, who were expelled from the country between 1984 and 1989.

In **Hungary**, about one quarter of the population (and half of the urban population) lived in state owned affordable rental housing in the mid-1980s, which dropped to around three percent by the early 2000s (8 percent in Budapest). Privatisation began as early as the 1980s, although only at a slower rate; but after the regime change it was boosted by very heavily discounted prices for sitting tenants (at around 15 percent of the dwellings' market price), and as there were no limitation to resell the apartment on a market price right after the acquisition, there was a strong incentive for every sitting tenant to buy as long as they could afford the discounted price.

Although the transitional recession represented a shock in Hungary as well as the other two countries, its impact was less dramatic, and well into the 2000s Hungary's economic development was considered exemplary among transition countries. Private banking

and the mortgage market developed faster than in the other two countries, and foreign exchange currency (FX) mortgage loans became widespread from 2004. However, this also meant that the Great Financial Crisis (GFC) hit the economy very hard after 2008, resulting in the massive indebtedness of private homeowners with an outstanding mortgage.

A conservative administration (lead by the Fidesz party) had been in place since 2010, which responded to the crisis with a series of ‘unorthodox’ economic policies.

**Table 3. Housing Loan to GDP ratio (%)**

	2002	2004	2006	2008
Bulgaria	0.7	2.6	7.0	12.2
Hungary	4.8	10.4	15.0	23.2
Romania	1.0	1.4	1.8	3.7

*Source: European Mortgage Federation; European Banking Statistics; Hungarian National Bank*

Romania’s economic and political post-transitional instability lasted throughout the 1990s. However, market economy was largely consolidated by 2000, and was characterised by relative macroeconomic stability, high growth, low unemployment and increasing foreign investment between 2000 and 2008, with an average annual GDP growth of 6.9 percent. Post-GFC disturbances were treated with prudent macroeconomic management (partly as a condition to an IMF loan), and led to a gradual recovery.

Privatisation of state owned housing was quite overwhelming: by the early 2000s, Romania had Europe’s highest home ownership rate at around 97 percent; and the privatisation of public housing was still underway in 2014. The development of the housing finance environment is more similar to that of Bulgaria: the mortgage market is quite limited, and no FX loans were introduced.

The restitution of real property nationalised in 1945 is a pressing issue in Romania. With the Laws 112/1995 and 10/2001, the state returned the property in kind or in equivalent if the former owner required. However, Emergency Ordinance no. 40/1999 provides that owners of property privatised after 1 January 1990 must conclude a new rental contract with the current tenants if they require so, followed by similar protection measures that are still in force. In March 2014 the European Court of Human Rights ruled that Romania must return privatised property to their owners, or compensate; this process is set to begin in 2017 the latest.

The region as a whole has seen a significant population drop in the past few decades, with Hungary losing about five percent of its population, Romania losing about ten percent, and Bulgaria losing one-fifth since 1990. In real terms this means a drop from 10.4 to 9.9 million in Hungary, 23 million to 21 million in Romania, and 8.9 to 7.3 million in Bulgaria between 1989 to 2012. This was triggered by a low birth rate and a high death rate as well as a massive outmigration, mostly motivated by more attractive work opportunities in other EU Member States.

Although international outmigration is massive, internal labour migration is low within all three countries, which is to a large extent due to the lack of reliable and available rental housing. Although the level of unemployment varies greatly among the various regions

within each country, the flow from low economic activity areas toward the more dynamic ones is modest, even when the latter face a clear lack of workforce.

Finally, war migration has some current significance in Bulgaria since the start of the Syrian conflict. The number of migrants during the Yugoslav wars was insignificant in all three. Lately, the Syrian war triggered a massive wave of immigrants who enter the EU through Bulgaria, and roughly one third of them is not given full refugee status, which means they have to stay inside the country. Their entering into the rental market is a source of conflict to some extent, although so far the greatest problem is the lack of sufficient space on asylums, the physical condition of asylums, and of course the lack of satisfactory job opportunities for migrants. (Jakovljevic, 2014)

### **1.1.2. Current situation**

According to Eurostat SILC data, 86.6 percent of inhabited dwellings in EU-12 (new Member States, excluding Croatia) is owner occupied, as opposed to the 70.6 percent average owner occupation rate of EU-28, or the 66.5 percent average of old EU Member States. The three countries examined here fit into this trend of ‘super home owner’ states, ranging from a 87.4 percent share of home owners in Bulgaria to 96.6 percent in Romania (Eurostat-SILC: *“Distribution of population by tenure status, type of household and income group”*, ilc\_lvho02).

However, anecdotal evidence suggests that the statistics hide an unreported and poorly regulated private rental sector in all three, where owners hide their rental income from tax authorities, and if tenants are aware, they cooperate in return for a lower rent level.

The number of public task tenancies and private rental units is quite low in an EU-wide comparison. Informal solutions have an important role in all three examined countries, which is not limited to black market renting, but also includes various forms of cohabitation, interfamily transfers, as well as reduced price or free rentals within personal networks.

**Bulgaria’s** population of 7.36 million people is housed in 2.66 million dwellings. The National Statistical Institute noted 3.88 million housing units in the country, only 68.8 percent of which is inhabited. The astonishing number of vacant units is probably explained partly by the large number of holiday homes in ski and sea resorts, also considered as dwellings fit for permanent living by the NSI. Main urban centres include the capital Sofia (1.24 million inhabitants), followed by Plovdiv (431,000); Varna (334,000), and Burgas (200,000).

87.4 percent of all inhabited dwellings are owner occupied according to Eurostat SILC data and NSI Census data of 2011. Aside methodological differences, respondents may have made larger efforts to hide private rentals from national surveyors for tax avoidance. The full applicability of statistical categories used in the Western part of Europe is also questionable here, as “owner occupied” housing units as understood by NSI includes both outright owner occupier households, but also homes where tenants live in the same dwelling as their landlords (6.1 percent of all households). Nonetheless, official statistics may not cover most low quality self-built housing in extremely poor

areas (in ghettos or outside settlements), the size of which is unknown but is significant; and all of this kind of housing is owner occupied.

**Hungary**'s population of 9.9 million people live in 3.9 inhabited dwellings, out of the country's 4.4 million housing units, indicating a 12 percent vacancy, which is somewhat lower but still prominent in urban areas. The largest urban centre is Budapest, with around 1.7 million residents, followed by a series of smaller centres of 100,000-200,000 each.

SILC data shows 89-90 percent owner occupation rate, as opposed to 92 percent measured on the national Census of 2011. SILC data shows that 2.8 percent rent at a market price, while 6.7 percent rent at a reduced price or free. This latter includes both social rentals (at around three percent of the housing stock) as well as rent-free tenancies, arranged within family or in households' informal networks. The Central Statistical Office differentiates rental tenures by the type of landlords rather than rent setting mechanism, and measure social rentals (three percent of the housing stock) and private rentals (4 percent). While the number of social rentals is a clear cut case (the landlords are typically local municipalities, who have no reason to lie to surveyors), the share of private rentals is probably significantly higher, at around 8 percent of the full stock according to expert estimates.

**Romania** is the largest country of South East Europe, with a population of 20.3 million. Its largest urban centre is Bucharest (1.8 million inhabitants), followed by local urban hubs of 200,000-300,000 people. The country's 7.4 million households live in 8 million housing units, of which 1.43 million (16.4 percent) is vacant.

96.6 percent of inhabited dwellings are owner occupied, 0.8 percent are let at a market price, and 2.6 percent are let at a reduced price according to SILC data (2012). National Census data shows an even stronger predominance of owner occupation, presumably for the same reasons as in the other two countries (chiefly underreporting private rentals for tax avoidance). Experts believe that private renting is vastly underestimated, and its share may be as high as 11-15 percent in urban areas.

The number of affordable rentals, provided by public authorities to persons in need according to pre-determined social criteria, is clearly unsatisfactory in these three countries. Although social rental tends to be very affordable, its quality is often barely satisfactory, and the supply is so limited that it only serves a fraction of the legally eligible applicants. This reinforces the threefold structure of the private rental sector (PRS). In all three countries there appears to be a small high-end private rental market (it does not exceed one percent of the private rental market in any of the three countries), which primarily serves well-off citizens and expatriated professionals in the large urban centres. These typically function fully legally, and provide enough profit to landlords so that they will not need to resort to tax avoidance. This is also the area where professional landlord-investors are the most prevalent.

The majority of private renting falls in a middle range, where typically accidental landlords (who either inherited a second home, or bought one for small scale investment purposes) rent out to low to medium income persons. This level is more affordable to the average citizen; also, hiding rental income from tax authorities is much more prevalent in this category. The very basic regulation of private renting may lead to complications

when conflicts arise (e.g. small repairs, delays in payment etc.), supposing there is a written contract (the written form is not necessarily a condition for the contract's validity).

A smaller number of private rentals are at the lower end of the market, accommodating low income persons who could not procure a social rental dwelling, most often due to the unsatisfactory supply of social rentals. In Hungary, for instance, a large number of people defaulted on their mortgage loan payments after the Great Financial Crisis (GFC), but were not eligible for social rentals based on their social situation, since they owned a real estate property within the past 5 years.

The first category – the high end rental market – is largely satisfactory with regards to the number and quality of available rental dwellings, and renters here enjoy a high level of tenure security. However, this is the smallest segment of PRS in the region. Tenure security and quality and equipment of dwellings is very uneven in the middle range, and tends to be poor in the cheapest rentals. Although the three countries are at the low end of EU Member States in terms of per capita income (even if considered by purchasing power parity), this is not just a result of their economic realities, but also a number of shortcomings in the regulatory environment.

**Table 4. Housing quality and cost indicators**

	No of dwellings per 1000 inhabitants	m <sup>2</sup> per person	Dwellings with a bath or shower (%)	Housing cost level (EU27=100)	GDP in PPS (EU27=100)
Bulgaria	450	25.2	<i>no data</i>	32.4	43.0
Czech Republic	427	28.7	95.5	58.0	78.0
Estonia	454	29.7	67.1	74.7	63.0
Hungary	399	31.2	91.3	46.5	63.0
Latvia	398	27.0	60.3	62.9	61.0
Lithuania	375	24.9	71.1	45.3	53.0
Poland	307	24.2	86.9	47.6	49.0
Romania	352	15.0	58.9	55.1	42.0
Slovak Republic	310	26.0	92.8	52.4	72.0
Slovenia	358	30.9	92.3	69.3	87.0

*Source: EU Housing Statistics 2010*

### 1.1.3. Types of housing tenures

Based on statistical data (both Eurostat SILC and national Censuses), **home ownership** is vastly predominant in Bulgaria, Hungary and Romania, accounting for 90 percent or more of the housing stock. Nonetheless, qualitative studies and anecdotal evidence in all three suggests that owner occupation is not as prevalent as Census respondents claim. The extent of informal economy is relatively high in these countries, accounting for an estimated 31.2 percent of the GDP in Bulgaria, 28.4 percent in Romania, and 22.1 in Hungary; as opposed to the EU28 average of 18.5 percent in 2013 (Schneider, 2013). Informal economic activity plays a particularly emphatic role in private renting, hiding *the larger part* of PRS according to housing experts. Social

housing and rental housing with a public task is free of tax avoidance (as it is tax exempt, except for the local communal taxes), and hence is fully represented in official statistics; accordingly, we have reliable statistics in this regard. One sign of this is the correspondence between national and Eurostat data, which is not the case for private rentals.

The share of **intermediate tenures** has no real significance in these countries. What may be considered the closest to ‘mixed tenure’ is rent free tenancy, which is more of a mix between social and market rental (the landlord is a private owner, but the profit motive is less salient). A mixed tenure forms between ownership and rental are insignificant.<sup>1</sup> In Romania, however, we may consider tenants living in restituted property, who enjoy a great deal of tenant protection under various Government Ordinances (esp. G.O. 40/1999 and its extensions), although here too the trend is towards eventually granting owners their full property rights.

**Condominiums** in these three countries usually refer to a form of management of multi-family buildings. Condominium laws were partly introduced to arrange the status of multi-unit buildings where the common parts remained unregulated after the wave of privatisation. Nonetheless, these laws regulate the behaviour of a community of *owners*, and if an apartment is rented out, the person or entity in charge of cooperating with the condominium is the owner, whether it is a private person or a public body.

Where **housing cooperatives** are active, they chiefly act as management and maintenance organisations of multi-unit buildings. Nonetheless, the dominant tenure form in these buildings is still owner occupation, and the owners are expected to take responsibility for rented apartments.

Mixed tenure forms between ownership and renting barely exist in any of the three countries.

In all three, national statistical offices register rental tenure data by the type of owner, where municipally owned rental dwellings are considered “**social rental**” (**rental with a public task**) and rental units owned by private landlords are considered “**private rental**” (**without a public task**). Eurostat SILC surveys, on the other hand, register rentals by the rent price, and differentiate between “market price” and “reduced price or free” (see Table 5). Although these categories correlate to some extent, they do not correspond entirely.

**Table 5. Share of owner occupied and rental housing (%), 2012**

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<sup>1</sup> Unless we consider ownership with an outstanding mortgage; but it does not have a different legal status in any of the three countries, as long as the owners pay instalments on time.

	Owner occupied	Rental (market price)	Rental (reduced price or free)
Bulgaria	87.4	1.3	11.3
Hungary	90.5	2.8	6.7
Romania	96.6	0.8	2.6
EU-12 (new Member States)	86.8	4.3	8.9
EU-15 (old Member States)	66.5	22.0	11.5

Source: Eurostat SILC [Distribution of population by tenure status...](#) (ilc\_lvho02)

The legally defining feature of **rental dwellings without a public task** is the owner, who is either a private person or a private legal entity. The typical owner is an “**accidental landlord**; someone who manages and lets a second (sometimes a third) home, but this is not their primary source of income.

Given the large share of below market price landlords in **Bulgaria** (their number multiple times higher than that of market renters), we cannot even necessarily state that the private rental sector is driven by a clear profit motive. The large share of landlord-tenant cohabitations is also quite striking in the Bulgarian rental market, originating from the severe post-transition economic crisis, when masses of people needed to find an income source – often their own home. Furthermore, a survey conducted in the 1990s suggested that over half of the available rental accommodations in an attractive area (downtown Sofia) were rented out by businesses for office space, rather than individuals with a residential purpose. (Lowe, 2003)

Presumably even a large number of private individual landlords in **Romania** and **Hungary** may consider their second home to be an asset, e.g. for the future use of family members, and rent it out primarily as a part of its long term maintenance strategy. The achievable rental revenue would lead to a very long cost recovery, so unless the second home is inherited, the goal of investment is usually the dwelling itself, rather than the rental income.

In all three countries, the vast majority of **rentals with a public task** are owned by local municipalities, and a smaller part is owned by the state, or by other public bodies. This stock was created in the early 1990s, when the responsibility for previously state owned social rentals was transferred into the competency of local municipalities. This was directly followed by a mass privatisation, most prominently to sitting tenants, triggered on the one hand by municipalities’ ambition to balance their finances, and on the other by a widely accepted ideology attributing a greater efficiency to a privately owned housing stock (which did not entirely worked out as expected – see later).

The share of public task rentals (owned by the state, the municipalities, or other public bodies) in the housing stock is around three percent in Hungary, 2.6 percent in Bulgaria, and 1.5 percent in Romania, according to the respective national Censuses (2011). Most of them are **social rentals** in Bulgaria and Romania, although a small part of the stock provides home to municipal staff. And while most public task rentals are social rentals in Hungary, a part of the stock here is leased out at differentiated price ranges in a threefold system: to improve the sector’s financial sustainability, municipalities rent out some of their stock at a cost-recovery price (lower than market rent, but significantly

higher than the social rent level), and they also let high quality apartments at a market price, to counterbalance the losses generated by social housing provision.

All public task rentals provide better tenure security than open market renting, typically a 5 year contract, in some cases an open-ended one; and most of them are significantly more affordable. Accordingly, beneficiaries are incentivised to stay in the sector as long as they can. The adverse effect of the outstanding tenure security in the social rental sector compared to open market renting is the accumulating arrears typical in all three countries, making the sector as a whole financially unsustainable. This hinders any further expansion or development, resulting in the poor maintenance and the gradual dilapidation of the stock – and therefore to a growing number of vacant municipal flats in a dangerous condition, but with no resources to renovate.

The share of free or reduced price rentals, as measured by Eurostat (SILC), is significantly higher than the share of municipally owned rentals in all three countries: 11.3 percent in Bulgaria,<sup>2</sup> 6.7 percent in Hungary, and 2.6 percent in Romania. The explanation of this is that a significant part of privately owned rentals are let out within the friend or family network, so that landlords have someone reliable to manage the apartment and prevent its amortisation, and pay either a reduced fee, or at least the utility costs that would still burden the owner if the unit was left vacant. They may lose the market rent, but since renting on the open market does come with a fairly high risk of non-payment or even the accumulation of arrears due to vague regulations and the non-enforceability of contracts, letting for a below-market price or free may still be an attractive option for many second home owners.

The **quality of rental housing** is very uneven in the three countries rental sectors. High end privately owned rentals and medium price private or municipal rentals tend to be well equipped, and range from high to at least acceptable quality. However, there is no regulatory control over the quality of rental units; they merely have to correspond with the modest minimum criteria for habitable housing. The very liberal regulation on housing issues means, among other things, that rental contracts essentially need to cover two issues to be considered valid: (1) a clear indication of the object of the contract (it has to state exactly which parts of which dwelling are to be rented); and (2) a clear agreement on the rent level. Also, not all contracts are concluded in a written form. Concluding the tenancy contract in writing has been a requirement for its validity in Hungary since 2006, but in practice some contracts (e.g. the ones that date before 2006) are still valid after an oral agreement. To date, written form of tenancy contracts is not a validity requirement in Bulgaria and Romania. Therefore the quality of the rented dwelling, particularly in private renting, is mostly only in line with the landlord's financial possibilities. Accordingly, even rentals at an average price could have some serious flaws, and cheaper units (both market and social rentals) could have some significant weaknesses, among which leakages, poor thermal insulation, and other imperfections in machinery and equipment that make utility costs higher and the dwelling all the less affordable. Both social and lower end market rental apartments are usually inhabited by the lowest income groups, for whom utility costs mean a serious financial problem, but in

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<sup>2</sup> Bulgaria's particularly high share includes landlord-tenant co-habitations and other various forms of rent free of lower-than-market-rate uses uses.

many cases the landlords do not have the means to improve the dwelling either. This is another point where the sector of low cost rentals (both public and private) seems to be trapped in a vicious circle of limited finances and growing arrears.

The share of professional landlords is very low in the whole region, which could be an indication of the unsatisfactory functioning of the rental sector: due to both uncertain regulation and unenforceable contracts, but also to the limited solvency of possible renters and high risks associated with non-payment and arrears, investors cannot expect a solid and reliable profit in renting, and therefore stay away from the rental sector. Surprisingly, it was the recent financial crisis which gave a small boost to professional landlordism: developers who could not sell their residential real estate in the post-2008 downturn started renting out individual units, to recover some of their losses. However, chances are they will only continue this activity until the market takes up again, to the level they can eventually sell their property.

#### **1.1.4. Other general aspects of the current housing situation: lobby groups, vacant housing, and the role of the informal economy**

Professional landlordism is largely absent in all three countries. Lobby groups or umbrella groups play a very limited role on the national rental markets, if they exist at all; and it is unclear if they have any discernible influence on housing and tenancy regulations. While homeowners' associations or condominium management associations are active in Bulgaria, Hungary and Romania, small scale ("accidental") landlordism and the low share of (reported) tenants do not result in an attractive environment for rental advocacy groups. Widespread tax avoidance also deters landlords from joining professional organisations.

Although there is a National Real Estate Association in Bulgaria since 1992, it gathers real estate agents rather than landlords or tenants; and despite its long history, it consists of only a fraction of Bulgarian estate agents. Hungary's National Association of Tenants was founded as early as 1989, and initially played an important role in tenant advocacy, but lost its significance in the massive privatisation wave of the 1990s. Currently the association is quite passive due to a lack of resources.

The share of vacant dwellings is above ten percent in all three countries, and there are no significant countermeasures in place in either of them. While massive industrialisation pushed people in industrial centres before 1990, leading to higher vacancy in rural areas, many of the former employers were shut down in the transition process, and the share of vacant dwellings rose in larger towns as well. This is exacerbated by the population drop that has been continuous and consistent since the late 1980s, although – paradoxically – it also alleviates the social burden of the high vacancy rate. Although the percentage of uninhabited homes is significantly higher in rural areas, their share is around ten percent in urban contexts as well. It is doubtful whether measures to sanction vacancy could be successful. Many of the vacant properties are in economically underperforming areas, and there is a risk that countermeasures would hurt an already quite vulnerable group of owners, without spurring much activity on the housing market.

There is no single methodology for measuring the size of the informal economy within a country's GDP. Nonetheless, estimations exist: the extent of the informal economy as a percentage of GDP was estimated to be around 25-33 percent in new EU member states between 1990 and 1999, and as much as 20 percent in 2007 (Hegedüs et al., 2014b). Analysts largely agree that black market activities permeate the rental sector to a great extent, meaning not only widespread tax avoidance in private renting, but also informal subletting in the public rental sector. Tax evasion has been a strategy for many households and economic actors to manage the hardships of the transitional recession, and as it absorbed some of the social tensions associated with the transition process, it was (in some cases, still is) often overlooked by the authorities. Black market activities in the housing market (such as fraudulently selling a home with a fake ID) are salient, but statistically not so significant. Tax evasion, on the other hand, is everywhere in the rental market: in all three markets, unreported rentals massively outnumber fully legal and properly taxed transactions. Also, rental contracts do not always have a written form; even where it is required by law, in practice contracts are sometimes concluded through implied action, which also facilitates tax avoidance, and makes keeping track of the sector all the more complicated.

## **1.2 Economic factors in comparison**

### **1.2.1. Comparative view of the housing market**

The maintenance of a large affordable housing sector, including a state owned housing stock isolated from market mechanisms, was part of all three housing systems under socialist rule, and weighed a heavy financial burden on these countries. The transition process led to a series of decentralisation, privatisation and restitution efforts, where the state withdrew from all sectors, and focused on boosting private sector development. One step in decentralisation was the delegation of social housing provision to local authorities; and since local authorities managed limited resources, privatising housing units was a logical step to improve their budgets (but also to boost private ownership). In practice this usually meant the sale of housing units to sitting tenants at a heavily discounted price.

As a result, housing markets in Bulgaria, Hungary and Romania predominantly function by free market rules; in all three only small sub-markets are exempt. In principle, every aspect of both the sale and lease of residential housing depends on the free agreement of the contracting parties, as long as it does not violate other legal provisions (e.g. the contract law). Furthermore, tax authorities have been very permissive towards tax evasion in private residential renting – as stated above, to facilitate households' struggle through the transitional recession – and efforts to fight tax avoidance in the PRS began only recently. In our estimation, private rental markets are regulated in a manner so liberal it could be considered “underregulated”: the regulatory environment is so lax it does not provide stable conditions for PRS, which makes the sector as a whole unpredictable to the parties, and hurts its development (despite the original goal of boosting private property and the free market).

*Housing with a public task* is a notable exception. In all three countries, social rental housing is primarily provided by the local municipalities, while the state and other public bodies could also own and manage a housing stock. The precise regulation of the management of such housing depends on the owner, and in some cases, they may have the right to rent out some of their dwellings at a market or near-market price (to improve their financial management); but for most of this stock, the selection criteria of tenants are laid out in their respective decree. In any case, the share of public rental housing does not reach four percent of the full housing stock in each of these countries.

*Restituted housing in Romania* is also an exception. Restitution laws were accepted starting from 1995 (Act 112/1192, and later Act 10/2001), returning ownership to the former owners; the current owners in restituted property became tenants by the virtue of these laws. However, a law was also passed to protect these new tenants: they had the right to automatically renew their contract for five years, followed by newer and newer such prolongations. A final restitution law was eventually passed in April 2013, ruling that the rightful owners of formerly nationalised property have to be compensated in points (with a nominal value of RON 1 each) if they cannot be compensated in kind. The compensation process – concerning 200,000 claims – is expected to be concluded by 2024;<sup>3</sup> and until this date, part of the housing stock will remain exempt from free market mechanisms.<sup>4</sup>

In quantitative terms, the supply on the housing market is satisfactory. With the rise of industrialisation and urbanisation, intensive residential building became inevitable to house new urban populations in all three countries. Housing construction continued after 1990, although inevitably slowed down in the post-transition recession; but the first half of the 2000s brought about a renewed impetus in new construction, ending with the GCF. As the population has been dropping in all three countries, there is no demographic pressure on either of the housing markets. However, the liberalised market did not lead to a balanced demand and supply in housing: the share of vacant housing is above ten percent in all three countries, and overcrowding is high in a European comparison: according to Eurostat SILC data for 2012, the rate of overcrowding was 44.5 percent in Bulgaria, 47.2 percent in Hungary, and 51.6 percent in Romania (the highest in the EU).<sup>5</sup>

This can at least partially explained by the fact that housing in the economically best performing areas is often unaffordable for lower income households; however, due to economic restructuring and the disappearance of jobs in many former industrial bases, people are forced to migrate to these areas in order to find employment. If a household remains in a slow labour market area, it might find itself trapped, as its property loses its market value, while household members' chance at holding down a stable job decreases.

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<sup>3</sup> <http://www.neurope.eu/article/romania-passes-property-restitution-bill> Romania passes property restitution bill, 17 April 2013.

<sup>4</sup> Restitution and the various compensation processes had their fair share of controversies in Bulgaria and Hungary as well, but were much less subversive, and the processes were largely concluded by the end of the 1990s.

<sup>5</sup> [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc\\_lvho05a&lang=en](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc_lvho05a&lang=en) Overcrowding rate by age, sex and poverty status – Total population [ilc\_lvho05a].

Working markets are typically the urban hubs, most importantly the capitals; while many rural areas seem to be in an irreversible process of shrinking. In Bulgaria, property prices are stable or rising in ski and sea resorts (e.g. Varna, Burgas on the Black sea coast) and in the cities (Sofia, Plovdiv), and become hardly affordable to many locals. In Hungary, real estate market in the Central and Western regions (with an intensive commercial contact in old EU members) is picking up after the recession, while property depreciation continues in the rest of the country, and real estate in remote rural areas is virtually unmarketable. In Romania, property prices are stable in Bucharest, in the larger towns (of more than 300,000 inhabitants), and particularly in Black sea resorts, while rural areas are on the decline.

### **1.2.2. Comparative view on price and affordability**

While there are statistics on **household income levels** in Bulgaria, Hungary, and Romania (both by the national statistical institutes and by Eurostat), there are no precise statistics about **private sector rent levels** in either of these countries, partly due to the informal nature of private renting. Accordingly, the typical cost of rents is an estimation based on informal sources (e.g. the authors' practical experience, internet forums), stakeholder interviews, and anecdotal information. Moreover, considering average household incomes as a basis of rent-to-income ratio will result in a very generic picture that may not give very accurate information on the typical renter household, given the widening income differences in all three countries, but also the gaps among various categories of renters (high-end versus low income).

Average "mid-level" rental prices in all three are estimated to range between EUR 250 and EUR 1,000, depending on quality and location. High end rental prices high quality, well located rentals go up to EUR 1,000 in Sofia, EUR 2,000 in Budapest, and to almost EUR 3,000 in Bucharest; while low end rentals could be around EUR 200 or less per months.<sup>6</sup> There is some differentiation among smaller urban hubs: the rental market is more expensive in Bulgaria's ski and sea resort, the smaller cities in the better-off Central and Western Hungarian regions, and in Romania's seaside cities and medium sized cities (with a population of around 300,000).

Utility costs are a significant factor in housing affordability: in the case of less expensive rentals, utility costs might actually exceed rent. Their average share within household budgets in post-socialist countries grew from cca five to about ten percent in the 1990s; and then continued to grow in the 2000s (Hegedüs et al., 2014b). Exacerbated by the poor energy efficiency level of a huge share of residential buildings, it is an important issue for low income households, and a major problem to low income renters.

According to Eurostat data, gross average monthly incomes are EUR 380 in Bulgaria, EUR 830 in Hungary, and EUR 500 in Romania.<sup>7</sup> However, due to the relatively large role of the informal economy in household incomes as well as in private renting, household income statistics also need to be taken with some caution. While it is possible

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<sup>6</sup> These ranges are the estimation of the authors of the national reports for Bulgaria, Hungary and Romania, based on interviews and average rent levels indicated by major real estate agencies.

<sup>7</sup> Based on Eurostat "[Average gross annual earnings in industry and services](#)", 2011 [Code: tps00175].

to make a basic estimation of rent-to-income ratio using estimated average rents and statistical average household incomes, it is not sure if the result of such a calculation would give very helpful information.

Furthermore, more precise information on the median renter would also be necessary for this kind of indicator to be truly helpful. We know that

- a) while social rental provides significantly more tenure security than private rental, which clearly is an unattractive tenure form in this regard, home ownership provides the strongest tenure security by far; and
- b) nearly every element of housing support (on the central or the local level) is targeted at home owners. There is no imputed rent on real property, while there is limited support to social renters, and virtually no form of subvention for private renters.

Accordingly, we have reason to believe that every rational actor who has the means to acquire home ownership will do so, and households will only continue to rent in the long run if they do not have the means to buy. We believe that the median private renter is usually a student or young person, or someone with average income, who needs to remain mobile, or someone whose income is too low to buy a home, and lacks support from the family. Two of these three typical renter groups have lower than average income levels; so we have reason to believe that the group of renters as a whole has lower than average income. However, it is very difficult to make estimation on their income level without conducting surveys specifically in this regard.

While the GFC and the surge in the share of non-performing loans made it clear that not everyone can afford to own a home, the housing related tax and subsidy environment has so far largely retained its post-transition structure, focusing in reinforcing private ownership. Social rental is made attractive by its affordability, despite the low prestige associated with it, but the supply of social rentals is very limited in all three countries. The only thing that makes private rental attractive is the high level of flexibility; other than this, it is an expensive and unsecure tenure, which is unattractive to tenants. Private rental has so far only became a stable market for students (who by definition usually search only for a short period, usually two semesters); and there is also a high end market for foreign professionals.

The affordability of social rental housing is a straightforward issue in Romania: while social rent levels are determined by a complicated formula, according to national regulation it must not surpass ten percent of the beneficiary household's income. In Bulgaria and Hungary, the vast majority of social rentals are owned by municipalities, who can define rent levels fairly autonomously, and as a result they vary greatly depending on geographical location. They are usually significantly more affordable than market rents, although even this may be unaffordable for some of the extremely poor renters. The real challenge here is the scarcity of social rental dwellings: in all three countries, the number of households who pass the legal criteria for social housing is far greater than the number of social housing units.

### **1.2.3. Tenancy contracts and investment**

Institutional for-profit landlordism is nearly entirely absent in the countries in question, which – in our assessment – indicates the unsatisfactory level of return on investment in market renting. The vast majority of landlords in either of the countries are individual (“accidental”) landlords, and maintaining a second home is not always an investment in private renting. Many individual landlords simply inherited a home, which they rent out to generate complementary income (especially if they cannot sell it at an attractive price); and many purchase an apartment for the future use of family members, and rent it out to compensate for the mortgage loan payments.

However, renting out an apartment is a risky business due to the pool of potential tenants. Not only young or mobile persons rent, but also households with limited means who cannot afford to buy a home. Many landlords report problem or “disappearing” tenants, who might leave varying levels of arrears behind; and landlords cannot necessarily achieve compensation for these with the currently available conflict resolution mechanisms (slow court procedure).

Interestingly, the GFC and the following recession seem to have given a boost to private renting. On the one hand, the crisis made it obvious that – despite the general ambition for home ownership – not everyone can really afford buying an own home. On the other, home sales dropped significantly in all three countries, and some real estate developers decided to bridge their losses by renting out the unmarketable dwellings. However, their return remains low on these transactions, and they only view this as a temporary solution until they can finally sell their housing units.

The landlords of rental housing with a public task, on the other hand, are institutions: local municipalities own and run most public rentals, while ministries and some state owned companies and organisations also have (smaller) housing stocks, or – occasionally – an option to allocate tenants into municipal dwellings.

Social rental housing provision is the nearly exclusive responsibility of municipalities, delegated from the central level in the early phase of transition. Municipalities were charged with managing previously state owned housing and the responsibilities related to housing provision, no corresponding support from the central budget was allocated for this objective in any of the three countries. Although there were programmes in Hungary and Romania to support building social housing, the regular management of social housing receives no noteworthy support. Rent level in this sector is very affordable, and only covers a fraction of its costs. Accordingly, it produces massive losses to municipalities, who are thus incentivised to get rid of their social housing stock. As a result, many municipalities still try to sell out their housing stock in 2014, while in all three countries the persons legally entitled to social housing is multiple times greater than the number of available social rental units. Although there are some initiatives to counteract this process, the basic financial incentive system of municipalities remains intact.

#### **1.2.4. Other economic factors**

The activity of real estate agents is quite loosely regulated in all three countries. They essentially act as intermediaries between parties, and provide information and a basic

filtering of landlords (apartments) and tenants, but they do not take any formal responsibility for conflicts or adverse consequences once the rental contract is concluded. Nonetheless, their services can be very useful for foreign nationals, who are unfamiliar with the local market and customs, especially since the majority of the population (and of individual landlords) do not necessarily speak foreign languages fluently. Their fees vary – as does the general view on their fairness and efficiency – but tend to be around the equivalent of 1-3 months' rent, depending on the rental submarket (lower to higher end).

### **1.2.5. Effects of the current crisis in comparative perspective**

By the end of the 1990s, all three countries were largely past the transitional recession, and all three had witnessed prolonged economic growth between 2000 and 2008. They also shared a constant growth in real estate prices, as well as a relative construction boom. The housing finance market remained quite segmented though: mortgage lending became quite widespread in Hungary, with the share of owners with an outstanding mortgage reaching nearly the fifth of the total population, while their share remained below two percent in Bulgaria and lower than one percent in Romania. The high share of downright owners in these two countries can be attributed to the greater role of self-building, a higher role of intra-family transfers, but also to more cautious bank lending. Regardless of the volume of mortgage loans, the number of non-performing loans (NPLs, late payment exceeding 90 days) blew up in all three countries during the GFC and the ensuing recession, and available lending products were restricted.

**Table 6. Share of non-performing loans, percentage of loan portfolio 2009-2013.**

	2009	2010	2011	2012	2013
Bulgaria	6.4	11.9	15.0	16.6	<i>No data</i>
Hungary	6.7	9.8	13.4	15.8	17.6
Romania	7.9	11.9	14.3	18.2	21.6

Source: [The World Bank](#)

In **Bulgaria**, foreign investors played a huge role in real estate, and property prices almost tripled between 2004 and 2008. In 2009, property prices started to plunge, and they have been decreasing ever since; instead of the formerly dominant West European investors, a larger share arrives from countries that were less strongly affected by the crisis (e.g. the Russian Federation). The domestic mortgage market grew slowly even during the housing boom of the early 2000s, but it has been stalling and occasionally contracting since 2009.

No specific housing related legislation has been introduced in response to the crisis. However, in March 2014 the National Assembly adopted at first hearing amendments in the Law on the Consumer Credit<sup>8</sup> according to which a penalty interest cannot be imposed for early credit repayment.

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<sup>8</sup> Law on the Consumer Credit, promulgated in State Gazette issue 18 of 5 March 2010, last amended State Gazette issue 30 of 26 March 2013.

**Hungary**'s mortgage market was more advanced, but its development came to a halt with the GFC and the following prolonged recession. The country's most salient issue was that of foreign exchange currency (FX) loans. After the crisis, the repayment of loans grew and the share of non-performing loans grew simultaneously. The effect of the crisis was delayed, nonetheless, with the volume of mortgages only starting to decrease in 2012, while property prices have been falling since 2009.

In response to the crisis, FX mortgage lending was not only restricted by banks, but also by law. A number of measures were taken to "save" FX mortgagors, the financial burden of which was partly covered from the central budget, and partly transferred to the lending banks, with the justification that although such loans were legal, they were unethical. Limitations were also introduced on foreclosures, including a winter foreclosure moratorium first in 2009, and then repeated in the subsequent years. Also, a quota was introduced on the number of foreclosures permitted in each quarter. Finally, the National Asset Management Company was established: a public body whose mission is to buy the homes of defaulted FX mortgagors, and rent it back to them at a strongly discounted price.

**Romania** saw stable and dynamic economic growth between 2000 and 2008, followed by a sharp decline in 2009. The growth period was accompanied by a similar increase in incomes and prices (including house prices); and the GFC meant in household incomes in real terms. The share of NPLs tripled between 2009 and 2013 (7.8 percent to 21.7 percent). However, the crisis seems to have actually helped affordability in some areas: house prices skyrocketed in Bucharest and some other bigger cities prior to the crisis, reaching a Western European level (up to 3,000 EUR/m<sup>2</sup>), which dropped significantly after 2009. To this date, the most expensive housing market is in the capital Bucharest, and it was also characterized by the sharpest decline in prices, with the average monthly rent on the private sector dropping by 51 percent.

In 2010, the central government launched the Prima Casa (First House) programme to support mortgage lending for new construction; however, in the past few years this programme proved costly, and was mostly used to finance the purchase of existing housing, instead of boosting construction. Also, to counteract the spread of foreign currency loans, the government started to offer a state guarantee for loans issued in RON, starting in August 2013; however, due to the National Bank's base interest rate cuts, state guaranteed loans lost their advantage over commercial foreign exchange loans by 2014.

It would be difficult to formulate an assessment about which of the three countries has best overcome the crisis. These are relatively small and open economies, vulnerable to external shocks. The GFC meant a significant GDP contraction in all three: gross domestic product shrank by 5.5 in Bulgaria; and nearly 7 percent in Hungary and Romania in 2009. The initial shock was followed by a prolonged recession, with a decline in jobs and incomes, and housing transactions and new constructions fell to record lows in all three. The three housing markets and construction sectors have been recovering very slowly in all three. Economic growth in Bulgaria and Hungary remained near stagnation so far, with few signs of taking off in the future. Romania did produce a more spectacular year-on-year economic growth by the end of 2013, after a series of

strict austerity measures as per the EU/IFM agreement the country entered in 2011 to manage the effects of the crisis.

Given the limited size and especially the informal nature of private renting, it is difficult to formulate any precise conclusions regarding the effect of the crisis on the three rental markets; however, there seems to be no significant direct influence. The drop in house prices could be expected to make housing more affordable to households; but the GFC's other effects, like higher unemployment and decreased household incomes, largely cancel this out. As the role of landlord-investors is very limited; and individual landlords often seek goals other than direct rental profit (e.g. covering loan payments for a second home which is destined for future family use), therefore the crisis did not seem to have changed the course of private residential renting in these countries so far.

Nonetheless, there are suggestions that the crisis gave a small push to renting in all three countries. First, with the restriction of credit criteria, the opportunities to buy a home narrowed down. Second, the surge in NPLs shows that despite households' ambitions, owner occupation may not be affordable to all, and may not even be truly more affordable than renting. And finally, a number of people lose their homes as a consequence of defaulting on their loans, and they will be pushed out on the rental market, at least for a couple of years. However, this too is based more on qualitative studies rather than statistical data; and even if these changes start to show in official statistics, it is unclear whether they will prevail in the long run.

### **1.3. Urban and social aspects of the housing situation in comparison**

#### **1.3.1. Urban aspects in comparative perspective**

##### The spatial distribution of tenure types

The opaque nature of private renting makes it difficult to formulate precise statements on the city-wide distribution of various tenure types (that is, the spatial distribution of rented dwellings within cities). Experience suggests that there is high demand for rental housing near the city centres due to the good access to jobs and services, but the more affordable parts of the outskirts or the suburbs may also be attractive for lower income renters. On the other hand, it is clear that private renting is an urban phenomenon in all three countries. Some 70-90 percent of rental dwellings are in towns and cities, and owner occupation is predominant in smaller municipalities and rural areas.

Thanks to more reliable statistics on municipal rentals, we can state that they have a very similar distribution: there is barely any in rural areas, making up as low as one percent in small settlements; and most of them are concentrated in towns and cities. Their city-wide distribution is clearer too: while there is no high-end market in municipal renting, some of these units may be close to city centres simply as a heritage of the socialist past, when the state owned housing units in fairly valuable plots as well. Nonetheless, the majority of housing units in attractive locations were privatized by the early 2000s.

##### Tenure forms and ghettoisation

The issue of extremely poor rural communities is important in all three countries. Better-off inhabitants tend to flee as job opportunities dry up, and the settlement becomes more and more dependent on social assistance. On the local level, this is hardly a result of the dominant tenure form, which is usually exclusively home ownership. However, an argument could be made that a flexible, reliable and affordable rental market could help the unemployed leave the areas where the job market is down. In most cases, low income neighbourhoods near urban hubs are still much better off, simply thanks to the closeness of an active job market.

Public perception often associates ghettoisation and social rentals in Bulgaria and Hungary (this may be less clear in Romania, simply due to the extremely low share of social rentals), which is in fact fairly similar to the public perception in most developed countries. On the other hand, a large part of “ghettos” (extremely poor segregated neighbourhoods) are in rural settings, in remote villages with weak or nonexistent transport connections with the job market where home ownership is the predominant tenure form. Clusters of social rentals in urban areas tend to be lower income than the surrounding areas, but they often remain relatively mixed, as they are saved from extreme levels of material deprivation by the closeness of available jobs. However, some of the extreme examples of poor urban areas are in municipal lands or in social rentals (e.g. some areas of the Batalova Vodenitsa and Krasna Polyana districts of Sofia), which reinforces the negative public perception of social rentals.

### Tenure forms and gentrification

Although there may be some initial signs of gentrification in the larger cities, particularly in the capitals, in our assessment they do not reach the significance of gentrification related issues in Western European or North American large cities. During the socialist/communist regimes, state owned inexpensive rentals were everywhere in urban areas, including near the downtowns; after the transition most of them were privatised, and the neighbourhoods usually became unaffordable for the original tenants, who are forced to leave. However, despite a large number of low income persons migrating to cheaper areas, there remain quite a few affordable neighbourhoods in the capitals, even fairly close to the downtowns; and gentrification did not yet start to hurt middle class interests.

There seems to be no particularly clear public opinion on gentrification, or associated tenure forms – most of the population is not even necessarily aware of the concept, as it does not affect the lives of most people. If anything, it is associated with affordable rentals in relatively inexpensive parts of the bigger cities, which attract young middle class people – quite similarly to how the process is viewed in old EU member states, although Bulgarian, Hungarian or Romanian middle class comes with less purchasing power, hence the seemingly lesser effect of gentrification.

### Squatting

Squatting is suspected to be limited in all three countries; however, it is difficult to precisely assess its significance due to the lack of statistical data in this regard, but also due to its invisibility. Most squatters in these countries are the most destitute of the homeless, who move into unused buildings. A huge vacant housing stock provides

ample opportunity for this, but there is no precise data on its extent; and due to its lack of direct social significance, it does not appear as a prominent issue in daily news.

### **1.3.2. Social aspects**

The dominant public opinion in all three countries is a strong preference for home ownership. While social renting is widely seen as socially inferior, this is not necessarily the case with private renting. However, it most certainly grants significantly less tenure security than owner occupation. Even in renter societies and tenure neutral environments, such as Germany or Switzerland, people tend to buy their own home by the end of their active career, and prefer living in their own home after retirement. This preference is significantly stronger in Bulgaria, Hungary and Romania, three of the so-called ‘super home-ownership’ states, where not only is ownership the most secure form of tenure, but it is also the least expensive form in the long run, thanks to its preferential tax and subsidy treatment. We can safely state that home ownership is considered as the only truly secure option for retired persons.

The second safest option would be municipal dwellings in any of the three, or tenancy in a restituted dwelling in Romania, which also comes with legal safeguards. However, over time these options also seem more temporary: municipalities struggle to curb tenant protection to make their housing stocks more manageable; and Romania will eventually have to return its restituted dwellings to their owners (where the contracts of tenants were centrally prolonged by five year periods on multiple occasions).

Private renting is the most flexible, but also the most expensive and least secure tenure. It is wide-spread (and considered socially acceptable) in the case of students and young, mobile households, but people usually seek to buy an own home once they intend to start a family. In many cases, private tenants rent simply because they cannot afford ownership, and not because they seek flexibility (e.g. for workplace mobility within the country, which is notoriously low in all three countries). In the case of low income renters, or young persons with no financial help, this could indeed constitute a “rental trap”, where the rent means such a financial burden to the household that they cannot make enough savings for a mortgage down payment. Eventually, conventional wisdom in all three countries holds that it is cheaper to buy than to rent, and with all the tax and subsidy incentives aiming to boost ownership, and the complete lack of a tenure neutral environment, this is true in most cases – unless, of course, if we also consider the indirect losses caused by the lack of mobility and the rigid workforce.

Private tenancy is generally considered a temporary state in all three countries; and the average tenant will act accordingly. This means that everything related to the long term functioning of the household (the building and its equipment) is managed and maintained by the owner. Although municipal tenancies are much more stable and secure for their tenants, renters usually cannot afford to contribute significantly to the upkeep of the dwellings, and tend to rely on the municipality.

Privatisation often led to a mixed ownership structure in multi-apartment buildings, as owner occupation became the dominant form, but private rentals appeared, and some of the dwellings remained in municipal ownership. However, after a long history of relying

on the municipal management of council housing, new owners needed a fairly long transition period before being able to take full responsibility for their property as owners (or still expect council management in some rare cases). The management of multi-family housing was a problematic issue everywhere in the transition period, especially where the share of state owned housing was high before 1989. Although housing policies advanced slowly in Bulgaria, Hungary, and Romania, condominium laws were relatively well developed in all three, as the management of common parts in multi-apartment buildings was a major issue. (Elbers and Tsenkova, 2003)

## **2. Housing policies and related policies in comparison**

### **2.1. Introduction**

All three countries can be considered mixed welfare systems: they did retain a socialist tradition of relatively generous social provisions (e.g. free healthcare and schooling); but all three had to cut back on social spending from 1990 to facilitate the transition to market economy; and all three adopted a number of fairly liberal policies, to boost private sector development (and possibly to counterbalance the lasting influence of socialist past).

The informal economy is significant in all three, and countermeasures against it were not particularly emphatic until recent years. Most of the private rental sector is implicated in the informal economy; to the extent that the majority of private individual landlords do not report their rental income to tax authorities, and as it means a slightly lower rent level, tenants usually play along. According to analysts, the informal economy and intra-family transfers filled in the gaps in welfare provisions, and helped alleviate the social tensions stemming from the transitional recession throughout the 1990s. Besides this, the general permissive treatment of informal renting may have also been underpinned by the intention of political decision makers to allow the development of private profit-seeking activities during the transition period. But it also served as a buffer against social tensions during the transitional recession: on the landlords' part as a complementary income, and for the tenants, often as a sole housing option due to the waning social rental sector.

Altogether, housing provision is only very loosely integrated in the wider welfare structure. The provision of affordable rental housing by public bodies is limited in all three, and is unlikely to significantly increase in the foreseeable future, despite repeated efforts to maintain and expand the social housing stock (at least in Hungary and Romania). Taxation favours owners; social tenants generally receive a favourable tax treatment on account of their social situation rather than their tenure form, but private renting is largely treated as a business transaction, so the tax regime is insensitive to the income situation of private renters.

A constitutional right to housing does not exist in any of the three countries. The constitutions state the objective of creating a stable legal environment and ensuring the safety of private property and the inviolability of the home, and it is expected that these will create the right conditions for citizens to find decent housing. However, considering

the economic performance and fiscal limitations that Bulgaria, Hungary and Romania face, declaring an enforcing a fundamental right to housing would probably beyond their realistic possibilities.

## **2.2. Policies and actors**

### **2.2.1. Governmental actors**

In Bulgaria as well as in Hungary and Romania, decision making in national housing policy resides on the central government level, including the Housing Law, Condominium Law, laws and decisions on municipalities, housing related taxes and subsidies etc. However, none of the three countries have a consistent housing strategy, and housing related responsibilities are often dispersed among multiple ministries (finance, interior, public administration, justice etc.).

In the majority of cases, social housing provision is the responsibility of the local municipality, although local authorities' level of autonomy may differ. In Hungary, decentralisation was taken further in the transition period than in Bulgaria and Romania. Social housing provision was delegated to the local level in the latter two as well, but municipalities do receive some level of central support targeted at housing, whereas municipalities in Hungary are expected to fully cover social housing costs. This has led to the introduction of cost based and even market price municipal rentals to balance the losses incurring in the social rental stock. Besides being the primary social housing providers, municipalities also coordinate other aspects of local social provision, including some housing allowances and benefits.

Furthermore, regional authorities also play a role in housing policy implementation in Bulgaria, where the regional governor has the authority to implement the central spatial development policy.

In Hungary, some additional public actors also have a substantial housing stock, including the Ministry of Interior, the Ministry of Defence, and the National Railway. Moreover, the National Asset Management Company, a public body created to help alleviate the effect of currency fluctuations on FX mortgage loans, is purchasing residential property en masse, and is planned to acquire a total of 25,000 housing units within the next few years, which become state owned affordable rentals (where the tenants are the former owners who defaulted on their currency based mortgages).

Romania's National Housing Agency is also a public body that plays a significant coordinating role in the development of national housing policy. It was initially established to assist the development of mortgage-financed private residential construction, but later the Agency also assumed the coordination of rental housing construction for young people, and some measures aimed at alleviating the social effects of GFC.

### **2.2.2. Housing policies**

The main function and stated objective of housing related policies in each of the three countries is to create a stable and predictable legal environment, which allows citizens to procure decent housing. However, neither of the three has a coherent housing strategy, referenced or followed by housing related legislation, so the fundamental objectives of national housing policy can be tracked down in the countries' respective constitutions.

The Constitution of Bulgaria states the objective to ensure property rights and the inviolability of the home, expressing a fundamental preference for owner occupation, and provides legal foundation for supporting ownership. Article 22 of Hungary's Fundamental Law, in force since 1 January 2012, states that "Hungary shall strive to ensure decent housing conditions and access to public services for everyone", which expresses a general ambition rather than a clear policy commitment. Romania's Constitution does not directly mention housing or the protection of the home; it rather underlines the objective to create conditions for citizens to fully exercise their rights (e.g. protection of private property, fundamental human rights).

None of the three regimes is tenure neutral. Home ownership is supported by all three tax and subsidy regimes. This – together with the massive housing privatisation of the 1990s – contributed to all of them becoming 'super home-ownership' states. While private residential renting receives more preferential treatment than general business transactions (it is VAT exempt in all three), there are barely any subventions to private tenants, and none to landlords. Social housing provision is residual, and considered a last resort option for the most vulnerable households.

All of the three countries have special housing policies targeted at certain groups of the population.

Although policy papers identify Roma communities among the major groups of people that suffer from housing poverty, housing policy measures are usually not targeted on the Roma as a group; instead, they usually benefit from measures intended to tackle poverty and socially vulnerable groups. (There are various social integration efforts targeted at Roma communities, but these rarely have a housing element.)

Young people – usually people under 35 – benefit from various forms of housing related support, for subsidised renting as well as for purchasing a first home. These initiatives are particularly important for young, moderate income persons without substantial financial support from their families, especially that this is the generation that could not benefit from the privatisation wave of the 1990s.

Finally, in all three countries there is some sort of financial support for the accessible redesign of the housing of persons with a handicap. Typically such redesigns are implemented in owner occupied housing, as rental housing is rarely considered permanent to the level that a tenant would consider a major investment in it.

In Bulgaria, one of the special target groups of housing policy is the displaced ethnic Turkish population, regulated by the 1992 law "Ownership of Real Estate of Bulgarian Citizens of Turkish Origin Who Have Taken Steps to Leave for the Republic of Turkey and Other Countries in the Period Between May and September 1989". It aims to compensate the hundreds of thousands of Bulgarian citizens expelled from the country

during the so-called “Process of Rebirth” (*Възродителен процес*) between 1984 and 1989.

In Hungary, ethnic Hungarians immigrating from Transylvania (Romania) in 1990-1991 were accommodated in dwellings in public ownership, including emergency housing and municipal social housing. Since 2010, in response to the GFC, a number of special measures have been taken to manage the issue of persons with FX mortgage loans; most of these were not specifically targeted at persons who defaulted on their loans or are at risk of losing their home, but everyone who took on an FX mortgage loan before the exchange rate of HUF dropped significantly in 2008.

### **2.3. Urban policies: ghettoisation, gentrification, and quality control**

Ghettoisation is a relevant phenomenon in the countries under review in both urban and rural settlements, and it particularly affects the most vulnerable groups and the Roma population. It is a result partly of spontaneous segregation process due to the affordability hardships of impoverished households who move to lower status areas, often in marginalised places, but partly of deliberate measures of municipalities who often move lower status and/or indebted families to municipality outskirts in the framework of rehabilitation programs. In urban context it primarily affects traditionally built urban neighbourhoods both with multi-unit buildings and single family houses, and some of these areas consist of municipal social housing or are on municipally owned land. Rural ghettos (including entire villages) derive from a two-way migration process when the better-off households leave the settlements while impoverished households who could not maintain their housing in cities/towns move into such settlements because of the low housing prices.

Although all three countries make some level of anti-segregation efforts, anti-ghettoisation measures or policies such as pepper-potting or consistency in creating mixed tenure type environments are not employed systematically. The actual treatment of areas at risk of ghettoisation is largely left to the planning division of local municipalities. And while some of the municipalities employ progressive strategies at preventing the segregation and further impoverishment of vulnerable neighbourhoods, or makes efforts to create mixed tenure areas, others might do the exact opposite by using segregation as a way of getting social problems out of sight, instead of tackling them (e.g. building social rentals outside the city boundaries; in some extreme cases building a fence around a problem area).

There is no strong gentrification process in either Bulgaria or Hungary or Romania, although there are some clear issues in the capitals and Bulgaria’s holiday resort cities which could be characterised as gentrification. In the real estate boom of between 2000 and 2008, housing prices in the most attractive parts of these cities increased to an extent that parts of these cities were effectively unaffordable even for the local middle class, particularly in Bucharest, Sofia, and the seaside resorts of Varna and Burgas in Bulgaria (although this process was slightly reversed by the GFC). Also, city managements will occasionally try to encourage some form of gentrification, in an attempt to push out lower income groups and attract higher income inhabitants (or

“better taxpayers”), or to attract investors and jump-start some form of capitalist urban development.

### Anti-ghettoization and anti-gentrification measures

Probably the most prominent case of an urban ghetto in Bulgaria is that of Batalova Vodenitsa, a municipal land in Sofia with a Roma community, many of whose members occupy illegally built structures. The original renters of the municipal dwellings in the district moved in decades ago, followed by friends and family members who moved in semi-legally or illegally, and many built huts or houses on the municipal land. No anti-ghettoization measures were undertaken until 2005-2006, then 2008, when the Municipality of Sofia tried to evict illegal settlers. However, the settlers had no other home, and the municipality was not able to provide them housing elsewhere either. Eventually, the European Court of Human Rights ruled against the eviction (Yordanova and Others vs. Bulgaria, application no. 25446/06).<sup>9</sup> The squatters of Batalova Vodenitsa were evicted regardless of the ruling, and moved to other ghettos in Sofia.<sup>10</sup>

What closest resembles gentrification in Bulgaria is wealthy foreign citizens purchasing high end property.<sup>11</sup> The issue is particularly significant in ski and seaside resorts, where they may push up the prices to the extent they significantly deteriorate housing affordability for locals. During the 2000-2008 boom, property prices rose by 300 percent. Nonetheless, an urban trend more prevalent than gentrification in the classic sense is the development of gated communities, private residential neighbourhoods cut off from their surroundings, such as the Mountain View Village southeast from the capital Sofia. (Stoyanov and Frantz, 2006)

Similarly to the other two countries, the majority of extremely poor segregated communities (or “ghettos”) are located in rural areas, often on the periphery of settlements; and typically to rural areas in all these countries, they are usually almost exclusively owner occupied (although in many cases these are low quality self-built huts). While owner occupation or private renting in an urban context does not have a link to ghettoisation, municipal social housing – particularly when concentrated in a close-knit area – is associated with some risk. In the urban development wave of the 1980s and 1990s, some urban renewal efforts included clearance of Roma settlements in

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<sup>9</sup> “The Court considered that it was legitimate for the authorities, for the purposes of urban development, to try to recover land from people who occupied it unlawfully. There was no doubt that the authorities were in principle entitled to remove the applicants who occupied municipal land unlawfully. However, for several decades the authorities had tolerated the unlawful Roma settlements in Batalova Vodenitsa. That had allowed the applicants to develop strong links with the place and to build a community life there. Notwithstanding the above, there was no obligation under the Convention to provide housing to the applicants. However, an obligation to secure shelter to particularly vulnerable individuals might flow from Article 8 in exceptional cases. [...] In the applicants' case, it was undisputed that their houses did not meet basic sanitary and building requirements, which entailed safety and health concerns. The Court noted, however, that the Government had not shown that alternative methods for dealing with those problems, such as legalizing buildings where possible, constructing public sewage and water-supply facilities and providing assistance to find alternative housing where eviction was necessary, had been studied seriously by the relevant authorities.”

<sup>10</sup> ECHR Rules in Favour of Illegal Squatters in Bulgarian Roma Case. Novinite Sofia News Agency, April 24, 2012.

<sup>11</sup> Bulgaria's housing market is recovering slowly. Global Property Guide, April 7, 2014.

central urban areas, linked to the renovation or development of downtown areas. The former residents were moved to scattered dwellings, which technically led to their desegregation, while the cleared downtown area was renovated, and gave place to new developments (either commercial or residential, but without any aim at keeping the old residents in place). However, this was not centrally coordinated or encouraged.

Currently, there are no policies in Hungary that explicitly counteract gentrification, while a number of local development and renewal plans endorse gentrification as a means of renewal either explicitly or implicitly. A very prominent example of this is the Corvin promenade development in Budapest's District 9, launched in the mid-2000s, aiming at clearing slum-like areas near Budapest's downtown, and exchanging residents through removing old, low income residents to new dwellings. On a technical level, this project can be considered anti-ghettoisation, although its implicit rationale was to remove the low income population from a possibly advantageous area to clear the space for new, attractive residential blocks, a shopping mall, and the redesign of the surroundings in a style that might cater to young urban professionals.

The mechanisms leading to ghettoisation in Romania are similar to the other two countries: either middle class and lower middle class people move away from an unattractive area, which further deteriorates it; or social rentals are built in a concentrated area (and often away from town centres). There are no centrally coordinated anti-ghettoisation regulations, and municipalities rarely employ any efforts in this regards. In some cases it is the municipality leadership that makes a conscious decision to raise a fence or wall around a complicated neighbourhood, thus creating an inverse "gated community".

Gentrification does not happen in Romania in a magnitude comparable to Western European or North American cities. Here, too, the property price boom led to housing prices often hardly affordable for the average citizen, which was slowed down and slightly reversed by the crisis. Similarly to Bulgaria, the issue of gated communities is more prevalent for the time being. And similarly to Hungary, city leadership occasionally attempts to employ pro-gentrification techniques to replace old residents with higher income ones, or with businesses, to as an urban development tool; but high income customers are not yet present in a mass that could massively crowd out current populations.

#### Quality control of private rented housing

In all three countries, there is no quality control whatsoever on private rental housing, besides the requirement that the rented dwelling must conform to the housing law's definition of a "house", that is, it must fulfil certain minimum requirements to serve as a person's residence. However, this is not controlled by any authority before the conclusion of a contract; it can only be used in a potential litigation if a conflict arises between the parties that cannot be solved outside the court.

### **2.4. Energy policies**

The most important influence of European energy policies on the housing sectors of Bulgaria, Hungary, and Romania is the subsidies for energy efficient refurbishment of

residential buildings, and the harmonised energy efficiency standards set for newly built housing. Despite the importance of these factors on the three countries' housing stock, which certainly have high energy saving potential, these do not directly influence their rental sectors. On the other hand, they might have an indirect impact on the buildings where energy efficient renovations are undertaken. The low level of energy efficiency often raises utility costs significantly, which could seriously hurt affordability. However, such renovations are rarely implemented on housing with low income residents, so this indirect impact is quite limited.

## 2.5. Subsidization

None of the three subsidy systems is tenure neutral: the most generous housing related subsidies are targeted towards home owners; there are virtually no central subsidies for private renters; and while there are various forms of support for social tenants, these are granted on the basis of their social situation rather than their tenure status. Private landlordism is essentially seen as a for-profit activity, and therefore there is no support for private landlords whatsoever; and despite the very limited supply of social rental housing, support for private rental is very rare.

In **Bulgaria**, the housing related subsidy that reaches the most households is heating allowance in the winter months. There are some forms of support that are very strictly targeted, like assistance to persons with disabilities for accessible retrofitting; military housing subsidy; and a subsidy for municipal social renters, the conditions of which are so strict that in 2010 it only reached 200 beneficiaries. Unlike the other two countries, there was no large scale programme to support social housing construction.

In **Hungary**, the largest parts of housing related central expenses supports current or future home owners. Loan and mortgage interest rate subsidies have been accounting for two thirds of all housing related support for housing; and contract saving schemes (based on the Bausparkasse model) for another 16 percent.

While there is no central subsidy for private renting, there are some municipalities that offer rent support for low income private renters, if the local authority cannot allocate them a rental unit due to the chronic lack of municipal housing. Although central governments were committed to support the construction of social rentals from 2000, the rent support programmes launched in 2000 and 2005 were not successful: neither could substantially reinforce the position of municipal housing or renters. In the post-crisis years, the focus of subsidy programmes shifted towards encouraging new construction and home ownership.

The first housing related subsidies introduced in **Romania** in the 1990s were granted for the completion of residential constructions suspended after 1989. A subsidy scheme to support ownership through new construction and acquisition was launched shortly after, and was replaced by the Ownership Scheme of the National Housing Agency (ANL) in 1999, which channelled housing related subsidies primarily towards mortgage support and a Bausparkasse system based on the Austrian and German models.

A subsidy programme to boost social housing construction was the "Construction of new social and necessity rental housing" scheme, launched in 1996, which only covered the

construction of a few hundred units each year. ANL's largest rental programme was "Rental Housing for Young People" from 2001, aimed at the population group that had not benefited from the large-scale privatizations and was facing affordability problems on the private market. More than 32,000 housing units were completed in this programme by 2012, with the support of local authorities, central resources, and from foreign loans. The programme was not targeted at the neediest; furthermore, in 2007 the central government decided to sell housing units to sitting tenants to fund new constructions, so eventually this scheme further reinforces owner occupation against rental tenures.

## 2.6. Taxation

There is no disputed rent in any of the three countries, which also means that home owners do not pay an income tax on their property. Local property taxes ('communal taxes') could be based on the market value of the property, but this cannot be conceived as a form of income tax either, as is used by the local authority for basic services (e.g. waste collection).

Private tenants do not pay taxes on their tenancies. Individual private landlords pay the usual personal income tax on their rental income, and institutional landlords pay corporate income tax. Nonetheless, residential tenancy is VAT exempt, which can be considered as a form of subsidization via the tax system (which distinguishes residential tenancies from purely for-profit business transactions).

In Hungary, owners who let their property to the local municipality for at least 36 months are exempt from PIT payment on their rental income (but have to pay PIT retroactively as well if they terminate the contract before its expiration).

Tax on rental incomes is ten percent in Bulgaria. In Hungary it is 16 percent for private persons and 10 percent for legal persons (the latter cut from 19 percent in 2013). In Romania, income tax is a flat 16 percent. Neither levy VAT on residential rentals, and health contribution is only payable above a fairly high annual income level. While these can be considered low rates, combined with the lack of subsidies to the private rental sector and the generous subsidy opportunities for home owners, the overall system of taxes and subsidies further distorts the three already quite unbalanced tenure structures towards the predominance of owner occupation.

The expected influence of the relatively low tax rate on the rental market is that should encourage landlords to duly pay their rental incomes. Nonetheless, the vague legal environment of private renting makes private renting a risky business for tenants (especially because of the low tenure security) as well as landlords (especially because of the potential financial losses); and as a result, the vast majority of landlords do not report their rental revenues to the tax authorities to improve their margins, but also to attract reliable tenants with a slightly better rent level. While tax authorities (at least in Bulgaria and Romania) made initiatives to encourage tenants to report on landlords if they suspect the latter does not pay taxes, it is uncertain whether tenants are truly incentivised to do so, as this might deteriorate their relationship to their landlord, while they might just benefit from the slightly lower rent levels as long as PIT tax payment is being avoided. Tenants are more likely to report on the landlords when a conflict

emerges between the parties, or they already intend to leave the tenancy, but it is unclear how effectively this helps to improve the overall tax payment performance of the sector.

### **3. Comparison of tenures without a public task (Regulation in Private Markets)**

#### **3.1. Evaluative criteria for the landlord**

##### **3.1.1 Profitability**

There is no rent regulation in any of the three private rental markets. All contractual conditions, including the rent, the methods and frequency of payment, the landlord's visits in the dwelling etc., depend entirely on the agreement of the parties. The rent is VAT-free in all three countries. Landlords have to pay an income tax on their rental income (Personal or Corporate Income Tax, depending on the type of landlord).

In principle, the landlord should cover all expenses related to the long term quality of the apartment (general maintenance and repair of main equipment), and the tenant should take care of minor repairs that do not affect the overall quality of the apartment (clean, change light bulbs etc.). However, there are no detailed mandatory regulations in any of the three housing laws; at best there are dispositive measures from which the parties can freely deviate in the contract. This means that – unless the parties prepare a very detailed rental contract to cover all possibilities – the uncertainties regarding maintenance obligations is a potential source of conflict between the parties.

In order to conclude a valid contract, parties only need to set the most basic information in the contract, that is: the identification (address) of the dwelling to be let, and the amount of rent and regularity of rent payment. On top of that, in Bulgaria and Romania the rental contract does not have to be written in order to be valid. Consequently, the majority of private rental contracts only contain the most basic and general provisions regarding maintenance and renovations – if any. If the parties ever come to litigation as a result of a conflict about this particular issue, the governing law would be the Housing Law (unless the Civil Code or another higher ranking legal source contains provisions on residential renting). Litigation is lengthy and expensive, so parties will usually attempt to avoid it, and manage their conflicts privately. However, loose regulations and the lack of alternative dispute resolution services probably raises the number of court cases, which effectively risks profitability for landlords, and could be an important factor in discouraging them from entering or remaining on the private rental market.

There is no regulation in any of the three countries as to which party should cover utilities (water, gas, electricity) and other costs (e.g. local waste tax, common costs of the condominium etc.). In practice, utilities used by the tenant are most often expected to be paid by the tenant. The majority of private rental dwellings are in multi-apartment buildings, and as long as the tenant resides in the dwelling, he also has to pay the common costs of the building. Common costs usually cover the normal daily maintenance of the common parts. However, in a growing number of cases common costs also contribute to a renovation fund for the building. While well informed tenants

usually expect the landlord to cover this part, as this contributes to the long term value of the dwelling rather than the everyday use, whether or not the landlord does cover it depends more on the private negotiation of the parties, and expresses their power position. In practice, landlords often devolve it to the tenants; also, some tenants do not even make the effort to obtain information on the precise items covered by the common costs, while others simply avoid the potential conflict to avoid the risk of having to move from the dwelling.

In assessing these factors, we can conclude that rent related regulations or the tax environment do not impede a reasonable profit for landlords in the Bulgarian, Hungarian or Romanian private rental market. Still, a number of disadvantages stemming from the loose or unsettled nature of the legal environment significantly curb the profitability of renting for landlords, to the extent that institutional landlords are largely absent from all three, and the vast majority of lessors are individuals who lease a property for reasons other than profit making (e.g. providing a future home for family members, and renting it out to help cover its expenses).

Such disadvantages are the loose regulation of rentals, which often materialises as a source of conflict between the parties; the weak enforceability of contracts; the slow court system and expensive conflict resolution; and the limited solvency of the average tenant. Altogether, private renting is a fairly risky business for both tenants and landlords. From the point of view of landlords, tenants may damage the apartment or leave significant arrears behind, not only in unpaid rent, but in unpaid utility costs (and the low level of energy efficiency exacerbates this significantly). Landlords can hardly demand a rent level that would cover for their risks outside the high end of the rental market. Safety measures, e.g. concluding a contract in front of a notary, are costly, but litigation tends to be even more expensive; and its length particularly deters parties from filing a lawsuit, as it usually takes years, which is strongly disproportionate to the tenant's immediate need for a stable home, as well as for the landlord's immediate costs and debts related to a dwelling they cannot exploit. If landlords seek a profit, they need to establish their own conflict management methods, and in many occasions they are not fully in conformity with regulations. Also, most private individual landlords avoid paying taxes on their rental income to improve their margin.

However, neither of the three countries private rental sectors has a profitability potential that would attract institutional landlords. In our assessment, the lack of professional landlordism indicates an overall socio-economic imbalance of all three private rental sectors.

### *3.1.2. Property rights respected de iure and de facto*

#### Risks: non-payment and damages

The risk of default on payment is a relatively important issue in all three private rental markets. Also, *utility arrears* are on par with it. While real estate prices as well as market rents are altogether still relatively low compared to many old EU member states, energy price and utility costs have been approaching international market prices; so it is not rare that the utility costs of a rental housing unit equal or surpass the rent. The overall poor energy efficiency level of the housing stock exacerbates this issue.

In all three countries, there is a risk of contracting tenants who will ‘disappear’ and leave behind huge arrears. Moreover, in the worst cases tenants abuse regulations created to protect vulnerable tenants (e.g. winter eviction moratorium; possibility to object to the termination of the contract, even if it is done due to non-payment or other breach of contractual obligations). While landlords in all three countries technically have the right to terminate the contract of a tenant who does not pay the rent for 3 months, evicting the tenant and thus regaining the use of the dwelling is a whole different issue. Aside from the general procedure of emptying the dwelling, there are further measures in place to protect vulnerable tenants. Concluding a contract in front of a notary public can accelerate the process, but due to protection mechanisms, a non-paying tenant can actually stay in a rented apartment for another year or so. In some cases, tenants simply abuse the protection measures (like the ‘winter moratorium tenants’); others might simply abuse their position in the apartment, and refuse to pay and cooperate with the landlord, even if there is no real legal basis to their claims; and in other cases again, they truly have no other means. Both these are aggravated by the low supply of affordable public rentals, and the lack of options for many low income households outside the private rental sector. And a non-cooperating tenant who stays in an apartment for a prolonged period when his relationship with the landlord is already beyond reconciliation has no incentive to pay rent or utility bills or common costs.

A non-cooperating tenant could accumulate massive arrears. On the other hand, there are issues with the effectiveness and efficiency of enforcing contracts, and court process, decision, and enforcement could take many months, or even a few years. (Extremely long litigations do exist, but cases lasting longer than 2 years are rather the exception.) Although the number of court cases is not huge, they do result in very significant losses to some private landlords.

Some of these landlords will not necessarily be able to ever recover these losses:

- unless a loss-making tenant has stable income or savings, they cannot always repay the incurred losses – and the riskiest tenants have none of these;
- in other cases, the landlord is never able to find or identify the disappeared tenant, e.g. in the cases when the tenant originally identified himself with a fake I.D., or the landlord was careless enough to accept a tenant without proper identification and check of papers.

This probably deters a large number of landlords from entering the market in the first place, which hinders private rental market development (in countries where the limited supply of affordable rentals is already a pressing issue).

In Bulgaria, a number of tenants attempt to rent out apartments with fake IDs, and the Notary Chamber discloses around 20 fake IDs each year. As most private rental contracts are not concluded in front of a notary, this is probably only a fraction of all cases. In Hungary, some interviewed landlords complained about ‘tenancy hoppers’, who give false data on their contract, disappear after a few months (leaving behind utility arrears), and move to another private rental, where they presumably do the same thing all over again. ‘Winter moratorium tenants’ were also mentioned as a risk factor. These issues only cover a small fraction of private tenancies, whoever, they could generate a

huge loss to landlords, who in turn set higher prices for all tenants to make up for the potential loss.

One of the reasons landlords do not authenticate rental contracts with a notary public is that in the three countries' rental culture it is commonplace for tenants to come and go fairly quickly. On the one hand, owners avoid additional costs for a tenant who may be gone within a few months, and on the other, while they could be devolving part of the notarial fees to the new tenant, they risk deterring tenants with an additional cost at the beginning of the tenancy, and hence losing out on rental revenue. This issue is probably a lot less pressing on the high end market, and stable middle class renters in higher quality housing probably also manage to resolve their conflicts in a more mutually satisfactory manner.

#### Deposit

The deposit is explicitly regulated in the housing law of Hungary: it should not surpass 3 months' of rent. In principle, this should cover the landlord's losses if the tenant does not pay rent for 3 months (although this does not make up for utility arrears or damages to the apartment). In practice, landlords usually ask for less, 1 or 2 months', as the average tenant could not afford the legal maximum. It is not explicitly regulated in Bulgaria, and applies only to housing under GEO 40/1999 in Romania; but it is still a standard practice in both in residential renting, and functions in roughly the same way as deposit in practice in Hungary.

Owners on the low end of the market, letting out very poor quality apartments to very low income renters, sometimes ask for no deposit at all, on the assumption that the tenant could hardly do any significant damage to the dwelling. On the other hand, the owner in such a case does not necessarily intend to follow the slow legal procedure if the tenant refuses to pay; and the tenant in such a case probably does not have the means to start litigation. On the other hand, owners on the high end of rental market could easily ask for up to 6 months' rent as deposit. As in many other potential conflict sources, parties rarely go to court to arrange their issues, since they need an immediate solution, and by the time a court decision is reached (months or years later), the issue will have no relevance to them.

In the majority of cases, the parties do reach an agreement, and are able to manage potential conflicts amicably. Conflicts regarding the repayment of the deposit are reported from all three; however, parties nearly never go to court for this. However, if a rapid mediation or alternative dispute resolution alternative were available, a significantly larger number of such cases would probably be recorded.

Personal securities (surety) or insurances are not used in practice by landlords to ensure their property rights. All three legislations provide for a statutory lien of the landlord over the belongings of the tenant, although it is hardly ever used in practice, simply because the regulation itself is not very well known or understood. A landlord will probably only apply it if he is a lawyer himself, or if he is a professional investor with a very detailed knowledge of the regulatory environment (very rare). A further uncertainty is whether the value of the tenant's belongings covers the losses incurred to the landlord. Moreover, the informal nature of most of the private rental sector further limits the application of such safety mechanisms.

A key principle of the private rental sector in all three countries is the contractual freedom of the parties. If the contract is open-ended, any of the parties can terminate it by a simple notice, within a fairly short period: it is the longest in Romania, 3 months; and the shortest in Hungary, where a written notice by the 15th of the month is sufficient to terminate a contract by the beginning of the next month. In the case of fixed-term contracts, parties usually respect contract expiration, although in practice it is usually considered legal to include a clause for the possibilities of terminating the contract before the termination date. In Romania, there is also a hardship clause permitting the termination of a fixed-period contract if it becomes “excessively onerous” for either of the parties (although here too the foreseeable length of the litigation procedure is not in line with the needs of the parties, and hence this kind of safeguard is hardly ever put in practice). While there is no such clause in Hungary, this may not hinder the parties to provide for such a possibility in tenancy contracts concluded for determined period too, thanks to the dispositive nature of the pertaining regulations.

#### Dispute resolution and eviction

Alternative dispute resolution is hardly ever applied in any of the three. Although the legal regulations do not treat this issue at all, which also means that no legally defined conditions to launching ADR services, it is almost unheard of in all three countries. The reason for this could be that fragmented individual landlords and tenants lack the necessary coordination to put such mechanisms to practice; and while an example of successful ADR mechanisms may be able to spread, so far there are no such examples in any of these countries to instil public trust towards them.

Since there are no special courts for housing and rental issues, parties have to go to ordinary courts if they want to resolve their issues legally. This does not only mean a lengthy procedure, but it is also hard to foresee results, as court decisions are autonomous and may be quite diverse, which some decisions giving preference to tenant protection, and others electing to ensure respect for private property above all. Due to the informal nature of a large part of private rental sector, landlords could attempt evicting (or driving out) the tenant through informal means, as the cost and duration of litigation is rarely on par with the means and possibilities of either of the parties.

An effective and efficient forum for alternative dispute resolution would be extremely helpful, but it would also require a sort of housing policy and justice system reform that does not seem likely to happen in the near future. A number of private companies have recently emerged which undertake the management of rented property, and occasionally provide special services – such as removing the uncooperative tenants from the dwelling within 2-3 month. However, given the length of legal objection and moratorium options of the tenants according to law, these companies probably do not work in a fully legal manner.

#### Access to finance and subsidies

Mortgage credit is available on all three markets, although the share of owner occupied dwellings with an outstanding mortgage is much higher in Hungary than in Bulgaria and Romania. Subsidies on mortgage loans were comparatively high in Hungary in the early 2000s, but were gradually phased out by 2004, when they were replaced by the similarly

inexpensive FX mortgage loans (particularly CHF based loans). This led to a serious difficulty for a huge number of households after the GFC, when the HUF depreciated significantly against CHF and other base currencies, and in many cases debt levels exceeded by far the dropping market value of the purchased housing unit. Although mortgage lending did not enjoy a similar level of state support, and FX loans did not expand significantly, the growth of mortgage lending did eventually begin in Bulgaria and Romania too in the 2000s. According to European Mortgage Federation data for 2012, the residential debt to GDP ratio was 20.7 percent in Hungary, 17.6 percent in Bulgaria, and 6.6 percent in Romania. (Although due to the relatively short period of development of mortgage markets, this still falls short of EU-27 average of 52 percent.) In all three countries the crisis brought about a surge in non-performing loans, and the financial sector's restriction of the credit supply.

This means that the mortgage markets have been developing in all three countries, albeit at a slightly different pace. However, this has a very limited impact on the rental markets. Subsidized mortgage loans and mortgage interest rate subsidies are generally targeted at first time home owners. And although market loans were available for landlord-investors, the overall legal and financial environment does not support the development of the private rental sector, or the functioning of professional landlord-investors.

In all three countries there are various subsidies for construction and for rehabilitation; although the former is usually combined with support for buying an existing home (particularly for young households buying a first home), and rehabilitation subsidies are usually for energy efficient renovations. However, these too are usually targeted at home owners. In this regard, too, construction or renovation subsidies to incentivize private landlord-investors are largely missing, as private renting is seen as a for-profit activity, which should be competitive and viable without external support.

In Bulgaria, public subsidies for energy efficient renovations were introduced shortly before the crisis, which so far seriously limited their expansion. In Hungary, construction support is mostly limited to young persons with children, who expected to become owner occupiers as a direct outcome. Energy efficient renovations have become quite popular, and even though they slowed down in the wake of the crisis, it seems that they retain their popularity even as public support dwindles. However, they probably only affect the rental sector indirectly. Furthermore, they may lower utility costs, but raise market price/rent level, so while it improves the general quality of the housing stock, its price effects might cancel out. In Romania, the first building subsidy for construction was introduced in 1994, for the completion of residential constructions suspended after 1989. It was followed by various forms of support, although here too it was primarily aimed at prospective owners, particularly young families.

Subsidy schemes created on the basis of the Bausparkasse system exist in both Hungary and Romania; it is in the pipeline in Bulgaria, although not in place yet. As it is not tied to social criteria, it is available for investment purposes as well, although it is only likely to support private landlordism to some extent.

Following the predominant principle of contractual freedom, a private arrangement where the tenant agrees to rehabilitate apartment (performance in kind) in lieu of paying

rent is perfectly feasible in all three; however, it has hardly any practical significance to date.

### **3.2. Important evaluative criteria for the tenant**

#### *3.2.1. Affordability (rent, deposit and other expenses)*

The level of initial rent and the possibility and rate of future rent increases is entirely up to the agreement of the contractual parties, in line with the principle of contractual freedom which governs the private rental sector. “Gross disproportionalities” may be corrected by the court; however, this hardly ever happens in real life due to factors discussed earlier (particularly, the financial value of the disagreement rarely justifies litigation costs; and parties usually need a prompt solution while court procedure tends to last for months or years). However, even when future rent changes are not laid out in the contract, the parties may start negotiating a modification of the rent level. Although tenancy contracts are only valid if they express the mutual will of the parties, and hence a unilateral rent increase is not legal in any of the three countries, the eventual agreement of the parties will reflect their power relations. The possibility of a unilateral raise of the rent is a risk factor to tenants, and as long as it is not an extreme raise, they will probably rather accept it (or negotiate an acceptable level), otherwise they have to move away (high transaction cost).

The amount of deposit is not regulated in Romania, with the exception of restituted housing under GEO 40/1999. It is not formally regulated at all in Bulgaria. However, in both countries the standard practice in private renting is 1-2 months' rent upon the conclusion of the contract. There is a legal maximum in Hungary, although most private landlords accept less than the legal maximum, and high end owners may ask for more. Aside from covering potential losses, landlords also use it to filter tenants and avoid the ones who will probably have problems with payments in the future. Interviews suggest that in the low end of the market, landlords occasionally ask for no deposit at all (in the cheapest and lowest quality rentals, where they assume that the tenants can do no great damage to the unit anyway). Altogether, although paying the deposit is somewhat an issue to renters, it does not mean an affordability problem comparable to regular rent payment or high utility costs.

Conflicts do sometimes arise at the payback of balance at the end of tenancy, but due to the informal nature of the sector, there is mostly only anecdotal evidence on this. In the case of conflicts at payback, but also in the cases where a landlord demands a higher deposit than the legal maximum, the slow and costly litigation procedure will keep most renters from trying to resolve such an issue in court.

In practice, tenants usually pay for the services (utilities, equipment) that they directly use; while the owner pays for expenses that contribute to the long term condition and usability of the property. E.g. tenants pay for their own utility consumption and they pay the common costs in a condominium and communal taxes to the extent it covers their own wellbeing; however, if the common cost has a long term renovation fund which enriches the owner, it should be paid by the landlord. However, in practice the contractual freedom of the parties prevails in this regard too. That is, if the landlord does

not inform the tenant that part of the condominium cost is transferred into a long term renovation fund, they can devolve the entire common cost payment to the tenant in the contract, who will have no legal remedy in this case once he signs the contract. In practice, the individual agreement as per the division of fees, costs and local taxes of the housing unit will reflect the power position of the parties.

Theoretically the same principles apply as with the regulation of expenses: small, immediate repairs fall into the responsibility of the tenant, and larger renovations which raise the overall market value of the property fall on the landlord. However, if the tenant decides to improve the property, they can usually demand compensation from the landlord; and the precise level of that compensation may be a source of conflict.

Other fees (e.g. registration fees or taxes to be paid by tenant) are not applicable in any of the three private rental sectors. Rent subsidies for low income households are very rare; so far they only exist in a handful of municipalities in Hungary, where they serve to counterbalance the chronic lack of municipal social housing.

### *3.2.2. Stability and Flexibility*

The position of the tenants is comparatively unstable under the housing law as well as the contract and real property law in all three countries. Tenants do have the possibility to delay eviction; but they do not have any regulatory safeguards *before* this point. On the one hand, both parties have the right to terminate the contract in case of a breach of the other party; on the other, due to the very permissive regulatory framework of private rental in Bulgaria, Hungary, and Romania, both parties have a right to terminate the contract fairly easily even if the other party fully respects the contract.

In accordance with the freedom of contract principle, the vast majority of contracts can be freely terminated at any point. A simple notice is sufficient to terminate open ended leases; the shortest notice period is in Hungary, where either party can hand in a notice by the 15<sup>th</sup> of a month to end the contract by the 1<sup>st</sup> of the following month; the longest notice period is 3 months in Romania. However, in all three private rental sectors it is not against the law to include a clause even in fixed-term contracts permitting the free termination of the contract before its expiration. It is generally considered acceptable to end the contract if a family member of the landlord wishes to use the dwelling, or the owner decides to sell it; in this sense, the owner's right to the property does outweigh the tenant's right to security of tenure. On the other hand, the tenant is also free to end the tenancy within a short period, and in this sense the flexibility of tenure is guaranteed.

With regards to subletting, the principles of freedom of contract and the protection of private property prevail. The tenant's right to sublet the whole or parts of a dwelling depends on his agreement with the landlord, and can be done only with the landlord's consent. In this sense, subletting is non-abusive as long as the landlord is aware of it, and has agreed to it. In Bulgaria, the law does not directly forbid tenants from subletting a dwelling or parts of it without the landlord knowing, if it results in no damage; however, it could easily be a source of conflict with the landlord, who in most cases has the freedom to unilaterally terminate the contract with a simple notice if he believes that taking in a sub-tenant without his knowledge was a breach of terms. In Hungary,

consent of the landlord is required, and in Romania, the consent must also be in writing to be valid; otherwise, subletting is legally considered a breach of the contract.

While the informal nature of the sector arguably weakens tenure stability in the private rental sector, the lack of a swift and reliable conflict resolution mechanism means that the only legal way to resolve disagreements is either an informal agreement or a court procedure; and the duration and cost of court procedure deters the contractual parties from this solution.

The private rental sector is certainly a flexible tenure in the sense that the tenant has the right to unilaterally terminate an open-ended contract with a simple notice, within a relatively short timeframe. On the other hand, the lax regulation and the limits of swift and efficient enforcement make the sector risky to the extent that it seriously limits its expansion; which in turn keeps actors (prospective landlords) from entering the market, and thus limits the sector's overall flexibility.

In Bulgaria and Hungary, the legislation lacks any rules designed for protection of the tenant from eviction on social grounds. All protection mechanisms in Bulgaria are encompassed in the respective procedural acts and only concern the right of defence of the affected persons against unlawful acts of the enforcement authorities. In Hungary, the landlord similarly has the right to terminate the contract if the tenant does not pay for 3 months, or otherwise breaches the contractual terms. While the tenant has no possibility raise objections on the substance of the execution procedure, it may be suspended one time upon the tenant's request for a period up to 6 months. There is also an eviction moratorium during the winter months, which serves to protect vulnerable tenants, but is generally applicable. The sole legal defence mechanism formally enshrined in Romanian law is the ban on evictions during the winter months, from 1<sup>st</sup> December to 1<sup>st</sup> March each year. In these two countries, the landlord has the right to terminate the contract if the tenant does not pay for 3 months; however, the termination can only be enforced following a court order, which may still present some delay in the procedure.

A very important factor impacting tenure stability in private residential renting is the widespread lack of a written agreement. Written form is not a condition of the contract's validity in Bulgaria and Romania. Putting the agreement in writing has only been a requirement of validity in Hungary since 2006, and contracts concluded before the entry into force of the new regulation continue to be valid. The details of oral agreements are extremely complicated to prove in a litigious procedure. Hungary's private rental sector benefited from the spread of written contracts (although in practice it may still be avoided, and numerous court cases address such tenancies); and Romania's new Civil Code provides enforceability of contracts signed before a notary public and registered with fiscal authorities as an incentive to boost both written agreements and official registration (thus the legalization of the sector as a whole). Nonetheless, the current regulation in Bulgaria and Romania does not ensure the overall stability and predictability of the sector.

One possible threat to tenure security in many EU member states is that landlords may only accept fixed term contracts, which denies the tenant the security provided by the indeterminate contract duration. However, this kind of security is not enforceable in

Bulgaria, Hungary and Romania: in practice, any of the parties is free to initiate contract termination by simple notice. Landlords familiar with the regulatory environment will still prefer fixed term contracts to protect their interests, nonetheless, so they can initiate the eviction of a tenant without the lengthy judicial procedure once the contract has expired.

#### **4. Comparison of tenures with a public task**

##### **4.1. Generalities**

Local municipalities act as the main social landlords in all three countries, and “social rental” and “municipal rental” are very often used interchangeably. On an overall European comparison, their social housing systems are fairly similar. The share of the social housing stock is small, at around 2-3 percent: due to the massive privatization wave, which took a huge impetus in the 1990s, but could be felt even recently in all three countries – the supply of social rental units is very limited, and falls very short of demand in all of the countries in question. Municipally owned housing is in an overall poor physical condition; and not only do municipalities lack resources or capacity to renovate them, but they also generate losses, so in most cases even the incentive is missing to improve municipal rental housing.

Nonetheless, despite the similar outcomes there are some differences in the regulatory environment of the three municipal housing systems, some of which are as basic as their level of autonomy within the national administrative and legal framework; which in turn affects their whole range of possibilities in social housing management.

Bulgarian local municipalities enjoy the greatest level of autonomy, although a loose framework is defined in the Municipal Property Act. Aside from the obligation to provide housing to low income, vulnerable and otherwise disadvantaged populations, each of them is mostly free to adopt its own social tenancy regulations via municipal Ordinances, from selection criteria to conditions, rent level and rent increase. While the law sets out some regulatory points, in most questions it still gives discretion to municipalities in most regulatory issues. Furthermore, tenancy relations are not set in a contract under civil law, expressing the mutual will of the parties; instead, social tenancies are *allotted* through an act of a public authority.

Hungary's social housing system is similar to that of Bulgaria in the sense that municipalities enjoy a great deal of freedom in regulating the housing stock they own. Nonetheless, their limitations are much stricter for two main reasons: (1) social tenancy relations are created through contracts under civil law between two equal parties; and (2) while the main legal acts regulating municipal tenancies are municipal orders, these cannot deviate from the Housing Law unless the latter provides them explicit discretion. A major difference compared to both Bulgarian and Romanian public task rental stock is the threefold structure of the Hungarian municipal rental stock: besides social rentals, they typically also manage cost-based rental units (cheaper than market rentals, although more expensive than social housing) and market price rentals. These are

considered public task housing too, especially as the income they generate helps make the municipally owned social housing stock more financially sustainable.

The Romanian social housing system is much more centralized than the other two, and most issues are centrally regulated by the Government Emergency Ordinance no. 40/1999, which regulates tenancies in restituted dwellings as well as state or municipally owned social housing. While social rent in Bulgaria and Hungary can vary greatly due to local authorities' discretionary rent setting, social rent in Romania must never exceed 15 percent of the tenant household's total income, and is defined by a complicated equation set by law. Overall, municipalities have very limited maneuvering room in managing the social rental stock.

Romania's GEO 40/1999 also regulates tenancies in restituted dwellings, where tenants who still reside in them enjoy a great deal of protection, and their contracts were centrally prolonged for five years on multiple occasions already. However, it is debatable whether these should be considered as public task tenancies, as the long term obligation of the state is to eventually ensure return of the right of use to the owners; and they will not be available as affordable rentals for future low income tenants.

Aside from public task tenancies in municipal ownership, there is a smaller rental housing stock with a public function in all three countries, owned either by the state, or ministries, or other public bodies (e.g. state owned companies). These units are typically retained for the use of the public sector employees working for the owner organization. While the number of (inhabited) municipally owned social rental units is in the order of a 100,000, the number of these "other" public task dwellings is around a few thousand units in all three countries. Aside from housing owned by the state or ministries, some examples of these are apartments owned by the Hungarian National Railways, or the Romanian National Bank. Another special case is that of ministries in Hungary which – aside from owning housing units – have a right to appoint tenants in municipally owned dwellings.

There are some other social landlords too (churches, charities, NGOs) in all three countries, but they usually operate under the national Housing Act, and their significance is marginal. They provide some important input for experimenting with alternative housing solutions for low income persons, although most of them were not yet adopted on a wider scale. One exception is Hungary's National Asset Management Company (NAMC), an entirely new type of rental tenure, initiated by the central government. NAMC was established to buy the homes of defaulted FX mortgage borrowers and rent them back to the former owners at a very affordable rent level. This is also the sole way in Hungary to date for defaulter mortgagors to be able entirely write off their debt, even if the current sale value of their home was lower than their debt towards the credit institution. The company is set to purchase 25,000 housing units by 2015, and although it is criticized for some of its clear shortcomings, it will likely become the largest social housing project launched since the transition to market economy.

The role of housing associations in public task rentals is negligible in all three countries. While housing associations do exist in all three housing regulations, they are more of a form of condominium management for a number of owner occupied multi-unit buildings

than a rental or intermediary tenure form. And while there have been some recent initiatives to launch Social Rental Agencies, they are not currently active as of mid-2014.

As municipal rental housing is the predominant subtype of rentals with a public task, we will treat it as a default and will discuss municipally owned rental housing unless specified otherwise.

#### **4.2. Evaluative criteria for public/social/private subsidized landlords**

Social housing provision is essentially the task of local municipalities in all three countries, and covering the expenses of housing provision is also almost exclusively their task. So while the social rental stock is very small (under three percent of the total housing stock) in all three countries, public task housing largely coincides with municipal housing; and nearly none of it is centrally subsidized. While the sector generates significant losses in all municipalities, they receive hardly any external funding from the state or any other sources for this purpose. This produces strong counterincentives for municipalities to maintain – let alone improve or expand – their social housing stock; and this is the main reason social landlords have still been selling out their housing units in 2014, despite the fact that by this date the need for more affordable housing has become obvious in all three countries.

The majority of the social housing stock is of a poor quality, and has been deteriorating. Quite commonly in all three countries, tenants are supposed to maintain their dwellings properly and do small repairs; municipalities or municipal companies should undertake large reparations; however, usually neither side has the adequate resources.

Tenure security in social rental housing is significantly stronger than in private rentals, although weaker than in owner occupied housing. Rent and utility arrears are very common in all three countries, which further incentivizes to municipalities to dispose of their social housing units if they have the possibility.

In **Bulgaria**, rent levels and the precise selection criteria are determined by the municipalities in accordance with the Municipality Property Act. There is no central regulation about the details of social tenancy, such as initial rents and rent increases, except that they have to remain significantly below market rents. Since there is no targeted funding from state bodies for social housing, most municipalities have trouble properly maintaining their social housing stock, with the exception of some of the better-off municipalities. The tenants do have the right to improve their dwellings, although their possible compensation for this is not regulated, which could result in unclear situations or conflict with the social landlord. As quoted from an interview in Yordanov et al. (2014, pp. 213), “*We had a dramatic case in which we found a social dwelling released from the tenants without windows – tenants had moved out and had taken the windows because they belonged to them*”.

In **Hungary**, the typical social landlord is the municipality, although two subtypes of municipal rentals which are not strictly social (cost-based rental dwellings and market rate municipal rentals). The rent setting of municipal tenancies is liberalized and depends on local municipalities' autonomous regulations, which should nonetheless be significantly lower than market rent level and reflect the guidelines laid down in the

Housing Law. Regardless of the exact rent level, rental income from social housing is unreliable and does not cover maintenance costs; the threefold system of municipal rentals helps make the municipally owned stock more financially sustainable.

In **Romania**, the lease regime for social rental dwellings is regulated by the Romanian Housing Law (Law nr. 114/1996), and the Emergency Ordinance no. 40/1999, which was also created to ensure tenure security for persons living in restituted dwellings. Social rent level is centrally regulated: it is calculated by a complicated formula, but must not exceed ten percent of the household's income. Contracts are usually concluded for five years, and may be renewed if the tenants can prove their continued income eligibility. A tenant can only be evicted by an irrevocable court decision, which is rare, and politically risky, and municipalities try to avoid them. The state provides assistance to the construction of new public housing (through the ANL), but the maintenance and renovation of existing municipal housing falls entirely on municipalities. Some public task rental programmes however, like Rental Housing for Young People, have funding from international financing agencies (CEB, Council of Europe Development Bank, Deutsche Bank AG).

The main target groups of the various housing policies in the three countries are the lowest income groups; young married couples (under 35) with no substantial family support; people with disadvantages; young people leaving social care establishments (after 18 years of age); disabled persons; and other vulnerable groups (e.g. persons who lost their homes in natural disasters).

Tenants of public task rental units which do not serve a strictly social purpose – like dwellings owned by a ministry or a state company – are not selected on a social basis, and therefore non-payment is less of an issue in their case. While the rent in these is usually to be lower than market level, the number of such dwellings is limited, so while this kind of subsidized housing provision is not profitable, appropriate funding does not mean a disproportionate burden to the landlords.

### **4.3. Evaluative criteria for the tenant**

#### **4.3.1. Access**

The low share of public task tenancies in all three countries already indicates the huge shortage of affordable rentals. The number of persons who respond to the legal criteria of applying for a social rental dwelling is multiple times higher than the number of social rental dwellings. Yet the number of affordable rentals have been decreasing for decades now, even in Hungary and Romania where there were serious efforts to build new social housing; due to the disincentives stemming from the lack of appropriate funding against the financial losses generated by non-payment and low rental income. According to the data of CECODHAS Housing Europe, social housing took up 3.1 percent of Bulgaria's housing stock, while this rate was 3.7 percent in Hungary and 2.3 percent in Romania, while the share of groups at risk of poverty and social exclusion have been growing in all three countries (CECODHAS, 2011; Eurostat, 2013). As a consequence, a municipality could receive dozens – sometimes hundreds – of applications for each vacant social

rental dwelling; and as social rentals are the second most stable tenure form, the number of new vacancies is always low.

Similarly to most other aspects of social rentals, eligibility and selection criteria of social tenants is centrally defined in Romania, while municipalities have much more autonomy in Hungary, and even more in Bulgaria. Regardless of their level of autonomy or freedom to select and define contractual conditions, municipalities generally respect the spirit of the law in as much as they strive to house the persons the most in need. At the same time they need to create a balance between social housing provision and ensuring financial sustainability (or minimizing losses). In certain cases this could lead to unlawful practices, such as social landlords taking bids from applicants, or otherwise demanding financial guarantees to ensure that the future tenants will be able to regularly pay the rent, which is in clear contradiction with the principle to house the poorest persons.

#### *4.3.2. Affordability*

Similarly to other aspects of municipal rental housing, regulations on rent levels and rent increases reflect the level of decentralisation that took place in the transition period. Municipalities enjoy the greatest extent of freedom in Bulgaria, where social housing is allotted through an administrative act instead of a bilateral contract; and locale municipalities determine terms and conditions, including rent level and rent increase, deposit, regulation of expenses, repairs and maintenance, and local subsidies, with very little central regulation.

In Hungary social rental relations are created by a rental contract concluded between equal parties, although social tenants do enjoy greater protection than private tenants. Municipalities enjoy a large amount of autonomy in determining the regulations (rent levels and rent increase, expenses and maintenance, and so forth) of municipally owned rental housing, be it social, cost-based, or market based rental. At the same time these regulations must be in line with the Housing law and the sections of the new Civil Code on rental housing.

Romania's social housing system is much more centralized than the other two: essentially all aspects of municipal rental housing are defined by the Housing Law and Emergency Ordinance no. 40/1999. The rent level in social rental units is determined centrally by a complicated formula, and it can never exceed ten percent of the household's disposable income.

Despite the huge regional differences among social rent levels in Bulgaria and Hungary, landlords in all three countries make efforts to keep social rent at an affordable level, and they do succeed in all cases to keep them significantly below market levels. However, the affordability of social housing is frequently affected by factors entirely independent of rent and deposit regulations. Due to the privatization practices typical of the CEE regions throughout the 1990s, local authorities very often only managed to retain ownership of the housing units in the poorest condition. These dilapidated, poorly insulated buildings cannot ensure an efficient use of household energy and other utilities. If we consider affordability in the internationally used level, at thirty percent of a household's monthly income, then rent alone is often perfectly affordable to social tenants in Bulgaria and Hungary, and in all cases in Romania, where its legal limit is ten percent of the household's income. Utility costs on the other hand may be as high, or

even higher, than the rent; some social housing providers reported cases where utility costs alone took up as much as sixty percent of the tenants' monthly income during the winter months. Therefore utility arrears are a major issue in all three countries' social housing stock.

Utility arrears could often lead to late payment in other areas. Utility providers could discontinue service after three consecutive months of non-payment, while social tenants enjoy relatively high tenure security in a social rental unit. Therefore if a social tenant finds herself in a situation where she can only pay some of her bills, she is incentivized to pay utility bills, and be late with the rent instead. In this case it is the larger security guaranteed by the social rental tenure which further undermines the social housing stock's financial sustainability from the point of view of the landlord.

Rent subsidies for low income tenants are atypical in all three countries. Low income households often receive (very modest) subsidies on the basis of their social and/or income situation, but not directly for housing. In fact social housing tenants never receive housing subsidies, as they are not the owner of their dwellings. In Hungary some municipalities provide rent subsidy to poor households to counterbalance the scarcity of social rental housing, but no rent allowance is provided on the national level.

#### *4.3.3. Stability*

In all three countries five year contracts are reported to be typical. In Bulgaria and Romania, renters usually have the possibility to renew their contract if they can justify that they are still eligible based on their income situation. Authors of the present text have information on a more diverse practice in Hungarian municipalities (which does not mean that similar practices are nonexistent in Bulgaria and Romania, but it may be more complicated to obtain credible information on them). Here, some municipalities set further criteria to contract renewal, like the absence of rent arrears towards the municipality, or utility arrears towards utility service providers; and in some cases municipalities may be more flexible with renters who do have an arrear, but are willing to cooperate. In some cases, the social landlord will unilaterally change the contract from indefinite to limited in time if the amount of rent arrear reaches a set level (based on the local municipal order regulating social tenancies); in more problematic cases the social landlord terminates the contract due to non-payment, and demands a 'user fee', which is higher than the rent.

Even with these taken into account, social rental is by far the most stable tenure form for low income households that do manage to obtain a rental unit despite severe shortage in all three countries. In all cases, tenants have a guarantee to stay in the dwelling as long as they respect the contract, in a stark contrast to private rentals. In fact, tenants very often have a possibility to stay in the dwelling even if they have trouble paying the rent on time; and social landlords will usually try to help them find a solutions as long as there is a chance that the tenants will continue to cooperate (particularly they seem willing to pay the missed rent later). On the other hand, there are no meaningful social defences if the case of a tenant has come to eviction. In Hungary and Romania tenants are automatically protected from being evicted during the winter months; in Bulgaria such rules depend on the municipal ordinance. Given the shortage of social housing and

the similarly vulnerable status of the other (numerous) prospective social renters, social landlords have little motivation to further protect renters who have come to the point of eviction.

An adverse effect of tenure stability combined with very low rent levels in all three countries is that a huge share of social tenants has varying levels of arrears in all three countries. As pointed out earlier on multiple points, social housing is already financially unsustainable for municipalities as rental incomes do not cover the required expenses, and no central budget support is available for this purpose; and rent and utility arrears further exacerbates this issue. On the whole, municipalities have no real interest in maintaining their social housing stock, while have strong incentives to sell what is left of it. Decision makers on the local level usually provide an option for tenants to buy their dwelling, although its conditions may vary (tenants could receive different levels of discount from the market value; or have to justify a required length of time spent in the housing unit they intend to buy). This leads to an ever shrinking supply of social housing, which is rarely discouraged by higher (urban or regional or national) policies aimed at preventing the further decrease of the social rental stock.

#### *4.3.4. Flexibility*

In principle, public task tenancy is very flexible in as much as unilateral notice by the tenant is always acceptable. Due to the heavy demand for municipal rental housing, there is not much point in introducing restrictions for tenants in leaving a municipally owned rental unit. This does not typically happen in practice, though. Although the possibility is there, social housing in Bulgaria as well as in Hungary and Romania is the second most stable tenure form after owner occupation, and once a social tenant secured a rental unit, they will hold on to it as long as possible; and the typical low income municipal tenant can hardly ever afford to obtain home ownership.

The regulation of non-abusive subletting is fairly restrictive in all of the three countries: it is never acceptable without the prior consent of the landlords, and even then only with strict conditions. In Bulgaria, most municipal regulations explicitly forbid subletting, and social tenants may be evicted and fined if they take in a sub-tenant; although this may vary geographically, due to municipalities' wide range of freedom in defining their own real estate and tenancy regulations. In Hungary, subletting a public rental dwelling is typically only acceptable with the consent of the landlord.<sup>12</sup> In Romania, the otherwise more strictly regulated municipalities' are free to establish local regulations in this regard, but in practice they will typically stick to permitting subletting only with prior written permission and under the conditions established by the owner.

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<sup>12</sup> A municipal tenant can accommodate (as co-tenant) her spouse, parent, child, and/or the accommodated child's child in the dwelling without the consent of the landlord, and other persons that may be accommodated are defined in the municipalities' order on municipal real estate and tenancies. However, this is not considered a form of sub-letting.

## 5. Conclusion

A shared state socialist past between 1945 and 1989, as well as partially path-dependent transition and a shared ambition to join the European Union, has resulted in quite similar welfare and housing outcomes in Bulgaria, Hungary and Romania – at least in a wider European comparison. Despite the differences in the origins and early influences of their legal systems, the development of their legal environments had to respond to fairly similar social and economic challenges. Although many of their economic and social policies have been different both before and after the transition, and to this day they show diverging levels of development, the key outcomes relevant to housing and particularly to tenancy, remained very similar.

### 5.1 Historical overview

The level of communist state control over societies under and housing systems varied, but in every case it was pervasive. Residential building soared to respond to intensive industrialisation. In the new urban industrial hubs, it was largely taken over by state owned companies, and was financed from the central budget. At the end of the communist era, the share of social rental housing was higher than ever in the history of these countries – and yet, even then it was not higher than the share of public task rentals in Western European countries. Despite the intensive state efforts in construction, sixty percent or more of new residential building was still carried out in the private sector, through self-financing and self-building, and it very often involved the help of family and friends (particularly in the rural areas).

#### Urbanisation rates, 1900-2000

	Bulgaria	Hungary	Romania
1900	20%	31%	16%
1945	24%	37%	22%
1990	67%	62%	54%
2000	75%	65%	53%

Source: Sillince, 1990; Wikipedia; Hungarian Statistical Office

As communist principle was antagonistic to profitmaking, private renting was lawed out in these societies, which in itself strongly distorts their tenure structures. However, massive need for rentals resulted in an underground (illegal) rental sector, which could take up as much as 20% of the urban housing stock. It was typically of poor quality, but expensive due to high demand. Although this sector remained illegal throughout the communist period, authorities seemed to look the other way when it came to informal renting. It probably represented a compromise of sorts: communist citizens could not legally pursue this profit seeking activity, but since the state was not prepared to house all these people, it rather chose to avoid triggering intensive social tension by effectively eradicating the sector.

The transition process began in 1989-1990, although some sectors of the economy saw significant liberalization as early as the 1980s. One of its initial and pervasive effects was the transitional recession, which, among other things, meant a drop in GDP levels

and in new housing construction. Policy reforms and economic restructuring began in the early 1990s in Hungary, where the transition process was relatively peaceful and followed a liberalization process in the 1980s. And yet the GDP level recovered to pre-transition levels only by the early 2000s. In the meantime, economic and political turmoil delayed reforms and restructuring by nearly a decade in Bulgaria and Romania.

A free housing market was put in place in all three countries, although at different paces. The mortgage market was developed with state assistance in Hungary from 2000, and took off on the mostly unsubsidized private markets by 2004; a similar process, although at a much lower rate, unfolded in Bulgaria and Romania. Nonetheless, by the early 2000s the three countries showed some signs of economic convergence, as the latter two countries eventually undertook the required economic reforms to prepare for their EU accession, while Hungary's growth was hindered by a series of irresponsible macroeconomic decisions. Eventually, all three were hardly hit by the Great Financial Crisis in 2008, and showed signs of a prolonged recession in the following years.

Housing construction already slowed down in the 1980s, and suffered more after the transition in all three countries. The development of the early 2000s was mostly undone by the GFC.

#### **Housing construction (1,000 units), 1980-2011**

	1980	1990	1993	1997	2002	2008	2011
Hungary	71,9	43,8	20,9	28,1	31,5	36,1	12,6
Bulgaria	74,4	26,0	11,0	7,5	6,2	20,9	14,0
Romania	73,3	49,1	30,7	31,5	28,0	68,2	45,4

Sources: National Statistical Offices, Housing Statistic for Europe, 2011, Sillince, 1990

## **5.2. Current welfare and housing regimes**

In our study, we analysed the context of residential renting of Bulgaria, Hungary, and Romania on three levels:

1. *Macroeconomic development:* all three countries went through a post-transitional crisis, after which they recovered and eventually joined the EU. However, they all are in a peripheral position within the EU; and as their economic growth never surpassed that of most other member states significantly and for a prolonged period, it is doubtful whether they are truly "catching up" to Western European economic performance. Development is marred by the difficulties of building democratic institutions and the rule of law; tax evasion and the informal sector play significant roles in all three countries, and it is unclear whether economic growth has truly translated into wages and living standards. Due to swiftly growing inequalities, a large portion in all three societies is worse off than they were before the transition, while elites have gained significant wealth, and living standards have improved for a fairly wide middle class. Nonetheless, Central and East European "middle classes" are hardly comparable to their Western counterparts; and they face dire difficulties when it comes to labour security, future pensions, tenure security (weakened even for homeowners if they have mortgage or utility arrears) and other factors affecting their long term prospects.

2. *Welfare regimes*: as a consequence of their communist history, social safety networks had a strong tradition in all three countries. They had to reduce welfare funding significantly in the decades after 1990 due to the pressure to create financially sustainable social care systems; but also because of limited resources, stemming from modest overall economic performance, as well as widespread informal sectors and tax evasion.

- Adequate welfare response to social issues is also complicated by lack of reliable data on household incomes (again due to the large informal sectors, which could cover up to 20-30% of national GDPs).
- Insufficient care is often completed by family help and intergenerational transfers, while individuals with no supportive family are more vulnerable to economic hardships. Homelessness have become a massive issues in all three countries after the transition, and experience shows that persons are much more likely to become homeless if they have no supportive family networks to fall back on.
- Another major social problem of all three countries is the huge number of extremely poor persons within Roma ethnic groups, who often find themselves in urban as well as rural segregated areas with little to no social assistance, as welfare systems lack the resources as well as the ability to efficiently respond to their issues.

3. *Housing regimes*: in all three countries, current housing regimes are defined by the predominance of homeownership, which statistically covers around 90% of the housing stocks (ranging from 87% in Bulgaria to 96% in Romania).

- A demographic decline characterised all three countries, although its rate has been different. Bulgaria's population dropped from cca. 9 million to around 7 million in two decades; outmigration and natural decrease in population in Romania was also significant. While it has been the lowest in Hungary, losing only about half a million people in 20 years, it gained impetus after the GFC. So despite the slowdown of construction, the share of empty dwellings had been on the rise in all three countries; and the declining population might also explain the low level of investment in housing.
- The current legal and financial circumstances do not encourage private renting. Nevertheless, the private rental sector is present, and is much larger than what statistics suggest – and it is also largely informal.
- Social housing was decimated by the massive privatization of public task housing: in the three countries, its share it was between two and four percent in 2011. The share of low income populations is obviously much higher than this, which means that the majority of poor people have to find market solutions to their housing needs, which only perpetuates their unfavourable situation. For the least well-off this often results in a sort of savage capitalism, well outside the safety of the national welfare systems, which are better equipped to respond to (lower) middle class issues.

### **5.3 Result of the analysis**

A brief summary of the current state of affairs is that a functioning market economy, including a free housing market, has been established in all three countries. However, market correction mechanisms in welfare provision and housing need further reinforcement. Although they were harmonised to EU law in the accession process, housing was not a central issue of this process, and accordingly reform efforts were concentrated elsewhere. While the various sectors of housing were thoroughly liberalised after the transition, no detailed and adequate legislation was developed to enable to optimal functioning of the various housing subsectors. Housing policy outcomes in all three countries show that regulations are very liberal, to the extent that these fields could be considered *underregulated* compared to housing regimes in old EU member states.

The housing policy outcomes in all three countries can be characterised by a *distorted tenure structure*, where cca. 90% of all housing is recorded as owner occupied, while both private and social renting appears to be residualised. In this housing environment, official policy still widely supports homeownership, and the types of support and subsidy that require the most public resources are almost invariably pro-middle class (including mortgage loan subsidies, support for new housing construction, Bausparkasse type contract savings schemes etc.).

Public task rental really is tiny, between two and four percent in the three countries. The reasons for this were detailed extensively in the report, but to give a brief summary: after the transition, responsibility for social housing provision was delegated to local municipalities, together with a large and dilapidated housing stock, and virtually no central funding to maintain or renovate it. Social rents are very low, and social tenancies very stable, so municipalities are incentivized to get rid of rental housing, and preferably social renters too. In the end, they need to balance their obligation to provide social housing, and their pressure to create a sustainable housing and tenant portfolio.

Unlike social housing, the private rental sector is much larger than what the statistics show, albeit it is largely invisible due to its informal nature. Its size is hard to gauge, but field experience suggests that many housing units reported as owner occupied or vacant on Censuses is privately rented. Despite the simple, convenient and flexible nature of private renting, the unfavourable legal and financial environment keeps landlords and tenants off the market; landlords will only enter it if they can improve their margin by tax evasion, and for most tenants it is a temporary solution, or a last resort. As pointed out earlier, some of the most vulnerable groups must find a housing solution in the relatively costly private rental market, for the lack of other options. One noteworthy consequence of this situation is that professional (institutional) landlords are almost entirely missing from all three markets. Neither them, nor their tenants would not be eligible for any kind of support from the state or city, without which the average renter just cannot produce sufficient income as to make the sector lucrative for institutional investors.

For the same reason, the unfavourable environment for renting, “other tenure types” (such as building or tenant cooperatives, or any real intermediary tenures between renting and ownership) are almost entirely missing as well.

#### **5.4. The future of the rental sector**

A coherent housing policy or strategy – or the apparent political will to change the situation – has been missing so far in all three countries. Tenure security in private renting is weak, and the position of tenants in social renting has also been becoming looser in the past years. GFC and the resulting mortgage crisis has shown that even owner occupation may not be as stable as previously believed. The public perception of renting could change in the aftermath of the crisis, as it *might* change the tenure preference of households; but real changes in the sector can be expected only if the reforms in macro-economic sector, welfare regime and housing policy will take place.

Post-transition countries should probably adopt an economic development model that provides perspective for the younger generations, who could not profit from the massive privatisation at a discount of formerly state owned property, and then saw their opportunities narrowed by a steep rise in real estate prices, and later by the mortgage crisis. New member states should pursue a stable and sustainable macroeconomic development; steer their welfare regimes in a way that enables efficient management of the social consequences of the growing income inequality; and create a coherent housing policy framework that allows the efficient and fair use of housing sector resources. Among other things, this means the reconsideration of their current tax and subsidy frameworks, with a view to tenure neutrality, in order to counterbalance the current heavily skewed tenure structure.

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

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### **Intra-team Comparison Report for CYPRUS, GREECE, ITALY**

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Deliverable number 4.1

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## **ZERP Tenancy Law Project**

### **Comparative Report on Cyprus, Greece and Italy**

#### **Introduction**

The aim of this report is to provide a comparison of Cypriot, Greek and Italian tenancy law systems. Notwithstanding some similarities, the current housing policies and legislations of these three countries are very different. While several regulations of the private rental market were established in Italy in the 1900s and still play a prominent role, in Greece and Cyprus they were introduced much more recently and to a more limited extent.

The first part of the comparison focuses on the historical evolution and on the current situation of the national housing systems, while the second part compares the most significant regulatory aspects.

#### **1. The current housing situation**

##### **1.1. General Features**

###### **1.1.1. Historical evolution of the national housing situation and housing policy**

The development of housing policies in Italy, Greece and Cyprus has followed different paths. In Italy it began in the early 1900s as a consequence of industrialization and the necessity to provide housing for low-income people moving from the countryside to the cities. This increased after the destruction of the two world wars and the economic boom, which were the stimulus for policies financing the building of a great number of public dwellings. At the same time, several types of incentives for home ownership were enforced. Regarding the private rental market, from the 1920s various limitations in the contractual freedom were introduced, consisting of capped rents and forced prolongation of tenancy contracts. Although these were initially designed to be short-term, they were reiterated time after time until the Fair Rent Act came into force in 1978. This law introduced rent control on a permanent basis and a mandatory minimal duration of all residential tenancy contracts.

Changes began in the 1980s when investments in public housing were reduced. Home ownership continued to be subsidised, while the rental market started to be liberalized from the beginning of the 1990s. The new tenancy law came into force in 1998.

In Greece housing policies are less developed and began as a consequence of the huge exodus of the Greek population from the Asiatic coasts of Turkey to the mother land in the 1920s and then due to the social changes following the second world war. However these policies have never led to building homes and nor have they regulated the private rental market. They have only provided subsidies for buying or

renting houses. In 2012 this form of welfare state was suddenly interrupted as a consequence of the dramatic economic crisis in the country.

Likewise, housing policies in Cyprus are mainly a consequence of the exodus of the population from the part of the island occupied by Turkey in 1974. However in this case helps also included the provision of homes or at least of state land for self-building.

Despite these differences and the even more significant differences in population (Italy: 59.5 million; Greece: 11.2 million; Cyprus: 870,000), the percentages of housing tenures nowadays are not so dissimilar. The share of home ownership is high but below the EU-27 average (73.5%) in all three countries. In Italy this is the result of a progressive increase, since the 1990s until the beginning of the crisis, which is mainly the consequence of high sales of dwellings owned by public entities in order to swell the state's coffers as well as the increase in bank loans. On the other hand, both in Greece and Cyprus, where the shares of home ownership were already higher, the situation has remained more stable during the between 1991 and 2011. In the last fifteen years in Italy the share of rent has been clearly affected by the trend in home ownership : initially there was a decrease, and then in 2010 there was a rise following the economic crisis and the drastic cut in loans for new homes. Rental tenures in Greece were again more stable, though with a similar trend to Italy, which seems to be mainly affected by migration from abroad, which largely heads to the rental sector<sup>1</sup>.

Cyprus had quite a significant increase in rental tenures, which reflected a reduction in other intermediate forms of tenure. The latter are instead quite stable both in Italy and Greece.

It is worth noting that in Italy, unlike Greece and Cyprus, about a quarter of rental tenure is composed of public housing, which corresponds to 5.5% of the total in 2012<sup>2</sup>.

**Table 1**

	ITALY	GREECE	CYPRUS
<b><i>Home ownership</i></b>			
1991	63.9%	73.6%*	-
2001	68.5%**	71.7%	68.4%
2011	67.2%***	73.2%	68.7%
<b><i>Rental tenure</i></b>			
1991	24.6%	20.05%*	-
2001	20.9%**	19.8%	13.9%
2011	21.8%***	21.7%	18.8%
<b><i>Intermediate tenures</i></b>			
1991	11.5%	4.1%*	-
2001	10.6%**	5.3%	17.5%
2011	11.0%***	5.1%	11.3%

\* Data 1992

\*\* Data 2002

\*\*\* Data 2012

<sup>1</sup>T. Konistis, National Report for Greece, 2014, <[http://www.tenlaw.uni-bremen.de/reports/GreeceReport\\_09052014.pdf](http://www.tenlaw.uni-bremen.de/reports/GreeceReport_09052014.pdf)>, 6.

<sup>2</sup>R. Bianchi, National Report for Italy, 2014, <[http://www.tenlaw.uni-bremen.de/reports/ItalyReport\\_09052014.pdf](http://www.tenlaw.uni-bremen.de/reports/ItalyReport_09052014.pdf)>, 10.

Migration has played a significant role in the housing policies of both Greece and Cyprus. This migration was mainly the consequence of specific historical episodes, such as the exodus of the Greek population from Asia in the 1920s or the occupation of part of Cyprus by Turkey in 1974. Above all, more recently there has been an increasing concentration of people in the urban area of Athens.

Migration within the country also had a significant impact in Italy especially during the years of the economic boom, after the WW II, when millions of people left the countryside and began to work in factories, typically concentrated around the big cities in the north of Italy. Still today, there is a tendency to move towards the more economically-developed regions in the north of the country, with the risk of depopulation for certain areas in the south of Italy<sup>3</sup>.

Another important aspect is that both Italy and Greece, after being for many years countries of emigration, have more recently became countries of immigration<sup>4</sup>, although in Greece migrants tend not to remain but just pass through. In the late 1990s, there was a sudden increase in the number of foreigners living in Italy. As the vast majority of these people arrive from poor countries in Africa and Asia and have very limited financial resources, the possibility for them to find suitable dwellings is one of the most difficult housing problems.

### **1.1.2. Current situation**

Table 2 reports the number of dwellings and households:

**Table 2**

	<b>ITALY</b>	<b>GREECE</b>	<b>CYPRUS</b>
Dwellings	28,863,604	6,384,353	433,212
Households	24,512,012	4,134,540	303,342

As mentioned above, the percentages of housing tenures are quite similar in these countries: home ownership is rather high and rent accounts for about one fifth of the total (see Table 1). This means that the housing market is not particularly developed in any of these countries.

In Italy there is not a sufficient supply of dwellings to rent, especially in the main cities where people tend to be concentrated and the need for mobility is more widespread. However it especially seems to be a problem of affordability rather than the numbers of dwellings. In Greece and Cyprus housing supply problems with regard to rent do not seem to arise. In Greece, there is quite a high number of vacant dwellings waiting to be sold or rented<sup>5</sup>. The same can be said for Cyprus, as the number of dwellings are proportionate to the households and rent prices seem to be affordable<sup>6</sup>.

In terms of quality, although statistics do not distinguish between owned and rented dwellings, in Italy the percentage of satisfaction expressed by tenants in some surveys strongly suggests that houses and flats to rent in many cases do not meet

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<sup>3</sup> See amplius Ibid., 8.

<sup>4</sup> For new recent forms of emigration from Italy, see Ibid., 10.

<sup>5</sup> Konistis, Greece, 14.

<sup>6</sup> T. Konistis, National Report for Cyprus, 2014, <[http://www.tenlaw.unibremen.de/reports/CyprusReport\\_09052014.pdf](http://www.tenlaw.unibremen.de/reports/CyprusReport_09052014.pdf)>, 13 and 14.

the quality standards required by the occupants<sup>7</sup>. This problem seems to be less evident in Greece and Cyprus<sup>8</sup>.

### 1.1.3. Types of housing tenures

Despite the prevailing role played by home ownership and rent, all these countries have a certain number of intermediate tenures. The traditional distinction between real property rights (such as usufruct and habitation) and tenures deriving from a contract (such as loan for use) is shared by all of them. Rental agreements with the option to redeem the dwelling are becoming more widespread both in Italy and Cyprus as a way to overcome difficulties in obtaining home loans to buy houses<sup>9</sup>.

Condominium ownership is prevalent in all the three countries, and in Italy about 55% households live in this kind of dwelling. Cooperatives are not prevalent in Cyprus, and in Italy and Greece only have a very limited share of the housing market<sup>10</sup>.

With regard to rental tenures, although the share of the market is not particularly different in the three countries (see Table 1), both in Greece and Cyprus, there is no specific legislation for public tenancy. This is due to the fact that a system of public housing has never been created in Greece and Cyprus. In addition in Greece the rental market was completely liberalized during the 1980s and 1990s and after the economic crisis remaining subsidies were also cancelled<sup>11</sup>. In contrast, in Italy public tenancies represent about one fifth of the whole rental market<sup>12</sup>.

In Italy rented dwellings, with an average surface of 74 m<sup>2</sup>, are twice as crowded than dwellings where the owner lives<sup>13</sup>. Further statistics considering only the quality of rented dwellings are not available but, as already mentioned, surveys regarding tenant satisfaction suggest that rented dwellings are often affected by many more quality problems than dwellings where the owner lives (see 1.1.2 above)<sup>14</sup>.

There is no specific data for Greece and Cyprus, but it has been suggested that the general quality of the housing seems to be adequate<sup>15</sup>. In addition, the 2011 national census results confirm that general living conditions have improved since the early 2000s.

Rented dwellings in all the three countries seem to be especially owned by small private owners. In Italy small private owners account for 70% of the market, public housing for about 22% and dwellings owned by corporations for 7/8%<sup>16</sup>.

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<sup>7</sup> Bianchi, Italy, 15 et seq.

<sup>8</sup> See respectively Konistis, Greece, 13 and Konistis, Cyprus, 11.

<sup>9</sup> In Italy their shares are as follows: 7.4% loan for use; 3.3% usufruct or right of housing; 0.3% rent with faculty to redeem the dwelling: see Bianchi, Italy, 11. For Greece and Cyprus it was not possible to find the respective shares of the market, but at least in Greece loans for use seem to be less widespread: Konistis, Greece, 9.

<sup>10</sup> In Italy about 0.17%: Bianchi, Italy, 11.

<sup>11</sup> Konistis, Greece, 10.

<sup>12</sup> Bianchi, Italy, 14.

<sup>13</sup> Bianchi, Italy, 15.

<sup>14</sup> See Bianchi, Italy, 15 for the problems which most commonly affect Italian houses.

<sup>15</sup> Konistis, Greece, 13; Konistis, Cyprus, 9.

<sup>16</sup> Bianchi, Italy, 16.

#### **1.1.4. Other general aspects of the current housing situation in comparative perspective**

The situation of lobby groups operating in the housing market is quite different in the three countries. In Italy there are many associations representing the interests of both homeowners/landlords and tenants, in the private and public sectors.

In the private sector, for the most representative of these organizations, the law expressly recognizes the role of establishing model contracts through a national general agreement, which must be used where parties opt for 'assisted tenancy', 'temporary tenancy' or a tenancy contract executed by a university student for studying purposes (Art. 4 and 4-bis Law no. 431/1998: Tenancy Act). Local agreements among these associations are also required to establish the amount of rents at a local level when rent ceilings apply (Art. 2, subs. 3 Tenancy Act). With regard to 'free market tenancies', the role of these associations is more limited but a further legal provision expressly deals with it: parties may be assisted by these associations during negotiations or for contract renewals (Art. 2, subs. 2 Tenancy Act). In addition, these associations play a lobbying role at local and national levels regarding the interests of their associates, and also offer assistance, through local offices, to landlords or tenants with regard to negotiation, execution, registration and performance of contracts<sup>17</sup>.

In Greece there is an association of owners and landlords and also an association of tenants. Their role however is more limited, concerning representation and defending their interests, as well as consultation services and solicitation of payments<sup>18</sup>.

Finally in Cyprus, there is only an owners/landlords association, which plays the same role as the corresponding Greek association<sup>19</sup>.

The issue of vacant houses affects all three countries, although its numbers can only be roughly estimated as it involves the exclusion of 'second houses' and the black rental market.

In Italy vacant houses are in the range of 400,000/500,000 (out of 28,863,604 total dwellings), which is quite a significant number considering the housing problems (due to shortages, not affordability, low quality) affecting many Italian households. The most critical situation is vacant public housing (generally not rented because they need repairs), as they are frequently subject to illegal occupations<sup>20</sup>. Until 2012, fiscal policies were used to some extent to deter vacancies. After the reforms to housing taxation carried out over the last few years, fiscal policies for deterring vacancies have played an even minor role. In fact, owners are currently required to pay an income tax on 'non-rented dwellings' (which also includes dwellings granted to relatives free of charge and 'second homes') only when they are located in the same municipality as the owner's 'first home'<sup>21</sup>.

In Greece, according to the 2011 national census data, 2,249,813 dwellings (35.3 % of the total dwellings) were found to be vacant. Most of these (representing 60.09% of vacant dwellings and 21.21 % of total dwellings) are holiday homes, but a significant percentage is made up of houses available for rent (453,901 houses, representing 7.12 % of total dwellings and 20.2 % of vacant dwellings) or for sale

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<sup>17</sup> For further details see Bianchi, Italy, 16 and 178 et seq.

<sup>18</sup> Konistis, Greece, 12 and 94.

<sup>19</sup> Konistis, Cyprus, 11 and 84.

<sup>20</sup> For further details see Bianchi, Italy, 17.

<sup>21</sup> See Bianchi, Italy, 52 et seq.

(88,996 houses, representing 1.4% of total dwellings and 4% of vacant dwellings). A number of these houses (357,806) were built after 2001<sup>22</sup>.

Therefore, unlike in Italy, the housing supply in Greece seems to exceed demand, which is why policies to counteract vacancies have not been adopted<sup>23</sup>. The situation seems similar in Cyprus, where about 12.6% of dwellings are available for rent or sale and there are no policies in force to counteract vacancies<sup>24</sup>.

As far as irregular practices in the rental sector are concerned, black rental market seems to be the most significant. Non-registration of tenancy contracts is a problem in all three countries, although in Greece and Cyprus, data on the extent of this are not available. In Italy it is estimated that there are almost 1,000,000 non-registered contracts, which is about one fifth of the whole market. In addition, this does not include cases of students renting a room or a flat in university towns where they study, even though they formally live with their parents. Black rental market definitely affects students and immigrant contracts to a very high extent.

In Italy there are three main reasons for such a widespread phenomenon: tax evasion, the high number of dwellings not fulfilling habitability requirements, and irregular immigrants. In Greece and Cyprus black market seems to regard mainly low quality and abusive houses, especially in poorer neighbourhoods<sup>25</sup>.

In Italy other illegal practices include registered contracts which for fiscal reasons indicate a lower amount of rent. In terms of public dwellings, the most common problems are illegal detention or occupation.

## 1.2. Economic factors in comparison

### 1.2.1. Comparative view of the housing market

The three housing markets, despite many differences in size, historical evolution and response to the 2007 crisis, have various similarities.

In Greece and Cyprus a public rental sector does not exist, as public intervention has constantly incentivised home ownership or subsidised the private rental market. The result of these policies was the massive access to home ownership also for the lower classes, although in many cases this was of low quality and in some cases the housing had been built illegally. This housing stability was reached between the 1950s and 1980s, and has been only partially altered by more recent events, such as immigration and the economic crisis.

This seems to be particularly true for Cyprus, where the supply of houses is in proportion to the population, so although after the crisis investments in new buildings have been less attractive, there do not seem to be any notable housing problem<sup>26</sup>.

Also in Greece for the moment the housing situation does not seem to be as dramatic as the overall economic situation. The number of homeless people has definitely greatly increased but the problem almost only affects Athens where 15,000 of these people live (out of a total of about 20,000). Similar to Cyprus, throughout the whole of Greece there are several hundred thousand commercial and residential

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<sup>22</sup> Konistis, Greece, 14.

<sup>23</sup> Konistis, Greece, 26.

<sup>24</sup> Konistis, Cyprus, 11 and 22.

<sup>25</sup> Konistis, Greece, 15 and Konistis, Cyprus, 11.

<sup>26</sup> Konistis, Cyprus, 12 et seq.

units abundant, although the number of new buildings has drastically decreased in the last few years. This situation, together with the significant increase in housing taxation and the demand for reductions in rents, encourages landlords to offer substantial discounts for rents. Thus the absence of protective legislative measures for the rental sector is at least partially compensated for: the market was liberalized years ago and funds were completely cut in 2012 as a consequence of the crisis.

The trend in housing loans in Greece is potentially more problematic. These contracts significantly increased before the crisis. Although the indicator of mortgage debts of Greek households is still low compared to the European average, it is worrying that the share of non-performing housing loans is high and increasing (23% in May 2013<sup>27</sup>). Until now the consequences of this situation have been limited through regulations protecting borrowers from foreclosure, however there is pressure to limit these restrictions, thus the current equilibrium could change.

For the moment the general impression is still of quite a balanced market, apart from Athens, where an increasing percentage of the Greek population tends to be concentrated and the scarcity of dwellings and affordability problems are more evident, especially considering that no public housing or other subsidies for the rental sector exist.

There are further differences in the Italian housing market . Despite the wide sales of public dwellings over the years, the public sector, with about 900,000 dwellings, still accounts for about one fifth of the rental market and provides help in some problematic situations. More recently 'social housing', as it is called in Italy, aims to provide affordable dwellings through joint ventures between public subsidies and private investments.

As for the legislative framework, despite a progressive liberalization of the rental market since the 1970s and 1980s, in Italy there is still a protective approach towards tenants. The mandatory minimum duration of tenancy contracts is worth mentioning, together with the so-called 'assisted tenancies', which are particular contracts that provide a rent ceiling in return for a more favorable fiscal treatment for the landlord.

Despite these policies, the housing market in Italy has many critical points. Unlike Greece, Cyprus and Spain, the country did not experience an overproduction of new dwellings during the period before the crisis, but their number increased at a pace with the number of new households. Thus, since 2007 prices both to buy and to rent have experienced a limited decrease. In contrast, the condition of many households has deteriorated faster as a consequence of unemployment or reduction in income. The result is, for example, a drastic increase in eviction orders due to non-payment of rents (about +75% from 2007 to 2013). In addition half of the landlords have reported delays or irregularities in payments. Also the number of homeless people has significantly increased. They are now estimated to be about 50,000, while in 2001 the estimated number was about 17,000.

Since 2000 the unprecedented amount of immigration from Eastern Europe, Africa and Asia has also played a role in the evolution of the housing situation in Italy, as these people on low incomes or unemployed have had to face additional problems in finding suitable accommodation. In contrast, the impact of immigration was more limited for Greece and Cyprus.

As for the Italian housing loan market, the habit of buying houses with family savings and the traditionally cautious approach followed by the Italian banks limited the number of mortgages contracted before the crisis. Then after the crisis there was an immediate and drastic cut in new home loans and only very recently have there been

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<sup>27</sup> According to data from the Bank of Greece.

slight signs of recovery. The level of indebtedness of Italian households is still among the lowest in Europe, even lower than in Cyprus and Greece<sup>28</sup>. In addition the percentage of non-performing loans is also still limited (3% in 2011). On the other hand, a number of households who are not able to receive bank loan opt for tenancy, which subsequently has experienced an increase in demand since the crisis. This further explains why the cost of renting has not been decreasing as much as the disposable income of Italian households.

All this helps to explain the imbalance in the Italian housing market. However, the situation is not uniform throughout the country. The really problematic areas are the biggest cities and their surroundings: Rome, Milan, Turin, Genoa, Venice, Trieste, Bologna, Florence, Naples, Bari, Palermo and Cagliari, where about 35% of the Italian population is concentrated, including an above average percentage of immigrants<sup>29</sup>.

### **1.2.2. Comparative view on price and affordability**

No recent national data are available with regard to the average cost of rent per household in the three countries investigated. Thus it is only possible to consider a rough estimate: 300-400 euros per month in Greece, and about 400 euros in Cyprus and in Italy. The corresponding gross average household income is 1,830; 2,666 and 2,083 euros respectively per month. Consequently, no particular problems of affordability seem to affect the Cypriot rental market, while potential problems are more likely to affect low income households both in Greece and in Italy.

Specifically in Italy, rents differ by region and according to the size of the town. For example in the 19 regional capital cities, the average rent in 2013 was 516 euros per month, which increases in the cities in the centre and the north. In addition, rental households tend to belong to low-income classes (according to 2007 data, about 77% of whom earned 20,000 euros or less per year). All of these factors imply that affordability is a serious problem for many households in the main Italian cities. This is illustrated by the percentage of tenants for whom rent accounts for more than 30% of their income: this percentage in 2002 was 22%, in 2008 26%, in 2010 31% and in 2012 37%. Where the head of the household is a foreigner, this percentage is as high as 42%, according to 2012 data.

In all three countries ownership has always long been preferred to renting. Before the crisis, this traditional approach was further stimulated by the development of bank loans, which were almost equivalent to the payment of rent. After the beginning of the crisis, the situation changed drastically, at least in Italy, where banks adopted a very restrictive approach towards new credit, thus, since the peak in 2006, the number of transactions has now more than halved. This explains a recent rise in the demand for houses to rent. However surveys reveal that there is still considerable interest in home ownership: most people are waiting for mortgages to become easier to obtain.

### **1.2.3. Tenancy contracts and investment**

The Return on Investment (RoI) for residential rental dwellings in all three countries is only moderately attractive for investors. Properties have been traditionally considered

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<sup>28</sup> In 2011 the mortgage debts per household in thousand Euros were: Cyprus, 15.74; Greece 6.93; Italy, 5.98.

<sup>29</sup> For further details see Bianchi, Italy, 19 et seq.

as a safe harbour for savings and generally preferred to other forms of investment. Recent developments will probably, at least in part, modify this attitude.

In Cyprus gross RoI is relatively stable at around 3.8% for apartments and 2% for houses. These values are considered quite low, and in addition there is a high number of vacant dwellings on the island<sup>30</sup>.

In Greece data on the exact RoI is not available, but similar investments seem to be attractive only for construction companies who already own the piece of land on which the housing will be built or where there are mixed work contracts<sup>31</sup>. The problem of vacant housing also affects Greece.

In recent years the gross RoI in Italy has increased (3.2%, according to 2012 data), which presumably means that rents have decreased less than house values. On average, percentage returns have risen for smaller houses and are highest for apartments of up to 60 m<sup>2</sup> (3.6%) and just 2.3% for those over 120 m<sup>2</sup>.

Net returns are thus affected by fiscal policies, which in the last few years have significantly increased for properties, while the reform of the flat rate tax option (*cedolare secca*) represents a potentially lighter fiscal regime for income from rents<sup>32</sup>. Further elements negatively impacting on such investments are expenses for house maintenance, non-regular payment of rents, which have been increasing in recent years, and lengthy court proceedings in the case of breaches of contract<sup>33</sup>.

#### 1.2.4. Other economic factors

In the three countries the position and role of estate agents has many similarities. Selling and renting real estate is considered as a form of brokerage, thus at least in Italy, the professional has a right to a fee provided that the contract is executed as a consequence of his/her intervention. However, as in Greece and Cyprus, it is also usual in Italy for the agent to play a more active role on behalf of one of the parties, for example actively looking for people who might be interested in renting or sale/purchase.

In the three countries, there are no restrictions on becoming an estate agent, they just need a minimum education<sup>34</sup> and to be registered.

The amount of fees is also fixed in accordance with the free market, but on average the equivalent of one month's rent for each of the parties is usual in all three countries, as well as about 3% of the sale price. It is also usual that both parties bear the expense.

These standard prices seem to create a certain rigidity in the market of estate agents, with the result that the fee is not always regarded as fair with respect to the actual role played by the agent. This is true in particular for Italy and Greece, while in Cyprus the intervention of estate agents is mostly limited to commercial leases.

Among the main obligations common to agents in all three countries, are providing fair and complete information on the qualities of the property, as well as reporting any defects that come to their notice. Information also includes whether the agent has any personal interest in a specific dwelling or if he/she received a mandate from both the parties. Confidentiality duties are equally important.

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<sup>30</sup> Konistis, Cyprus, 15.

<sup>31</sup> Konistis, Greece, 16.

<sup>32</sup> See below para. 3.1.1.

<sup>33</sup> See for further details Bianchi, Italy, 29.

<sup>34</sup> See Konistis, Greece, 20; Konistis, Cyprus, 17; Bianchi, Italy, 31 et seq.

In addition, in order to counteract the black market, in Italy estate agents are responsible for the fiscal registration of contracts agreed as a result of their intervention, and for the payment of the related taxes, in cases where these contracts are not drafted or authenticated by a public notary.

### 1.2.5. Effects of the current crisis in comparative perspective

The 2007 crisis has affected Italy, Greece and Cyprus to a different extent and subsequently also the impacts on housing policies are quite different. In all three countries, there is a lower level of household debt for house purchases compared with the European average. It was only quite recently, in the years before the crisis, that mortgage credit progressively substituted more traditional ways to buy houses, such as family savings.

Despite this, the impact of the crisis was clear. In Italy the decrease regarded the number of new operations, the percentage of houses bought with a mortgage loan, and the loan-to-value ratio. For example, the overall amount of new home loans in Italy decreased from over 60 billion euros in 2006 to 24 billion in 2012. In Greece and Cyprus the decrease was not so drastic however banks adopted a more cautious stance in granting new loans for housing.

The share of non-performing housing loans is another significant aspect. In Greece this figure is high (23% in May 2013), while in Italy it is significantly lower (around 3%)<sup>35</sup>. This also explains the different legal responses to the problem of repossession. Greece adopted a strict protection of borrowers from foreclosures. Firstly, from 2011 a ministerial decision prohibited banks from auctioning main residences worth less than 200,000 euros. Then in 2013, in part also as a consequence of the International Monetary Fund, European Central Bank, European Commission and merchant banks, a law introduced additional requirements in order to receive protection from auctions<sup>36</sup>. In Italy a similar act limiting the possibility of repossession was adopted in 2013 however it is applied only in the case of debts with the tax authorities, and was adopted as a consequence of bitter criticism regarding episodes of repossession and sale of primary houses by the national tax agency even for rather low fiscal debts<sup>37</sup>.

Despite these limitations and the fact that repossession is seen by banks as a last resort (because of the difficulties in managing and selling buildings), the number of repossession has significantly increased since the beginning of the crisis. For example, according to data regarding Italy between 2008 and 2011, repossession by banks increased by about 75% (38,000 houses in 2011 and about 100,000 over the last four years).

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<sup>35</sup> No data are available for Cyprus.

<sup>36</sup> Therefore, from 1<sup>st</sup> January 2014, public auctions of defaulted main residences are prohibited provided that the following conditions are met:

- the objective value of the protected main residence should not exceed 200,000 euros;
- the net annual income of the household should not exceed 35,000 euros;
- the total value of the debtor's movable and immovable property should not exceed 270,000 euros;
- the debtor should not hold bank deposits of more than 15,000 euros.

<sup>37</sup> Art. 52, subs. 1 Decree Law 21 June 2013, no. 69(later converted into Law 9 August 2013, no. 98) establishes that the national tax agency cannot repossess a dwelling if the following conditions are met: it is the only dwelling owned by the debtor, it is classified as a residential dwelling and the debtor resides there provided that it is not a luxury dwelling or a dwelling included in cadastral categories A/8(villas) or A/9 (castles). In addition, repossession of property has been limited to debts exceeding 120,000 Euros (the previous limit was 20,000 euros) and cannot be required within six months of mortgage registration.

The impact on the rental market seems to have differed in the three countries. In Italy the drastic cut in new home loans was only followed by a limited decrease in sale prices. The result was a significant reduction in transactions and an increase in rental contracts.

In Greece after the crisis people seem to prefer homeownership rather than rent. In fact, the number of new vacant dwellings is much higher in comparison with the population and so prices have fallen much more than in Italy. Thus buying has become more affordable or at least is perceived as safer than renting. A similar situation can be seen in Cyprus where rent prices decreased slightly compared to residential prices, and so home ownership is now regarded as more attractive than rental tenures.

The housing policies adopted in the three countries in recent years reflect these differences.

In Italy the onset of the crisis coincided with a renewed interest at a national level in housing policies, which were almost completely left in the hands of the regional authorities in the previous years. The aim was to make house purchases more affordable, to increase the supply of housing benefitting from subsidies, and to set up specific funds to help tenants and owners. More recently attention has also focused on the recovery of the home loan market, which experienced a drastic decrease after the crisis.

In 2007 and 2008 the center-left and center-right governments, which rapidly succeeded each other, approved two different housing plans. The common aim of these projects was to stimulate the offer of affordable dwellings for households in need. However, the centre-left plan mainly focused on 'public housing', which means housing directly built with public funds by public entities, and therefore on houses for rent. The centre-right government on the other hand, mainly adopted a program of 'social housing', which means projects to provide housing, both for sale and for rent, through various forms of partnership between public entities and private investors. Then in 2013, the new Letta government focused on incentives to the banks so that banks could provide new home loans. They considered this as a key measure for dealing with housing problems and, more in general, with the economic crisis.

Further provisions regard funds for families to afford home loans or rents for families in particular situations of difficulty as defined by the law: one fund finances payment suspensions; another guarantees banks half of the provided home loan; the third provides money to 'non guilty' tenants who cannot pay the rent regularly.

Finally in 2014 a new national housing plan was adopted by the Renzi government aimed at combining and reintroducing the measures launched with both the 2007 and 2008 housing plans. Subsidies for the private rental market were also enhanced, increasing the incidence of fiscal incentives and funds.

During the years of the crisis provisions to suspend evictions in particular circumstances have also been periodically created however they are a typical feature of Italian housing policies and not something specifically connected to the last crisis.

In Greece, the most recent housing policies mainly originate from pressures to come to terms with the country's debt and from the need to prevent massive repossession, given the high percentage of borrowers in default.

The austerity policy in Greece led to the abolishment, in 2012, of all forms of housing subsidy, previously granted through O.E.K. programs<sup>38</sup>. In addition a significantly heavier legislation on property taxes was introduced.

On the other hand, law no. 3869/2010 on the '*debt adjustment of overcharged households*' was introduced. The main purpose of this act is the judicial adjustment of debts, provided that households are unable to pay due to reasons beyond their control and as long as there is no property that could be liquidated. In addition, since 2011 a ministerial decision prohibited banks from auctioning primary residential dwellings worth less than 200,000 euros. As previously mentioned, this protection was later partially limited.

Finally in Cyprus, where the housing and financial situation seems more stable, no particular housing policies have been adopted since the beginning of the crisis.

In conclusion, Cyprus seems to be the best-performing country in overcoming the crisis. In fact, despite a decline in the home loan market, in Cyprus the dwelling stock is enough to fulfill the housing needs of residents.

The Greek problems are instead related to debts both of the country and households. These circumstances have involved cuts in housing subsidization, increased taxation, and difficulties in paying loan installments. For the moment more widespread housing problems seem to have been prevented thanks to the wide availability of vacant dwellings, a high decrease in sale prices, and a protective policy against repossessions.

In Italy, the crisis has mainly affected the affordability of housing. Many households have incurred a reduction in income because of job losses, job reduction schemes etc. This situation has not been compensated for by the limited reduction in house prices either for sale or for rent. This is due to different reasons such as the structural rigidity in the Italian housing market made up of many small owners, a low number of vacant dwellings (few new ones or ones that are immediately available), and increased taxation on properties. In addition access to bank loans to buy houses is still difficult.

### **1.3. Urban and social aspects of the housing situation in comparison**

#### **1.3.1. Urban aspects in comparative perspective**

In the three countries rented houses tend to be concentrated in the biggest cities, where their percentage is significantly above the national average<sup>39</sup>. In contrast in smaller cities and in the countryside, the percentage of rental properties is below the average. In Greece this concentration of rental property especially applies to Athens, while in Italy it is typical of a wider number of big and medium size cities throughout the country.

Rented houses tend to be more widespread in certain neighbourhoods, in some cases in the city centres, in other cases in the suburbs. This mainly depends on the characteristics of the tenants and towns. For example in Italy, where rental contracts

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<sup>38</sup> This scheme was particularly used to grant loans for the purchase of a house with subsidized interest rates, to subsidize the payment of rents for low income families and for housing sensitive social groups.

<sup>39</sup> Konistis, Greece, 23; Konistis, Cyprus, 18; Bianchi, Italy, 38.

are typical of students, immigrants and in general low income people, rented houses tend to be concentrated near colleges, transport hubs and the most dilapidated parts of towns.

A similar situation creates the risk of segregation. In Italy this has been especially observed for public housing neighbourhoods, which lead to the concentration of many problematical situations in locations that increase a sense of separation from the rest of the town. Thus new public and social housing projects tend to enhance a social mix or at least avoid too big housing estates.

More recently communities of immigrants are at risk of segregation as they tend to settle in dilapidated parts of towns, left by Italian residents, and experience further difficulties in finding suitable places to rent. For the moment the different ethnic origins of the immigrants residing in Italy and, paradoxically, the absence of specific public programs aimed at these people have favoured a social mix and prevented, to a certain degree, segregation. In addition, the traditional concentration of these communities in the biggest cities, such as Rome and Milan, has been slightly decreasing in recent years, and the towns surrounding the metropolitan areas are becoming new areas of settlement<sup>40</sup>. However in some problematic neighborhoods, the economic difficulties brought by the crisis create more evident cohabitation problems between Italians and immigrants.

In Italy the situation of the Roma is also particularly problematic. It is estimated that about 40,000 of these people still live in the hundreds of legal and illegal camps all over Italy, often lacking a regular water supply, electricity, heating, and a sewage system.

In Greece and Cyprus, the contribution of housing tenures to segregation seems less evident. This is due to the absence of public housing policies, and more generally, the diffusion of home ownership in all social classes limits the effect of segregation for tenants. However these countries also experience accommodation problems for Roma living in camps and more recently for immigrants.

Differences also exist in terms of gentrification. This is prevalent in certain Italian cities, as a consequence of the restoration of dilapidated but valuable areas of historical centers, and in certain expensive holiday resorts, whose housing market is affected by the interest of wealthy Italian and foreigner investors. However, at least in the former, Italian public opinion does not appear to be particularly concerned by the phenomenon and a positive attitude towards the restoration usually prevails. Neither Greece and Cyprus seem to be affected by any problems of gentrification.

Squatting is another social phenomenon worth mentioning. In both Greece and Cyprus this is mainly linked to the Roma, who illegally occupy land for camping, as they tend to move continuously within the country. Also in Italy squatting exists, however it involves mainly dwellings. The problem affects in particular vacant public dwellings, which are waiting to be restored, assigned or sold. The crisis and the difficulty in finding affordable dwellings have been playing a decisive role in the increase in squatting. Recently its wide diffusion has led to Italian public authorities taking a stronger action against it, also because it has become clear that behind these occupations, there are often groups which exploit people in need and receive money in return for housing.

This new trend is confirmed by Decree Law no. 47/2014 (converted into Law no. 80/2014), according to which occupants cannot be recognized as resident in the occupied dwelling and the dwelling cannot be provided with 'public services', such as

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<sup>40</sup> For further details, see Bianchi, Italy, 39 et seq.

water, electricity, gas; any contract contrasting with these prohibitions is null and void (Art. 5).

Squatting is also considered as a criminal offence. In Italy Arts 633 and 639 *bis* Crim. Cod. Punish any illegal entrance into a private or public land or building in order to occupy it or to gain another form of profit. In Greece occupation is indirectly punished through Art. 381 Crim. Cod. regarding damage to property belonging to another party. The owner is also entitled to exercise the remedies provided for by property law and by tort law<sup>41</sup>.

With regard to the law in action, a decision by the Italian Court of Cassation is worth mentioning, according to which if occupants of a public dwelling are in housing need, the offence of squatting is excluded, as occupation is held to be out of necessity (Art. 54 Crim. Cod.)<sup>42</sup>. However, as the court pointed out in a subsequent decision, permanent occupation cannot be considered an act prompted by necessity, which requires that the occupants are in a temporary and urgent danger of injury to health<sup>43</sup>.

### 1.3.2. Social aspects

In all three countries, common opinion is that homeownership is a preferable tenure form and an important goal in life. Rent, on the contrary, is mostly considered a temporary solution to cover short-term housing needs. The idea that rent is a “waste of money” if you can afford a house is still widespread. This is the consequence of a still low interest in other forms of investment, particularly financial, and of the relatively easy access to bank loans, at least before the crisis, which enabled people to buy a house by paying a monthly sum almost equivalent to a rent. However the burden of home ownership, not only from an economic point of view but also in terms of mobility, seems to be undervalued by the dominant opinion.

In Italy a more negative opinion concerns renting public housing, as this is traditionally associated with low-income families and possible further problematic situations<sup>44</sup>.

The idea that home ownership provides protection for savings, especially after retirement, is equally widespread in the three countries. Currently, the taxation of properties has been significantly increasing, at least in Italy and Greece. In addition the percentage of a household's wealth composed of properties is already particularly high (in Italy they account on average for 85%). This situation can create a deficit of current assets, especially for old people, thus, also from this perspective, a greater interest towards other forms of investment is advisable.

The above situation explains the prevailing interest of tenants in home ownership. According to a 2009 Italian survey of two thousand families, 80% of people living in rental properties were not satisfied with their housing conditions and would prefer to buy a house if they could afford it. Of the same sample of people, 95.2% said, in more general terms, that they prefer homeownership to renting<sup>45</sup>. The attitude seems to be very similar both in Greece and Cyprus<sup>46</sup>.

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<sup>41</sup> No data are available for Cyprus with regard to this issue.

<sup>42</sup> Cass. pen., 26 September 2007, no. 35580, *Foro Italiano*, 2007, II, 678.

<sup>43</sup> Cass. pen., 7 August 2012, no. 14222, unpublished.

<sup>44</sup> In Greece and Cyprus, as already said, public dwellings do not exist.

<sup>45</sup> Nomisma, ‘La condizione abitativa in Italia’, 96 and 99.

<sup>46</sup> Konistis, Greece, 25 and Konistis, Cyprus, 19.

Moreover, tenants of rented properties do not feel their home belongs them, which often results in the poor maintenance of the premises. An important difference in Italy regards public housing, as in these cases tenants generally enjoy a much safer and more stable position: once they have obtained the house, they tend to keep it throughout their lives. The effect is that people living in public housing consider themselves to be in a situation which is much more similar to ownership than all other tenants.

## **2. Housing policies and related policies in comparison**

### **2.1. Introduction**

The three Mediterranean countries share a high level of ‘familism’. This means that kinship plays a particularly crucial role in the housing system, as families can provide one of the main ways of financing the building or purchasing residential housing for the younger generations.

Given this common feature, it is necessary to make a distinction.

Italy has quite an established welfare system in the field of housing, whose origin dates back to the early 1900s, when, as in other European countries, industrialization began to move increasing numbers of people from the countryside to the cities where factories were built. Therefore, the milestones of housing policies are in common with the other European countries of early industrialization, although with some particular features. In fact, after the end of WWI there were periodical regulations of the private rental sector to control both rents and the termination of the contracts. In addition, after the destruction of WWII there were many public housing initiatives. This was followed by subsidies for home ownership, where a significant part consisted of the sale of public housing to occupants at very low prices.

In 1978 a new regulation of the private rental sector was introduced but it turned out to be excessively strict and distorted the market. Next there was a progressive move towards a liberalized private rental market in the 1990s, together with the introduction of a system of public funds to help rental affordability.

There was a new focus on the housing issue after the beginning of the last economic crisis. This was mainly in terms of funds, subsidies or fiscal incentives to sustain both home ownership (bank loans in particular) and the rental sector; attempts to improve the management of public dwellings; ‘social housing’ projects, which provide dwellings at lower prices than the market, involving both public funds and private investors<sup>47</sup>.

Although with different phases over the decades, this tradition of housing as part of the welfare state has survived and is still prevalent in the country.

Conversely, Greece and Cyprus, have a much more recent and limited experience of housing policies. This is in part a consequence of the fact that they are much smaller countries, much less densely populated and remained mainly rural for a longer period of time.

Greece experienced significant urbanization after WWII, although the country was still lacking an industrial backbone. During this period policies were mainly aimed at also guaranteeing access to homeownership for rural migrants, however policies of

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<sup>47</sup> See also Bianchi, Italy, 43 et seq.

rent control were also adopted. In 1954 O.E.K. ('Labor Housing Organization') was set up as the only competent body for subsidization in the housing field. It was not aimed at building public dwellings but mainly promoted homeownership for workers and employees, handing over dwellings at cost price or paid with subsidized rates. This scheme also provided funds for the improvement of housing conditions and rental contributions for low-income families. The result of these policies was massive access to homeownership also for the lower classes and a substantial social equilibrium in housing, despite the significant social changes that were taking place in the country.

After this period, focus on housing policies began to decrease. Special regulation for the private rental sector was attempted by a socialist government at the beginning of the 1980s, introducing a minimum duration, rent levels in certain cases, and rules for rent increases. However these regulations were rapidly abandoned and since the 1990s the market has been completely liberalized, save for a minimum duration of residential tenancy contracts, which is still in force.

In 2012 the O.E.K.'s activity completely terminated as part of the austerity measures imposed on Greece, with an act which expressly declared it as '*non-priority social expenditure*'<sup>48</sup>. In other words, in the last few years housing has been substantially cut from welfare policies.

The situation in Cyprus is quite different again. As the island was part of the British Empire, the regulation of tenancy law closely resembled the English legislation in force in the 1920s. The adoption of English-based rules continued even after independence in 1960. The Rent Control (Work Dwellings) Law of 1961 is particularly worth mentioning, which provided for fixed rent of work dwellings as well as restricting evictions. The episode that drastically affected Cypriot housing policies was the occupation of the northern part of the island by Turkey in 1974. The result was a massive migration of about 200,000 Greek-Cypriots to the southern part of the island, with the subsequent problem of providing them with suitable dwellings. Stricter regulations were thus introduced, in particular to protect expatriated households from eviction, thus creating a wide system of statutory tenancies. Today this system is criticized as the vast majority of cases brought before rent control courts are rarely connected with residential tenancies but rather with contracts of a commercial nature<sup>49</sup>.

The Turkish occupation was also the occasion to introduce subsidies for the payment of the rents for low-income expatriated households. These measures are still in force today, however the vast majority of public subsidies, which are split into a wide number of schemes, target ownership instead of tenancy (subsidies to buy houses or to improve their quality).

Therefore, similarly to Greece, in Cyprus the welfare system has never created a system of public/social housing, but, more generally, has paid limited attention to tenancies, mainly due to the invasion by Turkey. Thus also Cyprus has focused on the widespread diffusion of home ownership, considering this as a sufficient means to obtain a social equilibrium in housing.

As for fiscal policies, there is a common trend among the three countries. For many decades all three have favoured the acquisition of home ownership which has been stimulated via favourable taxation. After the beginning of the crisis, the taxation of

<sup>48</sup> See Konistis, Greece, 26 and 5: «All obligations already undertaken by OEK, were transferred to a 'Temporary Administrative Committee' (in Greek: «Προσωρινή Διοικούσα Επιτροπή»), assigned with the liquidation of O.E.K. However, the said Committee explicitly does not have the right to undertake any new obligations or exercise any new social housing policy».

<sup>49</sup> Konistis, Cyprus, 43.

properties became one of the key measures to gain new resources for the state budget. This is particularly evident for Greece and Italy, but also in Cyprus the Immovable Property Tax was reformed in 2014. In view of the wide diffusion of home ownership, this is considered as a way to reach almost all citizens and, in addition, evasion is more difficult than for other forms of taxation. However, the disadvantages of this taxation are that it burdens capital assets and not incomes, and evaluations by which properties are taxed, are often not updated to present market prices.

A fundamental right to housing is expressly provided for only by the 1975 Greek constitution, among other ‘social fundamental rights’, such as the right to employment, health and social security, with the following words:

Art. 21, subs. 4 – *The acquisition of a home by the homeless or those inadequately sheltered shall constitute an object of special State care.*

The absence of a constitutional court in Greece limits its role to a behest towards the legislator so that it adopts policies to supply houses to people in need or to improve their conditions. The individual citizen cannot enforce a legal claim against the state in order to obtain a suitable dwelling, so the right to housing remains a declaration of principle and a socio-political goal for the State.

Neither in Italy nor in Cyprus is a right to housing expressly provided by the constitution.

However, in Italy an indirect reference can be found among the ‘Economic Rights and Duties’:

Art. 47, subs. 2 Const. – *[The Republic] promotes the access to home ownership through the use of private savings...*

This article has become the justification for policies aimed at supporting people’s access to housing. Even more significantly, the right to housing has been seen as a necessary prerequisite for achieving and maintaining some of the fundamental rights directly granted by the constitution. In other words, even though not expressly mentioned by the constitution, the right to housing can be combined with other social rights and become directly enforceable under certain circumstances. For example, the right to create a family (Art. 31 Const.), to support and educate children (Art. 30 Const.) and the inviolability of the home (Art. 14 Const.) all require a person to have a dwelling. The lack of a place to live may even jeopardize the principle of ‘human dignity’ and ‘substantial equality’, granted amongst the ‘fundamental principles’ of the Italian constitution.

A further indirect constitutional basis of the right to housing is identified in Art. 42, subs. 2:

*Private property is recognized and guaranteed by law, which prescribes the ways it is acquired, enjoyed and its limitations so as to ensure its social function and make it accessible to all.*

In recognizing the social function of property, Art. 42 allows the legislator to introduce limits to property rights in order to grant prevailing rights. Tenancy law is definitely one of the fields where Italian legislators, through rent regulation, have most frequently used their power to limit private property and contractual autonomy.

The courts have also played an important role in affirming the principle of the right to housing, although its practical applications remain circumscribed. The most significant application in the field of tenancy law concerns non-married partners. On the basis of the right to housing, the Italian Constitutional Court stated that non-married partners habitually cohabiting (*living more uxorio*) were entitled to succeed in their dead partner’s tenancy contract concerning their dwelling, although this

possibility was not expressly mentioned by Art. 6 of Law no. 392/1978<sup>50</sup>. The same principle was later also applied by the court in the case of tenancies regarding a public dwelling<sup>51</sup>.

The constitution of Cyprus also contains an indirect reference to the right to housing:

Art. 9 – *Every person is entitled to the right to adequate living conditions and social security.*

Therefore, also in this case, there is a declaration of principle and a socio-political goal for the State, but not a right directly enforceable by each citizen.

The overall impression is that, despite the different constitutional formulations, housing is commonly perceived as one of the fundamental aims of social policies, even though its practical enhancement depends on a combination of political actions, judicial decisions and the attention of legal experts.

## 2.2. Policies and actors

### 2.2.1. Governmental actors

Government intervention concerning housing policies is on a greater number of levels in Italy than in Greece and Cyprus. This is particularly due to a constitutional reform adopted in 2001, which introduced a model defined as the ‘multi-level protection of social rights’.

The Italian system gives a central role to regional authorities, who set targets, carry out undertakings and in some cases decide on the destination of funds, even if received from the State. Regional decisions also concern the management of public buildings destined for housing policies, for example access criteria and the amount of rents. Consequently, today public services concerning the right to housing depend almost entirely on regional rules<sup>52</sup>.

The Italian Constitutional Court specified that in order to protect human dignity, the state still has exclusive responsibility to determine the minimum level of offer (both in terms of quantity and standard of quality) concerning dwellings for the weakest members of the population. The State also shares responsibility with the regional governments for the ‘government of the local area’, which means that it gives national guidelines concerning public housing for residential purposes. In addition, the State coordinates the regional governments regarding important national programs and splits national funds destined for housing policies between them (in particular, the Social Fund to help people pay their rent).

Italian municipalities are the main owners of public rental dwellings for social purposes and, in accordance with rules set by the regional governments, they regulate how these buildings are managed and accessed. Municipalities are also entitled to provide different solutions to local problems concerning housing, such as providing temporary accommodation. In addition, through the adoption of special urban plans, municipalities are responsible for deciding the location in their area of urban interventions decided at the upper levels of government. Finally, local authorities may provide policies to help people pay rent, for example by means of reduced rent arranged with the owners.

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<sup>50</sup> Const. Court, 7 April 1988, no. 404, *Giustizia Civile*, 1988, I, 1654.

<sup>51</sup> Const. Court, 20 December 1989, no. 559, *Giustizia Civile*, 1990, I, 612.

<sup>52</sup> See Bianchi, Italy, 48.

This system at a national, regional and municipality level can be considered as an application of the well-known principle of subsidiarity. However, especially at the beginning, it created problems of responsibility, which needed to be solved by the Constitutional Court. In addition regional governments had lower funds to deal with these policies than the State previously had. This explains why, after the beginning of the crisis, stronger intervention by the State, through national housing plans, became necessary.

In Greece, as a consequence of a more limited focus on housing policies and of the fact that the competences among the various levels of government are less articulated, the decisions in this field are still mainly centralized. Housing policies are introduced and implemented by the Ministry of Labour, Social Security and Welfare and by the Ministry of Environment, Energy and Climate Change. The former is responsible for social policy, while the latter is responsible for regional planning and urban development. Municipalities are then responsible for housing policies at the local level<sup>53</sup>.

Similarly, in Cyprus housing is split between the Ministry of Social Internal Affairs and the four local districts that make up the island. However, in Cyprus, where there is a wide range of housing schemes, some ministry departments play a significant role: the Department of Housing and Housing Policy, the Expatriated Care and Restitution Service, the Cyprus Land Development Corporation, and the Housing Finance Corporation<sup>54</sup>.

## 2.2.2. Housing policies

Traditionally housing policies in Cyprus, Greece and Italy have favoured home ownership. The main aim was to provide each household with a house, although of a low quality, by granting subsidies or discounts in order to make it affordable. Tenancy contracts were not encouraged, however they were subsidized when it became clear that it was very difficult (and, for certain aspects, not wise) to increase the share of homeownership further.

This is particularly evident considering for example, that in Italy thousands of public dwellings built for rental purposes were progressively sold to the occupants at very low prices, or that both in Cyprus and in Greece, the vast majority of the housing schemes were aimed at helping people to buy.

However, with about 20% of the population in all three countries living in rented housing, and often its weakest sectors, some subsidies have been provided to this sector.

Differences in national policies have become more evident over the last few years. Italy, which has always focused more on rents than the other two countries, has reduced its policies to favour homeownership and, at the same time, favours rents with subsidies and other forms of incentives, especially when rents are lower than market prices (so called ‘assisted tenancies’)<sup>55</sup>.

In Greece, in contrast, in 2012 subsidies to the housing sector were dismantled, thus at present, no tenures are directly favoured by the legislator. Considering that the taxation of properties has increased, this could become an indirect incentive for tenancy contracts.

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<sup>53</sup> See Konistis, Greece, 27 et seq.

<sup>54</sup> For further details, see Konistis, Cyprus, 21 et seq.

<sup>55</sup> See Bianchi for details, Italy, 50 et seq.

Finally, in Cyprus changes in traditional housing policies are not so evident. Schemes continue to be mainly targeted at home ownership and only to a more limited extent provide funds to tenants in need. In addition, the traditional rules of rent regulation, introduced to protect expatriated Cypriots after the Turkish invasion, are increasingly criticized as they no longer serve their original purpose.

Only limited attention is paid to vulnerable groups through housing policies in the three countries.

In Greece there are no specific policies aimed to groups such as migrants and Roma. In Cyprus there are only the rules to protect expatriated Greek-Cypriots.

In Italy some initiatives have been adopted to improve the living conditions of Roma, which are generally decided at local or, at most, regional levels, thus their results are not easy to verify. In any case they are definitely insufficient to solve the problem of Roma living in camps, as the decisions by the European Committee for Social Rights against Italy in 2005 and 2010 testify<sup>56</sup>.

A more cohesive set of rules can be found with regard to migrants. The Italian Immigration Law considers the availability of a suitable dwelling as a requirement for a non-EU citizen to live in Italy, to be awarded the status of 'long-term resident' and to reunite the family. Further provisions specify the right for these people to have access to public/social housing programs, the prohibition of discriminatory acts, also with regard to housing, and accommodation in centers which are thought to provide immediate and temporary housing for regular immigrants in need<sup>57</sup>.

### 2.3. Urban policies

Segregation is prevalent to some extent in all three countries, but is generally the consequence of a plurality of socio-economic factors, thus housing policies do not always contain provisions to counteract it. This explains why, for example, in Greece and Cyprus there are no measures related to urban policies aimed at preventing segregation.

In Italy one difference lies in the existence of the public housing sector, which typically represents a segregation risk. These neighborhoods, made up of only public dwellings, often set in peripheral and low-cost areas, without a doubt create a feeling of separation with the other parts of the town and, in the worst cases, are dilapidated, socially degraded and crime-ridden.

Recently measures have thus been adopted in order to limit these effects, through strategies which limit the concentration of households in need in certain areas and pay more attention to a 'social mix'. For example, Min. Decree 22 April 2008 defines 'social dwelling' and expressly indicates the need to 'integrate different social groups' in this field. However a contrasting provision can be found in Art. 3 Decree Law no. 47/2014<sup>58</sup>, which introduces a plan to sell public dwellings and stresses the opportunity to sell dwellings in "*mixed condominiums where the public ownership is below 50% or in different situations from 'public housing'*". Such a measure to reduce costs seems to imply the worrying intention to reduce attempts at social mixing in public housing.

<sup>56</sup> Italy was considered guilty of discriminatory acts against the Roma, Sinti and other nomadic populations with particular regard to housing rights, in contrast with the provisions of the European Social Charter.

<sup>57</sup> For a more detailed analysis of the rules for immigrants in the field of housing, see Bianchi, Italy, 53 et seq.

<sup>58</sup> Now converted into Law no. 80/2014.

Policies against gentrification are even more unusual: both in Greece and Cyprus it seems that this phenomenon has never been encountered. In Italy, in contrast, this clearly exists, thus particularly affecting the historical centers of more attractive big and medium size cities and renowned holiday resorts. Despite this, public concern for this situation is quite limited, thus policies to counteract the phenomenon are very limited and generally depend on municipal initiatives<sup>59</sup>.

The quality of private rented dwelling is monitored in different ways in the three countries.

Neither in Greece nor Cyprus is there a regulation indicating the minimum requirements of a dwelling, thus parties are free to decide on a contract. The only exception is where the dwelling is of such a poor quality that the constitutional principle of respect of human values is violated<sup>60</sup>. In addition, Art. 588 GCC, in the case of an important risk to the tenant's health, grants the latter the right to terminate the contract "*even if at the conclusion of the contract or the delivery of the lease the tenant was aware of the dangerous circumstances or he/she waived from his/her relative rights*"<sup>61</sup>.

In Italy, the legislation provides a broad number of minimum requirements that a dwelling should have and that need to be proved by a specific 'certificate of conformity to standards'<sup>62</sup>. However, the absence of these requirements, does not prevent the dwelling from being rented *per se*. Courts tend to consider it as a breach of contract by the landlord. According to tenancy law, in the event of 'defects' affecting the rented property, the tenant can discharge the contract (or ask for a reduction in rent) only if the defects make the dwelling 'significantly unsuitable for the agreed use' and if the tenant was not aware of these problems or they were not easily recognizable. This means that Art. 1578 ICC cannot be invoked if the tenant accepted the risks regarding the future granting of the certificate from the competent authorities, or when a specific use of the dwelling, for which certain standards are required, was not indicated in the contract, as in this case the landlord cannot be expected to provide for these standards.

However, as in Greece, when the defects of the rented property are a risk to the health of the occupants, tenants in Italy may in any case terminate the contract, despite having been aware of the risk and notwithstanding different agreements (Art. 1580 ICC)<sup>63</sup>.

## 2.4. Energy policies

The impact of energy policies still seems to be different in the three countries, even though this issue has been subject to various European directives.

In Greece the most recent intervention seems to be Law no. 3661/2008, according to which each tenancy contract should be accompanied by an 'energy efficiency certificate'.

Similarly, in Cyprus Laws no. 141/2006 and no. 30/2009 establish that every sale and tenancy contract should be accompanied by an 'energy efficiency certificate'. In

<sup>59</sup> See Bianchi, Italy, 59 et seq.

<sup>60</sup> Konistis, Greece, 30 and 24.

<sup>61</sup> However, the tenant must not have provoked the dangerous circumstances or these must not be easily avoidable.

<sup>62</sup> For these requirements, see Bianchi, Italy, 60 et seq.

<sup>63</sup> See Bianchi, Italy, 90 et seq.

addition, all newly built dwellings and all buildings bigger than 1,000 m<sup>2</sup> that are to be radically renovated should fulfil certain standards for energy efficiency. For this reason the impact of energy policies is still limited in these countries.

In Italy the recent adoption of Directive 2010/31/EU led to the introduction of the ‘certificate of energy performance’ (as a replacement of the previous certificate) and to an increase in the responsibilities for owners or landlords upon execution of a contract regarding a dwelling. These measures involve significant savings in energy costs, thus it is expected that they will increasingly affect the market and the price of dwellings both for sale and for rent, although for the moment only about 15% of dwellings comply with the highest standards of energy efficiency. In order to promote renovations in accordance with these rules on energy saving, a broad range of concessions have been provided over the last few years.

## 2.5. Subsidization

All three countries have traditionally provided subsidies to both tenants and homeowners, although to different extents. In Cyprus and Greece subsidies for homeownership are more evident than in Italy, where the approach seems to be more balanced.

In Greece subsidization was adopted before 2012, however since then housing subsidies have been completely cancelled for state budget reasons. Subsidies consisted, on the one hand, of loans with favourable interest or without interest rates to buy, complete or repair houses; on the other hand, lump sums to tenants to help them pay the rent.

In Cyprus the situation is much more established as there are more than a dozen housing schemes. These can be divided in two main groups: one for the whole population and another one for expatriated households. Almost all of them are targeted at home ownership as they provide different types of help to buy, build, and repair houses. These involve lump sums, loans with favourable interests, provision of land for self-housing or houses at favourable prices. Notable also is the provision of housing units in Expatriated Housing Blocks, which share some similarities with public housing. In addition, there are two programmes of rental subsidies, for the whole population and for expatriated households.

In Italy subsidies to home ownership mainly consist of funds to enable citizens to take out bank loans and of sales of public dwellings at favourable prices, generally to the occupants. Rental subsidies consist of help for the payment of rents and, even more significantly, of tax deductions for both tenants and landlords. Finally there are public and social housing programmes.

In all three countries it seems there is a low level of discretion in assigning the subsidies. Provided that the household sends the application and has the necessary legal requirements, the subsidy is granted.

Also the amount of subsidy is generally indicated by the law, however there are some cases, such as the Cypriot Unified Housing Plan, where only the minimum and maximum amounts of subsidy are indicated; in these cases the authorities have some discretion in deciding the exact amount of subsidy to assign.

One limitation is represented by the funds available. In some cases, such as the Italian Social Fund for Rents, the yearly budget is divided among all the eligible people. In other cases subsidies are assigned following a priority order, generally in accordance with criteria indicated by the law. For example, this is the case of public

and social housing, which means that, when no dwellings are currently available, the applicant can only wait and he/she cannot claim another accommodation or request an indemnity.

Both in Cyprus and Greece, subsidies always seem to be assigned at a national level by the ministerial authorities, whereas in Italy, about 85% of housing subsidies depend on regional and local policies.

As already mentioned, both in Cyprus and in Greece most housing subsidies have been traditionally targeted at home owners, thus compensating for the lack of public and social housing. In Italy the situation is more balanced: subsidies to the rental sector, both public and private, are more developed and the most important measure to facilitate home ownership – the sale of public dwellings at very low prices – is now less common than in past decades.

Some of the major criticisms of the efficiency of the above-described subsidies are worth mentioning.

The system of public housing in Italy is rather rigid, which means that, once the dwelling has been occupied, occupants tend to be lifelong. This is due to the fact that the regulations protect the stability of the tenure and that dwellings are very cheap, thus occupants are generally interested in staying there as long as possible. In certain conditions, occupants can also bequeath the tenure to their heirs. In addition, even when the occupants no longer have the right to continue occupancy, evictions tend to be difficult and lengthy. The result is that public housing in Italy represents a significant form of subsidy but its benefits are enjoyed by a limited number of households, while many hundreds of thousands of applicants are waiting to receive housing.

The sale of public dwellings, used for many years in Italy to subsidize home ownership, has an even worst effect, as it grants a very high subsidy to a household once and for all, represented by the discount on the market price.

However, more recent forms of subsidization have also been criticized, such as the funds to help tenants pay the rent. This is because they are considered to benefit landlords and prevent rental prices from being reduced.

## 2.6. Taxation

In none of the three countries do tenants pay taxes on their rental properties. However in Italy tenants and owners are jointly and severally liable for payment of a 'registration tax' regarding the tenancy agreement, thus this, as well as the stamp duty, tend to be split between the parties.

In all three countries both taxes on properties and the income from properties exist. One difference is that in Greece and Cyprus, the tax only seems to refer to money effectively gained from the dwelling, such as the rent. In Italy an income tax is paid, with certain conditions, also notwithstanding the real income. Before 2001, every non-rented house had to pay an income tax calculated on its cadastral rent. This provision was abolished for the owner's primary residence (the so-called 'first home') in 2001 and for all other non-rented houses in 2012. However, in 2014 payment of income tax was partially reintroduced at 50% for 'non-rented housing', provided that they were located in the same municipality as the owner's 'first home' (thus 'second

homes' should normally be exempted). In other words, the present regulation only aims to deter vacancies but does not consider as a taxable income the fact that the owner occupies his/her own houses.

All three countries also tax the sale of immovable properties, these taxes include a specific tax on the surplus value. In Cyprus it is applied to every kind of sale of a property and amounts to 20% of the net value<sup>64</sup>. In Greece this type of tax was only introduced in 2014 and amounts to 15%, however, where the property was already owned by the seller before 1 January 1994, the tax does not apply<sup>65</sup>. Similarly in Italy the profit is taxed only if the sale is considered as a speculative investment (the rate is 20%). For this reason the following transactions are exempted:

- sale of a property more than five years after the purchase;
- sale of a property received by inheritance;
- sale of a dwelling used as 'first house' by the owner or a relative for most of the time between the purchase and the sale<sup>66</sup>.

In Greece the subsidization of rental tenures via the tax system is quite limited. The tenant can deduct the rent paid from the total amount of tax imposed at 10% of taxable income and under the condition that any deducted tax does not exceed 1,000 euros.

In Cyprus subsidization concerns only the landlord's position: for the income tax, the taxpayer is entitled to deduct 20% of the collected rent premiums from his/her taxable income, and for the Special Contribution for Defence, the 3% rate applies only to 75% of the rent collected.

In Italy there is a wider subsidization of the rental sector via the tax system. This mainly involves tax deductions, regarding both tenants and landlords, and an alternative fiscal regime for rent incomes<sup>67</sup>. These measures favour 'assisted tenancies', i.e. contracts where rents cannot exceed a ceiling fixed in accordance with the law. In Greece and Cyprus the influence of these subsidies on the rental sector is clearly limited.

Tax evasion is a problem in all the three countries and also widely affects the rental sector. Landlords in many cases do not register tenancy agreements in order not to pay the relevant income taxes. In Italy the black market of non-registered contracts is estimated at about 20% of the total, which means almost one million. In other cases landlords declare a lower income than they actually earn.

As for the effects of this evasion, on the one hand, for a number of people this option, although illegal, is a stimulus to rent out properties; and may lead to cheaper rents. On the other hand, evasion and non-registered contracts facilitate further violations that negatively impact on tenants: for example, non-compliance with mandatory rules concerning the duration and amount of rent or minimum requirements of health and hygiene and the safety of the dwellings. In addition, evasion obviously reduces the amount of funds received by the state and involves a higher level of taxation, which at least in part is also a burden on legal contracts.

Both in Greece and Cyprus tax subsidies favour homeownership, in particular the purchase of a residential dwelling by a person who has no other properties<sup>68</sup>. In Italy

<sup>64</sup> Konistis, Cyprus, 35.

<sup>65</sup> Konistis, Greece, 37.

<sup>66</sup> See Art. 67 D.P.R. 22 December 1986, no. 917.

<sup>67</sup> For an analysis, see Bianchi, Italy, 70 et seq.

<sup>68</sup> Konistis, Greece, 38; Konistis, Cyprus, 36.

over the last few decades, the wider development of fiscal incentives in the rental sector reflects a tendential neutrality towards the different forms of tenure.

In Greece and Cyprus the tax system is used to influence the rental sector only to a very limited extent. Also in Italy, despite the greater focus on fiscal incentives in order to promote house affordability also in the rental sector, the role of taxes is still limited. Assisted tenancies, which are the most subsidized form of tenancy, still represent only about 20% of the market.

### **3. Comparison of tenures without a public task (Regulation in Private Markets)**

**Key parameter: “Socio-economic equilibrium” between position of landlord and tenant – so as to accommodate both the tenant’s need to have access to decent housing at an affordable cost and the landlord’s profit-orientation and property rights**

#### **3.1. Evaluative criteria for the landlord**

##### **3.1.1 Profitability**

In all three countries legal limits on the amount of rents play a residual role, although with clear differences.

Greece can be considered the most liberalized country of the group as together parties can fix the amount of rent as they choose and increase it during the tenancy. An automatic rent increase, amounting to 75% of the previous year's price index is imposed by law, notwithstanding a specific agreement. Therefore the only legal limit is that the landlord cannot unilaterally increase the rent during the tenancy<sup>69</sup>. Unfortunately, no data are available on how this regulation impacts on the average return of a tenancy investment in Greece.

Similarly, in Cyprus, parties are free to agree on the rent at the beginning of the tenancy and the landlord cannot modify it later unilaterally. However there is a stricter rule with regard to rent increases. After the tenancy agreement expires, if the tenancy becomes ‘statutory’, an increase of more than 14% of the previous rent is prohibited<sup>70</sup>. Recently the Rent Control Law has been highly criticized, due to the fact that the vast majority of the cases brought before rent control courts are rarely connected with residential dwellings, but in most cases are of a business and commercial character. Therefore, in theory, limiting rent increases in certain cases might also be unreasonable, however, as right now rent prices are decreasing because of the economic situation, this is not so evident.

As for the effects of these rules on the return of tenancy investment, in Cyprus, at the end of the third quarter of 2012, its average gross percentage stood at 3.8% for apartments and 2% for houses.

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<sup>69</sup> Konistis, Greece, 83.

<sup>70</sup> Statutory tenancy is a measure introduced by the Rent Control Law no. 23/1983 to deal with the housing emergency of expatriated Greek-Cypriots and has a wide field of application: if a tenancy - for a dwelling built before 1999 in a controlled area (practically all the urban areas and surroundings) - is terminated by the landlord or expires, then it automatically becomes statutory provided that the tenant does not leave the dwelling.

In Italy the situation is more complex. After the partial abrogation of the Fair Rent Act in 1998, legal limits to rent levels have been generally decided by the parties involved. In other words, they may decide to opt for ‘assisted tenancies’, which fix a maximum rent, lower than the market price, in exchange for other fiscal and regulatory benefits for the landlord. These contracts represent only about one fifth of the total market but, when opted for, it means that the landlord considers that such a solution is profitable over all.

Contracts with a shorter legal duration and contracts executed by university students for studying purposes<sup>71</sup>, according to the prevailing opinion, must always respect the legal rent ceilings for ‘assisted tenancy’. This is justified due to the uniformity and the reduction of transactional costs but has received some criticism considering that it was introduced by a law that was supposed to liberalize the tenancy market. The dissatisfaction with this regulation is testified by the fact that contracts with university students with fixed market rents are widespread in practice<sup>72</sup>. The black market also very seriously affects this kind of tenancy.

Further limits regard the possibility to increase the rent during the tenancy. Clearly this cannot be done by the landlord unilaterally. In case of ‘free market tenancies’, the prevailing opinion is that parties can decide on rent increases only at the beginning of the contract. In the case of ‘assisted tenancies’, rent increases need to be expressly allowed by local agreements which also indicate their amount. In any case such increases cannot exceed 75% of the official yearly inflation rate. For contracts executed by university students for studying purposes and contracts with a shorter legal duration, rent increases are not allowed at all. The explanation for this is that for these kinds of contracts, all of which have a shorter legal duration, the need to update rents is less important. However, such strict rules might have a role in the high percentage of black market rentals, especially for university tenancies.

Finally, when the landlord opts for *cedolare secca* (flat rate tax) – an alternative fiscal regime for rental income – the possibility of an increase in rent ‘in any form’ is suspended until the tax regime applies. This is likely to affect a wide percentage of both ‘free-market’ and ‘assisted tenancies’. Presumably, the reason for this provision by the legislator is that the tenant may also benefit from the option for *cedolare secca*. However, considering that the duration of residential tenancies is compulsory and quite long<sup>73</sup>, such a limit in periods of high inflation might appear unreasonable.

As for the return on investment in Italy, in 2010 its gross value was 2.9%, while in 2012, it was 3.2%. These figures are quite low and furthermore affected by an overall increasing taxation on properties. However, in a period of difficult economic investments, they still attract a certain number of small savers.

All three countries tax rental incomes. Italy is the only country of the three to introduce the possibility of a tax regime specifically for rental income. However this is not necessarily more profitable than the ordinary income tax, which provides some specific deductions for rental income. Cyprus applies ordinary taxes to rental income but also with specific deductions. Greece applies the ordinary income tax regime without any relief.

In Italy the *cedolare secca* regime was introduced in 2011 in order to counteract the high number of black market rentals. It grants landlords, who are natural persons, to have rental income taxed separately at various fixed rates: from 21% for ‘free market

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<sup>71</sup> Contracts for holiday reasons and public dwellings are excluded from this regulation.

<sup>72</sup> De Tilla & Giove, ‘Le locazioni abitative e non abitative’, in *Trattato Teorico Pratico di Diritto Privato*, ed. by G. Alpa & S. Patti (Padova: CEDAM, 2009), 447.

<sup>73</sup> For ‘free-market tenancies’, 4+4 years; for ‘assisted tenancies’, 3+2 years.

tenancies' to 10% for 'assisted tenancies' in municipalities with a 'scarcity of dwellings' (Law no. 61/1989) or with 'serious housing problems' (Resolution CIPE no. 87/2003)<sup>74</sup>. In addition, the contract is exempted from the annual registration tax and the stamp duty<sup>75</sup>. On the other hand, the choice of this form of taxation prevents any form of rent increase and tax deduction.

The ordinary fiscal regime provides that rental income is taxed together with the rest of the landlord's income through IRPEF (personal income tax): the rates go from 23% for annual incomes below 15,000 euros to 43% for incomes over 75,000 euros, with three intermediate income brackets (incomes up to 8,000 euros are exempted). In addition, a percentage of the collected rent can be deducted: 5% for 'free-market tenancies' and 33.5% for 'assisted tenancies'. All these differences explain why *cedolare secca* is not always more profitable, but generally only for higher incomes. In Cyprus, incomes from immovable properties are taxed separately with a specific income tax ranging from 20% to 35% (over 60,000 euros). Incomes up to 19,500 euros are exempted and a deduction of 20% of the collected rent is allowed. The Defense Tax then imposes a further rate of 3%, but only on 75% of the total rental premium collected.

Finally in Greece the total taxpayer's income is calculated and taxed with rates of 11% (up to 12,000 euros) or of 33% (for income exceeding this limit). This is the result of the tax reform introduced in 2014, which, among the other things, also abrogated the exemption for incomes up to 5,000 euros.

The differences in these approaches are quite clear. While Italy tries to use fiscal subsidies also to reduce the black market, the Cypriot tax system provides a more traditional subsidy to rental tenures. Finally the Greek system is clearly greatly affected by state budget difficulties and seems to have abandoned any form of subsidy through fiscal policies.

With regard to other expenses, such as costs of repairs or utilities, while Greece and Italy provide specific regulations, Cyprus has no provisions, but the practical results are not very different.

Both Greek and Italian legislations share the principle that the landlord has to ensure that the dwelling is offered and maintained suitable for the agreed use during the tenancy. This means that the landlord is responsible for all essential maintenance works and repairs on the dwelling. In Cyprus the same principle seems to originate from the general rules on tenancy contracts<sup>76</sup>.

Italian law (Arts 1576 and 1609 ICC) specifies that only 'small repairs' are the responsibility of the tenant, such as the replacement of window glass, locks, lamps broken as a consequence of use. Repairs deriving from the age of the dwelling or from fortuitous events on the other hand, are always the responsibility of the landlord<sup>77</sup>.

Similarly, in Greece, Art. 592 GCC states that the tenant is not liable for damage or alterations that result from the agreed use of the dwelling, but only for repairs due to improper use.

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<sup>74</sup> The rate for 'assisted tenancies' in the above mentioned situations would be 15%, but it has been further reduced to 10% from 2014 to 2017.

<sup>75</sup> It is worth considering that the registration tax is another annual tax on rental income: 2% of the yearly amount. A reduction of 30% is provided for 'assisted tenancies'.

<sup>76</sup> Konistis, Cyprus, 69.

<sup>77</sup> However the landlord cannot be required to rebuild the dwelling if it has been totally or partially destroyed: in both cases, the supervening impossibility of performance can be invoked.

It is important to remember that these rules are all dispositive, thus the duty of the landlord to carry out repairs can be contractually derogated by the parties. Limits arise, at least in Italian law, when parties decide that repairs are the responsibility of the tenant, as this involves an additional burden for the latter. With ‘assisted tenancies’, this provision cannot be used to derogate the legal rental ceiling.

Also for utilities, similarities among the three countries are evident: in all of them, utilities are considered as expenses for the use of the dwelling and therefore are normally to be paid by the tenant, except for different agreements.

As for Greece, the only exception concerns the Temporary Special Tax of Electricity Supplied Surfaces, which, according to Art. 12 Law no. 401/2011, the tenant can lawfully set-off from the rent.

As for both Greece and Italy, it is worth remembering that, according to case law, with the common utilities in a condominium, the owner is always the only subject responsible for payment towards the condominium. Then, after payment, the owner/landlord can ask to be refunded by the tenant.

Finally, although the taxation of properties is not directly connected to the landlord but rather the owner, it is worth noting its potential impact on the field of tenancies. This is because in all three countries, this form of taxation was recently increased as one of the main resources to cover state budget problems after the beginning of the economic crisis.

### *3.1.2. Property rights respected de jure and de facto*

The payment of a deposit is a common procedure in all three countries and its function is to serve as a guarantee against future claims made by the landlord and not as an advanced rent payment.

In both Greece and Cyprus the amount of the deposit can be freely decided on by the parties. In Italy, Art. 11 Law no. 392/1978 indicates that the deposit cannot exceed three months’ rent, however this rule is nowadays considered as dispositive for contracts executed under Law no. 431/1998<sup>78</sup>.

The aforementioned Italian regulation indicates that interest on the deposit should be given to the tenant at the end of each year, but also this provision is mainly considered as dispositive, at least with regards to ‘free-market tenancies’. Also, in Greece and Cyprus, in the absence of a specific provision, the issue is a matter of debate. In Greece the prevailing opinion is that the landlord is obliged to return the deposit plus interest to the tenant once the contract expires, and all claims against the tenant are set off. Another opinion retains that interest should be paid only if the landlord defaults on returning the deposit to the tenant<sup>79</sup>. The latter solution seems to prevail in Cyprus<sup>80</sup>.

It is notable that, at least in Italy, the landlord cannot automatically retain the deposit: he/she has to file civil proceedings in order to ascertain the amount due and be authorised to retain it.

Both Greece and Italy provide a lien on the tenant’s belongings, although with some differences. Cyprus has no provision for this, but a lien can be agreed between the parties.

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<sup>78</sup> See Bianchi, Italy, 135 et seq.

<sup>79</sup> See for references Konistis, Greece, 76.

<sup>80</sup> Konistis, Cyprus, 69.

The principal differences between the Greek and Italian models are the following<sup>81</sup>:

- the Greek provision (Art. 604 GCC) considers all the movable objects brought into the dwelling by the tenants or his/her family, provided they are legally subject to attachment. The Italian provision (Art. 2744 ICC) refers to belongings that 'furnish' the dwelling, thus anything but furniture, such as money, jewels, clothing and similar are excluded;
- the Greek provision also expressly considers the things belonging to the wife and the children of the tenant or the subtenant. Also in Italy the furniture of the subtenant is included but the belongings of other subjects are excluded, provided that the landlord was aware that they did not belong to the tenant;
- in Greece the lien secures only the tenant's claims for delayed rent (for a period of two years before the tenant's belongings are seized). In Italy it can be used for any credit arising from a breach of contract, such as a refund for repairs not carried out by the tenant or for damage to the dwelling.

In any case, in all three countries the deposit is a much preferred form of guarantee for the landlord's claims. In Greece this is because the lien does not secure any kind of claim, in Italy it is because a guarantee for furniture is less practical than a guarantee for a sum of money and generally requires a longer procedure to be paid.

A personal security is quite common, especially when tenants are university students or young people in general. This is also due to its very simple mechanism: another person, often parents or other relatives, can be required to pay the rent in case the tenant is in default. Many landlords do not rent dwellings to young people without such a security, but according to public opinion this is a reasonable precaution. This is probably another indication of the inter-familial approach to housing in southern Europe.

Insurance against damage to the dwelling by the tenant or non-payment of the rent exist but is quite unusual, at least for normal dwellings. However, in Italy, since the beginning of the crisis, an increasing number of landlords have opted to secure rents.

As for terminating contracts, if the property is needed for personal use, for close relatives or other economic uses, the three countries follow very different policies.

As far as Italy is concerned, it is worth focusing on Law no. 431/1998, although termination, for a very limited number of tenancies is still regulated by the Civil Code or by Law no. 392/1978<sup>82</sup>.

Law no. 431/1998 liberalized the rent market but in return it introduced stricter rules for the duration and termination of the contract. Therefore contracts regulated by this statute cannot be terminated by the landlord at any time but only after three or four years from the beginning of the contract (depending on the kind of tenancy: 'free-market' or 'assisted'), with at least six months' notice. Termination in these cases is also possible only for one of the reasons indicated by Art. 3, lett. a) to g). These include: a) *when the landlord wants to use the dwelling for him/herself or for his/her spouse, parents, children, relatives up to the second level, for a residential, commercial, artisan or professional activity*; b) *when the landlord is a public, cultural or religious legal entity that wants to use the dwelling for its own purposes, provided that it provides the tenant with another adequate and fully available dwelling*; ... g)

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<sup>81</sup> For further details on these liens see, respectively Konistis, Greece, 73 et seq.; Bianchi, Italy, 131 et seq.

<sup>82</sup> For termination by the landlord in similar cases, see Bianchi, Italy, 165.

*when the landlord wants to sell the dwelling, provided that he/she does not own other residential dwellings, in addition to his/her own house; a pre-emption right is granted to the tenant in such cases*<sup>83</sup>. Thus the legislator takes into consideration, with very precise conditions, various needs of the landlord to interrupt the contract for personal reasons, balancing it with the interest of the tenant in stability. These rules are considered unilaterally mandatory which means that they cannot be derogated in favour of the landlord. At the end of the legal term (five or eight years, depending on the kind of tenancy), the landlord is free to terminate the contract without justification, with at least six months' notice.

Both in Greece and Cyprus, there is a much more liberalized approach to the problem of termination, which means that the protection of stability for the tenant is more limited.

In Greece the main distinction is between open-ended contracts and those that are limited in time. In open-ended contracts, the landlord can always send a notice of termination without justification. The law simply indicates the period and the minimum deadline to send the notice, but these rules are dispositive. It is also necessary to consider that, pursuant to Art. 5, subs. 1 Law no. 2235/1994, the minimum duration of a residential tenancy for a primary residence is three years, thus during this period freedom of termination does not apply. During this term only the rules regarding termination in exceptional cases are applicable: which are also only applicable for time-limited contracts. These provisions do not provide for the right to terminate the contract earlier in order to meet the landlord's personal needs. The only possibility is termination of tenancies exceeding 30 years: "*If a lease is entered into for a period longer than thirty years, or for the lifetime of one of the lessor or the lessee, either party may after thirty years give notice of termination of the lease according to the provisions of the lease of non-fixed duration*" (Art. 610 GCC).

In addition, both the courts and the legal doctrine accept 'termination for outstanding reasons', in accordance with the principles of good faith, although the Civil Code does not expressly state it. According to case law, this form of termination cannot be invoked by the landlords in order to terminate the contract earlier for their own use<sup>84</sup>. Obviously, apart from the only mandatory rule in this field, regarding the minimum duration for primary residential tenancies, parties are free to provide clauses for early termination in the contract.

In Cyprus the role of contractual terms, at least in theory, is even more important, as formally there are no provisions with regard to minimum duration or restrictions to termination of the contract. The only limit is that parties must always indicate a term for the tenancy contract, thus a specific clause for earlier termination for particular reasons should be provided.

Despite this, the Rent Control Law, which grants special protection to tenants against eviction, plays a key role in this field. When this law is being applied, no eviction orders can be issued against the tenant, even after proper termination, except in the cases indicated by Art. 11, subs. 1<sup>85</sup>. Of these, it is worth mentioning the following:

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<sup>83</sup> The other reasons are the following: c) *when the tenant has at his disposal a free and adequate dwelling in the same municipality;* d) *when the building is seriously damaged and needs repairs which are prevented by the presence of the tenant;* e) *when the building must be fully renovated, or destroyed or elevated (in the latter case, the tenant must be living on the top floor and the building needs to be evacuated);* f) *when the tenant does not continuously occupy the dwelling without a legitimate reason, save cases of succession in the contract.*

<sup>84</sup> See Konistis, Greece, 90.

<sup>85</sup> The Rent Control Law and the notion of 'statutory tenant' have a very wide application in Cyprus: this law applies to all the dwellings in controlled areas (practically all the urban and surrounding

- f) if the owner needs to use the property as a residence for him/herself, spouse, children or dependent parents. However, in such a case the court will not issue an eviction order if it is proven that such an order would cause serious damage;
- g) when the owner reasonably requires the dwelling in order to demolish it and construct a new building, or to make substantial changes or alterations which will lead to the development of the property or to execute works in a preserved building. In this case, the tenant should be given four months' notice;
- k) if the tenant has given prior notice declaring his/her intention to vacate the dwelling, and the landlord concluded a sale or tenancy contract<sup>86</sup>.

Cyprus therefore has a *de facto* regulation, which is quite similar to the Italian regulation, when the Rent Control Law applies. Although no minimum duration of tenancies is provided, the stability of tenants is widely protected by the special statute: the landlord can recover the dwelling only for one of the reasons expressly indicated by the law, which are similar to the reasons indicated by the Italian law. In Cyprus the Rent Control Law has been criticized as it no longer seems to be coherent with its original purpose: protecting expatriated people after Turkish occupation. In addition, the fact that the rule only applies to dwellings built before 1999 seems to create an artificial distinction between two almost opposite systems.

The Greece and Cyprus situations have similarities in terms of eviction procedures. In particular, due to the vast supply of houses available for rent, tenants, at least with regard to residential tenancies, generally prefer to leave the house, rather than begin time-consuming and costly court proceedings<sup>87</sup>.

In Greece proceedings are quite lengthy but, on the other hand, no particular protection against eviction is granted by the legislator. Thus considering that first-degree judgments in tenancy disputes are immediately enforceable, evictions do not seem to be subject to considerable delays<sup>88</sup>.

In Cyprus court proceedings seem to be faster but the Rent Control Law represents a significant limit to evictions, when the tenant does not spontaneously leave the dwelling. First of all, it is necessary that one of the grounds for the eviction provided by Art. 11 of the law applies. Then the landlord has always to give one month's notice, unless agreed otherwise. Finally, the court may, in any case, suspend the execution of its judgment for up to one year<sup>89</sup>.

In both countries mediation has been recently introduced and for the moment, as with other alternative dispute resolutions, appears to be rarely used<sup>90</sup>.

areas), built before 1999; «a tenant is deemed statutory if, after the expiration or termination of the first tenancy, he/she remains in possession of the dwelling»: Konistis, Cyprus, 82.

<sup>86</sup> The other reasons are the following: a) When rent is in arrears for more than 21 days after a written notice demanding payment is given to the tenant, should he/she fail to pay the amount due within 14 days from the service or should the tenant constantly default on the rent. b) In the event that the tenant proves to be a nuisance to neighbours, or uses the dwelling for illegal or immoral purposes, or permits such use. c) If the Court finds that the condition of the dwelling has worsened due to the destructive actions or gross negligence of the tenant. d) If the tenant, despite the explicit obligation not to sublease the property, does so and the Court considers this reasonable cause to issue an eviction order. e) If the tenant exploits the dwelling in a way that the profit gained is disproportionately high compared to the rent owed. h) When the dwelling is required for legal planning purposes. i) When the landlord has been expropriated by law. j) When the dwelling is reasonably required for public law purposes. See Konistis, Cyprus, 82 et seq.

<sup>87</sup> Konistis, Greece, 97 and Konistis, Cyprus, 85.

<sup>88</sup> Konistis, Greece, 96.

<sup>89</sup> Konistis, Cyprus, 82 et seq.

<sup>90</sup> See Konistis, Greece, 96 and Konistis, Cyprus, 84

The most important difference in the Italian situation is that in a wide number of cases tenants tend not to leave the dwelling spontaneously. This is probably the consequence of a more difficult tenancy market, where available dwellings are not as widespread as in Greece and Cyprus. In addition Italy is affected, apparently even more than Greece, by very lengthy court proceedings, at least when the tenant files an opposition to the eviction<sup>91</sup>. Furthermore, once the eviction order has been obtained, evictions can be significantly delayed. Firstly, the law grants the judge the possibility to delay the order for up to six months (twelve in exceptional cases). Then for many years in Italy a periodically updated law has provided a temporary suspension of evictions for tenants in particularly difficult conditions. Finally, also public authorities who should factually intervene in order to vacate the dwelling have a certain power to 'graduate evictions', in consideration of political decisions, such as the difficulty and the opportunity to go ahead with the procedure<sup>92</sup>.

The result is that in certain cases eviction can be really difficult and take years. After the intervention of the ECHR and the Italian Constitutional Court, attempts were made to limit the time and discretion in these procedures. However the economic crisis has greatly increased evictions and also the protests against them, so it is doubtful whether the lengths of court proceedings really are being shortened.

The situation in public housing in Italy is even more complex as evictions in these cases have been always delayed much longer than in the private sector. In addition, more recently, evictions from public dwellings have been increasingly contested and prevented through pickets by groups fighting for the 'right to housing', even when evictions concern illegal occupations.

Since June 2013 mediation before filing ordinary proceedings for tenancy law has become compulsory again, but it is still too early to find data regarding its effects<sup>93</sup>.

### *3.1.3. Construction and rehabilitation capabilities*

In all three countries the modernization and extension of mortgages was one of the driving forces for the significant development in the housing market in the years before the crisis. Since 2007 new bank loans have decreased considerably, although with partially different effects .

In Italy the reduction in new home loans was particularly drastic, from 60.4 billion euros in 2006 to 24 billion euros in 2012, and signs of recovery are still quite limited. The result is that house purchases more than halved and there has been an increase in the percentage of people living in rental properties.

In Greece and Cyprus, the reduction in new home loans was more limited and in addition affected a market with a high number of available, often newly built, dwellings. Thus the impact was more evident for the construction industry, which had to abandon many new or ongoing projects, rather than on families looking for a house to buy.

In Cyprus a significant proportion of public subsidies target the construction or renovation of buildings. These plans include loans with limited or no interest to build or renovate houses but also the provision of land for self-building programmes<sup>94</sup>.

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<sup>91</sup> For an analysis of the procedures: Bianchi, Italy, 171 et seq.

<sup>92</sup> For further details on all these aspects, see Bianchi, Italy, 174 et seq. and 180 et seq.

<sup>93</sup> Bianchi, Italy, 180.

<sup>94</sup> Konistis, Cyprus, 26 et seq.

Also in Greece, until 2012, loans were provided to complete or repair houses, but were later cancelled for budget reasons<sup>95</sup>.

In Italy, subsidies in this field are represented by fiscal incentives. A certain percentage of the expenses for the construction or renovation of a building can be deducted from the taxable income of the person who paid for such expenses (owners, landlords but potentially also tenants). In recent years deductions have been increased, as they are considered an important measure to stimulate investments and economy<sup>96</sup>. In addition, these works have a reduced VAT at 10%.

In all three countries a performance in kind by the tenant, who renovates the dwelling during the tenancy, is admissible only when parties expressly agree to it. It is not easy to say how widespread this is. In Italy it is sometimes adopted for public housing, in order to rent dwellings that need refurbishments for which the public owner does not have sufficient funds.

### **3.2. Important evaluative criteria for the tenant**

#### *3.2.1. Affordability*

Both in Greece and Cyprus parties are free to fix the rent at the beginning of the contract.

In Italy this is also the most frequent solution (so called ‘free-market tenancies’), however ‘assisted tenancies’ also exist. In the latter, the rent is fixed in accordance with various legal parameters, thus it is generally slightly below the market level.

The different regulation with regard to rent increases was described above in Sect. 3.1.1. The common feature of the three countries is that the landlord can never increase the rent unilaterally, not even for renovations or other measures that increase the value of the dwelling during the tenancy<sup>97</sup>.

Greece is the only country to provide an automatic rent increase (75% of the previous year’s price index) in the absence of a different specific agreement between the parties.

In Cyprus limits to rent increases only regard ‘statutory tenants’, when, an increase of more than 14% of the previous rent is prohibited.

In Italy rent increases are not allowed for contracts that are stipulated for studying purposes by university students and shorter legal contracts to meet the needs of one of the parties. In the case of ‘assisted tenancies’, rent increases need to be expressly allowed by local agreements, which also indicate their amount. In any case such increases cannot exceed 75% of the previous year’s consumer price index. In the case of ‘free market tenancies’, the only limit seems to be that parties must decide on the rent increases from the beginning of the contract. The last exception is represented by *cedolare secca* – an alternative fiscal regime for rental income. In this case the possibility of obtaining an increase in the rent ‘in any form’ is suspended for the duration of this regime.

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<sup>95</sup> Konistis, Greece, 32 et seq.

<sup>96</sup> The percentage of deduction depends on the type of work and on the year; from 36% to 65%.

<sup>97</sup> In Greece, in similar cases, the possibility of having the contract renegotiated by the judge, in accordance with good faith, is in theory possible, but no relevant case law can be found: Konistis, Greece, 83 et seq.

Thus Italy has the most protective approach towards tenants, while Greece has the most liberalized (i.e. pro-landlord) approach. The ordinary regime in Cyprus resembles the Greek policy, but where the Rent Control Law applies, protection becomes stricter.

In all three countries deposits seem to be the most widespread form of guarantee required by landlords. Its amount is not fixed by mandatory rules, but it generally corresponds to one or two months' rent.

No other particular provisions can be found. As already mentioned in Sect. 3.2.1, some debate still regards the payment of interests on the sum by the landlord<sup>98</sup>.

With regard to utilities, the common principle in the three countries is that these expenses shall be usually paid by the tenant as they derive from the use of the dwelling. However these provisions are dispositive.

As for repairs, the common principle emerging from the regulations in the three countries is that the landlord is normally responsible for repairs. The Italian law (Arts 1576 and 1609 ICC) specifies that the tenant is responsible only for 'small repairs', such as replacement of window glasses, locks, lamps broken as a consequence of use etc., while repairs deriving from the age of the dwelling or from fortuitous events are always the responsibility of the landlord<sup>99</sup>. Similarly, in Greece, Art. 592 GCC states that the tenant is not liable for damages or alterations that result from the agreed use of the dwelling, but only for repairs due to improper use.

However these rules are also dispositive, thus the tenant's responsibility may be extended by the parties. In Italian law, a limit is represented by the fact that, in case of 'assisted tenancies', such provisions cannot be used to increase the burden for the tenant and subsequently to derogate the legal rent ceiling.

In Italian law, provisions specify the sharing of some 'additional costs' between tenant and landlord, in the absence of an agreement to the contrary: Art. 9 and 10 Law no. 392/1978 or Intermin. Decree 30 December 2002 (Enclosure G) for 'assisted tenancies'. In addition there is also a Table of Additional Costs arranged between some associations representing landlords and tenants, which can be voluntarily adopted by the parties<sup>100</sup>. These provisions are useful as they take into consideration various problematic examples of repairs and utilities.

In Greece and Cyprus no 'registration tax' or 'stamp duty' exist and, more generally, there is no tax burden on the tenant.

In Italy, tenants and owners are jointly and severally liable for payment of a 'registration tax' (2% of the annual rent, every year) and a 'stamp duty'; thus these sums tend to be split in half between the parties. In addition, the tenant has to pay *TARI* every year, which is a tax paid to municipalities for waste collection. They also have to pay a percentage between 10 and 30%, depending on each municipality's choice, of *TASI*, a tax for 'indivisible public services' such as lighting, road, repairs, maintenance of public gardens, security services and so on.

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<sup>98</sup> For further details about the regulations on deposits in the three countries, see Konistis, Greece, 75 et seq.; Konistis, Cyprus, 68 et seq.; Bianchi, Italy, 135 et seq.

<sup>99</sup> However the landlord cannot be required to rebuild the dwelling if it has been totally or partially destroyed: in both cases, the supervening impossibility of performance can be invoked.

<sup>100</sup> See Bianchi, Italy, 133.

Subsidies to tenants provided by the countries at issue have already been described in Sect. 2.5.

### 3.2.2. Stability

In Cyprus there is a wide case law of the Supreme Court that distinguishes between a tenancy and license for use. This suggests that licenses are quite often used to avoid tenancy regulations, which is quite strict when the tenancy becomes statutory. In Italy the most common alternative to a tenancy contract is a commodatum or loan for use. This contract is often used to simulate a gratuitous agreement or to derogate the minimum legal duration of tenancy contracts. In Italy loans for use represent about 7.4% of all tenures.

In Greece the use of alternative contractual agreements seems to be less widespread, probably as a consequence of a much less regulated tenancy law.

In Greece tenancy contracts can be validly executed without particular formalities, so validity problems are connected to omitted registration, as described below.

In Cyprus, the written form is widespread, as it is necessary for all tenancies of immovable dwellings lasting more than one year. Without this, the contract is null and void.

In Italy since 1998 a written form has been required for all kinds of residential tenancies<sup>101</sup>. More significantly the legislator introduced a specific discipline, derogating the normal rules on the invalidity of contracts. This was aimed at a particular deterrent and punitive effect, when the lack of a written form is the landlord's fault. In this case, the contract is valid, but its content is modified by the court in accordance with legal provisions. The rent cannot exceed the amount established for 'assisted tenancies'. If the tenant previously paid a higher rent, he/she has the right to have the difference refunded (Art. 13, subs. 5 Law no. 431/1998). In order to obtain the judge's corrective decision, evidence that the landlord did not want to sign a written agreement is required, in addition to evidence that the tenant was actually provided with the dwelling. Although not expressly governed by the law, it is deemed as reasonable that the duration of the contract, if lower, will also automatically be fixed at the minimum legal level<sup>102</sup>.

This shows once more that some of the most typical Italian legal solutions in the field of tenancy law, which do not exist in the other two countries, are meant to counteract the black market, as the lack of a written form normally implies tax evasion. Cyprus has a more traditional approach to the lack of a written form. Finally Greece still has a very liberalized approach, which is compensated for by the rules on tax registration described below.

Two different kinds of registration exist in the juridical systems of the three countries. There are tax registers only in Greece and Italy.

In Greece, legislation imposes a special registration duty on tenancy contracts "of urban immovable properties". In the absence of registration, tenancy contracts "are deprived of any probative power and cannot be taken into account by the courts and the public authorities in general" (Art. 77 Law no. 2238/1994 "Tax Income Code"). However, the well-established opinion of the Greek Court of Cassation is that the

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<sup>101</sup> Discussions only regard the application of this rule to particular categories of residential dwellings: see Bianchi, Italy, 103.

<sup>102</sup> For more details, see Bianchi, Italy, 103.

court legally takes into account any unregistered tenancy contract when Art. 650, subs. 1 GCCP applies: “*The court also takes into account evidence that does not fulfil the requirements of the law*”<sup>103</sup>.

In Italy all contracts for properties lasting more than thirty days a year are subject to tax registration. In 2004, it was established that non-registered contracts were null and void. This provision is unusual as fiscal irregularities, such as non-registration, should not affect the validity of a contract, according to traditional civil law rules<sup>104</sup>. Nullity means that the contract is retroactively without effect and cannot be legally enforced before the court, which could also be counter-productive for the tenant. For this reason in 2011 the possibility of a validation of the contract was introduced. This solution, on the one hand, provides a deterrent and punitive effect on the landlord (as in the above-mentioned lack of the written form) and on the other, encourages the tenant to claim registration of the contract<sup>105</sup>. However in 2014, the 2011 rules were declared unconstitutional because the government adopted them without respecting the boundaries authorized by parliament. Thus in the following months it will be clear whether the government is going to propose the same rules again following the correct procedure<sup>106</sup>.

There are land registers, on the other hand, in all three countries with a very similar content. They are not necessary for the validity of the contract but to prevent the new owner from lawfully terminating the tenancy contract if the dwelling is transferred. The registration requirement in all three countries is provided only for tenancies exceeding a certain duration: nine years in Greece and Italy, fifteen years in Cyprus<sup>107</sup>.

Landlords may be motivated to enter into non-registered contracts as a way of circumventing the mandatory rules of tenancy law and taxation. This situation seems to be common to all three countries. A minimum legal duration is provided in Greece and Italy, but also in Cyprus ‘statutory tenancies’ create, for certain aspects, an even more rigid regulation. Taxation of the income from rent is equally common to all three countries.

Regarding the protection of the tenant against unilateral termination by the landlord, the three countries follow different approaches.

In Cyprus, in accordance with the Supreme Court, open-ended contracts are not allowed but parties must always indicate a term. Despite this, legislation does not provide a minimum or maximum legal duration for tenancy contracts and not even particular rules for termination. Thus normally parties stipulate in each contract reasons, terms and modalities for termination. This completely liberalized approach is compensated for by the provision of ‘statutory tenancies’ in a wide number of cases,

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<sup>103</sup> See Konistis, Greece, 56 et seq.

<sup>104</sup> For this reason some authors and court decisions do not consider it as invalidity but simply as unenforceable until the contract is registered: see Bianchi, Italy, 104 et seq.

<sup>105</sup> Art. 3, subs. 8 Leg. Decree no. 23/2011 established that if the tenant registered a contract that was not previously legitimately registered, the content of this contract automatically changed: the duration became four years from the moment of registration, upon expiration the contract was automatically renewable for another four years according to the conditions of Art. 2, subs. 1, Law no. 431/1998 and the rent was reduced to three times the cadastral rent (a particularly low value in comparison to current market prices, which in the country are on average eight times the cadastral rent). For further details, see Bianchi, Italy, 88 et seq. and 104 et seq.

<sup>106</sup> Regarding the relationship between tax registration and rent increase, see Bianchi, Italy, 148 et seq.

<sup>107</sup> See respectively, Konistis, Greece, 57; Bianchi, Italy, 105 et seq.; Konistis, Cyprus, 55.

which prevents eviction and *de facto* renews the contract until the tenant leaves the dwelling of his/her own accord, or one of the reasons for eviction provided by the law is met<sup>108</sup>.

In Greece open-ended contracts can be stipulated, but the law provides a mandatory minimum duration of three years for primary house tenancies. The law also indicates various minimum terms that the landlord has to respect in order to give ordinary notice, but they can be derogated by the parties. The landlord is, in any case, entitled to terminate the contract, even during the mandatory term of three years, in extraordinary cases indicated by the law: the bad use of the dwelling<sup>109</sup> or rent in arrears<sup>110</sup>. In the latter case, the law provides that termination can be prevented if the tenant pays the delayed rent and the notice expenses before the term of the notice expires. In ordinary termination notices, the tenant can object that the landlord's termination was illegal, because it went against the limits set by good faith, good morals, or the economic and social purpose of the right (Art. 281 GCC). An application of this principle might be that the landlord gives notice to a tenant who is late in paying the rent, without claiming his/her rights from the guarantor who would be able to fulfil the obligation<sup>111</sup>.

Other exceptional circumstances concern termination of tenancies exceeding 30 years, which is always possible after this term<sup>112</sup>, and termination for 'outstanding reasons'. The latter is accepted by courts and legal doctrine in accordance with the principles of good faith, for example when some facts render the continuation of the contract particularly onerous for the party invoking them<sup>113</sup>.

Finally, it is worth remembering that pursuant to the provision of Art. 612A GCC "*when the dwelling is used as a family house and such use has been notified to the landlord, the latter's termination is void, if the relevant notice is not also addressed to the tenant's spouse*".

In Italy stability for the tenant is carefully protected by Law no. 431/1998. Contracts regulated by this statute can be terminated by the landlord only after three or four years from the beginning of the contract (depending on the kind of tenancy: 'free-market' or 'assisted'), with at least six months' notice. Termination in these cases is possible only for one of the reasons indicated by Art. 3, lett. a) to g)<sup>114</sup>. At the end of

<sup>108</sup> For further details on 'statutory tenancies', see Sect. 3.1.2 and *amplius Konistis, Cyprus*, 82.

<sup>109</sup> Art. 594 GCC "*The lessor is entitled to terminate the lease agreement, and in addition to claim compensation for damages, where the lessee, notwithstanding the protest of the lessor carelessly uses the property and in a manner inconsistent with the agreement or if he/she does not behave appropriately towards the other tenants*".

<sup>110</sup> Art. 597 GCC "*If a lessee has delayed payment wholly or in part of the rent, the lessor is entitled to give notice of termination of the lease at least one month if it is about a lease whose duration was agreed for a year or more, and before ten days in the other leases. A lessor's claim for damages due to the premature dissolution of the lease contract is not excluded. The notice of termination is ineffective if the lessee pays the delayed rent before the time period passes with any expenses relating to the notice*".

<sup>111</sup> In this sense, see Konistis, Greece, 93.

<sup>112</sup> Art. 610 GCC: "*If a lease is entered into for a period longer than thirty years, or for the lifetime of one of the lessor or the lessee, either party may after thirty years give notice of termination of the lease according to the provisions of the lease of non-fixed duration*".

<sup>113</sup> See Konistis, Greece, 90.

<sup>114</sup> The reasons are the following: "a) when the landlord wants to use the dwelling for himself or for his spouse, parents, children, relatives within the second level for a residential, commercial, craft or professional activity; b) when the landlord is a public, cultural or religious legal entity which wants to use the dwelling for its own purposes, provided that it provides the tenant with another adequate and fully available dwelling;c) when the tenant has at his disposal a free and adequate dwelling in the same municipality; d) when the building is seriously damaged and needs repairs which are prevented by the presence of the tenant; e) when the building shall be integrally repaired, or destroyed or

the legal term (five or eight years, depending on the kind of tenancy), the landlord is free to terminate the contract without justification, with at least six months' notice. These rules are considered unilaterally mandatory, which means that they cannot be derogated in favour of the landlord, but only in favour of the tenant.

In addition tenancies can always be terminated in accordance with the general provisions of contract law, when these are not expressly derogated. This means that it is possible to rescind the contract or to discharge the same for breach, for supervening impossibility of performance or for supervening hardship. In a breach for non-payment of rent, there are some special rules which specify the term beyond which the contract can be terminated, which at 20 days is not particularly long. However, they also grant the tenant the possibility of avoiding termination by paying rent, interests and expenses before a court<sup>115</sup>. These rules are also unilaterally mandatory in favour of the tenant.

The overall impression is thus that Cyprus provides, on the one hand, a very strict protection of stability through 'statutory tenancies', which is limited to dwellings built before 1999 and in 'controlled areas'. In addition it has a very liberalized system for the remaining tenancies: parties always fix a term for the contract and possible cases of earlier termination both by the landlord or by tenant have to be expressly agreed between the parties in the contract.

Greece has a more homogeneous system, which is based only on one mandatory rule, regarding the minimum duration of three years for primary house tenancies.

Italy has a more articulated legislation, which limits the autonomy of parties to a greater extent than the Greek legislation, but in a more homogeneous way than the Cypriot system.

It is necessary to consider that both in Greece and Cyprus tenants seem to have fewer difficulties in finding alternative housing solutions in the case of evictions. This explains, at least in part, the smaller attention by the legislator in guaranteeing stability through mandatory rules. In Cyprus this tendency over the last decades has conflicted with 'statutory tenancies', which are the legacy of the Turkish invasion in the 1970s but no longer seem to correspond to present housing needs.

In Italy, the greater attention on stability reflects a situation which has not drastically altered over the decades. There is a more difficult housing market, especially in the largest cities, where supply barely meets demand and prices remain generally high. Consequently, there is a more conflicting situation between tenants and landlords in terms of keeping the dwelling or having it returned. However, such legislation might be not only the consequence but, to a certain extent, also a cause of these conflicts. The protective legislative approach and above all the very lengthy judicial procedures induce some tenants to stay in the dwelling even after termination of the contract, aware that the actual eviction will take months or years.

In the three countries, it does not seem that fixed-term leases are used to circumvent the protection of the tenant in the case of open-ended leases.

In Cyprus the Supreme Court requires that every tenancy has a fixed term so that parties are aware that the contract will last until that term, save exceptional cases of earlier termination that must be decided on between the parties.

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elevated (in the latter case, the tenant must be living on the top floor and the building needs to be evacuated); f) when the tenant does not occupy continuously the dwelling without a legitimate reason, save cases of succession in the contract; g) when the landlord wants to sell the dwelling, provided that he does not own other residential dwellings, in addition to his own house; a pre-emption right is granted to the tenant in such cases".

<sup>115</sup> See Bianchi, Italy, 129.

Both in Greece and Italy, legislation indicates mandatory minimum terms of duration of residential tenancies, as this is considered as a more effective protection than open-ended contracts, where landlords have much more freedom to terminate the contract at any time.

It has already been mentioned how protected periods differ in Cyprus, Greece and Italy and also in the same country, depending on the applicable rules. These measures range from the indefinite extension of 'statutory tenancies' in Cyprus, from five or eight years in Italy, to three years in Greece and to a complete contractual freedom, especially in Cyprus.

All three countries also occasionally introduced legal prolongation of tenancy contracts, but these measures are not used anymore. In Italy such a function is now played by rules granting the possibility to delay or suspend evictions in particular conditions. So even in the absence of prolongation rights of the contract, actual eviction can be greatly delayed.

In Greece and Cyprus prolongation depends only on the initiative of the parties, which may include an option right or a prolongation clause in the contract, as well as renewing the contract before its expiration<sup>116</sup>.

In Greece and Italy the principle 'emptio non tollit locatum' has a similar formulation in the Civil Code, deriving in both cases from the German model of BGB.

The basic rule of Arts 615 GCC and 1599 ICC is that the tenancy binds the new owner of the property when the contract had a certified date before the transfer of ownership<sup>117</sup>. In both cases, 'certified date' requires a public document or a private document that is somehow certified by a public authority (a notary public, a public register, etc.). It is also the same principle for which tenancies of nine years or more, in order to be valid for the new owner, should be registered in the land registry.

Differences arise with regard to tenancies without a certified date. In Greece the legislator grants only a term to send notice of termination and the right of compensation for the tenant against the landlord<sup>118</sup>. In Italy, in contrast, further ways to prevent termination are provided: when the tenant can provide evidence of his/her possession of the dwelling before the sale and when the purchaser agreed to respect the tenancy in the contract<sup>119</sup>.

Another important difference is the role of private autonomy. In Greece, the tenancy agreement can contain a stipulation that in the case of alienation of the property, the tenancy is discharged (Art. 615, subs. 1 GCC). In Italy a similar provision is provided in the Civil Code (Art. 1603 ICC), however its practical role is extremely limited, as

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<sup>116</sup> See Konistis, Greece, 68 and Konistis, Cyprus, 64.

<sup>117</sup> In both countries the rule equally applies in the case of constitution or transfer of a real right over the property.

<sup>118</sup> Art. 615 GCC: "*In the lease of a piece of land which is not executed in a deed bearing a certified date, or contains a stipulation that upon alienation of the property or concession of real right which excludes the use from the lessee, the new owner is entitled to terminate the lease on a month's notice if the term of the lease is a year or less, or on two months' notice if it exceeds a year. In the event of termination by the new beneficiary, the right of the lessee to compensation as against the lessor shall be fully preserved*". See for further elements, Konistis, 62 et seq.

<sup>119</sup> Art. 1600 ICC - *If tenancy does not have a certain date but detention by the tenant is before the sale, the purchaser shall not respect the tenancy for more than the duration established for open-ended tenancies.*

Art. 1599, subs. 4 ICC – *The purchaser is in any case bound to the tenancy if this duty towards the seller was accepted.*

such an agreement is forbidden for the wide majority of dwellings by Art. 7 of the Fair Rent Act both for residential and professional tenancies.

The situation is very different in Cyprus, as in this field the Supreme Court ruled that common law and equity apply, qualifying the relationship between the purchaser and the tenant as ‘constructive trust’<sup>120</sup>. The decision was that anyone purchasing a dwelling who is aware that a tenancy contract has been signed on this dwelling is bound to respect the obligations of his/her predecessor.

In comparison with the Greek and Italian systems, the Cypriot system protects the purchaser to a greater extent but it is much more uncertain for the tenant, as it is only based on the effective knowledge of the purchaser. It is worth considering that in Cyprus such a solution in accordance with equity is more favourable for the tenant than a solution pursuant to immovable property rules (Chap. 224), which would not provide any protection for tenancy agreements in similar cases<sup>121</sup>.

None of the three countries provide the right of first refusal of the tenant when selling the house to a third party. Italy is the only country providing a pre-emption right of the tenant in particular conditions: when the landlord terminates the contract after three or four years (depending on the kind of tenancy) in order to sell the dwelling (Art. 3, subs. 1, lett. g) Law no. 431/1998)<sup>122</sup>.

The use of massive rent increases to force the tenant to leave the dwelling should be prevented by the fact that unilateral rent increases during the tenancy are not allowed in any of the three countries.

Parties could instead agree to a substantial increase in the rent after a certain period of time. According to the prevailing opinion, in Italy it is forbidden to increase the rent during tenancy if this was not agreed on at the beginning of the contract.

Finally, the rent can be increased after termination of the contract. Only Cyprus provides some limits: when the tenancy after termination becomes statutory, the rent cannot be increased by more than 14% of the previous rent.

No additional “social defences” against eviction are available in the three countries. The articulated defences against evictions provided in Italy and Cyprus have been already described above and in the two countries are represented by suspensions or prorogations of evictions and statutory tenancies respectively. In Greece, no particular measures on this point can be found.

### *3.2.3. Flexibility*

Both in Greece and Cyprus private autonomy still plays an important role in termination by the tenant because only a limited number of mandatory rules can be found.

In Cyprus, when tenancies are concluded for a specific period of time, the criteria for earlier termination depends on the parties. Instead, when tenancies are concluded for an indefinite period of time, according to the prevailing case law, they are considered as month-to-month, year-to-year or even day-to-day, depending on the periods when the tenant owes the rent, and are automatically renewed for the same

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<sup>120</sup> See Konistis, Cyprus, 59 et seq.

<sup>121</sup> Konistis, Cyprus, 60.

<sup>122</sup> See Bianchi, Italy, 111.

period. In these cases the opinion is that notice can be given one full period in advance, but this rule can be derogated by the parties.

The tenant seems to have a statutory right to terminate the tenancy agreement when the landlord breaches the contract, but no terms are specified (Art. 39, Chap. 149).

In Greece, Art. 609 provides that the tenant can give notice of termination of an open-ended contract under the same conditions as the landlord. For example, in the case of a tenancy which has been established for more than a month, notice has to be given at least three months in advance and is effective only in certain periods of the year. Terms and periods indicated with this rule are also dispositive.

In addition, the tenant can terminate the contract in some exceptional cases provided by the law. In the case of non delivery of the use of the dwelling or real or legal defects, the tenant has to set ‘a reasonable time’ for reinstatement before termination, save when the tenant is no longer interested in the performance of the contract (Art. 585 GCC). In important, direct and forthcoming risks to the tenant’s health, the setting of a time period for termination is not necessary (Art. 588 GCC). In the case of a necessity to move, public civil servants can send notice of termination “*in accordance with the provisions of the lease for an indefinite duration*” (Art. 613 GCC).

In Italy, the Civil Code provides a similar regulation to the Greek regulation, with regard to termination due to risk to tenant’s health (Art. 1580 ICC), of defects of the dwelling (Art. 1581 ICC) and for public civil servants (Art. 1613 ICC). However, after the introduction of special statutes, the fundamental rule for residential tenancies is that the tenant has the right to terminate the contract at any time with six months notice in the event of ‘serious reasons’ (Art. 3, subs. 6 Law no. 431/1998). This rule grants the tenants a certain flexibility and is justified by the rather long and mandatory minimum duration of tenancy agreements; however it also protects the landlord in requiring ‘serious reasons’. It is obvious that the exact range of this expression depends on the interpretation of the courts, which generally means that they are unpredictable, supervening to the execution of the contract, not depending on the tenant’s responsibility and making the continuation of the contract particularly burdensome<sup>123</sup>.

Six months’ notice by the tenant (or by the landlord) is also necessary to avoid the contract being automatically renewed after the end of the legal term of five or eight years.

Unlike Cyprus, in Greece there is an express provision regarding subletting. However, the rule is identical in both countries: subletting is allowed provided that the parties do not stipulate otherwise in the contract.

In Italy, the Civil Code contains an identical provision but for almost all residential tenancies this has now been supplemented by the 1978 Fair Rent Act, which distinguishes between total subletting, which is allowed, and partial subletting, which is not. ‘Partial’ refers only to some rooms in the whole dwelling and not for example, to total subletting for a limited period of time. In any case, these rules are dispositive, and parties can always agree to limit or extend the right to sublet the dwelling.

Both in Greece and Italy direct rights of the landlord over the sub-tenant are recognized, even in the absence of a contractual relationship. This means that the landlord can demand the rent or seek the rented property from the subtenant.

Cyprus follows a different rule: “*In the event of judgment or order for repossession against any tenant of a residence or a shop, such judgment does not have effect*

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<sup>123</sup> For a further analysis, see Bianchi, Italy, 162.

*against the sub-tenant unless the Court is persuaded that, pursuant to the terms of the initial tenancy contract, the tenant did not have the right to grant a sub-tenancy, or if the sub-tenant made illegal or immoral use of the dwelling*" (Art. 28 Rent Control Law). In other words, the landlord has direct rights only if subletting was not allowed or "*the sub-tenant made illegal or immoral use of the dwelling*".

## 4. Comparison of tenures with a public task

### 4.1. Generalities

One of the most significant differences between the three countries concerns tenures with a public task.

Italy, since the early 1900s, has developed a public housing sector, like other industrialized European countries, which reached its highest levels in the decades after WWII. The sector was subsequently downsized through the progressive sales of dwellings to the occupants and funds to build new dwellings were cut. However it still plays a considerable role in housing policies, representing about 5% of all the tenures in the country and about 20% in the rental sector.

Neither Cyprus and Greece, on the contrary, have ever created a system of public or social housing, instead focusing on different forms of subsidies to the private sector, which means funds to help the construction or purchase of houses and to help the payment of rents. At most some land is provided by the State for construction purposes.

One exception is the particular form of subsidy adopted in Cyprus after the partial occupation by Turkey and targeted at expatriated people. This measure has provided dwellings in specific Expatriated Housing Blocks to low-income families in which at least one of the spouses holds an expatriated identity card<sup>124</sup>. However the figures on this policy are very limited, and no further data are available on its current mode of operation.

Thus a comparative analysis of tenures with a public task is not possible between Cyprus, Greece and Italy. In terms of the Italian situation, the National Report for Italy includes a more detailed analysis of tenures with public task<sup>125</sup>.

### 4.2. Evaluative criteria for public/social/private subsidized landlords

As already explained in the preceding section, given that there is no proper system of tenancies with a public task in either Greece or Cyprus, this section only analyzes the Italian situation.

In Italy tenures with a public task can be summarized with the definitions *Edilizia Residenziale Pubblica* (ERP, i.e. 'public housing') and *Edilizia Residenziale Sociale* (ERS i.e. 'social housing').

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<sup>124</sup> The other requirements for this subsidy are: the expatriated person should permanently reside in Cyprus; neither the applicant nor any member of their family should possess any other housing unit or immovable property of substantial value; the annual income of the individual or the family should not exceed 20,500 euros (the sum of 1,280 euros is added to this for every dependent family member).

<sup>125</sup> See Bianchi, Italy, in particular 73 et seq. and Chap. 6.

a) 'Public housing' is represented by the offer of dwellings for rent, owned directly by the state or more often by other public entities such as municipalities.

The main national legislative benchmark for this is still Law 18 April 1962, no. 167, which regulates the building of public housing. The most significant reforms were carried out with Law 22 October 1971, no. 865, which introduced the concept of *ERP* and entrusted further competences to each municipality. In addition Leg. Decree 31 March 1998, no. 112, entrusted the main competence in the field of public housing to the regions. If we consider that the state now only has the power to indicate the general principles concerning this sector, it is clear how differentiated and fragmented the situation in Italy is.

In general terms, *ERP* controls about 900,000 dwellings that are usually owned by municipalities and managed by specific public agencies operating in every province. This kind of housing is assigned to the weakest part of the population through selective procedures carried out by each municipality.

b) 'Social housing' groups together a variety of different programs that all have in common the idea of establishing various forms of partnership between public authorities and private investors in order to offer dwellings for social purposes with different forms of tenure.

These programmes are generally classified as follows:

- *Edilizia agevolata* or 'assisted housing' can be promoted by private investors, cooperatives or public agencies, and is partially based on a variety of different public funds (for example, sums of money, but also fiscal discounts and easier access to credit), which cannot exceed 50% of the total investment. The aim is to offer dwellings for rent or sale at lower rates than the market price.

- *Edilizia convenzionata* or 'contracted-out housing' is financed by private investors using their own funds; public authorities (especially municipalities) participate by granting the land for building for free or at discounted prices for ninety-nine years. Alternatively or in addition, they can offer discounts on the sums required to grant authorisation to build.

The main role in such projects is played by regional and local authorities, which makes it even more difficult than in the case of public housing to find an overall evaluation on a national level of the rules adopted and the projects funded and provided. For example, it is not easy to find a recent and precise quantification of the number of dwellings provided for rent using this kind of measure.

Prospective tenants are households that do not have the requisites to receive a public dwelling, but who likewise do not have sufficient income to find suitable housing in the free market.

### **4.3. Evaluative criteria for the tenant**

As already explained in the above subsections, given that there is no proper system of tenancies with a public task in either Greece or Cyprus, the following subsections only analyze the Italian situation.

#### **4.3.1. Access**

The supply of dwellings with a public task is not sufficient in the countries at issue. This can be said both for Italy, where forms of public and social housing exist, but also for Greece and Cyprus, where these forms of public aid do not exist.

In Italy this is evident especially considering that over the last few years, the number of applications for public housing has significantly exceeded (about 650,000 households) the number of available dwellings. Also in Italy in the last decade, only one thousand new public dwellings were built each year.

In Greece and Cyprus, even though dwellings at affordable prices seem to be easier to find than in Italy, a form of public housing would be useful to deal with situations of housing need, especially in the largest cities.

a) Public housing: every municipality is responsible for selecting those entitled to a public dwelling. Although this selection must be carried out in accordance with general national principles and above all with regional rules, it is difficult to examine the procedures and requirements of such a fragmented system in detail.

As a general rule, every year municipalities usually publish notice for those who need a social dwelling, indicating the procedure to follow and the requirements. The notice is published in the municipality's register and since 1 January 2013 it has also been published on the municipal website. The following conditions of eligibility are practically identical in all regions:

- the applicants must have Italian or EU citizenship; other foreigners need a 'residence card' or a biannual 'residence permit' to live in Italy plus a regular job;
- the applicants must have residence or a job in the municipality; in some cases notices also allow applications from people living in neighbouring municipalities, in other cases this possibility is allowed only under special conditions;
- the applicants must be compliant with the fixed economic parameters regarding the household's overall wealth (generally not only income is considered, but also other assets);
- the applicant and his/her family must not already have an adequate dwelling for the needs of the family in Italy or abroad;
- the applicant and his/her family must not have already received public housing for rent or sale, they must not have been evicted from public housing for non-payment of rent, and they must not have illegally occupied such a property.

Lists are drawn up taking into account the personal conditions of the applicants in light of the parameters and other priorities established by the competent public authorities (for example, older people, young couples, families with many children and people in poor living conditions generally have a priority).

A list drawn upon the basis of the applications received is then published. From that moment on it is possible, for a certain period of time, to file a petition against the list. In this case too, the timescale and modalities of opposition are fixed by each region, thus they change from place to place. Available housing is assigned based on the final list and in accordance with tables fixing the useable floor area per number of occupants.

In the event of emergencies connected, for example, to particular kinds of eviction, calamities or serious health problems, municipalities are entitled to assign public dwellings in exception to the list. However, this measure cannot generally exceed a certain percentage of total assignments.

Contracts are executed by the public agencies that manage the dwellings on behalf of the municipalities, following standard contracts approved by the regional government.

b) Social housing: in general terms, the procedure for assigning social houses resembles the procedure adopted for public housing. It is done through public notices concerning available dwellings. The notices indicate the procedure for filing

applications, the requirements for applicants, and the conditions under which dwellings are assigned.

#### *4.3.2. Affordability*

With regard to ‘public housing’, the rent (called ‘social rent’) is fixed in accordance with legal parameters established by competent authorities with specific regulations. The amount generally depends on the surface and other relevant characteristics of the dwelling. It is normally very low, although regional and local differences may be quite high; a 70m<sup>2</sup> dwelling is on average rented for less than 100 euros per month (while the market price would be in the range of 800 euros).

Instead with ‘social housing’, the rent can also be affected by specific agreements with the private investors taking part in the project. Its amount is on average about 430-470 euros per month for a 70m<sup>2</sup> dwelling. This means a sum halfway between the social and market rent, in line with the recipients of these dwellings.

It is generally established that the rent can be increased every year within a percentage of the annual inflation rate as calculated by the National Institute of Statistics (ISTAT).

It is sometimes possible that the landlord has the right to increase the rent whenever the local regulation that fixes its amount changes. This is different from the rules for private rent, which do not allow unilateral rent increases during tenancy. The justifications are, on the one hand, that similar increases are established through regulative interventions and, on the other, that they are normally very low.

The delivery of a sum as a deposit is also usual for housing with a public task. This issue is generally regulated in accordance with rules provided for private tenancies (see Sect. 3.2.1). The amount is often two months’ rent.

The sharing of costs for utilities and repairs is normally regulated as for private tenancies (see Sect. 3.2.1).

#### *4.3.3. Stability*

Tenants in public dwellings generally enjoy a much safer and more stable position than tenants in private dwellings, as, once they have obtained the house, they tend to keep it throughout their lives and, in certain conditions, can even bequeath it to their heirs. This is due to the fact that contracts generally do not have a time limit or are automatically renewable. Their duration is only subject to compliance with various established rules.

In terms of the rules that seem to be required in every region, the tenant and his/her family must maintain the necessary requirements for access to public dwellings, the rent must be duly paid and the dwelling must not be damaged, left or given to other subjects.

Stability is further protected granting people the right to stay in the dwelling even though their income may increase over the years. This is because, while the initial income brackets to qualify for accommodation are quite low, they may increase after the dwelling has been awarded.

Tenants are generally interested in keeping the dwelling as long as possible, as social rents are very low.

A downside of this legislation lies in the fact that it is difficult to check an occupant's circumstances in terms of their continued right to maintain occupancy over the years and that, even when the occupants no longer qualify to keep the dwelling, evictions tend to be difficult and lengthy.

The ultimate effect is that people living in public dwellings consider themselves to be in a situation that is much more similar to ownership than other tenancies.

The sale of public dwellings to occupants has been common practice for many decades and one of the main policies that has increased the share of homeownership in Italy. Nowadays this is less widespread. In addition, the option to buy cannot be considered a right granted *per se* to each occupant, but rather depends on occasional decisions by regional or other local competent authorities, often in order to deal with budget necessities.

A national law has thus recently established some general rules to follow regarding the option to buy a public dwelling: Art. 8 Law no. 80/2014 grants the possibility to insert in subsequent tenancy contracts of public dwellings the right to redeem the dwelling and the relevant economic conditions, provided that these limits are respected:

- the option cannot be used for the first seven years of the contract;
- the option can be used only by tenants who do not own any other suitable house;
- the purchaser cannot sell the dwelling again before five years.

The law also specifies that part of the rent already paid can be considered as part of the purchase cost of the dwelling.

#### *4.3.4. Flexibility*

The rules for termination of the contract by the tenant in public dwellings depend on each regional government. In some cases the same rule for private tenancies is provided: termination at any moment but only for 'serious reasons' and with six months notice. In other cases, only a term of notice is required, which seems to be more consistent with a national situation where hundreds of thousands of households are waiting for a public dwelling.

Subletting seems to be always strictly prohibited in public dwellings and non-occupation of the dwelling is considered one of the reasons for termination of the tenancy by the landlord. Such behaviour is considered as evidence that the tenant does not really need the subsidized dwelling. Some regional governments even indicate limits to hosting people that do not belong to the tenant's family for long period of times, but it is doubtful whether similar clauses are always lawful.

## **5. Conclusions**

In conclusion we will summarize the most interesting features of the countries under review together with various legal solutions and factual practices that work particularly well or badly.

In Cyprus the most important factor is the sharp distinction between tenancies subject to Rent Control Law and those subject only to contract law. The former are protected by strict eviction and rent increase limitations and are also subject to

special courts. The latter follow a liberal approach, which gives the parties wide power to decide on the rules. The Rent Control Law is applied only in ‘controlled areas’ and for dwellings built before 1999, which risks creating a not reasonable difference in the regulation.

Regarding the mandatory rules, the written form and the presence of at least two witnesses for any tenancy contract lasting more than one year are among the most important. If the contract does not respect the above rules, a particular form of invalidity results, which means that the contract is considered as a shorter temporary contract that is automatically renewed from time to time. The solution is very similar with open-ended contracts, which, according to the courts, are not valid. This is because contracts must always indicate the term of duration, which is fixed in accordance with the terms of payment indicated by the parties and the contract is considered as being automatically renewed from time to time. This form of invalidity saves the contract by changing its content, in accordance with legal rules. However it does not consider the tenant as a weak party deserving particular protection. The result of invalidity is that the tenant finds himself/herself in a less stable situation, as a shorter contract can be more rapidly terminated.

Greece has an even more liberal approach to tenancy regulation than Cyprus, as rules are still mainly provided by the Civil Code and no particular rent control laws are in force.

Mandatory rules protecting the tenant are therefore very limited. However there is a minimum duration of three years for tenancies of primary residences, and termination is valid only if addressed to both the tenant and his/her spouse, in case the dwelling is used as a family house and the landlord has been notified of such use. The former rule equally prevents earlier termination by the landlord and by the tenant, save for extraordinary reasons, such as breach of contract. The latter rule is not provided for in Cyprus and Italy and seems to represent a useful protective measure.

In this context of limited intervention of the legislator, the Greek courts have adopted a very active role in certain fields, in particular using the general clause of ‘good faith’ and taking into account the catastrophic effects of the economic crisis.

As for termination, Greek courts recognize the right to terminate the contract for “exceptional reasons”, which means facts that render the continuation of the contract onerous for the party invoking them, in view of the special conditions of each case.

As for rent adjustment, recent court decisions have accepted that the agreed rent can be modified when there has been an exceptional change in circumstances since the parties originally executed the agreement. This principle has been considered applicable when, as a consequence of the economic crisis, both the tenant’s income and the amount of rents in the area have been significantly reduced. This is considered possible even when the contract was executed after the crisis had already begun.

It is obvious that in the present economic situation, such decisions may greatly affect the tenancy market, and show the particularly active role of the courts that does not apply to the same extent in Cyprus or Italy.

Finally, Italy has a more articulated tenancy legislation than Greece and Cyprus. The original, mainly dispositive Civil Code rules now play a residual role, as they have been largely supplemented by special statutes providing mandatory or at least prevailing rules.

One of the main features of this more regulated approach in Italy is the specific protection of the tenant, regarded as the weak party of the contract. This attitude is testified by several rules:

- the long and mandatory minimum duration of the contracts, in order to protect the tenant's stability;
- the tenant's right to terminate the contract at any time, provided that there are 'serious reasons' and the term of notice is respected, while the landlord has the right to terminate the contract only at certain times and for certain circumstances indicated by the law;
- the procedure which saves the non-written agreement, by modifying its content with rules in favour of the tenant that are punitive for the landlord<sup>126</sup>;
- the possibility to adopt rent ceilings, which are mandatory for particular kinds of tenancies (contracts with a shorter legal duration for particular requirements of the parties and contracts executed by university students for studying purposes);
- the general principle that mandatory rules in the special statutes are 'unilaterally mandatory', which means that they can be derogated only in favor of the tenant.

Another distinctive feature is the particular focus on counteracting the black market, although this problem for tenancy contracts is still huge in Italy. This policy is pursued through contractual and fiscal rules. The former are deterrent and punitive measures against the landlord (the aforementioned rules to validate non-written or non-registered agreements), and an incentive for tenants to report illegal agreements. The latter include a special fiscal regime, which treats income from rent more favourably than other income, together with an attempt to allocate taxes between the State and the municipalities in such a way that the latter are motivated to take a stronger action against the black market.

The protective regulation also plays a role in the extent of the 'black market', most of which is driven by the desire to avoid taxes, but a part of it is due also to the interest in avoiding some mandatory rules. For example the possibility of derogating the mandatory minimum duration of tenancy contracts is quite limited, and regarding this point, contracts are widely regulated by the law.

There is also some rigidity deriving from the regulation on rent increases, which cannot be decided by the parties during tenancies, and for some tenancies not even at the beginning of the contract. Conversely a reduction in rent can also be agreed after the execution of the contract and registered for fiscal purposes.

In contrast, the possibility of having the contract renegotiated by the judge for supervening hardship, as in Greece, is generally considered not possible in Italy. In addition the discharge of the contract for supervening hardship tends to be excluded by the courts when the party simply alleges a general situation of economic crisis.

The most negative impact on the system of tenancies in Italy however is due to the lengthy judicial procedures, in particular to have tenants effectively evicted, when they do not leave the dwelling of their own accord. It is important to note that the latter problem seems to be much more widespread in Italy than in Greece and Cyprus. The wide and protective regulation for tenants introduced by the Italian legislator should be balanced by a rapid and effective judicial procedure, once the tenant is in breach or the contract is in any case legally terminated. Such a countermeasure in Italy has never worked properly and this can, at least in part, contribute to phenomena such as vacancies, the difficulty for 'problematic' tenants to find dwellings and the black market. In some cases landlords prefer not to rent or not to "officially" rent in order to prevent the problems of having the dwelling returned in case of termination.

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<sup>126</sup> A very similar procedure was adopted for non-registered tenancies (and also for tenancies registered with a lower rent and for costly tenancies registered as free loans) but after its declaration of unconstitutionality for procedural reasons in 2014, it is still not clear whether it will be adopted again.

As a conclusion, with regard to Italy, the good practices are as follows.

In the private rental sector, the general principle that the tenant is a weak party deserving protection is a reasonable policy.

The system of 'assisted tenancies', for which the rent is negotiated between local landlords and tenant associations, is abstractly a good rule, even though further public subsidies are necessary in order to broaden its application.

In addition the tenant's right to withdraw at any moment with six months' notice, but only for serious reasons, is a good rule, as it balances the opposite interests of tenants and landlords, and allows a certain degree of flexibility of the tenancies.

As far as the social rental sector is concerned, the protection of stability is worth highlighting. This is pursued through rules that grant the occupants the right to stay in the dwelling in accordance with the legal requirements, without providing a time limit. This solution can also have a negative effect. It could be an incentive for the occupants not to increase the income beyond the legal limits. Thus, regional rules generally state that the income limit can be surpassed by a certain percentage and for a certain period of time without losing the right to the dwelling.

In the public sector there is also a widespread toleration of tenants in arrears, which can be considered as a positive measure when it is ascertained that the breach is 'non-guilty'.

Another positive aspect is the provision of non-renovated dwellings, under the condition that the tenant carries the burden of renovating the dwelling in return for a reduction in rent to be paid up to the value of works undertaken.

The bad practices in Italy are as follows:

In the private rental sector, the right to delay the eviction procedure (Art. 55 Law no. 392/1978, Art. 6 Law no. 431/1998) is definitely a bad example of regulation, as it burdens a limited number of owners/landlords with a problem which should be borne not just by them but by society in general.

Another negative aspect is the excessive rigidity of the contractual length, which does not sufficiently consider the landlord's needs.

The legislation does not pay enough attention to the quality of the rented tenures. The 'certificate of habitability' generally is not a precondition for renting a dwelling under tenancy law, although the landlord may be subject to administrative and criminal sanctions in the case of lack of such a certificate. Defects and reparations of the dwellings are still regulated by the Civil Code rules, which are too old and inadequate.

Finally, the tenancy legislation lacks specific pre-contractual duties of information, which completely depends on general clauses of diligence and good faith; clear duties of allegation would be preferable.

As for the social rental sector, the right-to-buy, widely granted to tenants for many years, is definitely a bad rule, as it has impoverished the system of public housing, favouring a relatively limited number of households in return for a rock-bottom price.

A more stringent control of public dwellings should be developed, in particular introducing more stringent responsibilities for the competent agencies.

Finally, repeated amnesties of unauthorized occupancies are definitely a bad practice.

Considering the most distinctive features of the tenancy systems in Cyprus, Greece and Italy analysed, it is not easy to assess which of these three countries has the most promising solutions in the different fields of tenancy.

Italy seems to have the most developed housing legislation and housing policy, with quite a wide variety of strategies adopted to tackle housing problems. However, these policies in some cases produce weak results and need to be improved (e.g. the fight against the black market). In other cases funds are insufficient to attain the goals indicated by the legislator (e.g. public and social housing projects). But above all, it seems that Italy – for a variety of historical, economic and social reasons –has many more housing problems than Greece and Cyprus. Thus the varying levels of development in housing policies in the three countries reflect originally different situations, which consequently can only be compared to a limited extent.

Although the Greek and Cypriot systems mainly follow a more basic principle of *laissez-faire*, these countries have been experiencing less problematic housing situations, as the general housing context seems to be more balanced than in the most crowded areas of Italy.



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

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### **Intra-team Comparison Report for CZECH REPUBLIC, POLAND, SLOVAKIA**

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# **Intra-team comparison on Polish, Slovakian, and Czech tenancy law**

## **1. The current housing situation**

### **1.1. General Features**

The current housing situation cannot be understood without the knowledge of some essential historical and statistic data. The three countries to be compared are Poland, Slovakia and the Czech Republic. Poland is the biggest country of the three (38.53 mil. inhabitants (2013)), the Czech Republic is the second largest (10.52 mil. inhabitants). Slovakia is the smallest, with 5.4 mil. inhabitants. Slovakia and the Czech Republic were parts of former Czechoslovakia until 31 December 1992, which is why the historical evolution of the housing system, as described below, was similar for both these countries. Obviously, the differences between the two became much stronger after the breakup of Czechoslovakia.

#### **1.1.1. Historical evolution of the national housing situation and housing policy**

Despite numerous legislative differences the historical evolution looked similar in all the three countries under comparison, especially in the communist period – with regard to the administrative system of housing allocation.<sup>1</sup> After 1989 also the processes of decentralisation and privatisation looked alike.

In Poland, the years 1944-49 were a period of intense restoration and construction. The following stagnation in the early 50's can be attributed to unnecessary centralization. Decisions made on the high level of governance could simply not be efficient. In 1957 a new policy was implemented. Once again, the state started to support initiatives launched by local administration, co-operatives and, predominantly, industrial employers. Tenements could be subject to individual property, however, rental housing was organized by a system of administrative allocation rather than freely concluded contracts. After the collapse of communism, the legislator had to find a way to make a shift from the administrative system to contractual freedom and solutions best suited to the needs of the free market. In the first years of the transformations, the construction market and housing economy were controlled by mechanisms worked out under the previous political regime. Already at the turn of 1992 and 1993, however, the change of the economic system led to a reorientation of the housing policy. At that time, housing premises ceased to be treated as welfare goods and became marketable. In 1994 the Residential Tenancies and Housing Benefits Act 1994 was adopted. It prescribed compromise solutions which were called for since a long time. Finally, the current Tenants Protection Act was adopted in 2001.

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<sup>1</sup> See e.g. Z. Radwański, *Najem mieszkań w świetle publicznej gospodarki lokalami* (Warszawa: Państwowe Wydawn. Naukowe, 1961).

The ownership structure of the housing stock at the beginning of the nineties reflected the policies of previous governments. Private ownership became the preferred form of satisfying the housing needs of the population. Housing cooperatives played a dominant role in construction investments since the early seventies. At the turn of the centuries cooperative premises made up nearly 1/3 of the entire housing stock in Poland. Throughout the nineties, the private construction sector was gradually growing in significance to finally become the major actor. Since the mid-nineties the portion of developer investments has also gradually grown. The legal position of a developer was not entirely clear, and even up to the present day vital questions concerning basic elements of development agreements have not been sufficiently answered, although the contract as such has now been defined in the so called Developers Act 2011.<sup>2</sup> In 1995, a new type of tenancy for households with low incomes (in Social Building Associations) was introduced by the Act on Certain Forms of Support for the Building Industry.

The Czech Republic and Slovakia had been a part of the former Czechoslovakia until 31st December 1992. Therefore the legislation in the field of civil law and housing was common for both these countries. The great amendment of the Civil Code was still enacted before the division (which instituted major changes, such as reintroduction of the contract of lease, replaced by the so called personal use of a flat during the communist period). Private ownership of flats was reintroduced already in the 1960's when the Ownership of Flats Act was adopted. There were, however, many limitations on such ownership (citizens were allowed to own only one flat). As usual in communist countries, protection of tenants was set on a very high level. The landlord's position was very weak (e.g. the automatic transfer of the tenancy agreement to people living together with the tenant upon his death). In the area of property law, a significant amendment was made in 1951 – the communist government introduced the *superficies non solo cedit* principle, which brought back divided ownership of land and buildings.

After the Velvet Revolution (1989), other major legal changes were adopted. From now on, the Constitution offered the same level of protection to all sorts of owners (state, private, municipal, etc.).

The Slovak Republic, which became independent in 1993, adopted the Flat Ownership Act in 1993. The Czech Republic introduced its own Flat Ownership Act a year later. This was the beginning of separate legal regimes of housing in both countries. In Czech Republic, the new act led to massive privatization of the municipal stock. Czech Rent control was abolished in 2012. It is still partly in force in Slovakia. Finally, in 2012, the New Civil Code (in force since 2014) was adopted in Czech Republic. Slovakia still uses the "old" one, which has been multiply amended. On the whole, this makes the position of a tenant generally stronger in Slovakia.

### **1.1.2. Current situation**

According to the data of the Polish Central Statistical Office (2011) there were 12,525 thousand housing units in Poland. Out of this total, 2,288 thousand belonged to housing cooperatives, 1,089 thousand were municipal property, 204 thousand were staff units

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<sup>2</sup> Ustawa z dnia 16 września 2011 o ochronie praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego (Act of 16 September 2011), Official Law Journal 2011 Nr 232 poz. 1377.

owned by employer companies, 196 thousand belonged to the State Treasury, 84 thousand to Social Building Associations. The number of dwellings owned by private individuals amounted to 8,025.<sup>3</sup>

The total number of dwellings in Slovakia (2011) amounted to 1,994,897 units located in 1,070,790 houses. Owner-occupied housing in Slovakia was apparently the most prevalent form of housing, as 84.9% of occupied dwellings were owner-occupied. This number consisted of 41.8% of dwellings in family houses and 43.1% of dwellings in blocks of flats.

Based on the data from the 2011 census, the housing stock in the Czech Republic included 4,756,572 dwellings. 4,104,635 dwellings were occupied, 35.8% of which were family houses and 55% in blocks of flats. Rental apartments accounted for 22.4% of all permanently occupied dwellings. 55.9% of Czech households lived in their own house or flat, 17.6% of them lived in rented premises.

### **1.1.3. Types of housing tenures**

In all of the three countries owner-occupancy, often within condominiums (communities of owners) is the prevalent type of tenure. The role of cooperatives is generally decreasing, although they keep managing the properties where private flats are situated. The social rentals regimes vary from none in Czech Republic to an extensive legislative framework in Poland.

Intermediate tenures in Poland comprise predominantly the cooperative stock. Condominiums, as such, are communities of owners, however, common parts of the building and the underlying plot of land are co-owned, which requires special procedures of governance. Cooperatives, although well developed in pre-war Poland, are now regarded by many as relics of communism whose significance should gradually decrease. Large cooperatives are often divided to form smaller entities.<sup>4</sup> To some extent condominiums and cooperatives have become competing structures, since the owners of units bought from cooperatives have the option to either retain cooperative governance of the common property or manage its common parts in the form of condominium. Transition from large cooperatives to smaller condominiums is gradual. In the nineties, social preferences on the primary housing market began to gradually divert from cooperatives. Units belonging to state enterprises made a significant portion of the market before the political transformations. Most of them have been transferred to housing cooperatives ever since.

Condominiums remain a common form of housing in Czech Republic and Slovakia. Cooperatives play a very significant role in managing the housing stock in Czech Republic (63%) and Poland (50%). In Slovakia the same figure makes only 14%. Company law schemes are not present in the three countries. In Slovakia, the public rental sector serves primarily to ensure social housing. In Czech Republic, individual municipalities fulfil this task. Central legislation on social housing is absent in Czech

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<sup>3</sup> The Polish Central Statistical Office does not differentiate between flats in multi-family buildings and detached or semi-detached housing. See e.g. H. Dmochowska (ed.), Statistical Yearbook of the Republic of Poland 2012, (Warsaw: Central Statistical Office 2011).

<sup>4</sup> H. Cioch, *Prawo spółdzielcze* (Warszawa: Wolters Kluwer, 2011), 146.

Republic, where only some minor regulations are in force (e.g. the VAT Act provides a lower rate of VAT (15%) on new social housing construction).

#### **1.1.4. Other general aspects of the current housing situation in comparative perspective**

According to officials from the Polish Ministry of Infrastructure, Transport and Regional Development, there are about 85 active tenant associations. None of them functions as a registered lobbyist under the Lobby Activities in the Legislative Process Act 2005. Private landlords have begun to associate as well. The Polish Residential Landlords' Association "Mieszkańczenik" is a new initiative on the national scale formed in 2012.

In Czech Republic there is no legislation on lobby activities. In spite of this, many lobby groups are present, e.g. the Civil Associations of Owners of Houses, Flats and Other Real Estate in Czech Republic (supporting rights of landlords) or the very powerful Association of Tenants of the Czech Republic. Similarly in Slovakia, there are many lobby and umbrella groups such as the Association of Communities of Flat Owners representing landlords, the Slovak Union of Housing Cooperatives established to support the interests of housing cooperatives.

In Poland, vacant units do not seem to pose any significant problem. Many of them are new premises built by developers and yet unsold. Quite contrarily, Poland is coping with a situation of housing deficit, sometimes estimated at over 1 million of housing units.<sup>5</sup>

According to the 2011 census data, there are approximately 13.7% vacant dwellings in Czech Republic. The highest number of vacant dwellings could be found in central Bohemia. Vacant dwellings appear mainly in regions with high levels of unemployment. Slovakia has a quite similar rate of vacant dwellings (10.3%).

In all three countries the major black market phenomenon is evasion of income taxes by private landlords. People do not register their rental agreements with tax authorities. Czech Republic, however, is facing a new problem. Low income individuals receive special subsidies from the state to ensure accommodation. There is no limit on the amount of accommodation payments per single room. As a result, there emerged so called "social housing entrepreneurs" who provide hostel accommodation for low income individuals. This leads to a situation in which several people share small rooms and the entrepreneurs are paid excessive "rents" with the direct subsidies.

### **1.2 Economic factors in comparison**

#### **1.2.1. Comparative view of the housing market**

Despite similar history, the problems faced in the three countries do not seem the same. This follows from the numbers of available housing premises and extent of privatization of municipal resources.

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<sup>5</sup> A. Mościcka, 'Ile naprawdę mieszkań brakuje w Polsce' <<http://rynekpierwotny.pl/wiadomosci/rynek-mieszkaniowy/ile-naprawde-mieszkan-brakuje-w-polsce/1678/>> last accessed in January 2015.

The major problem of housing in Poland remains to be the scarcity of housing. Despite the increased investment activeness of developers, municipalities and Social Building Associations, in the last decade no drastic improvement could be observed. The roots of this situation can be traced to the scarcity of funds available for investment, insufficient spatial planning and dilapidation of the oldest stock.

At present (2013), the real estate market in the Czech Republic stagnated, or even found itself in decline, as has been manifested in the decrease of apartment prices. This is due to several factors, the main reason being the overall decrease caused by the economic crisis. While in 2007 approximately 40,000 new apartments a year were built, this number has halved by the present day.

A characteristic feature of the Slovak housing market, and a consequence of the privatization programme initiated in the early 1990s is the virtual absence of the private rental market. The absence of a well-functioning rental market has been recognized as one of the key housing issues that need to be approached in terms of availability and affordability of rental dwellings. By international standards, Slovakia has rather high regional disparities. There are significant divergences on the regional markets of residential dwellings, which impacts the rental market as the whole.

### **1.2.2. Comparative view on price and affordability**

The respective figures in the three countries seem generally comparable.

The average monthly gross salary in Poland in 2011 was EUR 810. Taking as a basis the data of the Institute for Urban Development, the average rent in the private housing stock for a 60 m<sup>2</sup> housing unit was low and amounted to PLN 412.2 (approx. EUR 100) in 2010. This figure, however, did not include charges for utilities. In addition, average rents went up in 2011, mainly as a response to stricter credit policies of commercial banks, which shifted the demand from the property market to tenancies.

The average rent for a 60m<sup>2</sup> apartment is 346 EUR (December 2013). The average income in the Czech Republic is 980 EUR (1<sup>st</sup> quarter of 2013). The rent-to-income ratio is 35.4%

According to the data provided by the Statistical Office of the Slovak Republic, in 2011 the annual level of rent per one person in a household averaged 119.21 EUR, whereas expenditures for housing, water, electricity, gas and other fuels in total amounted to the average yearly sum of 778.14 EUR per person. Annual net income per capita averaged 4,341.27 EUR in this period.<sup>6</sup> These figures, however, do not distinguish clearly between various types of tenure, social and market rentals. As a result, it seems pertinent to indicate the data for market rentals in Bratislava. Here, rents in the first quarter of 2012 spanned from 12.40 EUR/m<sup>2</sup> per month for a garconnière to 7.64 EUR/m<sup>2</sup> per month for a flat of over 4 rooms, whereas the average income in 2012 was 1159 EUR (881 EUR nationwide).

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6 See TENLAW: Tenancy Law and Housing Policy in Multi-level Europe, the National Report for Slovakia, available at <http://www.tenlaw.uni-bremen.de/reports.html> (hereinafter: "TENLAW: The National Report for Slovakia), Section 2.2.

### **1.2.3. Tenancy contracts and investment**

In general, rental investments are slowly beginning to be viewed as profitable option, however, investors on the housing market prefer to sell newly erected apartments.

The rate of return on investment in Poland averages 5.5% for the whole country. It makes 4.5% In Warsaw, 6.5% in Katowice and Gdańsk, 5.5 in Poznań. The most significant investors in the rental sector are municipalities, which have to replace their old tenements with new premises in order to fulfil their statutory duties.

Real estate had been a popular investment option before the beginning of the global financial crisis in the Czech Republic. Many small investors had bought property or an apartment and watched the growth of its market value. The rate of return on investment in Czech Republic averages 5.6% (but there are cities like Česká Lípa where the ROL is over 10%).

Gross return on investment for rental dwellings in Slovakia is generally estimated at 4-5%, which is not particularly attractive when compared to other investment opportunities, taking into account the current yearly inflation rate of 3.6% (2012).

### **1.2.4. Other economic factors**

Real estate agents are present in all the three countries under comparison, and the role of this profession is gradually growing in importance.

Real estate agency arrangements are hardly at all regulated in Poland. Until 2012 the Real Estate Management Act 1997 comprised an whole chapter on this profession, yet, most of these provisions have now been repealed. By the contract of real estate agency, an agent undertakes to carry on activities leading to the purchase or sale of immovable property, acquisition or disposal of a freehold or tenancy cooperative right, conclusion of a lease contract referring to an immovable property or its part. The agent does not have to guarantee that his activities are going to result in the desired transaction. His efforts involve the pursuit of the purchaser, communication of information offers, preparation of the contract (verification of the legal and factual status of the property, negotiating the terms of the transfer, etc.), inquiry of the property's defects, possible development of the land, soliciting loans necessary to finance the transaction.

Since the law does not prescribe compulsory membership of estate agents in any professional association, their organizations cannot issue rules binding on all practitioners. In consequence, there is no readily applicable price-list.

Real estate agents do not have a good reputation in the Czech Republic due to the vague legal regulation of their activities. They fall under the category of so-called free (notifiable) trades that require no special licence. It is prudent to distinguish well-established real estate agencies adhering to their internal codes of ethics or the rules issued by the Czech Chamber of Real Estate Agencies. Real estate agents are usually paid a fee for brokerage of contract for sale or lease. The brokerage fee is usually equivalent to one monthly rent in the leased property.

The role of estate agents in Slovakia and their specific rights and duties vis-à-vis their clients are not regulated *expressis verbis* in any particular provisions of law. Hence, their position and duties regarding sale, lease or purchase of immovable property would fall

under general contract law. The contractual and related activities of agents are performed under specific trade authorization. Details of their performance can only be obtained from marketing materials and publicly available feedback from clients willing to share their experience.

### **1.2.5. Effects of the current crisis in comparative perspective**

In all the three countries, the crisis has been felt on the market, although the scale of its results may differ.

Already in 2007, first symptoms of the crisis became evident. Capital positions of commercial banks led to exacerbation of crediting conditions in the last quarter of that year. Polish banks were prone to fund their loans with deposits, yet, the mortgage boom considerably narrowed the gap between loans and deposits on the balance sheets. Indeed, this gap vanished by the end of 2007 for households' assets and liabilities. The financial crisis in 2008 and 2009 brought the previous construction boom to a halt, and demand fell significantly. Since 2011, however, economy has started to speed up once again. New investments on the market have appeared all over the country. Although the number of transactions on the primary market plummeted in 2008 and 2009, relative stabilization of prices was observed in 2010.<sup>7</sup>

Mortgage credit prices have fallen considerably in the Czech Republic in the wake of the financial crisis. It is not uncommon for mortgage to be available at 2.5-3% interest rates. This is a result of discount rate cuts by the Czech National Bank. The rate was reduced to as low as 0.05%. The banks, expecting growing interest rates in the future, are recommending fixation of interest rates for the period of three years. Increased availability of mortgages should generally influence the growth in numbers of mortgaged households, which, however, has not been the case in practice. The rental sector has not been markedly influenced, and rents tend to stagnate. Monthly mortgage instalments are about 30 per cent above the rent for a comparable apartment.

The market situation in Slovakia was predominantly influenced by the attitude of the banks that started to impose stricter criteria for loans. However, partly due to the falling prices of flats, the demand for housing loans remained high. Interestingly, in the crisis year of 2009, the volume of housing loans increased by 15%. Therefore, the banks in Slovakia did not have to decrease their interest rates on mortgage loans. In the year 2010, the volume of mortgages increased by over 10%, which means that the strong demand for housing loans persevered. Hence, unlike the rest of the euro-zone, Slovak banks did not lower the mortgage interest rates so rapidly.

## **1.3. Urban and social aspects of the housing situation in comparison**

### **1.3.1. Urban aspects in comparative perspective**

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<sup>7</sup> J. Ryszewski, A. Nierodka, 'Polish Country Report' in Hypostat 2010. A Review of Europe's Mortgage and Housing Markets, November 2011, 46.

The most severe common problem in the three countries is the localisation of many housing investments in the communist period which a contemporary observer might call random. The prevailing factor at the time was localisation of state run factories whose workers basically needed to be accommodated. Now that these factories are no longer operating, no particular patterns can be observed with regard to location of housing areas in general and rental premises in particular. Later investments were realized at sites where building land was available.

There is little data about the distribution of private rental housing in Poland, whether on the municipal or regional scale. As far as location on the regional scale is concerned, public and semi-public rented housing is hardly present outside cities. As a rule, no location policy for Polish public rental housing has been followed on municipal scale. Public rented housing, mainly municipal, is usually located on cheap, peripheral or unattractive building lots. Semi-public rented housing, built by Social Building Associations, is usually located on building lots which were already held by municipalities at the time of their erection.

The situation is similar in Czech Republic - there are no specific regularities in the distribution of different types of housing on municipal scale. Following privatisation in the 1990's, old buildings in city centres are now mainly in private hands - owner occupied or rented on free market basis. When comparing the situation between big cities and villages, we can assume that more rentals are located in the cities. Municipal housing is also frequently found in the suburbs, where land is generally cheaper. More rental houses can be found in and around big cities, fewer in villages.

The data about the distribution of housing types in Slovakia on a city scale is not available.

Currently, an ongoing process of suburbanization has been identified in several regions of that country. This affects suburbs of the largest Slovak cities which are the centres of administrative regions. Closed new communities (gated communities) are occasionally created for newcomers. As regards opinion polls, settlement of urban residents in suburban areas, according to the results of research in Slovakia, is rated as positive or neutral (neither positive nor negative).

In Poland these are luxury housing units, both rental and owner-occupied, especially lofts constructed in former worker neighbourhoods, that mostly contribute to gentrification. As far as ghettoization is concerned, there are two different types of the phenomenon: (1) gated communities, consisting mainly of owner-occupied housing, which contribute to voluntary ghettoization of its residents, and (2) social housing with its peripheral location and poor technical condition. The latter involves social exclusion and ghettoization of whole neighbourhoods.

Czech rentals with a public task are the only buildings which contribute both to ghettoization and gentrification. Neither private rented housing nor owner-occupancy contributes to these phenomena according to the Czech national report.

Homeownership is the only type of tenure which contributes to gentrification in Slovakia.

		Home ownership	Renting with a public task	Renting without a public task
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Contribution to gentrification?	PL	New condominium buildings are sometimes constructed in former worker neighbourhoods	no data	Luxury housing units for rent, especially lofts, may contribute to gentrification
	CR	no	yes	No
	SK	marginally	no	no
Contribution to ghettoization?	PL	The phenomenon of gated communities refers only to modern condominiums	Social stock with its peripheral location and poor technical condition is connected with social exclusion	No
	CR	no	yes	no
	SK	no	rarely	no

In all the three countries squatting, although present, is not a serious phenomenon.

Squats are observable in Poland, particularly in major cities, but are not widespread. Squatters are generally evicted, although some cultural/artistic potential of squats is sometimes appreciated – e.g. in „Free Dom” community in Wrocław.<sup>8</sup>

In Czech Republic squatting also plays a very marginal role – there have been no more than 30 squats on the whole recorded in the last 20 years. The existing ones are usually located in the Prague region. Squatting in Czech Republic makes a criminal offence, and squatters are not only evicted but also may be sentenced to 2 years of imprisonment or a fine.

In Slovakia, squatting has not been considered a significant or persistent problem. Rather than squat in empty flats and buildings, certain Romani groups illegally occupy abandoned, polluted, devastated plots, which makes both a social and legal issue.

### 1.3.2. Social aspects

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<sup>8</sup> P. Żuk, *Społeczeństwo w działaniu. Ekolodzy, feministki, skłotersi*, (Warszawa: WN Scholar, 2001), 223.

		Home ownership	Renting with a public task	Renting without a public task
Dominant public opinion	PL	Preferred option	Insufficient supply	Insecure option for both sides of agreement
	CR	The best variant but not available to everyone	Small public stock. It leads to ghettoization of those localities	No controversy
	SK	Preferred option	Attitudes similar as in Slovakia	No controversy
tenant opinion	PL	New condominium buildings are sometimes constructed in former worker neighbourhoods	n.d.	Most expensive option
	CR	n.d.	n.d.	n.d.
	SK	n.d.	Insufficient stock	Most expensive option

## 2. Housing policies and related policies in comparison

### 2.1. Introduction

As pointed out above, the concept of welfare state and the right to housing has been captured differently in the three analysed jurisdictions. Particular differences pertaining to allocation of social housing can be spotted between Poland and Czech Republic.

In Poland, the concept of welfare state is manifest in legal provisions protecting tenants against their landlords (Tenants Protection Act), the latter considered the stronger party of tenancy arrangements, and in the Social Welfare Act, which sets forth the terms for supporting less affluent families and individual households in their efforts to satisfy their basic needs and live under conditions worthy of human dignity.

The Czech attitude is that the state should not stand in the way of the free housing market. Instead, it has to offer assistance and cooperate with people who cannot satisfy their housing needs by themselves, due to social, economic and other reasons. If the loss of housing (caused by eviction or loss of employment) is related to material need,

the state is obliged to provide assistance. Public support involves programs financed from the state budget through the Ministry for Regional Development and the State Housing Development Fund. Also municipal activities are important. Certain social services connected to housing are provided directly by local authorities and non-profit organizations.

Slovakia, as enshrined in its Constitution, is a socially and ecologically oriented market economy that respects and protects people's fundamental rights and freedoms, including economic and social rights. The aim of the state housing policy is a gradual increase in the overall quality of housing so as to provide housing opportunities to the population.

In general, constitutional provisions set a guideline for public authorities in the three countries. Their realization, however, depends almost entirely on the available funds.

In Poland, the right to housing has been dealt with in art. 75 of the Constitution. According to this provision, public authorities pursue policies conducive to satisfying the housing needs of citizens, in particular by combating homelessness, promoting the development of low-income housing and supporting actions aimed at acquisition of a dwelling by each citizen. Under the same provision, protection of tenant rights is to be developed in statutory law. In the Polish context, one cannot speak of the right to housing which would enable individuals to assert a claim against the state. Rather than that, Polish constitutional law only defines general directions concerning state policies.

According to official housing policy documents in Czech Republic, the state must not hamper the free housing market. On the other hand, however, it must offer help and cooperate with people who cannot meet the housing needs by themselves, due to social, economic and other reasons.

In Slovakia, it is considered necessary to integrate the housing sector in national economic programs and policies and give it a high priority. The right to housing has not found any direct expression in the Slovak constitutional framework of human rights. Many of its aspects are, however, traceable in and inferred from other fundamental rights enshrined in the 1992 Constitution of the Slovak Republic, international law and further national legislation. The Constitution guarantees everyone in need the right to such assistance as necessary to ensure basic living conditions.

In none of the three countries is the right to housing actionable.

## 2.2. Policies and actors

### 2.2.1. Governmental actors

Czech Republic, Poland and Slovakia are unitary, rather than federal, states. As a result, most policy decisions are taken by the central government and only implemented locally or regionally.<sup>9</sup>

The official actors involved in housing policy-making in Poland include primarily the government, responsible for formation of the central housing policy, and municipalities,

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<sup>9</sup> See. E.g. J. Zapart, *Polityka mieszkaniowa w Polsce: zarys przemian* (Wrocław: Wydawnictwo Akademii Ekonomicznej im. Oskara Langego, 1999), 15

responsible for its pursuance and local policies. Apart from municipalities, there are two other levels of self-government in Poland: regional (voivodeship) and another local (powiat). At the level of voivodeship, strategic plans are enacted with regard to transport, location of certain public facilities and investments of major significance to the region as a whole. Powiats, in general, have not been entrusted with any significant responsibilities related to housing.

The Slovak government strives to create a framework for all actors participating in the housing industry and entrusted with specific subtasks. Public authorities are to create room for their participation at all levels of decision-making and strengthen the partnership between the public, private and NGO sectors.

In all the jurisdictions, the duties are distributed and balanced between the central government and local authorities, which can adjust governmental policies to the local circumstances.

The criticism faced by the Polish government, as far as the central policy-making is concerned, refers to insufficient funding of municipalities (the government delegates the responsibility for housing to the local level without designating proper funds) and poor selection of goals for housing policies, frequent changes of legislation. The criticism of individual municipalities differs in each specific case. It usually relates to the absence of any conscious housing policy, e.g. in terms of spatial planning.

In Czech Republic, formulation and financing of housing policies is the responsibility of the Ministry for Regional Development but other ministries are also involved. On the local level, municipalities pursue their own policies in addition to governmental actions. The main task of municipalities is to secure land and technical infrastructure for construction of new residential premises, improve conditions for the renewal of the housing stock, ensure affordability of information and methodological assistance, and keep information systems concerning housing and dwellings in the country. The common goals of municipal housing policies are twofold: municipalities are the owners of the housing stock; and b) municipalities are the co-creators of the social and housing policies within its territory. The State is not entitled to interfere with independent municipal competences and has no instruments at its disposal in matters reserved for the self-government by which it could enforce centrally adopted measures. In addition, the state does not have any comprehensive and coherent system of aid to the people in need, apart from housing subsidies.

The aim of the central housing policy in Slovakia is a gradual increase in the overall quality of housing so as to make housing available to the population and make it adequate to the household needs. In consequence, the government finds it necessary to create a framework for engagement of all the actors on the market in addressing specific subtasks. All semi-public initiatives, however, must be controlled by municipal authorities in order to obtain public funding.

### **2.2.2. Housing policies**

General objectives set for national housing policies look largely alike in the three countries under comparison.

Public authorities in Poland launch policies which lead to satisfying the housing needs of citizens, in particular by combating homelessness, promoting the development of low-income housing and supporting activities aimed at acquisition of a housing unit by each

citizen. Municipalities are obliged to meet the needs of low income families within the limits envisaged by law. In particular, they arrange social and replacement housing. Municipal councils adopt multi-annual management programs for the municipal stock and principles under which their units are let.<sup>10</sup>

The main goal of the housing policy in the Czech Republic is to ensure a sufficient level of housing available to all groups of inhabitants. Currently, the main task of municipalities is to secure land and technical infrastructure for the construction of new residential premises, and create conditions for the renewal of the housing stock.

In Slovakia, the aim of the central housing policy is a gradual increase in the overall volume and quality of housing. The Housing Development Fund is a key governmental actor which distributes funds allocated for housing and implements housing policies on various levels by means of central subsidies. The most recent governmental activities in the area of housing suggest that it is desirable for the state to support the development of the private rental market for the sake of smoother labour mobility within the country. Apart from the investment measures, a completely new regulatory regime for a short-term leases in the private rental market, introduced in 2013, lifts the legal disincentives for private renting of dwellings. Similarly, the grants and subsidies afforded to municipalities for development of public rental housing suggests a sway in policy preferences towards rental housing. However, since the prospects of further deterioration of the available housing stock (mostly owner-occupied) are considered a threat for the whole housing sector in the country, there are still numerous policy measures (subsidy programs) which make owner-occupation the preferred type of tenure. Rehabilitation of the housing stock continues to be viewed as a priority.

The favoured type of tenure in Czech Republic and Poland is owner-occupancy. Public rentals are generally treated as a necessity, and the private rental tenancy sector has been generally left to itself, apart from certain steps encouraging landlords to report their leases to tax authorities.

The Polish program of supporting mortgage loans suggests that the central authorities prefer ownership to tenancy. In Czech Republic, most state aid in the area of housing has so far been directed to owner-occupancy. The most recent Slovak governmental activities in the area of housing demonstrate that it has now become desirable for the state to support the private rental market.

In Poland, there are no special housing policies on the central level targeting any specific ethnic groups or immigrants. Such measures are, however, possible locally, especially in cooperation with non-governmental organisations.

The Czech government and municipalities are obliged to facilitate housing opportunities to all people in need, especially young families. The older generation must be guaranteed that lower income will not deprive them of the roof over their heads. Therefore, municipalities prefer to satisfy housing needs of low-income families and socially disadvantaged households. One of the governmental programs refers to renovation of apartment buildings, revitalization of the residential environment in a selected group of cities. Such activities are focused around problematic areas selected

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<sup>10</sup> See art. 21 of the Tenants Protection Act of 21 June 2001, Official Law Journal 2001 Nr 71 poz. 733, as amended.

in cooperation with the Council of the Government of the Czech Republic for Roma Community Affairs.

Special housing policies targeted at specific groups of the population that require special attention have also been adopted. These include a separate policy pertaining to “socially excluded” groups of people, with special emphasis on the Roma population. The policy instrument lays down the current housing situation of Roma people, issues they have to cope with in a broader social context, and provides models for addressing their housing needs (subsidized construction of rental housing of usual and lower standard and grants for renewal of the housing stock and technical infrastructure, financed from the EU operational programmes).

### **2.3. Urban policies**

Throughout the three countries urban policies are generally undertaken mainly in larger and richer cities. As depicted below, such policies still seem underdeveloped.

Neither measures nor incentives against fencing off residential areas have been introduced in the three jurisdictions. In Poland, the problem refers specifically to the so called temporary premises owned by municipalities, which sometimes still include container-houses. Neither “pepper potting” nor “tenure blind” are present in urban policies. Combination of private housing with social rentals is not a goal envisaged in central housing policies. Gentrification leads to changes in the social structure, yet, it has not been considered a serious problem. Even though the phenomenon is observable, no measures have been taken to address it.

Control of the quality of rental housing differs in the three compared jurisdictions.

In Poland the rules on the quality of housing are to be found in the Construction Law Act which sets forth basic standards for all newly constructed buildings.

Since 2006 Czech flats of substandard quality (e.g. without central heating or with shared amenities) have been legally regulated. Other questions concerning the quality of privately rented housing are determined by free market mechanisms.

In Slovakia, quality standards are a collection of minimal rules and procedures that must be followed so that the consumer can receive adequate utilities for the price he is paying for electricity, gas, heat and water. A special agency controls the stock and imposes penalties for any deficiencies in quality. In order to ensure public safety and public health, provisions of public law additionally lay down technical, architectural and hygienic requirements for housing.

### **2.4. Energy policies**

Polish, Czech and Slovak policies and legislative measures in this respect generally follow European legislation and are adjusted to match the latest UE directives

In all of the three countries, alternative sources of energy are subsidised. In the context of housing, this refers predominantly to solar panels. However, the procedures for granting the subsidies may prove excessively complicated. To avoid such difficulties,

there are governmental agencies which provide all necessary information to willing investors.

Emphasis throughout the region is generally put on thermal modernisation.

The Czech energy policies involve revitalization of existing buildings and the development of new ones with subsidised weatherization and thermal insulation of elevations, as well as installation of new windows. At regional levels, subsidies such as the CZK 60 million "Furnaces" programme in the Moravian-Silesian Region aim at reducing the energy intensity of heating as well as protecting the environment in areas threatened by pollution.

In Poland, thermal modernisation involves insulation of buildings, sometimes in conjunction with replacement of windows or/and heat-pipes. Such investments have now been supported by public authorities for over fifteen years. The Thermal Modernization Support Act was enacted in 1998.<sup>11</sup> Ten years later, thermal modernization was structurally linked to renovation of the oldest housing stock.

The current Support for Thermal Modernization and Repairs Act<sup>12</sup> entered into force on 19 March 2009. Along with the premium for thermal modernization, the legislator now envisaged grants for repairs. This encompasses assistance to tenement owners in the repayment of loans taken for the improvement of technical condition of buildings and combating their deterioration.<sup>13</sup> This support is afforded only to investments in the oldest multi-family residential buildings put into use before 14 August 1961, owned by natural persons, condominiums with a majority share of private individuals, cooperatives and Social Building Associations.

In all of the three legal systems proper legislation has been adopted to implement the EU energy efficiency standards in the housing sector.

## 2.5. Subsidization

As subsidies are one of the most significant instruments of central housing policies, in Poland, Czech Republic and Slovakia they are generally used so as to pursue specific goals. As a result, most subsidies in our three countries are object-oriented. One obvious exception are housing benefits, which were of much use to many less affluent families in early transition years in the 90's. They are still helpful the poorest groups of population. In addition, certain forms of subsidisation are of a mixed type, e.g. the Polish program "Housing Units for the Young," addressed to people under 35 covers purchases of a first dwelling.

It appears that most subsidies in all the three countries are generally destined for owner-occupied housing. Since home-ownership is the preferred type of tenure in Poland, Czech Republic and Slovakia, significant attention has generally been paid to partial repayment of mortgage loans. In Czech Republic, this primarily covers refund of a

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<sup>11</sup> Act of 18 December 1998, Official Law Journal 1998, no. 162, item 1121.

<sup>12</sup> Act of 21 November 2008, Official Law Journal 2011, no. 106, item 622 as amended.

<sup>13</sup> Official Law Journal 2001, no. 168, item 1006.

certain portions of interests on the loan.<sup>14</sup> In Slovakia, the percentage value of such allowance was reduced to 0% in 2005.<sup>15</sup> Instead, the Slovak legislator provided for direct loans by State Housing Development Fund for procurement of flats (home ownership) by eligible target groups of natural persons, i.e. young married couples (as in the case of Polish subsidies, aged up to 35). In Poland the pertinent subsidy within the program "Housing Units for the Young" is paid by a lump sum.

As regards subsidies for the rental sector, these predominantly refer to social and other municipal housing. Because of the aging or scarce municipal stock, an important form subsidy is addressed at municipalities and paid in the form of grants for construction of rental flats. In Slovakia, this legislative solution has recently been attached to the problem of restitution of ownership. Municipalities may obtain grants from the central budget for the construction of new housing intended to accommodate former tenants in such restituted properties.

As pointed out above, housing benefits destined for the poorest groups of population can be found in each of the analysed jurisdictions. In Czech Republic, they seem of particular significance, because of the system of direct benefits paid to low income households, implemented instead of actual distribution of social housing by public authorities. Czech Republic is facing a strange phenomenon resulting from poor adjustment of the special social benefit by official actors. This benefit is paid directly to the owners of social premises and the overall amount for a landlord is not limited for a single housing unit (room). As there is no actual limit on the amount of such payments. It is not uncommon for several people to live in small overcrowded rooms for which excessive "rents" are paid by means of the subsidies.

One particular type of subsidies absent in Poland but found both in Czech Republic and Slovakia refers to building saving funds offering special accounts where individuals may deposit funds intended for a housing purposes.<sup>16</sup> In the Polish context, such saving and construction funds were established in the 90's of the previous century, yet, they proved ineffective from the very start.<sup>17</sup>

In all the countries, green investments, repairs and thermal modernisation of the older stock are subsidised from public funds – central, local, and European – allocated by various agencies.

Subjective rights to subsidies are rare. In all the three jurisdictions they are practically limited to housing benefits, in which case pertinent criteria have been laid down in central legislation.

Other than that, especially in reference to object-related subsidies, the criteria for granting specific subsidies are evaluative.

<sup>14</sup> Ministerstvo pro místní rozvoj ČR, Státní fond rozvoje bydlení: Koncepce bydlení ČR do roku 2020 (Praha, KPMG Česká republika s.r.o., 2011), p.20, available on : <http://www.mmr.cz/cs/Stavebni-rad-a-bytova-politika/Bytova-politika/Koncepce-Strategie/Koncepce-bydleni-CR-do-roku-2020>.

<sup>15</sup> cf. <[https://www.slovensko.sk/sk/agendy/agenda/\\_hypotekarny-uver1/](https://www.slovensko.sk/sk/agendy/agenda/_hypotekarny-uver1/)>, 30 December 2013.

<sup>16</sup> See TENLAW: Tenancy Law and Housing Policy in Multi-level Europe, the National Report for Czech Republic, available at <http://www.tenlaw.uni-bremen.de/reports.html> (hereinafter: "TENLAW: The National Report for Czech Republic"), Section 3.6.

<sup>17</sup> See TENLAW: Tenancy Law and Housing Policy in Multi-level Europe, the National Report for Poland, available at <http://www.tenlaw.uni-bremen.de/reports.html> (hereinafter: "TENLAW: The National Report for Poland"), Section 1.4.

The levels of governance involved in particular subsidy programs generally differ. As regards investments involving construction and repairs, the volume of works necessitates central funding. The same refers to various forms of assistance relating to mortgage loans and acquisition of housing units. Subsidies only exceptionally come from the municipal pocket. Such is generally the case of housing benefits for the poor. In Poland, certain subsidies for energy efficiency initiatives are launched on regional level by Regional Funds of Environmental Protection and Water Management.

As far as housing benefits are concerned, in all the three jurisdictions they are paid to low income households, regardless of the tenure actually held in the unit. In consequence, both tenants and owner-occupiers qualify as long as household incomes are below the threshold provided in appropriate legislation.

In Czech Republic, certain types of subsidies have been criticized by the opposition, housing associations and similar entities. The main reason for the criticism is the alleged discrimination and preferential treatment of certain groups of the population.<sup>18</sup>

In Slovakia, building saving funds are subject to criticism for their high costs encumbering the state budget, dubious targeting and alleged unjustified support for private bankers.<sup>19</sup>

In Poland, the system of subsidising new rental constructions of Social Building Associations has practically been paralysed in the absence of necessary secondary legislation. This gives rise to much criticism. The lump sums paid as mortgage loan subsidies are criticized for unjustified support for developers.

Other than that, the systems implemented in the jurisdictions under comparison seem efficient. Naturally, one must bear in mind that the available funds are not exorbitant.

<b>Subsidization of tenant / owner-occupier</b>	Poland	Czech Republic	Slovakia
Subsidy before start of contract (e.g. voucher allocated before find a rental unit )	Mortgage Credit Allowance (owner-occupancy only)	Building savings funds (owner-occupancy only)	Mortgage Credit Allowance (owner-occupancy only) Building savings funds (owner-occupancy only)
Subsidy at start of contract (e.g. subsidy to move)	N/A	N/A	N/A
Subsidy during tenancy (in e.g. housing benefits, rent regulation)	Housing benefit	Housing benefit	Housing benefit

## 2.6. Taxation

<sup>18</sup> See TENLAW: the National Report for Czech Republic, Section 3.6.

<sup>19</sup> J. Franek, 'Prečo treba dotovanie stavebného sporenia zrušiť' IFP Komentár no. 14 (2011), <<https://www.finance.gov.sk/Default.aspx?CatID=7926>>, 30 December 2013.

Levies relating to rentals predominantly include income tax and property tax. When a real property is sold, the tax on civil law transactions (property transfer tax) usually comes into play. Building materials and services are taxed with VAT.

Technically speaking, no tax obligations have been directly imposed on tenants. The taxes payable by landlords, however, influence the value of rent.

In all the three jurisdictions, proceeds from lease are considered taxable income. Depending on the status of the landlord, provisions on PIT or CIT apply. Sale of residential premises is generally taxed as well. Exceptions in this matter can relate to natural persons who lived in the sold dwelling or use the income from sale for their own housing needs.<sup>20</sup> Apart from the income tax, in all the three systems transactions transferring ownership of immovable properties are themselves taxed. In Poland the rate of such tax makes 2% of the purchase price.<sup>21</sup> In Czech Republic, the corresponding rate is currently twice as high.<sup>22</sup>

There are tax exemptions for individual landlords who earn little income on rental. In Slovakia, for instance, they can be discharged from their obligation to pay tax on their immovable property if their income resulting from such a property oversteps 500 EUR per year.

Other than that, individual non-professional landlords are taxed on income on general terms. In Poland, it is now possible for landlords to pay a lump sum tax on registered revenue if, for some reason, they do not wish to tax their incomes in accordance with the progressive tax scale. It may seem an attractive solution, as the lump sum makes only 8.5% of the income, however, this form of payment is beneficial only to landlords with high proceeds and moderate expenses, which is quite rare in practice, taking into consideration the poor technical condition of the private tenement stock. This is the case as the landlord who elects payment by lump sum cannot deduct any expenses from his actual proceeds, and the lump sum entirely depends on the gross rather than net income.<sup>23</sup>

As regards property tax, its value is determined by reference to the area of the property. Although there have been certain attempts to introduce ad valorem taxation, especially in Poland, they proved unsuccessful.

The national legislators generally attempt to motivate individual landlords to register the lease with tax authorities. Examples of such incentives have been provided above, i.e. the Slovak tax free amount or Polish lump sum. Such measures are relatively new and only partly successful. Although more tenancies are now reported to tax offices, many individual landlords still prefer not to do so.

There are also legislative interventions to the contrary. In Slovakia, for instance the cap on deductible expenditures has been lowered in 2013.<sup>24</sup>

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<sup>20</sup> See art. 10(1) item 8 letters a)-c) of the Polish Private Income Tax Act.

<sup>21</sup> Art 7(1) of the Tax on Civil Law Transactions Act of 9 September 2000, Dziennik Ustaw 2010, No. 101, item 649, as amended.

<sup>22</sup> Under the Act No. 500/2012 the rate of taxation increased from 3% to 4% of the tax base (since 1.1.2013).

<sup>23</sup> Act of 20 November 1998, Official Law Journal, no. 144, item 930 as amended.

<sup>24</sup> See TENLAW: the National Report for Slovakia, Section 3.7.

In the case of individual landlords, tax evasion in all the three jurisdictions is a common practice. In Poland, however the problem of black market seems more complex. Due to the extensive protection of tenants afforded by the Tenants Protections Act, it is inconvenient for the landlord to report the contract to any authorities. Although no special form is required for tenancy contracts, not many tenants are aware of their rights, or, even if they are, prove able to evince their status as tenants in the absence of a written contract. By omitting to inform tax authorities, landlords not only avoid taxes but their position is bolstered, and, in practice, it is easier to terminate the contract or increase rent.

The major legislative construction implemented to combat black market in Poland is, so called, incidental lease. This institution lifts certain Tenants Protection Act (TPA) instruments protective of the tenant. Such benefits may now be enjoyed both by natural person and corporate owners. Under the new provisions, it is easier to terminate the lease and evict the unpaying tenant. These advantages, however, have been made contingent on the registration of the tenancy with the tax office.<sup>25</sup>

In general, the legislative interventions mentioned above were simple corrections aimed at reducing avoidance of taxation by landlords. In general, it is the owner that pays majority of taxes in all the three countries.

In summary, the taxes in the three jurisdictions do not seem particularly burdensome. As a result, they do not seem to pose any significant obstacle to development of the market. In the case of individual landlords of single apartments tax evasion is common as it is generally difficult for tax authorities to detect unreported rental arrangements if neither party is willing to pay the taxes (whether directly or indirectly).

### **3. Comparison of tenures without a public task**

**Key parameter: “Socio-economic equilibrium” between position of landlord and tenant – so as to accommodate both the tenant’s need to have access to decent housing at an affordable cost and the landlord’s profit-orientation and property rights**

#### **3.1. Evaluative criteria for the landlord**

##### **3.1.1 Profitability**

In Poland and Slovakia, the standard model of investment in residential real property by private investors involves residential or semi-residential construction projects with the majority of units destined for sale rather than long-term rentals. This retail oriented housing investment model was very popular in the Czech Republic until the beginning of the global financial crisis, even among individual investors. The crisis brought about substantial losses to actors used to the previous boom, high prices of residential property and rather accessible financing. In 2008, the sale prices of dwellings in Bratislava, for instance, were approximately 50% higher than aggregate construction

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<sup>25</sup> See art. 19b of the Tenants Protection Act.

costs borne by investors. Due to these significant market changes and inability to perform in accordance with earlier expectations and assumptions, a lot of newly constructed dwellings remained unsold. Therefore, in Slovakia, developers decided to rent some of these dwellings. Such rentals are considered an interim measure, adopted temporarily – until the recovery of the ownership market – rather than independent rental investment. In contrast, Polish developers were initially unwilling to let, as long as the mortgage market could finance their business activity – partly because of the protective legislative framework (provisions of the Tenants Protection Act). Corporate renting, however, appeared as one of the options at a later stage of the crisis. In response to this new tendency, the Polish lawmaker offered the benevolence of incidental lease (special statutory regime which lifts much of the tenant protection), previously available only to natural person lessors, also to corporate landlords. The situation in the Czech Republic suggests positive prospects, since the prices of real property are expected to be regaining their original values.

Considering purely rental investments, the gross return on investment for rental dwellings spans from the estimate 4-5%, in Slovakia, where such investments are not generally viewed as a particularly interesting opportunity – taking into account the yearly inflation rate of 3.6% (2012), to 5.5% in Poland (nationally the rates vary: 4.5% in Warsaw, 6.5% in Katowice and Gdańsk, 5.5% in Poznań). The Czech investor can buy real estate on the market, financed by a mortgage with affordable 3.5% interest rate, and rented with 5 to 10 per cent yield per annum.

Taking the structure of the rental investors into account, the most significant investors in the rental sector in Poland are municipalities, which have to replace their old tenements with new premises in order to fulfil their statutory duties. Slovak municipalities, which invest in the construction of rental housing (state-subsidised construction) may also be considered investors after 01 February 2001. However, Polish and Slovak municipalities are not acting for profit. Rather than that, they fulfil public housing tasks to make rental housing available and affordable. The rent in the new Slovak municipal stock has been capped at the annual level of 5% of the aggregate construction costs. Such rate assures desirable return and does not seem to make an obstacle given the special goals it serves.<sup>26</sup>

The situation in all three states – mainly owing to the financial crisis – shows that investments in tenancies are currently not particularly profitable, however, rent regulation is not considered troublesome for landlord investment plans. The only qualification to this statement may be the Slovak gradual deregulation of rents in respect of a minor class of landlords (owners of restituted buildings). This exception is to be completely eliminated by 2017.<sup>27</sup>

Income from rents is taxed similarly in all the three countries although the specific tax regulations vary. It appears that tax legislation in Slovakia and Poland provides for certain privileges, either in the form of partial discharge of taxation, in the former case,

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<sup>26</sup> See section 2 of the Regulatory measure of the Ministry of Finance of SR of 23 April 2008 No. 01/R/2008.

on regulation of the rents of flats as amended as of 20 December 2011..

<sup>27</sup> See the discussion of the Act on Termination of Certain Leases Related to Flats and Amending Prices Act (No. 260/2011 Coll., as amended) in Section 1.4 of TENLAW: the National Report for Slovakia.

or exemptions and a simplified lump sum regimen, in the latter. In addition, Czech tax privileges involve deductions from the tax base.

The Slovak rules on taxation of income from lease of a flat make it relevant whether or not the lessee pays for the utilities to the landlord. If so, the landlord's taxable income comprises the rent along with the cost of the utilities. The payments which the landlord transfers afterwards to the energy suppliers can be deducted as evidenced expenditure.

If the landlord is a party to the contract with the energy supplier and the utilities are paid directly by the lessee, such payments transferred by the lessee to the supplier are still considered the landlord's income liable to tax as the landlord's non-pecuniary income. Even in this situation, the landlord can deduct the sums paid by the lessee directly to the energy supplies as his evidenced expenditure. However, if the utilities are paid for directly by the lessee who is a party to the contract with the energy supplier(s), these payments are no longer the landlord's taxable income. In addition, any expenditure on technical maintenance and repairs of the leased immovable property met by the lessee would also be considered non-pecuniary income subject to taxation.

The Slovak legislation, as it stands now, discharges natural persons who lease their immovable property from their duty to pay income taxes on the lease of such property if the rental income does not exceed the sum of 500 EUR per annum. If the income is higher than 500 EUR, only the remaining part is taxed. This 500 EUR exemption makes an incentive provided by the Slovak legislator to the landlords to legalize their incomes from tenancy.

In the Czech legal order, income from rentals is taxed at a flat rate under the Act No. 586/1992 Coll. on Income Tax, similarly as other financial income reported by natural persons (15% rate), companies (19% rate) or other legal entities. Income tax is divided into personal income tax and corporate income tax. Taxpayers of the natural income tax are natural persons only.<sup>28</sup>

Tax privileges for the landlord include (1) the possibility of deduction of related outlays from the income tax basis in the case of lease of immovable property used for residential purposes, as well as (2) the option to deduct the interest paid on the housing acquisition loan (mortgage loans, building savings scheme loans) from the income tax basis. The maximum amount that a taxpayer may deduct from his/her tax basis is currently 12.000 EUR per annum. Obviously, the latter privilege is not exclusively afforded to a landlord but to just any owner of a housing unit.

In Poland, individual non-professional landlords are taxed on income on general terms - with private income tax. Among many other sources of the taxable income, the Private Income Tax Act 1991<sup>29</sup> points to proceeds from lease and sublease. It is possible for landlords to pay a lump sum tax on the registered revenue if they do not wish to have their incomes taxed in accordance with a progressive tax scale. On general terms, they have to calculate and prepay monthly sums to the tax office until the 20<sup>th</sup> day of each calendar month. Where the landlord elects to pay by lump sum, no expenses can be deducted from virtual proceeds, so that the lump sum depends on the volume of gross rather than net income. The sums due may be paid either monthly or quarterly. The

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<sup>28</sup> Further information can be found in TENLAW: the National Report for Czech Republic, Section 3.7.

<sup>29</sup> Act of 26 July 1991, Official Law Journal 2010, no. 51, item 307.

possibility to select this model is not contingent on whether the tenancy contract institutes the general type of lease or the so called incidental lease. Taxation by lump sum must be expressly opted in before the 20<sup>th</sup> day January or any other month following the month of the first proceeds received. It may seem an attractive solution as for the calculation of the lump sum the 8.5% tax rate is applied, however, this form of payment is beneficial only to landlords with high proceeds and moderate expenses, which is quite rare in practice, taking into consideration the poor technical condition of the private tenement stock. Landlords who carry on a business activity pay the income tax as professionals.

Tenancy incomes become taxable if they have been actually collected by the landlord. If the tenant runs late with rent, the overdue sums are not taken into account until duly paid. Only where the lease is taxed as a business activity carried on by a professional, the overdue sums are also taken into account. It is presumed that professionals acting diligently are able to enforce and execute any receivable debts. The tax rates applying to non-corporate professionals are either the general ones (18% and 32%) or the flat-rate 19% if the taxpayer opts for the latter choice.

Corporate tenants pay corporate income tax (19%), however housing cooperatives, Social Building Associations, municipalities and condominiums are exempt from income tax in respect of proceeds from rentals inasmuch as they cover maintenance costs.<sup>30</sup>

In all the types of Slovak lease of habitable dwellings – general lease (house) and lease of flats, whether short-term or open ended, the contract shall prevail as far as the extent, distribution of costs and person liable for repairs and maintenance are concerned. For tenants who are members of a housing cooperative, these issues may be specifically regulated in the statutes of the respective cooperatives.

By default, the landlord's and tenant's responsibility for repairs has been divided in accordance with the duty of the landlord to convey the object of lease to the tenant in a condition fit for its purpose – habitation – and to maintain it in such condition at the landlord's cost for the whole duration of the lease. Consequently, the landlord is liable for any repairs that make the premises fit for the agreed use (major repairs) unless legal provisions expressly shift the responsibility to the tenant. In contrast, the tenant is under the duty not to damage the premises he is inhabiting and, thus, would be liable for repairs necessitated by himself or his co-habitants.

The tenant is also generally obliged to bear costs of "minor repairs", i.e. repairs that would not make the dwelling unfit for its use. The tenant would be liable for their coverage, as well as the costs associated with routine maintenance of the flat.

Under the Czech Civil Code, the expenses for maintenance and basic repairs of the house have to be borne by the lessor since he is obliged to meet them *ex lege*. On the other hand, minor home repairs are required to be made by the tenant - unless specifically agreed otherwise. These repairs have not been defined in legislation. Among these repairs, we can rank e.g. replacement of handles, locks, blinds, circuit breakers, bells, lights, faucets, sinks, etc. On the other hand, radiator repairs, or the replacement of a gas cap for an apartment (not cooker) are not classified as minor repairs.

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<sup>30</sup> See art. 17(1) item 44 of the Corporate Income Tax Act of 15 February 1992, Official Law Journal 2011, no. 74 item 397.

When the lessor performs construction works during the term of the lease which permanently improve the utility value of the leased apartment or the overall living conditions in the house, or bring permanent savings of energy or water consumption, he can agree with the lessees on a raise in rent but only up to the amount of ten per cent of the yearly expenses.<sup>31</sup>

Under the Polish legislation the landlord is obliged to assure smooth operation of installations and equipment in the building enabling the lessee's access to running water, gaseous and liquid fuels, heating, electricity, elevators, as well as other installations and equipment in the unit and the building, as specifically defined in legal provisions. The obligations of the landlord comprise in particular:

- maintenance in due condition, assurance of order and cleanliness to spaces and equipment in the building destined for common use of all occupiers, as well as the building's vicinity;
- repairs to the building, its spaces and equipment referred to in item 1, restoration of previous condition if the building has been damaged, regardless of cause to the damage; the lessee, however, has to indemnify losses inflicted by his culpable behaviour;
- repairs to the unit involving maintenance or replacement of installations and elements of technical furnishing to the extent that they do not encumber the lessee, in particular:
  - repairs to and replacement of internal installations of running water, hot water and gas supply - without fittings and accessories, as well as repairs to and replacement of the internal sewage system, central heating together with radiators, electrical wiring, and diversity antennas,
  - replacement of heaters, window frames and door joinery, floors, flooring, carpets and plaster.

It can be, therefore, concluded that all the legal systems at stake conceptually provide for a distinction between fundamental repairs that relate to the overall functioning of the unit and minor ones, which are to be borne by the tenant. The Czech and Slovak legal systems apparently favour freedom of contract when setting the border between those two. The Polish legislation, on the other hand, is rather oriented towards legal certainty and offers a higher level of protection by specifying landlord's responsibilities.

In Slovak law, there is no clear obligation under which the landlord would be responsible to bear the costs of utilities. It is the contract of lease which governs the extent of utilities that will be charged from the tenant by the landlord (later reconciled with the supplier/manager etc.) or some other entity (supplier – as may be the case with electricity or gas supply; house managing entity – as may be the case with the services pertinent to the lease of a flat). However, once the volume of the provided (and billed) utilities has been set, neither of the parties may unilaterally decide to stop providing or

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<sup>31</sup> The Lessor's expenses for maintenance and basic repairs of the house are not included in these expenditures, since the lessor is obliged to incur them ex lege (§ 2257); see TENLAW: the National Report for Czech Republic, Section 6.4.

paying for them.<sup>32</sup> The tenant may always be charged for the “pertinent utilities”, as these are generally considered a prerequisite for habitability of the premises and assurance of their provision is the landlord’s utmost duty. Subject to concrete contractual arrangements, the tenant may be charged as well for the supply of power (electricity, gas).<sup>33</sup>

According to Czech law, the lessor provides for the necessary services throughout the duration of lease. These necessary services include water supply, sewage collection and disposal, including septic tank cleaning, heating, garbage collection, lighting and cleaning of the shared parts of the house, access to radio and TV broadcast, chimney sweeping, and lift servicing.

Once the landlord provides the supply of utilities, he is obliged to charge all their costs in accordance with a special piece of legislation (act no. 67/2013 Coll.). These costs form part of the rent paid by the tenant.

Polish law prescribes that when the lessor enters into the contract for the supply of utilities, such lessor is in a position to charge the lessee with payments for the supply of energy, gas, water and disposal of sewage, solid and liquid waste. In a situation when the lessee enters into a contract with the provider, the lessee pays the charges for the utilities directly to their provider.

The lessor may not bother the lessee with "charges independent of the lessor" if they are not mentioned in art. 2(1) item 8 Tenants Protection Act.<sup>34</sup>

Furthermore, real property owners are obliged to pay property tax to the municipality in which the property is located.

As regards utilities, their payment in Slovakia is guided by the contract itself. In Czech Republic and Poland the cost of utilities makes a part of the rent to be paid by the tenant. However, in Poland, also the tenant may pay for the utilities directly to the provider – where he is the party to the contract with the latter.

All of the countries provide for various schemes and financial stimuli for housing construction, procurement and renovation, specifically aimed at the targeted groups of addressees, which have been discussed in section 2.5 above. These programs, however, are not specifically destined for landlords but refer to all home owners, or even prospective home owners.

It may be added, as regards the Slovak tax legislation, that only recently (2013) the Slovak lawmaker has abolished the previous simplified form of taxation – very widespread among non-professional landlords in the country, namely, the possibility to deduct the flat 40% rate of the total income from tenancy (the so called flat expenditures). This step is generally considered to have a negative impact on the Slovak rental market because the taxpayers are now able to prove less expenditure than they were presumed to have spent under the former rule. They would also have to elect a much more burdening (thus costly) method of accounting for the expenditures.

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<sup>32</sup> The court held, for instance, that if the tenant decides to turn-off the radiators of the central heat distribution, it does not prejudice him from the duty to pay for the service. See the case R 29/1982.

<sup>33</sup> TENLAW: the National Report for Slovakia, Section 6.4.

<sup>34</sup> Such opinion is represented e.g. by M. Olczyk, *Najem lokalu mieszkalnego*, (Warszawa: LexisNexis, 2008), 46; E. Bończak-Kucharczyk, *Ochrona...*, 61-62.

The fact that the Slovak legislator has abolished the possibility to deduct flat tax expenditures as well as the possibility to prove costs as far as income from lease is concerned will decrease the taxpayer's income even in those instances where the taxpayer exercises the right to deduct provable expenditures. As a result, in order to avoid any lessening of their income, taxpayers will endeavour to evade the law.<sup>35</sup>

### 3.1.2. *Property rights respected de iure and de facto*

Under Slovak civil law, the default on rent payment results in the duty to pay a financial sanction. Different tenancy regimes should, however, be distinguished. Under the Civil Code tenancy regime, a *tenant of a flat* defaulting with rent and payments for pertinent utilities for up to five days is obliged to pay the late payment fee of 0.5‰ (i.e. 0.05%) of the sum due for each day of arrears, and at least 0.83 EUR for each started month of arrears.<sup>36</sup> It is unclear whether the parties have any discretion to agree on any additional penalties for late payment. In practice, most private-market lease contracts provide for an additional contractual penalty<sup>37</sup> payable by the tenant in the event of delayed rent payment.<sup>38</sup> In the event of *lease of a house*, the delaying tenant would be obliged to pay the statutory late payment interest,<sup>39</sup> currently 5.25% p.a. starting from the initial date of the arrears. In addition, the parties may agree on a contractual penalty in the form of a lump sum or periodic payments, either as a fixed amount or a certain percentage of the due debt or in any other determinable manner.<sup>40</sup> Long-term non-payment of rent and pertinent payments opens up the possibility of termination (or avoidance) of the contract.

In Czech Republic, a lessor who has met all contractual and legal duties will be able to demand from a lessee who runs overdue with any amounts the interest on late payment unless the lessee is not responsible for the delay. Under the Section 1970 CC the interest rate can be determined by an agreement between the parties. Otherwise, a default rate set by a governmental order would apply. Moreover, the landlord may cancel the tenancy agreement if the tenant grossly violates his obligations stated in the tenancy agreement, in particular by defaulting with rent and services connected with the use of the apartment in the amount of triple monthly rent.<sup>41</sup>

In Poland, delay in the payment of rent entails the obligation to bear interest. The interest rate may either be agreed by the contracting parties or follow from statutory provisions. Additionally, late payment of rent provides grounds for the lessee's liability for the loss incurred by the lessor. Should the lessee's arrears stretch over at least two

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<sup>35</sup> See TENLAW: the National Report for Slovakia, Section 3.7.

<sup>36</sup> See section 697 CC and section 4 Reg. 87/1995.

<sup>37</sup> Contractual penalty under section 544 et seq. CC. It is payable on the top of any statutory late payment fees and is usually set at ca 0,05 % of the due sum per day of delay.

<sup>38</sup> Interestingly, the original draft of the newly introduced short-term lease of flat regime left this issue specifically open for the parties' agreement, but this provision did not translate into the adopted text of the act. Cf. sec. 4 of the Short-term lease of flat Act (no. 98/2014 Coll.).

<sup>39</sup> It is a yearly interest rate calculated as the main interest rate of the European central bank (main refinancing operations - fixed rate) valid in the first day of delay, increased by 5 %. See section 517 para. 2 CC and section 3 Reg. 87/1995.

<sup>40</sup> see further section 545a CC.

<sup>41</sup> See TENLAW: the National Report for Czech Republic, Section 6.4 and 6.6.

full periods of payment, the lessor may terminate the contract without observing a notice period. However, under the tenant protection regime, wherever the tenant is entitled to use the unit for consideration, termination by landlord (which must be notified in writing and include proper justification) may be effected at one month's notice communicated at the end of a calendar month if the tenant defaults with the rent or other fees charged for the use of the unit for at least three full periods of payment. The tenant must be notified in writing about the landlord's intention to terminate the legal relationship and given additional monthly deadline to clear all the outstanding liabilities. As held by the Supreme Court,<sup>42</sup> this applies as well to leases of a fixed duration, even if concluded before the entry into force of the Tenants Protection Act, and even if the contract does not by itself provide for early termination in situations of rent arrears.

It can be concluded that the legal orders of Slovakia, Czech Republic and of Poland all provide for pecuniary sanctions once the rent has not been paid on time and also for the possibility to end the contractual relationship, either by way of termination or avoidance.

All the analysed legal systems take into account various possible uses of the flat, usually setting a limit on abusive and non-abusive conduct through general notions (excessive, abusive and the like), whereas the details may be set in internal regulations of the housing block. In order to prevent abusive subletting as is concerned, the Slovak and Polish law require landlord's consent is missing. Under Czech legislation, any permanently residing tenant would be free to sublet.

In Slovakia, the tenant, as well as any other persons living with him, are obliged to use the flat, common premises and facilities of the building duly and to ensure an environment which enables exercise of the rights of other tenants in the building. They may not interfere with the enjoyment of flats by such other residents. More specific duties may be set forth in the house rules and regulations of the block of flats. Some examples of problematic issues may involve: keeping animals; disbursing smells; receiving guests. Interim use of a flat (or a part thereof) for commercial purposes does not, in general, constitute an abuse. Even an official business licence for running a business in the rented dwelling does not make a sufficient proof of its actual conduct, and thus cannot be invoked as a ground for termination of the lease. Also using a dwelling for the purposes of business correspondence does not amount to a disallowed use of flat enabling termination of the contract and, hence, does not make an abuse on the part of the tenant. However, the absence of the lessor's written consent to a sublease invalidates the sublease contract.

Furthermore, the Slovak legislation requires the tenant to repair any defects or damages he or she caused. Failing this, the landlord shall have the right to rectify the defects upon prior notification of the tenant and to claim reimbursement from him. The tenant also remains responsible for the persons who occupy the flat when he moves out without terminating the lease.<sup>43</sup>

Under the Polish law, there are several typical ways in which the tenant may abuse the contract, i.e. by violating the house rules and regulations, usually rules on keeping animals, leaving one's personal property in the common parts of the building, failing to keep appropriate cleanliness in the room and causing, e.g., appearance of insects; use

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<sup>42</sup> SC resolution of 7 June 2006, III CZP 30/06, Biul. SN 2006, no. 6.

<sup>43</sup> See TENLAW: the National Report for Slovakia, Section 6.5.

of the unit in a manner contrary to the contract or its normal purpose (e.g. by carrying on a business at the premises); enjoying the unit and the common property in an abusive way (e.g. causing serious damage to the unit, devastation to the common parts); or sublease unauthorized by the contract and legislation or the unit's delivery to a third party under a different type of arrangement, whether gratuitous or for consideration.

The situation in Czech Republic suggests that the tenant is generally obliged to use the apartment in a regular manner unless a specific use of the rented apartment or house was primarily agreed on. In particular, the lessee is allowed to have an animal in the apartment unless this would cause unreasonable inconvenience to the lessor or other inhabitants of the building. Should the presence of the animal affect the costs of cleaning the common areas within the building, the lessee must reimburse the lessor for such additional costs (section 2258 CC). The lessee may work or run a business in the apartment or house unless this causes any increased strain on the building (section 2255 para. 2 CC), yet, any non-residential uses of the flat necessitate that the contractual relationship is regulated by provisions on the lease of commercial premises serving, which offer a slightly lower level of protection to the lessee. If the lessee does not reside in the apartment on a permanent basis, he may sublet the apartment or its part only upon the lessor's written consent.

Omission to use the apartment would not amount to abusive conduct of the tenant. If the lessee knows in advance of his absence from the premises which is to last longer than two months during which the apartment will be difficult to access, he must notify the lessor in a timely manner. If necessary, he should also designate a person who, during his absence, will provide access to the apartment. Where no other person is available to the lessee, that person will be the lessor.

Naturally, the Slovak, Czech and Polish legislative regimes provide for the possibility of eviction. All of them incorporate some socially mitigating measures that may render the eviction of a tenant particularly burdensome to the landlord (in terms of time and additional duties).

Under Slovak law, removal of a tenant as a self-help remedy is generally not allowable and doing so may expose the landlord to administrative liability or criminal prosecution, along with possible claims for damages from the evicted tenant. As a result, in virtually all eviction cases an execution title (a judicial decision, which in practice may be replaced by notary's record of the tenant's consent)<sup>44</sup> would be required, and only a bailiff acting within execution proceedings is entitled to enforce the removal. The Civil Code regime of an open ended lease of a flat prescribes extensive tenant protection as regards termination of a lease of flat (certain conditions may result in prolongation of the notice period) and replacement housing (replacement tenancy) to which the evicted tenant may be entitled on objective social grounds (e.g. taking care of a minor child or a paralysed person who is a member of the evicted tenant's household). Provision of replacement housing must be proven before commencement of the execution. Objections against the replacement housing unit furnished during the proceedings may

<sup>44</sup> This, however, is from the legal point of view dubious an enforceable title. See section 6.7 of the Slovak report and also D. Mihálová, 'Exekúcia na nepeňažné plnenie - vypratanie', *Spravodaj SKE*, no. 2 (2008): 1, <<http://ske.sk/Download/?bulletinArticleId=29>>, 15 December 2013.

<sup>44</sup> cf. e.g. contracts for a lease of flat by the city of Trnava available at: <<http://egov.trnava.sk/>>, 15 December 2013.

also protract the whole procedure. In contrast, the regime on the lease of a family house does not set forth such detailed protection in respect of termination, nor a right to replacement housing. One should also mention that courts, in individual cases, have already afforded protection on the grounds of immorality of a lawful eviction (extraordinary measure, social/family grounds, etc.) under both regimes, and thus the claims for eviction were dismissed. The newly adopted regime of the Short-Term Lease of a Flat Act addressed this issue in a way favourable to the landlord. Under this piece of legislation, no right to replacement housing has been offered to the former tenant, and, on top of that, the tenant's objection to the termination of the contract and ongoing court proceedings do not effect the enforceability of eviction.<sup>45</sup>

Czech law envisages<sup>46</sup> that if the tenant stays in the apartment after the expiry of the period of notice, an action for eviction shall be filed against the tenant and thus a court decision must be sought in order to evict the former tenant. If the occupier keeps on refusing to move out, then it becomes a matter of a bailiff to open the apartment by force and evict things, ensure the physical removal of the tenant and hand over the apartment to the owner. Fundamentally, a bedridden tenant is protected from eviction as it is unacceptable due to his/her medical status. The same refers to a women during her puerperium or at the later stage of pregnancy, when the eviction could seriously endanger the health of such person. Both conditions must be met simultaneously and the person to be evicted must evince that these conditions have been fulfilled by presenting a medical certificate. Moreover, the tenancy agreement cannot be terminated or withdrawn from by the landlord after the declaration of the tenant's bankruptcy based on his delay in paying the rent or other charges that occurred before the declaration of bankruptcy or deterioration of the debtor's financial situation.

Under the Polish legal order, the eviction procedure may be initiated where the lessee is in default with rent for at least three full periods of payment, usually expressed in months. In such circumstances, the debtor is called on to pay the whole debt along with the currently accruing liabilities. The request for payment must, under the pain of invalidity, be made in writing, name the amount of debt and deadline in which it is to be paid. In the written request, the landlord must also warn the tenant that in the absence of timely payment the contract may be terminated. Should the lessee fail to pay off the arrears, the lessor may terminate the contract. Respective notification of the termination should at the same time call on the debtor to voluntarily vacate the leased premises before a specific deadline. The debtor ought to be given a month to comply with this request.

Official proceedings are to be brought against the tenant who continues to occupy the unit despite expiration of the term assigned for vacation, and the uniform regime of 1046(4) of the Polish Code of Civil Procedure (PCCP) applies to all tenancy regimes. In such cases, the landlord files a suit before a district court having jurisdiction over the area where the premises are located, seeking an eviction order against the tenant and his household members. Landlord petitions most frequently additionally move for examining the case and passing the eviction judgment despite the possible non-appearance of the lessee at the trial. Evicted tenants may be entitled to a municipal social lodging. The court's duty to decide on that matter does not extend to tenants

<sup>45</sup> See section 9 Short-term lease of flat Act (no. 98/2014 Coll.).

<sup>46</sup> See TENLAW: the National Report for Czech Republic, Section 6.7.

under the contract of incidental lease (art. 19e) or squatters, and generally tenants in the private stock.<sup>47</sup> Under the current legislation, sidewalk eviction is possible in relation to individuals not entitled to social housing if temporary premises are not afforded to them within 6 months from the date of submission of the bailiff's motion for designation of a temporary lodging. On expiry of that deadline, under art. 1046(4) PCCP, the bailiff shall evict the debtor to a hostel, shelter or other centre offering overnight accommodation to the homeless – as indicated by the home municipality. The number of temporary premises in municipal resources is always deficient. In consequence, evicted persons often remain in the units occupied without any valid tenure. The landlord may quicken the procedure by furnishing the replacement lodging himself. Ultimately, Polish law provides for a general winter ban on eviction lasting from November to March.

In Slovak law, financial deposits have been expressly regulated only in relation to social housing leases and recently to short-term leases of flats. They are practically used also in general lease-of-flat arrangements. The deposit serves as security for payment of the agreed rent, charges for utilities and possible tortious claims.<sup>48</sup> As the deposit is a sum limited by purpose, its permissible use on the part of the landlord is delimited by the claims it secures. Thus, subject to the lease contract, the landlord would be entitled to set off his claims pertaining to the lease. Moreover, an average contract for lease of a flat in the private rental sector specifically states that the deposit may be used to offset the claims arising from any damage caused to the flat by the tenant or anyone whom he allowed to dwell in the premises, the tenant's outstanding debt on rent or utilities, or payment of the previous months' rent. Under the "short-term lease of flat" regime, the amount cap on deposits is set at the level of three months rent and charges for pertinent utilities for the same period. With no regulation of this institution for other rental arrangements, in practice only the standard of good morals confines the amounts of deposits. The usual contractual practice generally requires the tenant to pay a deposit in the amount of six, three or one month's rent.<sup>49</sup>

Under the Polish legal order, the deposit makes a single monetary provision, which cannot be spread over time. It is to be paid before the commencement of lease. Its function is to secure lessor claims relating to the contract of lease (and only lease). In Poland, deposit may amount to even twelve monthly rent instalments. With regard to incidental lease, the admissible amount has been reduced to the equivalent of three months' rent.

The new Czech Civil Code introduces an institution of deposit. The parties can stipulate that the lessee should furnish the landlord with a financial deposit which ensures that he will pay the rent and meet other contractual obligations. The deposit shall not be more than six times the monthly rent. At the end of the lease the landlord will be obliged to refund the deposit to the tenant. The lessor may set off a sum of money which the lessee owed to him as rent. The lessee is entitled to interests on the deposit at least at

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<sup>47</sup> R. Dziczek, *Ochrona praw lokatorów. Dodatki mieszkaniowe. Komentarz. Wzory pozwów* (Warszawa: LexisNexis, 2002), 117; in the case of squatters the issue was settled in the SC resolution of 20 May 2005, III CZP 6/05 (OSNC 2006, no. 1, item 1).

<sup>48</sup> In addition, in social housing leases the due date for payment of the deposit may not exceed 30 calendar days prior to signing of the lease contract. If the lease contract was for some reason not concluded, the landlord would have to return the deposit obtained without undue delay.

<sup>49</sup> TENLAW: the National Report for Slovakia, Section 6.4.

the statutory rate. In spite of this regulation, it is usual to pay one month's rent as deposit.

The deposit is legally constructed as a guarantee to cover future claims of the landlord. It can be set off against the rent which is owed after the termination of the contract.

The usual and lawful amount of deposit is one months' rent.<sup>50</sup>

In summary, all three jurisdictions view deposit as a payment separate from rent which is to guarantee that the landlord's claims and obligations that might emerge under the tenancy will actually be met.

The Slovak and Polish legislations share a rather similar regulation of the statutory lien on the tenant's movable items as a means of securing his obligations. All three countries subsequently provide for a version of a lien or retention of movable things to secure the directly endangered rent.

The Slovak law establishes lien on the tenant's movables belonging to the tenant or to persons living with him in a common household under just any tenure in order to secure claims for the payment of rent. The lien only extends to movables situated in the rented premises with the exception of the property exempt from execution by legal provisions,<sup>51</sup> such as usual clothing, equipment necessary in a household, pets for non-commercial use, wedding rings, etc. The lien is created upon bringing the property into the household and generally extinguishes when the items are removed from the premises.<sup>52</sup> The lien will persist if they are enlisted in an inventory drawn up by a court official or, where the movables have been removed upon official order, if the landlord applies for such remedy within eight days of the removal. The pledge may be enforced and the claim it is securing settled through general ways of execution of charges, which is, if nothing else is agreed between the parties, a private auction performed by a licensed subject<sup>53</sup> or execution following a court's final judgement awarding rent, enforced by a bailiff.

The law, furthermore, provides for a statutory retention lien, separately for the Civil Code regime of lease and the short-term lease of flat. In the former case, only if tenant is moving out of the leased property or the movables are being removed, the landlord will be allowed to retain the movables as security, and obliged to apply within eight days for drawing up of an official inventory of the retained assets by a court official.<sup>54</sup> Under the latter regime, the landlord may retain the movables upon termination of the lease and upon expiry of the prescribed period. The lien would be illegal if the deposit the outstanding debt of the tenant could be covered from the deposit.<sup>55</sup>

Polish law provides that in order to secure the rent and other provisions in which the lessee defaults for no longer than one year, the landlord has a statutory lien on the tenant's movables brought into the housing unit, unless these things as such are exempt from attachment. The statutory lien refers to movables, whether owned or co-owned by the lessee. Pursuant to art. 671 CC, the statutory lien is extinguished when the pertinent

<sup>50</sup> TENLAW: the National Report for Czech Republic, Section 6.4.

<sup>51</sup> For a complete list see sections 114-115 EO.

<sup>52</sup> K. Plank, in P. Vojčík et al. *Občiansky zákonník*, 850.

<sup>53</sup> See sections 151j et seq. CC and the Voluntary Auctions Act 2002 (No. 527/2002 Coll., as amended).

<sup>54</sup> See section 672 CC. An executor can also serve as the delegated court official.

<sup>55</sup> See section 8 para. 2 and section 10 para. 2 Short-term lease of flat Act (no. 98/2014 Coll.).

things are removed from the rented object. The lessor may object to such removal and retain the movables at his own risk until the overdue rent has been paid or secured. By doing so, the lessee might become exposed to compensatory liability towards the lessee.<sup>56</sup> If the pledged things are removed under an order issued by a state authority, the landlord still retains his statutory right of pledge if, within three days, he reports it to the authority which ordered the removal (art. 671(3) CC).

The Czech Civil Code does not envisage the lessor's lien on the lessee's movables. Nevertheless, it gives the lessor the right to recover debt by means of retention of movables belonging to the lessee left in the leased premises (Section 2234 CC). The new Czech Civil Code does not allow retention of movables belonging to persons other than the lessee. It follows from the wording of the regulation that the lessor's right of retention also applies to the settlement of debts other than rent arrears.

In neither of the compared countries is there a specific regime of sureties securing the payment of rent or other pertinent debts. It has to be assumed therefore that the parties are free to employ a surety as a personal security of the landlord's claims.

Under the Slovak law, it is possible to insure a property against its impairment, destruction, loss, theft or other form of damage. Insurance companies which provide their services on the territory of the Slovak Republic offer the following insurance products relating to dwellings: insurance of buildings, i.e. the insurance of a house, of a flat or non-residential unit; insurance of a block of flats; insurance of a household; liability insurance for household members; insurance for liability caused by immovable property; insurance of glass; insurance of buildings connected with the insured building; and rent guarantee insurance.

In Poland, compulsory insurance in the housing sector refers to entire buildings and covers damages following from mishaps such as fire, pipe leaks, hurricane, electrical surge or dilapidation. For additional premium, insurance may be expanded to cover floods. The obligation to buy the insurance rests upon the owner of the house.<sup>57</sup> Other types of insurance are generally available but optional.

In the Czech legal system, dwellings can be insured in two ways: by real estate insurance – usually paid by the owner (lessor); and by household insurance.<sup>58</sup>

Apparently, in all of the scrutinised countries there are insurance products relating to the property owned by a landlord. Only in Poland the owner of the building is under a duty to do so. Neither of the reports suggests that the choice or scope of insurance is insufficient for the market needs.

Under the Slovak Civil Code regulation of the lease of a flat, the contract may be terminated if the landlord needs the flat for himself, his spouse, children, grandchildren, son in law or daughter in law, parents or siblings; or – with public interest in view – if it is necessary to dispose of a flat or the block of flats in a manner that renders the use of the flat impossible, or if the flat or the block of flats requires such repairs that it is impossible to use the flat or the block of flats for at least six months, i.e. where it is not a mere commercial decision of the owner. In contrast, an open-ended lease of family house

<sup>56</sup> R. Doliwa, *Prawo mieszkaniowe. Komentarz* (Warszawa: C.H.Beck, 2012), 51.

<sup>57</sup> TENLAW: The National Report for Poland, Section 2.4.

<sup>58</sup> TENLAW: The National Report for Czech Republic, Section 2.4.

would not require any special reason for the landlord's termination, just observance of the prescribed notice period. Similarly, leases for definite period do not permit termination on the grounds provided in default provisions, which also holds true for the novel regime of short-term leases of a flat.

According to the Polish legal order, the landlord may terminate the contract at six months' notice given at the end of a calendar month if he wishes to live in the unit himself or pass it over to his major descendants, ascendants, or persons entitled to alimony against him and the tenant is authorized to use another unit which meets the minimal requirements for replacement premises. The notice period would be three years if the tenant could not be provided with adequate replacement premises. Furthermore, termination is possible if the tenant occupies the unit which has to be vacated because of the need to demolish or restore the building.

The Czech law gives the landlord the option to terminate the contract when he requires the apartment for himself, his spouse, children, grandchildren, a son-or daughter-in law, their parents or siblings; if it is necessitated by a public interest that the apartment cannot be used or the apartment or house requires renewal in the course of which this flat or house cannot serve its purpose for a longer time; if it is an apartment architecturally inscribed in areas intended for business or other entrepreneurial activities. On the other hand, tenancies concluded for a limited period automatically expire at the end of this period.

It thus becomes clear that Slovakia, Czech Republic and Poland provide for the possibility to terminate the contract when the property is needed for the family members of the landlord, and that the provisions on furnishing of replacement housing have to be observed. Moreover, all the three legislations enable termination of the contract once major changes to the property have been introduced. The Czech and Slovak laws additionally suggest that leases of flats for definite period allow to adjust the lease period to the commercial or family decisions of the owner.

In Slovakia, there are virtually no special alternative dispute resolution schemes to be applied in the residential tenancy sector. Although mediation, as a progressive and efficient concord-driven framework, is ever more developed and available, the parties to housing disputes generally resort to court proceedings. At the same time, the parties are also discouraged from suing by the popular opinion on the general inefficiency of official law enforcement. Landlords are, thus, willing to avoid court proceedings through stringent contracting (through e.g. fixed-term leases, subleases, notary's reports of tenant's consent to eviction, etc.). Tenants, on their part, may be discouraged by the generally feared cost of the proceedings. Due to the Civil Code regulation of the lease of a flat, usually favouring the tenant even in the procedural context,<sup>59</sup> and the willingness of courts to account for extraordinary circumstances of the parties under general principles of law, the tenants usually have the upper hand in the process.

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<sup>59</sup> This involves: survival of the lease until the issuance of final judgement on (in)validity of landlord's termination notice (section 711 para. 6 CC); the right to habitation of the tenant until ensuring replacement housing, if applicable (section 712c para. 1 CC).

The average length of a civil procedure was 11,6 months in 2012, which seems to be a stable expectancy.<sup>60</sup> This, however, refers only to first instance proceedings. Appellate trials and enforcement of the judgement could prolong the actual process. Tenants admit being afraid of the long duration and unpredictability of judicial proceedings, which, along with the fear of harassment on the part of the landlord, is a significant disincentive for seeking enforcement of their rights in court. Most of these deficiencies are expected to gradually become side-lined by the implementation of the short-term regime for lease of a flat, which would still require an eviction order to be delivered, but in this case invalidity of termination, even if challenged at the court, would not prejudice or postpone the eviction.

In Poland, there are principally two types of housing matters that are frequently considered in court proceedings, i.e. eviction cases (vacation of a unit by its previous occupier) and actions for payment of overdue rent along with other chargeable fees. Apart from these two, one could easily notice cases relating to:

- return of the deposit paid by the lessee; such disputes, however, do not generally relate to the refund itself, but to the grounds for and the manner of valorisation of the deposit;
- disputed legitimacy of a rent increase;
- return of the outlays on the unit made by the lessee and repair of the damage inflicted by the lessee in the leased premises;
- indirect nuisance involving noise, littering, animal husbandry, etc. in the unit.

All the types of cases set out above are examined in civil litigation. Non-litigious proceedings, generally reserved for matters expressly selected by the legislator, do not apply to the disputes mentioned above. Within litigation, most tenancy law cases are heard under the so called summary proceedings.

In the area of housing law, the legislator has not provided for obligatory mediation or any other conciliatory proceedings. Instead, the general regulation included in the Polish Code of Civil Procedure applies. In light of the above, it depends on the parties if they are willing to use the mechanisms of amicable dispute resolution or simply go to court. Among all conceivable forms of amicable dealing, special attention should be paid to two specific types. First, a possible claimant may initiate judicial conciliation,<sup>61</sup> whereby a judge induces the parties to settle the case by themselves and does not resolve the dispute authoritatively. As it turns out in practice, this procedure is applied only exceptionally rarely in housing law disputes. Second, the parties may resort to voluntary mediation,<sup>62</sup> based on mutual agreement. As a rule, mediation is commenced before the action is brought to court, but it is also admissible to refer the case to mediation (by court) in the course of pending judicial proceedings.

In Czech Republic, the number of lawsuits pertaining to housing is relatively large and enforcement proceedings are common. The parties may agree to arbitration, but there are certain restrictions following from consumer regulation. Access to courts is not

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<sup>60</sup> See <<http://www.justice.gov.sk/Stranky/Sudy/Statistika-priemerna-dlzka-konania.aspx>>, 15 December 2013.

<sup>61</sup> See arts. 184 – 186 PCCP.

<sup>62</sup> See arts. 183<sup>1</sup> – 183<sup>15</sup> PCCP.

restricted and verdicts are based on law. Recent amendments to procedural law introduced the obligation to invite the counterparty to seek amicable solution.

In Czech Republic, the average length of judicial proceedings in private law matters (about 60,000 per year) has decreased since 2005, when it was 453 days, to 284 days in 2011, but even so the average length of judicial proceedings in Czech Republic is twice as long as in Western Europe. Courts are too slow and there is no effective way of solving tenancy disputes. In practice, it is important to solidly prepare the contract and carefully select the tenant/landlord.

In general, all three jurisdictions allow for the possibility of judicial proceedings in housing matters, which appears to be by far the most popular mode of resolving disputes. As regards other manners of dispute resolution, the three countries have appropriate procedural frameworks for their implementation and, apparently, there are no legal obstacles as to their utilization in housing disputes. Nonetheless, alternative dispute resolution is only rarely embarked on.

In Slovakia, there is a system of support for the housing needs of inhabitants which is underlain by the income structure of Slovak households. Middle income earners have the possibility to acquire ownership of flats in blocks of flats or houses with the support from the state through the State Housing Fund loans, building savings programs, and mortgages.<sup>63</sup> In Bratislava, for instance, an average mortgage instalment for a newly built and purchased dwelling in the last quartile of 2013 amounted to EUR 781.12 as opposed to EUR 515.61 in the case of a secondary market dwelling. Such difference corresponds more or less to monthly mortgage rates.<sup>64</sup>

In Czech Republic, construction of new housing units is mainly financed by mortgage loans. Banks usually insist on a minimum equity requirement (15% of the value of the loan). It is not uncommon for mortgage to be available at 2.5-3% interest rates. This is a result of discount rate cuts by the Czech National Bank, the value being reduced down to 0.05%. Banks, expecting a growth in interest rates in the future, embark on fixed rates only for a three year period. Greater availability of mortgages should influence the growth in the number of mortgaged households, which, however, is not the case. The rental sector is thus not markedly influenced and rents tend to stagnate. Monthly mortgage instalments are usually about 30 % above the rent for a comparable apartment.<sup>65</sup>

In Poland, mortgage market was underdeveloped in the nineties. The market took off around the year 2000 and kept expanding very rapidly until late 2000's. In the aftermath of the financial crisis a recommendation was issued by the Polish Financial Supervisory Authority which set an upper limit for monthly instalments to 50% of the borrower's income in order to assure his solvency.<sup>66</sup>

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<sup>63</sup> TENLAW: the National Report for Slovakia, Section 1.4.

<sup>64</sup> See further: M. Jančura, 'Reality v Bratislave',

<<http://www.bencontinvestments.sk/app/cmsFile.php?disposition=a&ID=893>>, 10 February 2014.

<sup>65</sup> TENLAW: the National Report for Czech Republic, Section 2.5.

<sup>66</sup> Financial Supervisory Authority, 'Rekomendacja T dotycząca dobrych praktyk w zakresie zarządzania ryzykiem detalicznych ekspozycji kredytowych', Warsaw February 2010 <[http://www.knf.gov.pl/Images/Rekomendacja%20T\\_tcm75-18474.pdf](http://www.knf.gov.pl/Images/Rekomendacja%20T_tcm75-18474.pdf)> January 2013..

Financing of immovable property acquisitions in all three states is possible through mortgage loans, which generally seem to be accessible.

As mentioned in section 2.5 above, all the countries apply mostly object-oriented subsidies, which allows to subsidize construction and rehabilitation of the housing stock. However, as far as private investors are concerned, these subsidies do not apparently lead to any significant increase in the rental market.

In the Slovak Republic, such subsidies take the form of a grant for procurement of a rental flat. Under this scheme, an eligible applicant, i.e. a municipality, a higher territorial unit and recently also a non-for-profit organization with a dominant share of a municipality or a higher territorial unit, may receive a direct grant to partially cover the costs of acquisition of social rental flats. This may be done through purchase, construction, re-construction or rehabilitation of various premises and turning them into social rental flats. Secondly, grants for acquisition of rental flats as replacement housing for tenants who left their flats in restituted houses are available. Thirdly, there is system of loans for procurement of rental flats granted by the State Housing Development Fund to municipalities, higher territorial units or any legal persons that have been operating for at least five years. Clearly, these programs are mostly oriented towards housing with a public task.

Fourthly, The State Housing Development Fund may also provide soft loans for construction and renovation of social services facilities (which may provide housing). Fifthly, state subsidies for mortgage loans and state subsidies for mortgage loans for the young are available. These stretch beyond mere acquisition of housing, but concentrate both on the affordability and reconstruction of dwellings for the young.

Furthermore, there are grants for construction of technical facilities; grants for eradication of systemic deficiencies in blocks of flats; subsidization of ecological sources of energy in housing (subsidizing biomass and solar energy as a source of heat and loans by the State Housing Development Fund for renovation of residential buildings (mostly blocks of flats).<sup>67</sup>

In Czech Republic, there are also numerous subsidies which are oriented toward renovation and panel housing estates, provision of new technical infrastructure, development of shelter flats, building savings etc., i.e. the supply side of the rental market. The largest part of the subsidies goes for owner-occupied housing.<sup>68</sup> For example, the Ministry for Regional Development of the Czech Republic offers the programme of "Support for the Renovation of Panel Housing Estates", "Construction of Technical Infrastructure", "Subsidised Loan Interest Payments for Young People Aged up to 36," just to name a few. The most widespread arrangement for funding housing investments in Czech Republic is the "Promotion of Building Savings Scheme," which is a direct non-payable subsidy. This subsidy is remitted to the account of the client in a home building savings bank in the amount laid down by law.

In Poland, there are a variety of subsidization schemes oriented toward construction, spanning from preferential credit to targeted groups (e.g. "Family in Its Own Home", recently succeeded by the program "Housing Units for the Young"). As far as renovation

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<sup>67</sup> Further information to be found in TENLAW: the National Report for Slovakia, Section 3.6.

<sup>68</sup> See further in TENLAW: the National Report for Czech Republic, Section 3.6.

is concerned, in 2009 the Support for Thermal Modernization and Repairs Act entered into force. It expanded the previous regulation on supporting thermal isolation investments. Along with the premium for thermal modernization, the legislator now provides grants for repairs of the old housing stock. Compensation premium is available for landlords of tenements with formerly regulated rent.

All three legal systems respect the nature of lease as a contract for consideration, whereas the compensation (rent) does not necessarily have to be paid in money. In line with the principle of private autonomy, other types of consideration are possible, including provisions in kind. Such arrangements, however would be uncommon.

Under Slovak law, although the Civil Code uses the expression “payment of rent,” in light of the principle of contractual autonomy of the parties, the commentators agree that the rent may as well be agreed upon in a form other than monetary, or even as a corresponding right of use of some other property or any other performance, provided that the stipulation is clear or determinable as to the scope of the transfer or performance.

Since 2014, the Czech Civil Code expressly allows for payment of rent in forms other than pecuniary. Should the rent, under the parties' agreement, be non-pecuniary, the value of the provided rendition expressed in money is decisive.<sup>69</sup>

Finally, also the Polish law allows rent to be designated in money or renditions of some other type. It is thus admissible to honour rent e.g. by provision of a specific service (e.g. repair, retrofitting), or transfer of a given object (e.g. TV equipment, household appliances, a car).

### **3.2. Important evaluative criteria for the tenant**

#### **3.2.1. Affordability**

As far as rent is concerned, the private law principle of freedom of contract applies in fact to the vast majority of tenancies in all the compared legal orders. This freedom is almost unrestricted in Czech republic, where rent control has now been fully abolished, and it is possible to impeach contracts on the grounds of excessively high rate of rent only by recourse to the legal institution of usury or excessive reduction. In Slovakia price regulation is effected under the provisions of the Prices Act 1996, but in reality it is limited to certain tenancies almost exclusively within the public (i.e. mostly municipal) rental sector, especially to flats that had been built or otherwise procured through public funding. Rent regulation on the private rental market applies solely to the rare cases of flats (blocks of flats) owned by persons who have regained ownership under restitutive legislation and inhabited by “existing tenants.” Nowadays, rents in this class of leases would be slightly higher than the general rent ceiling regime in public housing.

In Poland, rent is not centrally regulated although certain statutory guidelines have been provided for municipalities. Restrictions on the amount of rent are more definite in the case of Social Building Associations. Rates of rent for 1m<sup>2</sup> of usable floor area of a unit are set, in the former case, by municipal councils which follow statutory guidelines of the Tenants Protection Act (depending on the location of the building and its general

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<sup>69</sup> See section 2217 para. 2 CC.

technical condition, and furnishing of the dwelling). In Social Building Associations, the aggregate of rental incomes in the Association should allow to cover maintenance and repair costs relating to the stock, as well as refund of the loan taken for construction. Moreover, yearly rent in the Associations may not exceed 4% of a unit's replacement value. Otherwise, parties to tenancy contracts may freely determine the amount of rent. To sum up this part of the comparison, the Czech regime seems to be the most liberal. The new Czech CC introduced a detailed regulation of rent increase and the possibilities for unilateral rent increase including the right to seek judicial determination of what makes an admissible increase. Similar provisions are in force in Poland. It is discussed in more detail below in the section on tenancies with a public task. At this point, it should be indicated that they are equally valid for the free market stock. On the contrary, Slovak law regulates rent increase only in respect of flats in blocks returned by restitution to their original owners or their legal successors. Otherwise, unilateral rent increase is possible and allowable only in cases where the landlord and the tenant permit such proceeding in the lease contract. In each case, the rent increase has to be mutually agreed. The contractually stipulated right of the landlord to a unilateral rent increase and its execution must be in line with the general requirements of Slovak law.

The Czech Civil Code introduces the institution of deposit in § 2254 CC. The deposit shall not be more than six times the monthly rent. In Polish law it may even correspond to twelve monthly rent instalments (6 in the case of incidental lease). The use and return of deposit after valorisation (Poland) or inclusive of interests (Czech republic) seems more thoroughly regulated in these countries than in Slovakia, where deposit has for the first time been introduced in 2014 by the Act on Short Term Lease of a Flat. This regulation is, however, restricted only to the general statement on admissibility of a deposit, its maximal amount (3 rent instalments), the use of deposit and the obligation to return it after the end of the lease minus rightful deductions (damages, due rent). In particular, it does not explicitly regulate valorisation of the deposit. Given the short term character of such lease, most probably, this will not be a serious problem.

Regulation of expenses is based on almost the same principles in all compared legal orders. Two models are in general use: it is either the landlord or the tenant to enter into contracts with providers of the utilities. As mentioned in the reports, in short term leases the landlord usually reserves the right to stay in the contractual relation with the utility providers and then the landlord charges the bills from the tenant. The landlord would then present the tenant with a yearly balance of the actual consumption, advance payments and settle the outstanding account. It is also not uncommon and legally acceptable for the rent to encompass all possible charges for the agreed services, direct payment of which would be the sole responsibility of the landlord. In case of long-term leases and leases for an indefinite period, the standing practice is that the tenants usually conclude a separate supply agreement and are charged directly by the electricity or gas supplier.

Distribution of responsibilities concerning repairs and outlays on the unit is similar in the compared jurisdictions. The landlord should deliver the agreed thing to the tenant in a condition fit for the agreed use and keep it in such condition throughout the term of the contract. Minor repairs that are connected with the use of the housing unit and the costs of routine maintenance are borne by the tenant. In Slovakia, the definition of minor repairs and the costs associated with routine maintenance have been set forth by default in a governmental regulation. In Czech republic these repairs are not defined in any piece of legislation. In Poland, the legislator has rendered in a casuistic way the

scope of repairs and outlays imposed on the landlord and on the tenant. There is, however, one notable difference: the list of tenant's obligations is exhaustive, whereas the catalogue referring to the landlord is open.

There is no registration fee or tax to be paid by the tenant in any of the compared jurisdictions.

In Poland and Slovakia there are housing benefits for low income households. In Czech Republic housing allowances are destined for persons in material need.

### 3.2.2. Stability

Although lease is a merely obligational right, in all the three jurisdictions entitlements of a tenant are specially protected and provisions on the protection of ownership apply as appropriate to the protection of tenant rights to enjoy a rented unit. This refers to remedies available to an owner *erga omnes*, which means that the tenant is likewise protected against the owner (art. 690 of the Polish Civil Code and art. 126 of the Slovak Civil Code).

No specific licence schemes have been recognized in these countries.

In Czech republic, the Civil Code provides that the lease contract must be made in writing in order to be valid. However, the landlord may not claim invalidity of the contract against the tenant on the grounds of formal deficiencies. The CC protects the tenant even if the statutory written form of the agreement has not been observed. Under §2237 and §2238, if the tenant has used the apartment in good faith for a period of three years, the lease contract shall be presumed to have been duly signed.

In Slovakia, the rules on the lease of a flat in the Civil Code generally do not prescribe any formal requirements for valid conclusion of a contract. It may be concluded orally, implicitly, or in writing. The latter form is recommended as the lease contract is normally meant to regulate long-term relations. Section 686 para. 1 CC requires the parties to prepare a written record of the content of the contract, if not concluded in writing. The absence of such a record does not, however, invalidate the lease, but is of great importance in potential court or other proceedings. As far as general lease (lease of a building, e.g. family house) is concerned, the Civil Code requires neither a written contract, nor a record of its content.

In Poland there are no particular formal requirements for a lease contract in the private sector. Contracts for a fixed term longer than year should be made in writing lest their duration be deemed indefinite. Departure from the principle that a contract for lease may be concluded in any form makes one of the distinctive features of incidental lease. For successful conclusion of an incidental lease contract, art. 19a(6) TPA requires the written form. This provision imposes the same form for any amendments to an incidental lease contract. Non-observance of the formal requirement precludes incidental lease. In such situations, the contract itself is valid but does not qualify under the special regulation.

In Poland, registration of residence is only an administrative requirement (valid until 2016). Non-registration does not affect the lease contract as such. Only in the case of incidental lease, it is necessary to report the contract to tax authorities. Otherwise the landlord forfeits his preferential position. The same applies under the newly enacted regulation on short term leases in Slovakia. Generally, in Slovakia registration of the rental agreement with the tax authority is a sole responsibility of the landlord, with potential administrative law or criminal law consequences for its omission. The tenant

usually does not even know about the performance of the landlord's tax duties. Tenants are also subject to a public law duty to register their permanent or temporary residence with the respective municipality. In Czech Republic it is not necessary to register lease agreements. However, the owner of the apartment or the lessee (with the owner's approval) may request that the lease be registered in the Land Registry (§ 2203 CC). Incentives for the landlord to conclude an unreported "black market" contract providing less stability to the tenant have been discussed above.

In Poland, as long as the tenant is entitled to enjoy the rented dwelling for consideration, termination by landlord may take place only for reasons specified in the TPA. Under the pain of nullity, the landlord's termination must be notified in writing. The letter must specifically name the reason for termination. More on the relevant Polish regulation can be found below in the section on tenancies with a public task.

In Slovakia, rules on termination of lease of a flat by landlord's notice reflect the special character of such lease and its protection by law. Therefore, the landlord may terminate the lease of a flat only if one of the grounds specifically listed in the CC occur. This regulation has a mandatory character. Moreover, as far as consumer lease is concerned, such person cannot waive in advance his rights guaranteed by the Civil Code or otherwise diminish his position. Tenants may claim invalidity of the notice before the court within three months from the date of notice. The notice shall become effective on the date of validation of the court's judgment dismissing the claim to declare invalidity of the termination. The sole exemption from the general rule that the landlord may terminate the contract only on the grounds provided in the Civil Code has been afforded to landlords by the Act on Termination of Certain Leases Related to Flats and Amending Prices Act 2011 (TCL). This special regime for termination of the lease of a flat by landlord's notice does not apply by analogy to leases of a family house.

In Czech republic, the landlord may cancel the contract without court approval if the tenant or his co-habitants: continue to violate good manners in the house despite previous written warnings; the tenants grossly violate their obligations stated in the tenancy agreement, in particular by not paying the rent and not paying for services connected with the use of an apartment in the amount of triple monthly rent; if the tenant has two or more dwellings, except when he cannot be fairly required to use only one apartment.

The common feature of the unilateral termination regimes is the requirement that the grounds for termination should be expressly specified in legislation. Usually, they cover such situations as the housing need of the landlord or / and his/ her close persons, various forms of breach by the tenant, etc.. Additionally, it should be noted that a lessee of a family house in Slovakia does not enjoy the same level of protection as a lessee of a flat.

Application of the Slovak regime of short term leases is restricted to leases which, following possible prolongation, last no longer than 6 years. Reasoned termination by landlord's notice is, however, permissible notwithstanding the duration of lease, and the grounds for termination are same for fixed and open ended leases. These grounds are stricter in the CC framework than in the regulation of short term leases. The distinction between these types of leases is important because when the lease for a fixed term

terminates, the tenant is not entitled to any replacement housing. The same applies to the lease of a family house, where special protection has not been afforded to tenants. In Poland, the same level of protection is offered to tenants for a fixed term and for unspecified term, which makes the latter particularly attractive to tenants. It seems that in Czech Republic there are no differences between short term leases and open ended leases as far as termination is concerned.

In Poland the landlord must withhold eviction if the tenant has been awarded the right to a social unit – until the respective municipality carries out its obligation to provide such lodging. Where the court decides not to adjudge such entitlement, which is usual in the private stock, the bailiff must still wait for the period of six months in which the debtor is to be assured replacement premises. In this additional period the rental contract is already terminated and the occupier has no particular right to the unit, still, he or she may not be ousted from the premises. The same refers to the protective period between 1 November and 31 March in which eviction has been banned.

Polish law is very restrictive on the landlord and protective for the tenant even if the former needs the rented dwelling for himself or his major descendants, ascendants or persons entitled to alimony against the landlord (longer notice periods, protection of special groups of tenants in the public stock exposed to specific risks).<sup>70</sup>

In Slovakia, as far as the lease of a flat is concerned, the reason for termination has an important role in determination whether the tenant, after the termination of lease, has the right to replacement housing or if he is obliged to move out without any form of support. Apart from the reason for termination, the social status of the former tenant and his household members is considered. If the former tenant has the right to replacement housing, he is not obliged to move out of the flat until corresponding replacement housing has been secured to him.

The new Czech regulation seems to be the most liberal out of the compared legal orders, as only a bedridden tenant may be protected from eviction if it is unacceptable due to his/her medical status. The same refers to a woman during puerperium or at a later stage of pregnancy, when the eviction could seriously endanger such person's health. Both conditions must be met simultaneously and the person to be evicted must present an appropriate medical certificate.

In Slovakia, if a change in the ownership of the leased property occurs (irrespective of its ground), the acquirer assumes the legal position of the landlord, and the tenant is relieved from his obligations towards the former owner as soon as the transfer is notified to him or proven by the acquirer. In such cases only the tenant may terminate the lease by notice. The landlord is not entitled to terminate the lease on the grounds of the change of ownership. Also in Poland and Czech Republic succession of the landlord has not been indicated among the admissible legal bases for terminating a tenancy contract.

There is no explicit regulation of the right of first refusal of the tenant in cases of sale of the house to a third party in any of the jurisdictions.

In Poland, the possibility to increase rent has been statutorily restricted (see the section on tenures with a public task below). Even if the increase complies with the statutory

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<sup>70</sup> See R. Doliwa, *Prawo mieszkaniowe...*, 215-216.

limits, tenants dissatisfied with an excessive increase may go to court (art. 8a(5) item 2 TPA). In such cases, it is the court to decide whether or not the questioned increase is justifiable. Alternatively, the tenant may refuse to accept the increase, which results in termination of the contract as a whole (art. 8a(5) item 1 TPA). Under art. 9(1b) TPA, rent increases may not be introduced more often than once in six months. Also in Czech Republic and Slovakia, the tenant may seek court protection in cases of rent increase. Czech regulation is explicit, in Slovakia, the tenants (apart from TCL 2011) may rely only on general provisions of civil law. However unilateral rent increase in this country is generally excluded if it was not agreed in advance in the lease contract.

In Slovakia, extraordinary social circumstances of the tenant and members of his household may actuate certain protective rights of a tenant, such as a longer notice period for termination by landlord and a grace period for the repayment of the debt, or the right to replacement housing to which the tenant would not otherwise be eligible. Moreover, if the strict execution of eviction is likely to cause inadequate harshness, its effects can be mitigated by section 3 para. 1 CC, i.e. by declining (or limiting) the execution of the landlord's right on the grounds of its inconsistency with good morals. In such cases, however, justifications of court decisions dismissing the claim for eviction on the grounds of morality usually contain *dicta* relating to the temporary nature of this extraordinary protection, justified by specific facts. Procedurally, the judgment would still be in force and it would bar any new action or ruling as the matter has been already judged (*res iudicata*). This obstacle will hold until new facts (or new legal grounds), as compared to the original claim, are presented by the claimant

In Poland, eviction (except when justified by acts of domestic violence) is possible in relation to individuals who have not been awarded a social unit if temporary premises are not afforded to them within 6 months from the date of the bailiff's motion for designation of such temporary lodging. Upon expiry of this deadline, in accordance with art. 1046(4) of the Code of Civil Procedure, the bailiff shall evict the debtor to a hostel, shelter or other place offering overnight accommodation to the homeless – as designated by the home municipality. The procedure of eviction has been simplified in the context of incidental lease, in which case the tenant agrees in advance to the possibility of future execution.

### 3.2.3. Flexibility

In Slovakia, the tenant may terminate open ended lease contracts anytime, however, the three months notice period should be kept. The question whether the lease of a flat may be terminated by notice if it was agreed for a definite time has not been sufficiently discussed in legal literature. The prevailing opinion favours the possibility of termination by notice also in cases of a lease for definite period, but only if this has been explicitly agreed in the lease contract. The Act on Short Term Lease of a Flat lists the special reasons for early termination by tenant (disruption of the flat, loss of employment, claim for social housing, or other just reason agreed in contract).

In Poland, the regime for open ended leases is practically the same as in Slovakia, however, leases concluded for definite periods may not be terminated earlier unless the statutory conditions for immediate termination are met. Also in the Czech Republic there

is no requirement of specific grounds for termination by the tenant. Also in this legal system, the minimal three-month notice period should be observed.

Slovak and Polish regulations of subletting are based on the similar principles:

- subletting requires the landlord's consent (in Slovakia it must be given in writing);
- subletting without the landlord's consent constitutes a sufficient ground for termination.
- If the landlord refuses consent, the tenant may go to court. Should the court find the refusal ungrounded, it may order the landlord to give the consent.

In Slovakia, any sublease contract without the landlord's consent would be void.

The Czech regulation differs for various situations of sublease. The lessee may sublet a part of the apartment provided that he resides there on a permanent basis; this does not require the lessor's consent. In the event the lessee does not reside in the apartment on a permanent basis, consent of the lessor is necessary for a sublease. The request for such consent, as well as the consent itself, must be made in writing. If the lessor fails to give any reply within one month, it is assumed that consent has been given. This does not apply if sublease was expressly prohibited in the rental agreement. If the lessee sublets the flat or its part to a third party in violation of legal provisions, it is considered a major breach of his duties.

## **4. Comparison of tenures with a public task**

### **4.1. Generalities**

In Poland, Slovakia, and Czech Republic, municipalities are primary entities entrusted with the responsibility for social housing. The main difference between these three refers to the size of the available resources. In Poland, the stock controlled by municipalities is rather considerable. According to the latest statistical data, there are about 1,089,000<sup>71</sup> municipal housing units, which makes about 9% of the entire stock. This number, however, is constantly decreasing due to the possibility of buying flats on preferential terms, often offered to the existing tenants.<sup>72</sup> In Czech Republic and Slovakia, the share of municipal housing does not overstep 2%.

Throughout the nineties of the previous century, there were hardly any new municipal constructions, which is understandable in the context of all the three compared economies in a situation of profound transformations and constant scarcity of available funds. Municipalities had to manage their existing stock and, where possible, gather proceeds from privatisation, usually spent on repair and maintenance of the existing resources.

In Poland, the condition of the stock was rather poor, and the overall increase in the number of permanently occupied units between 1989 and 2002 (8.5%) was even lower

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<sup>71</sup> H. Dmochowska (ed.), Statistical Yearbook of the Republic of Poland 2012, (Warsaw: Central Statistical Office 2011), 331

<sup>72</sup> As pointed out below, this depends on housing policies adopted by particular municipalities.

than in the years 1979-1988 (14.9%).<sup>73</sup> At the turn of centuries, nearly 30% of units in municipal buildings in the cities still came from before 1918, with only every tenth constructed after 1970.<sup>74</sup> Czech and Slovak municipalities have never controlled any significant portion of the market, which can only be confirmed by current figures. According to the Slovak Census carried out in 2011, only 1.8% of the flats were owned by municipalities.<sup>75</sup>

Throughout the compared countries, real municipal investments in the whole period following communism have, in fact, been a recent matter.

In Poland, owing to the scarcity of funds, true investments could only start in mid 2000's. Bearing in mind the condition of the ever older stock, it was high time for action. The underlying piece of legislation was the Act on the Financial Support for the Creation of Communal Housing units, Protected Housing Units, Shelters and Houses for the Homeless of 8 December 2006.<sup>76</sup> It enabled subsidies from a special fund, granted predominantly to less affluent municipalities, which could not afford to support their less fortunate inhabitants in respect of housing.

In Czech Republic, the absence of conceptual and systemic solutions pertaining to social housing for the socially weakest groups of the population means that individual municipalities, limited by the available resources, have to solve these problems on their own. Unfortunately, their rental premises are often unfit for accommodation and fail to fulfil the requirements of construction law, enactments protecting public health, fire and safety regulations, etc.

In all the three countries, effectiveness of the municipal stock is far from optimal. Even in Poland, where the available resources are generally ampler, this effectiveness is undermined by long waiting lists, ranging between 1 month and 18 years.<sup>77</sup>

Housing associations are generally present in the region. Polish Social Building Associations, first established in 1995, were to be active investors in the area of housing destined for households with income below average. For almost fifteen years, they were an active investor on the social rental construction market. By the present day, they have managed to construct 84 thousand units. One of the most controversial political decisions concerning housing in the recent years was liquidation of the National Housing Fund in 2009, which brought new Social Building Associations' investments to a halt.

In Slovakia, associations as such, just as municipalities, may be granted subsidies for replacement housing for former tenants in the reprivatized stock. Other than that, neither housing associations nor agencies are active landlords in the rental sector with a public task. As regards state subsidies for new constructions, they may be granted to municipalities or legal entities controlled by municipalities. Starting from 1 January 2014, the beneficiaries may also be non-profit organizations providing public services in

<sup>73</sup> R. Kierzenkowski, 'Bridging the Housing Gap in Poland', *OECD Economics Department Working Papers*, no. 639 (2008), 10.

<sup>74</sup> Ibid.

<sup>75</sup> See TENLAW: the National Report for Slovakia, Section 1.3.

<sup>76</sup> Ustawa z dnia 8.12.2006 r. o finansowym wsparciu tworzenia lokali socjalnych, mieszkań chronionych, noclegowni i domów dla bezdomnych, (Act of 8 December 2006), Official Law Journal 2006, no. 251, item 1844.

<sup>77</sup> Supreme Audit Office Report No. 170/2011/P/11/108/KIN: 'Realizacja zadań w zakresie polityki mieszkaniowej przez organy administracji rządowej i jednostki samorządu terytorialnego', 14.

housing, management, maintenance and restoration of the housing stock, established by municipalities or territorial units of higher level, or if the share of the latter in the entity makes at least 51%.<sup>78</sup>

#### **4.2. Evaluative criteria for public/social/private subsidized landlords**

In all of the compared legal systems social housing construction is financed from central budgetary funds as well as from municipalities' own means.

In Poland, the central institution allocating state funds is the only remaining state-owned bank, Bank Gospodarstwa Krajowego, acting in pursuance of the legislation cited above. The entities eligible for state subsidies are municipalities and Social Building Associations. NGO's may hope for municipal funding for arrangement of shelter housing destined for specific disadvantaged groups of individuals (e.g. disabled persons).

In Slovakia, subsidies for rental housing are currently provided by the Subsidies for Housing Development and Social Housing Act (SHDaSH 2010).<sup>79</sup> This Act replaced the previous ministerial regulation in this area. The Act defines the scope, terms and methods of providing subsidies, which can be obtained for the construction or acquisition of rental flats, procurement of technical equipment and removal of defects in blocks of flats. In the case of acquisition of rental flats, SHDaSH 2010 prescribes the conditions for the formation of a lease contract. As pointed out above, public subsidies in Slovakia may only be granted to municipalities or legal entities controlled by municipalities.

In Czech Republic, the question of central funding has remained underregulated. Rather than subsidize municipalities or other entities, Czech authorities concentrate on a system of housing allowances awarded to the poorest groups of the population.<sup>80</sup>

Regulatory interventions into rental contracts vary significantly in the three compared jurisdictions. They are quite extensive in Poland, present in Slovakia, and practically non-existent in Czech Republic.

In the case of the latter, there is no special legislation on municipal or social tenancies. In general, such tenancies involve the same rights and obligations as free market leases. Naturally, municipal authorities pass regulations to safeguard uniform criteria of selection and equal treatment to all tenants, and yet, there are no statutory protective measures which could be classified in terms of a specific type of lease.<sup>81</sup>

In Slovakia, the major modification concerns the term of contract. This means that the maximum duration of a social housing lease of flat contract may be:

- 3 years for generally eligible applicants, as based on income thresholds, or persons leaving foster home care;
- 1 year if a municipal unit is provided to a regular tenant (who does not meet the statutory criteria) due to the availability of social housing;

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<sup>78</sup> This restriction was introduced in the Subsidies for Housing Development and Social Housing Act (No. 443/2010 Coll.).

<sup>79</sup> Act No. 443/2010 Coll.

<sup>80</sup> TENLAW: the National Report for Czech Republic, Section 4.3.

<sup>81</sup> Ibid.

- 10 years for disabled applicants with reduced mobility.<sup>82</sup>

Upon expiry, a social housing lease may be prolonged, subject to reassessment of eligibility of the tenant.

Both in Slovakia and in Poland municipal rentals include not only social housing in the strict sense of the word. In Slovakia, the above reservations pertaining to the duration of lease do not concern the general municipal stock, which is not governed by any special regulation – apart from the regulation discussed below. In practice, rents in such general municipal stock are below the market level.

Rentals in the Polish municipal stock are governed by the TPA. As in the case of Slovakia, municipal stock can be subdivided into strictly social and other rentals. However, due to the amount of rent, all Polish and Slovak municipal tenancies could be classified as tenures with a public task.

In the Polish context, the TPA introduces regulatory interventions relating to both types of tenure. As regards the general municipal stock, rental contracts may be concluded only for unspecified duration unless the tenant requests otherwise, which in practice would be very uncommon. Social tenancies in the strict sense of the word, however, may be concluded only for a fixed term. This period, however, has not been provided by the legislator in any definite manner. Instead, the choice has been left to municipal councils. It is often argued that in such cases the period of lease should be long enough to cater for the housing needs of the tenants but sufficiently short to motivate them to raise their financial status and find a more suitable place to live.

Polish law introduces minimal habitability standards for a social housing unit. The term "social unit" means a place fit for living, taking into account the utilities and technical condition, with the usable floor area of minimum 5 m<sup>2</sup> per person (10 m<sup>2</sup> in single-person household). Even while a social unit may be sub-standard, tenants must still have the access to basic utilities, for example bathroom and toilet shared with other units in the same building (art. 2(1) item 5 TPA). Such definition does not have any counterparts in Czech and Slovak legislation. The Civil Codes of the latter countries provide only that the landlord must hand over the dwelling in a condition fit for the agreed use and to secure full and undisturbed exercise of the tenant's right related to the use of the flat.

### **4.3. Evaluative criteria for the tenant**

#### **4.3.1. Access**

Unfortunately, availability of social rental housing is problematic in all the three countries under comparison.

According to the Census carried out in 2011, Slovak municipalities own only 1.8% of the housing stock.<sup>83</sup> While the access to rental housing in Slovakia is limited, availability of social premises seems one of major concerns of the Slovak housing industry.

In Czech Republic, the system of housing subsidies for the poorest households combined with the scarcity of available resources led to the emergence of so called "social housing entrepreneurs" providing accommodation to low income persons in

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<sup>82</sup> TENLAW: the National Report for Slovakia, Section 6.4.

<sup>83</sup> See TENLAW: the National Report for Slovakia, Section 1.3.

hostels, where several individuals are crammed together in small rooms. In addition, only larger municipalities can afford to provide housing opportunities to low-income inhabitants.<sup>84</sup>

Despite the strong position of Polish municipalities in the rental sector, here as well their offer seems unsatisfactory. In the 33 municipalities covered by the survey of the Supreme Audit Office carried out in the years 2008–2010, the municipal stock increased only by 816 newly built units, which made 3,5% of the overall demand. The number of households applying for a municipal unit in these localities totalled 23,293. As a result of long waiting lists, the waiting period in the surveyed municipalities varied between 1 month and 18 years.<sup>85</sup>

The problem seems most burning in the case of social premises (in the strict sense of the word), especially ones awarded by courts. In the years 2008–2010, out of the total number of 12,648 eviction judgments awarding a social unit, only 1,444 were executed, which makes sheer 11.4%.<sup>86</sup>

In Poland, resolutions on the terms of municipal rentals are adopted locally by municipal councils. A council's latitude in this respect is, however, delimited by statutory rules. Art. 21(3) TPA envisages that such resolution is to provide the upper limit of household income which allows for lease, respectively in the social and the general municipal stock, as well as incomes justifying additional reduction of rent. The same article in paragraph (3) item 3 instructs the municipal council to define, within the said resolution, the priority criteria concerning allocation of housing units. In practice, the most fundamental criterion is income. Pursuant to art. 23(2) TPA, contracts for lease of a social unit may only be concluded with a person without any other valid tenure.

As indicated above, social premises are rented not only to those who apply for such assistance, but to individuals evicted from other premises who have been awarded by courts the right to a social unit (art. 14 TPA).

In Czech Republic, priority criteria regarding municipal leases are also determined by municipal councils, however, no statutory guidelines have been enacted in this regard. Since the Czech social housing system is based on subsidies rather than direct allocation of premises, fixed eligibility criteria have been statutorily provided for their beneficiaries. The first type of such subsidy, which can be classified as housing benefit, is addressed to owner-occupiers and tenants registered as permanent residents if 30% (in Prague 35%) of the household income proves insufficient to cover the housing costs and at the same time this 30% part is lower than the relevant prescriptive costs set by law. The other subsidy, "supplement for housing," refers to cases where the income of the person or family, including the housing allowance of the first type, proves insufficient to cover the justified housing costs borne by the family.

In Slovakia, the procedure of selecting tenants eligible for a municipal housing unit is basically set forth in municipal legislation. Processes employed by single municipalities are quite diverse and manifold across the country. Usually a separate collective body, such as a housing commission, social commission or municipal council is responsible for the selection of tenants (or makes a factually decisive recommendation to the mayor).

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<sup>84</sup> See TENLAW: the National Report for Czech Republic, Section 4.3.

<sup>85</sup> Supreme Audit Office, 'Realizacja zadań...', 14.

<sup>86</sup> Supreme Audit Office, 'Realizacja zadań...', 14.

As a recent empirical study<sup>87</sup> of the practices adopted in municipalities demonstrates, most of them employ a system of waiting lists, followed by individual eligibility assessment of the applicant, a lottery, and a few of them resort to a point-score system of prioritized factors or an auction (these methods are often combined). It has been reported that the following criteria have actually been applied by Slovak municipalities:

- permanent residency in the municipality - 95%;
- ability of the applicant to pay the cost of housing - 89%;
- income ceiling of the family (persons in material need) - 63%;
- crisis situation of the applicant - 58%;
- recommendation of an official (e.g. social worker, physician) - 45%;
- unsatisfactory state of current housing (no or substandard housing) - 42%;
- adherence to a particular target group - 21%;
- needs of the municipality - 18%;
- pro-active effort of the applicant to change his or her living conditions - 16%;
- activation of a special acceptant (the municipality) of the subsistence allowance - 13%;
- participation of the applicant in the construction of the housing unit - 11%.

#### 4.3.2. *Affordability*

In all of the three jurisdictions the criteria for determination of the level of rent are similar. Generally, municipalities enjoy some discretion. However, when it comes to the newest stock, emphasis has generally been put on recovery of the investment cost, which can make rent regulation more stringent, as in the case of the youngest Slovak municipal stock or constructions by Polish Social Building Associations.

A Slovak regulatory measure<sup>88</sup> sets forth a formula for calculation of maximal rents for respective public tenancies. For flats finalized on the 1 February 2001 at the latest, the calculation takes into account the area of the flat, category of the flat, its age, features of the utility infrastructure, if public funds were invested in its procurement, and the extent and age of the equipment provided to the tenant along with the flat. For newer flats, on the other hand, the calculation of the rent ceiling is based on the actual acquisition cost of the flat and the yearly rent is set at 5% of the flat's procurement price.

As regards the stock of Polish municipalities, it is the mayor, within the limits set by resolution of the municipal council adopted under art. 21 TPA, that designates the rate of rent per one square meter, taking into account: location of the building, location of the unit within the building, the unit's and building's furnishing with technical equipment and

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<sup>87</sup> A. Suchalová & K. Staroňová, *Mapovanie sociálneho bývania v mestách Slovenska*, (Bratislava: Ustav verejnej politiky a ekonomie, FSEV UK, 2010), 68

<sup>88</sup> Regulatory measure of the Ministry of Finance of SR of 23 April 2008 No. 01/R/2008 on regulation of the rents of flats as amended. Adopted pursuant to sections 11 para. 1 and 20 para. 1 and 2 Prices Act 1996.

installations, their condition and general technical standard of the building. The statutory list of criteria envisaged in art. 7(1) TPA does not cross out other factors increasing or decreasing the unit's value in use.<sup>89</sup>

Under art. 7(2) TPA, it is possible to reduce a rent based on household income criteria, as long as the respective municipal council provides for such option in the resolution concerning rent calculation. Reductions may be granted for 12 month periods, although their prolongation for following yearly periods is not excluded.

Municipal authorities in Czech Republic have more leeway than it is the case in the two other legislations. It is the case because rent control in the Czech Republic has been entirely abolished; the parties are therefore free to agree on the amount of rent. If they fail to agree on a specific amount of rent, the landlord is entitled to an amount of rent that is common for lease of a similar apartment in the same area at the time of contract conclusion. Municipal authorities also provide social housing, as a part of their housing stock. In such cases, the amount of rent should be lower than in the rest of their housing, reserved for the market purposes.

The regulation of rent increase differs considerably between the three legal systems under scrutiny. As there is generally little difference in this respect between the private and public stock in all of them, these issues have already been discussed above in the chapter on rentals without a public task.

The regulation of deposit in the public stock generally does not stray from free market rentals. As discussed above, in Czech Republic, the usual and lawful amount is one month's rent. In the Slovak social rental stock, the admissible level of deposit corresponds to 6 months' rent. In Polish municipalities, in general, it may be as much as 12 monthly rent instalments. It has been explicitly provided in the Tenants Protection Act that deposits may not be charged in the social part of the municipal stock.

Regulation of expenses and utilities in the three countries does not differ specifically for private and public rentals (with and without a public task). Some utilities are supplied under direct contracts between the tenant and the provider, others under arrangements in which the landlord acts as intermediary. These questions have been discussed above in the chapter on free market tenancies.

Also in respect of the distribution of responsibilities for repairs, the regimes are uniform for rentals with and without a public task.

Housing benefits are available in all the three jurisdictions. The Czech system has been analysed in this respect while referring to availability of social premises. It was the case because in the Czech context one may speak of a system of housing subsidies to low-income individuals rather than proper allocation of social premises to such people.

In Poland housing benefits are granted to applicants by municipal councils and paid from municipal budgets. They have been geared to household incomes. Their value depends on the number of persons within the household and floor area of a unit.

Slovak housing benefits are paid by state social security agencies along with allowances to the people in material need.

In the case of Poland and Slovakia, the system seems operative and the money goes to those in real need.

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<sup>89</sup> R. Dziczek, *Ochrona praw lokatorów...*, 80.

#### *4.3.3. Stability*

Although lease is merely an obligational right, in all the three legal systems the entitlements of a tenant are specially protected because of their importance to families and the society as a whole. According to art. 690 of the Polish Civil Code, provisions on the protection of ownership apply appropriately to protection of tenant rights. This refers to remedies available to an owner *erga omnes*, which means that the lessee is protected even against the landlord if, for instance, the latter wanted to evict him unlawfully. Similar regulation can be found in art. 126 (2) CC of the Slovak Civil Code.

In addition, especially in the context of social rentals, tenancy rights in all the three countries ought to be viewed through the prism of fundamental rights of an individual, in particular art. 31 of the European Social Charter. In addition, the Civil Code lease regulations in all the three jurisdictions are composed of mandatory (or semi-imperative) provisions, which means that they cannot be contractually modified to the detriment of the lessee.

The rules determining the tenant's rights to the premises as long as he respects the contract are generally the same for tenures with and without a public task. The right to stay as long as the duties are observed would basically be considered an overprotection of a tenant which is contrary to the rights of the landlord as the owner, even though in the three jurisdictions there are not many valid reasons for termination by landlord which would be truly independent of the lessee.

Also the rules on termination of contracts are not any different from those applying to market tenancies. Depending on the specific ground, the periods of notice provided for landlords may vary from 1 month to even 3 years.

In Poland, protection from eviction is generally stronger for tenants in the public stock. Here, certain categories of evicted individuals must be awarded a social unit as long as they have no other place to go. This refers to pregnant women, minors, disabled or bedridden persons, retirees and pensioners, and the registered unemployed.

Since the collapse of communism, pre-emption rights have been vested in Slovakia and Czech Republic in holders of the former right of use of a flat. Similar rights have been available to Polish cooperative tenants. Recently, similar construction has been provided for the Slovak stock rented to tenants who formerly occupied restituted premises.

In the absence of respective central legislation, municipalities may sell their housing units to the existing tenants on preferential terms. In practice, this has been one of the methods of streamlining municipal housing policies and generating income for necessary repairs in all the three countries.

It may be added that a statutory right to buy the dwelling has been awarded to tenants in Polish Social Building Associations.<sup>90</sup> Unfortunately, the terms of sale are in this case not as beneficial to the buyer as it was expected.

#### *4.3.4. Flexibility*

Termination by tenants is always possible as far as leases for indefinite duration are concerned. However, since social rental arrangements in all of the compared countries are made for a fixed term, unilateral termination by tenant is in fact problematic.

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<sup>90</sup> As a result of the adoption of the Act of 19 August 2011, Official Law Journal 2011, no. 201, item 1180.

In each jurisdiction, it is assumed that termination by notice is also possible in the case of leases for definite duration, however, this must be explicitly accounted for in the contract.<sup>91</sup> The generally applicable period of unilateral notice by tenant would amount to three months in all the legal systems under comparison.

In Poland and Slovakia, sublease always requires consent from the landlord. Since social premises are granted to people without any other place to live, in this context, the problem of sublease seems purely hypothetical.

In Czech Republic, consent of the lessor is not necessary in open-ended leases.<sup>92</sup> Still, such arrangements would be extremely rare in the public stock, also in the Czech context.

## 5. Conclusion

In the second half of the twentieth century, Czech Republic, Poland and Slovakia shared similar history. Most obviously, the links were much stronger between Slovakia and Czech Republic, as for most of that period they were a part of a single state. Until 1993, the two parts of Czechoslovakia had a uniform legal system. After the separation, both had to deal with legislative and social remnants of communism, and both dealt with them in a slightly different way.

The basic Czechoslovak type of tenure, the right of use of a flat, was uncommon for most of the Eastern Block. Under communism, Poland had quite a liberal Civil Code, with the construction of lease preserved, yet, the private law framework for tenancies was topped with an administrative regime of allocation of housing units, which precluded genuine party autonomy. As a result, despite differing legislative solutions, the public centralised system of housing was rather similar.

To some extent, the reforms following the collapse of communism were analogical in the three jurisdictions. The first steps towards a more efficient model of housing were decentralisation and privatisation of the public stock. What initially belonged to the state was now handed over to municipalities, which, in search of funds necessary for proper maintenance of this new acquisition, sold flats to their existing tenants at discount prices.

In Czech Republic and Slovakia, privatisation led to a serious decrease in the size of public housing. On the contrary, Polish municipalities still control a significant portion of the rental stock. This seems partly a result of the extensive legal protection afforded to Polish tenants. The benefits of becoming an owner, even for a preferential price, have been counterbalanced by the extensive tenant protection regime. In fact, municipal leases prove so durable that they often pass from one generation to another. In the nineties, when it was needed to protect less affluent households from the effects of economic transformations, this system of tenant protection seemed an advantage of the Polish model. Later on, however, as the population grew richer, it proved excessively burdensome for landlords. Another problem is that this system does not guarantee tenant mobility.

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<sup>91</sup> See e.g. the decision of the Supreme Court of the Czech Republic No. 26 Cdo 2876/ 2000 of 21 August 2002, practically followed as well in Slovakia.

<sup>92</sup> See TENLAW: the National Report for Czech Republic, Section 6.4.

The demand for rental housing surpasses the offer in each of the compared countries. In Poland, this demand has been satisfied in large measure by the public stock. In Slovakia and, especially, Czech Republic such demand must, for its most part, be responded to by private landlords. Although the situation seems more burdensome to lower-income tenants, return on rental investments is markedly higher in Czech Republic. As a result, reliance on the private sector brings greater potential for new rental constructions.

Rather than direct provision of housing, public support for the needs of the poorest groups of the population in the Czech Republic has taken the form of housing benefits and supplementary subsidies for low income individuals (rather than households). Such subsidies are paid directly to landlords. In this way, the state pumps money into the private rental market. The main disadvantage of such solution is that certain groups of landlords abuse tenants and gather their benefits at the lowest possible cost.

Notably, the Czech and Polish governments promote owner-occupancy as the most desirable form of tenure. This is particularly apparent in the system of subsidies, usually subsidized mortgage loans supportive of young people (aged up to 35) or young couples with children. Recent Slovak policy instruments, on the other hand, seem to favour rentals, as a desirable form of housing from the perspective of labour mobility.

Until recently, there have been hardly any positive forms of support for the private rental sector in the three countries. For many years, it was practically left to itself. Most of this sector was traditionally controlled by individual landlords, tenement owners or persons who acquired a second dwelling (e.g. by inheritance).

The recent legislative interventions, especially in Poland and Slovakia, provide incentives for private landlords to report the contracts to tax authorities and make the rental income taxable. Up to a certain amount of rent, Slovak landlords are exempt from tax. In Poland and Slovakia there is now the possibility available for individual landlords to pay income tax by a lump sum. In addition, the Polish legislator introduced a new type of tenure called incidental lease, which lifts much of the regime of tenant protection and offers more flexibility to the landlord. The benefits of this new solution may be enjoyed only if the rental arrangement is reported to the competent tax office.

In Poland, the opportunity to enter into incidental lease contracts, initially afforded only to natural person landlords, has now been offered also to corporate entities. This is to promote rentals among developers, who were traditionally unwilling to let, and built exclusively to sell. It is the economic crisis and the ensuing shift on the market from owner-occupation to renting that inclined corporate investors to let the unsold parts of their stock. If the growing tendency for corporate rentals persists in a long run, it can only contribute to greater labour mobility in the country.

The report shows the situation on the private and public rental market and legislative frameworks in Czech Republic, Poland and Slovakia. The comparison seems especially interesting in the light of the alleged overregulation in Poland (overprotection of tenants) and underregulation (absence of any specific legislation on public tenancies) in Czech Republic. It seems that both solutions have their advantages and disadvantages. Knowledge of the three legal systems and housing markets, which react to all legislative reforms, sheds light on how the balance can be established between the principle of party autonomy and free market solutions, on one hand, and protection of the weaker party, on the other.



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

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### **Intra-team Comparison Report for**

### **DENMARK, FINLAND, SWEDEN**

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Lead beneficiary: Technische Universiteit Delft

## **1. The current housing situation**

### **1.1. General Features**

#### **1.1.1. Historical evolution of the national housing situation and housing policy**

Compare the historic evolution of the national housing situation and housing policies briefly.

- Very brief overview and comparison of housing situation policies since WW II (or even before, if useful)
- In particular: Are there significant differences as regards the development of the principal types of housing tenures from the 1990s on? If yes, confront the reasons why that happened (e.g. privatization or other policies).
- Compare in particular: To which extent were the countries under review affected by migration within the country, immigration or emigration from/towards other countries inside and outside the EU (including war migration as in Ex-Yugoslavia)

Generally the historic evolution of the national housing situation in the three countries has been very similar without major differences. The differences that might be indicated in the following can generally be explained from different use of financial policies and instruments e.g. types of subsidization over a period of time, as well as the development of different types of dwellings (which will be compared in a later part of the report), more than differences in demand and supply, legislation or general housing policies.

In Denmark as well as in Sweden many people moved to towns and larger cities – especially the capitals Copenhagen and Stockholm – in connection with the transition from an agricultural to an industrial society in the mid and late 19th century even though Sweden was industrialized a bit later than Denmark. The situation was the same in Finland though wars in the 20<sup>th</sup> century also influenced the demand for housing especially in Helsinki (the capital).<sup>1 2</sup>

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<sup>1</sup> Anneli Juntto, *Asuntokysymys Suomessa Topeliuksesta tulopolitiikkaan* ['The Social History of Finnish Housing Policy from Philanthropy to Corporatism'], Helsinki: Valtion painatuskeskus 1990, p. 18.

<sup>2</sup> In Sweden, 40 % of the population live in metropolitan urban areas. Over 2 million, or 22 percent, live in Stockholm. The population of Helsinki is approximately 600.000 (2012 according to [Befolkningsregistercentralen Kommunernas invånarantal i storleksordning 30.09.2012](#)). The greater Helsinki region has a population of approximately 1.3 million out of 5.4 million people in Finland. Today (2013) approximately 1.2 million people live in Copenhagen. That is approximately 22 % of the population in Denmark. The greater Copenhagen region is home to approximately 1.95 million residents. In 1834 119,292 people lived in Copenhagen. In 1890 the population had more than doubled to 312,859; by 1930 it had increased to 612,434. The second largest city, Aarhus, has approximately 256,000 citizens today. Source: Statistics Denmark and Statistics from the Municipality of Copenhagen.

The industrialization did not just mean urbanization, but also a new way of looking at tenancies. Liberal ideas of freedom of contract and the owner's right to freely dispose of their property broke through. These were – in Sweden – expressed in an act from 1907<sup>3</sup> that regulated rented accommodation. This was the first statutory regulation on tenancies in the three countries. Until 1916, there were no specific statutory restrictions in Denmark on the right to freely establish conditions for rental agreements for residential accommodation. The first Danish statutory regulation of tenancy relationships was introduced in 1916, as a result of a desire to accommodate a sharp increase of rents brought about by a considerable increase in running property costs related to the outbreak of the First World War. A similar temporarily price regulation on tenure was introduced in Sweden and Finland (in 1917). The tenancy relationship was until this point regulated solely through the individual agreement between the parties concerned. The reason that there had been no political need to regulate this area up until this point in any of the countries was probably that there was no housing shortage, rising prices or other circumstances which created a great need to protect the parties in the tenancy relationship.

The interwar politics in Finland were concerned with the housing of landless population in the countryside, but also institutional foundations were laid in the 1920's, when the first tenancy act and the first limited-liability housing company's act were passed in 1925. The first permanent Rent Act in Denmark entered into force in 1937. Permanent rules on (indirect) security of tenure were introduced in Sweden in 1939 (by changes of the act from 1907). Due to the outbreak of the Second World War, the regulation of rents again came into focus for socio-political reasons even though the countries were affected by the war in different ways. There was a desire to avoid rent rises caused by the housing shortage, which was brought about by halted construction, rising prices, etc. As a result, from 1939, in Denmark a series of temporary regulations were once again introduced into the rent legislation concerning the scope for setting and adjusting rents due to the Second World War. In 1940 rent regulation came into force in Finland, and in 1942 a temporarily regulation was also introduced again in Sweden. Again the regulation was based on similar purposes in all three countries.

The preconditions for Danish housing policy in the post-war years, and the housing policy reforms from the mid-1960's onwards in particular, can be traced back to the situation that resulted from the outbreak of the Second World War. Housing production remained at a low level during the 1940's as a result of material shortages and building restrictions. As well in Sweden as in Denmark and Finland the rent control and the price control of cooperative apartments (Sweden) was kept when the war ended. In Finland the government first directly subsidised production in the post-war housing shortage and the so-called "arava" system<sup>4</sup> was introduced. This regulation was a "unique" Finnish system that is not known in Denmark or Sweden and it had an impact on the Finnish housing markets from the 1950's onwards.

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<sup>3</sup> The act on access right to immovable property/*Lag om nyttjanderätt till fast egendom*. SFS 1907:36 as part of The Swedish Land Code (*Jordabalkan*) Chapter 3.

<sup>4</sup> The state granted loans with the aim of housing displaced people and of coming to the aid of the demand for labor in urban areas. *Laki asuntolainoista, -takuista ja avustuksista* ['Act on housing loans, guarantees and subsidies'] (224/1949); *Laki asutuskeskusten asuntorakennustuotannon tukemisesta valtion varoilla* ['Act on state-financed subsidisation of housing development in urban areas'] (226/1949).

The rental sector was comprehensively reformed in Sweden during the 1960's, and in 1970. The Swedish Land Code of 1970,<sup>5</sup> which contains statutory rules about real estate, was introduced. The provisions on tenancy were moved to Chapter 12, often called the Tenancy Act. At the same time the "utility value" system was introduced, i.e. that rents shall be determined by a comparison with similar tenancies in an area. A system based on the same principles was already in function in Denmark<sup>6</sup> at the same time though the systems were and are not comparable as to how they regulate the rent and how they are legislated. During the period the industrialisation in Finland began a little later than in Sweden and Denmark, but in 1968 rent control was also introduced in Finland mainly due to active Labour-market unions that found that rent control was an element of incomes policy. It made way for a general rent regulation in 1974.

During the 1970's, Denmark saw more construction activity than ever before.<sup>7</sup> The Million Program in Sweden added 1 million dwellings in the period of 1965-1975. During the second half of the 1970's the problem was rather surplus than shortage, and the interest shifted to managing and developing the existing house stock rather than demolishing it. During this period in Sweden there were huge subsidies to owned housing; the state's subsidized interest rate was lower than the inflation as all interest costs were deductible against the marginal tax rate. Parts of the house stock were still outdated; however social segregation in the modern and high standard rental housing constructed by "The Million Programme"<sup>8</sup> was also recognized as an important problem. Those who lacked financial opportunities to buy a house of their own were dependent on renting a dwelling in a multi-family house.

The Danish home-ownership rate declined a bit after the mid-1980's due to a sharp reduction in the tax rebate on interest payments and not so many new single family houses were built.<sup>9</sup> However, from the mid-1990's building of home owned dwellings picked up again and reached a peak around the turn of the millennium. Since then it has shown a downward trend.

In Sweden – from 1980 to 1990 – managing and developing the housing stock continued to be the main problem, together with a shortage of small apartments and

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<sup>5</sup> Jordabalken – SFS 1970:994.

<sup>6</sup> Can be dated back to 1923. Consolidated Act no. 228 of May 18<sup>th</sup> 1923.

<sup>7</sup> Construction in Denmark reached a peak in 1973 which has yet to be surpassed: Almost 56,000 new homes were completed mainly in the private sector. As a result of rising construction costs, the introduction of VAT on construction, rising interest rates and the oil crisis, new construction decreased from again the mid-1970's.

<sup>8</sup> The Million Programme was implemented between 1965 and 1974. The aim was to construct one million new modern dwellings within the ten years period, and the idea was that everyone should be able to have a home at an affordable price. This could be solved by subsidies which made it possible for families with children to rent or to buy a home of their own. Country report of Sweden section 1.1.1.

<sup>9</sup> The drop in the 1990's was most pronounced for detached and semi-detached dwellings – typical for home ownership – where the number of completions dropped to only 25 % of the peak year completions, and compared to a drop to 50 % for multi-storey dwellings – typical for the rental market. The proportion of the total housing pool in Denmark made up of private-sector rental properties has more than halved during the past 40 years. From accounting for approx. 40 percent of dwellings during the 1960s, this form of housing today accounts for around 17 %.

student apartments. The economic crisis in the early 1990's made it clear that the housing subsidies must be reduced. Government expenditure on interest subsidies had increased rapidly due to high interest rates and an unregulated credit market, which prompted the Government to take action.<sup>10</sup> From the turn of the millennium onwards, the focus on housing policies has been a rational use of energy and availability, but also indoor environment and ecology.<sup>11</sup>

Significant for the period in Finland leading to and including the seventies, when most suburbs were built, was that a state loan was the only housing loan that people could get. Financial markets were regulated, and kept on being regulated until 1983–1987.

In Denmark building activity picked up from around 1995; however, the economic crisis from 2007 onwards has negatively affected the activity. The relative supply swing towards rental housing in the mid-1990's can be said to be politically influenced mainly because the non-profit sector mainly was in multi-storey buildings and the supply of new units required building permits from the government. In Sweden the biggest change in the different tenures from the 1990's and onwards was the share of tenancies in multi-family houses, which has declined.<sup>12</sup>

The late-eighties "housing bubble" had a large impact on the housing market in the three countries, with rent increases followed by political reforms in the start of the 1990's. In Finland, the Finnish housing market were influenced by three major economic policy factors during this period. In 1993, mortgage debt deduction was transferred from a progressive tax to a basis equal for all; from 1991 to 1995, tenancy law was liberalised; and during the new currency euro, interest rates have been kept low by the European Central Bank.

The last factor has been the key reason for the continued, even increasing, attractiveness of homeownership in the new century in Finland especially. At the same time, state-subsidised developments were moderate, though it was promoted counter-cyclically in 1992–1993 and again in 2009–2010, targeting both rental housing and the "intermediate" tenures between ownership and renting. Once the latest counter-cyclical economic policy ended, state-subsidised production of especially ordinary rental apartments – as opposed to rental apartments for special groups, such as students, the elderly, and the disabled – has reportedly been in a downward spiral (in 2011) and far behind objectives (in 2013). The consecution in state financing for ordinary rental dwellings was phased out at the turn of the century. In the 2007 budget, there was no space for direct state-loans any more.

Denmark and Sweden did not (and has not (yet) got) euro as their currency but interest rates has been kept low as well mainly as a consequence of the relation to the other EU

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<sup>10</sup> Swedish Board of Housing, Building and Planning, "*Bostadspolitiken - Svensk politik för boende, planering och byggande under 130 år*", (2007) p. 21.

<sup>11</sup> Swedish Board of Housing, Building and Planning, "*Bostadspolitiken - Svensk politik för boende, planering och byggande under 130 år*", (2007) p. 16.

<sup>12</sup> Between 1990 and 2007, the share of tenancies in multi-family houses decreased from 75 % to 69 %. At the same time, the share of owner-occupied apartments in multi-family houses increased. The sharpest decline in rental units, and the largest increase of owner-occupied dwellings during this period of time was in Stockholm. The distribution between rental and owner-occupied dwellings did not change outside the metropolitan areas.

countries. All three countries have independent central banks that may change rates if it is necessary to (try to) avoid inflation.

Housing policies in the three countries has mainly been the same throughout the years. Swedish housing policy in the post-war period has focused on providing good-quality housing for the whole population, without any purpose to build or grant special housing for low-income households. The aim has been to create good housing for everybody, by taking a broad approach to the complexities of the housing market. The idea behind this strategy has been that by improving the overall housing situation, the situation for vulnerable households would also improve. There was a change in Swedish housing policy in the last decade of the 20th century, when special economic regulations that had previously existed for the public housing sector were abolished. The main focus on both a national and a regional level today is the shortage of housing in the urban areas, and the municipal responsibility for housing construction is currently being debated in a number of government inquiries.

Danish housing policy has also in general had the main aim – through a comprehensive supply of housing to ensure that good (and healthy) housing is available to all of the population. In recent years, there has also been a focus on ensuring that greater consideration is given to the environment and energy efficiency in connection with new construction and refurbishment. The taxation of homeowners has been put on hold at a certain level, and welfare in other areas is not being financed through the tightening of this taxation.

In Finland realising housing at a reasonable price for all households is perhaps the first aim of housing policy. It is pursued through the system of production support, which includes interest subsidies and up-front grants for production and renovation. This system has also served the aims of counter-cyclical economic policies of the government. Based inductively on the policies enacted, another aim of housing policy has seemed to be the promotion of owner occupancy.<sup>13</sup> Ensuring possibilities of housing for low-income households is one policy aim on the ground that a dwelling is a necessity. In urban areas, the prevention of differentiation processes in residential neighbourhoods is another aim of housing policy. These aims are integrated in the purpose of tenant selection in the rent-regulated state-subsidised social rental dwellings.<sup>14</sup>

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<sup>13</sup> A final report of the Working Group for Developing the Finnish Tax System (2010) listed this aim in the second place, right after the realisation of housing at a reasonable price for all households: 'A second typical aim of housing policy seems to be to encourage homeownership. This is manifested, among others, in the fact that owner occupancy is treated more lightly in taxation than rental housing is, and that first-home buyers, in particular, are allocated targeted tax subsidies.' *Verotuksen kehittämistyöryhmän loppuraportti* (Final Report of the Working Group for Developing the Finnish Tax System), Valtionvarainministeriön julkaisuja 51/2010, Helsinki: Ministry of Finance 2010, 160.

<sup>14</sup> The purpose of tenant selection is that interest-subsidy rental apartments are assigned to households having the most acute need for a rental dwelling, whilst striving for a varied community structure in the building and a socially balanced neighbourhood. Act on Interest Subsidy for Rental Housing Loans and Right of Occupancy Housing Loans, June 29, 2001/604, 11a (The purposes of resident selection) August 18, 2006/717; correspondingly, *aravarajoituslaki* 17.12.1993/1190, 4a ['The purposes of resident selection'] (August 18, 2006/716).

A lately emerging aim of housing policy has been the prevention of urban sprawl. This aim is related to the environmental impact of housing and transportation.<sup>15</sup>

Migration, immigration or emigration, has played a more indirect role on housing policies and tenancy law regulation as a whole in the three countries, and the means behind regulation are mainly the same though the sizes and nationalities of groups of immigrants differ between the countries.

Immigration has no direct influence on the current general housing situation in Denmark from a tenancy law point of view. Legislation on social services includes regulation on refugees and asylum seekers regarding accommodation. This is mainly on a municipal level. It is a fact that immigrants come to Denmark<sup>16</sup> and that they have a demand for housing, but this has not created major problems regarding demand and supply. Housing policies regarding immigrants on the rental market has been focused on ghettoization. The initiative aimed at combating ghettoization is partly justified based on the fact that large groups of immigrants and their descendants – “people of non-Danish ethnic origin” – are becoming concentrated in certain residential areas. Part of the initiative aimed at ghetto development therefore represents an attempt to offer incentives to certain population groups to settle in other residential areas not characterised by ghettoization. However, the legislation is not directly aimed at any individual or specifically named population groups. The definition of whether a certain area is a ghetto is defined by law under certain criteria.<sup>17</sup>

In Finland the dispersal of immigrants is pursued through municipal housing policies and urban planning. The government advises the municipalities on the policy goals, for instance, through such guidelines as a framework policy in 1997 and migration policy programme in 2006, but the municipalities independently decide on policy implementation.<sup>18</sup> Refugees and asylum seekers are the two groups most strongly targeted by the state and the municipalities regarding accommodation.<sup>19</sup> In addition, the state gives housing renovation grants, subsidising renovations of the apartments of elderly and disabled people<sup>20</sup> and the construction of lifts<sup>21</sup> and other improvements enabling elderly or disabled people to access and move in the building.<sup>22</sup>

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<sup>15</sup> The list of housing policy aims is based on *Verotuksen kehittämistöryhmän loppuraportti* (Final Report of the Working Group for Developing the Finnish Tax System), Valtionvarainministeriön julkaisuja 51/2010, Helsinki: Ministry of Finance 2010, p. 159–161.

<sup>16</sup> Approximately 542,738 immigrants and/or their ancestors live in Denmark – 9.8 per cent of the total population (2010). The total population is expected to grow from 5.8 million today to 6.1 million people in 2050.

<sup>17</sup> A often used definition of ghetto is “an extreme form of residential concentration; a culture, religious or ethnic group is ghettoized when a high proportion of the group lives in a single area , and b) when that group accounts for most of that group in the area” (The Dictionary of Human Geography, 2000).

<sup>18</sup> Mari Vaattovaara, Katja Vilkama, Saara Yousfi, Hanna Dhalmann and Timo M. Kauppinen: *Contextualising ethnic residential segregation in Finland*, p. 233.

<sup>19</sup> Mari Vaattovaara, Katja Vilkama, Saara Yousfi, Hanna Dhalmann and Timo M. Kauppinen: *Contextualising ethnic residential segregation in Finland*, p. 234.

<sup>20</sup> *Laki asuntojen korjaus-, energia- ja terveyshaitta-avustuksista* 1184/2005, sections 5(1), 6(1.1 and 2), and 8(1).

<sup>21</sup> *Laki asuntojen korjaus-, energia- ja terveyshaitta-avustuksista*, section 6(1.4).

<sup>22</sup> *Ibid.*

Immigration is also highly concentrated to the metropolitan areas. Over the past fifteen years, Sweden's population has increased mainly due to more people immigrating to Sweden than those who emigrated. Population projections indicate that immigrants will continue to contribute to a significant portion of the population increase in the foreseeable future, with more people applying for asylum and receiving a residence permit in Sweden in recent years.<sup>23</sup> For the majority of the immigration groups, a concentration to the metropolitan areas is common and today immigrants can move to the place they want to live without restrictions. This was not the case earlier.

### 1.1.2. Current situation

- (Give a brief comparative overview of the current situation.
  - Compare in particular: What is the number of dwellings? How many of them are rented vs. owner-occupied? Is the housing situation satisfactory from a tenant perspective, especially in terms of supply and quality?)

The different types of dwellings and tenures in the three countries and the different available statistics make it difficult to draw any conclusions on the spread of households in different sizes of buildings. The larger part of people in all three countries is home owners, when including co-operatives. It seems though that a larger part of the households in Sweden and Finland live in co-operatives of different kinds. This is probably due to the fact that these types of dwellings are more popular in Sweden and Finland than in Denmark and the fact that the development of these types of dwellings has had more focus in housing policies in Sweden and Finland.

The approximate number of households in Denmark in 2012 was 2.5 million. The approximate number of dwellings in Denmark in 2011 was 2,745,000 million. 49.2 % was owner occupied. 7.3 % co-operatives. 18.9 % is rented social housing. 14.1 % are dwellings in the private rented sector. There were 465,210 private rented dwellings in 2010. Approximately 70 % were in buildings with more than 3 units. The rest were in single family houses and buildings with 2 units.<sup>24</sup>

There were 4,524,292 million dwellings in Sweden in 2011. Of these dwellings, 56 % were located in multi-dwelling houses and 44 percent in one or two dwelling buildings. Of a total of 4,582,000 households in Sweden in 2010, 41 percent lived in rented dwellings, 20 percent in owner-tenant<sup>25</sup> apartments, 34 percent in owner-occupied

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<sup>23</sup> Statistics Sweden, Demographic reports 2008:4, “*Immigrants' migration patterns*” (2008) pp. 3. In 2012, more than 111,000 people had received work and residence permits in Sweden. That is the highest annual figure to date and represents an increase of 19 percent compared with 2011. The Swedish Migration Board, <http://www.migrationsverket.se/info/6627.html>, (search completed 30.11.2012).

<sup>24</sup> Statistics Denmark and Whitehead, Christine et al.: *The Private Rented Sector in the New Century: A Comparative Approach*. København: Boligøkonomisk Videncenter, 2012.

<sup>25</sup> The form (bostadsrätt) was created in 1930. For a long time (1942-69) a strict price regulation applied and the holder of a co-operative right was not allowed to change the apartment. Nowadays the apartments can be sold at a market price and can be changed in anyway the owner wants as long as it

dwellings (self-owned one or two dwelling buildings) and 5 percent lived in other forms of tenure.<sup>26</sup> 2 million dwellings in one- and two dwelling buildings<sup>27</sup> and approximately 2.5 million dwellings in apartment buildings, of which 1,588,717 are tenancies, 947,102 are cooperative apartments and 566 are condominiums.

In Finland the number of dwellings is 2.8 million, about 2.5 million of which are permanently occupied.<sup>28</sup> About one third of permanently occupied dwellings are rented. At the same time, only a quarter of the population lives in a rented dwelling: in 2012, 3,817,670 people lived in an owner-occupied home, 1,289,969 in a rented dwelling, and 200,846 in a right-of-occupancy dwelling.<sup>29</sup> The discrepancy rises because the size of renter households (on average 1.65 persons in 2011)<sup>30</sup> is smaller than the size of owner-occupier households.

The supply of rental housing seems to be a general problem in the largest cities in Sweden and Finland and no solution to this has been sufficiently generated yet.

In Denmark there is no general housing shortage and the system for buying, selling and renting of property appears to be fair and well balanced. In the major urban areas and cities with institutions for higher education, particularly Copenhagen, Aarhus, Odense and Aalborg there is strong demand for attractive rented housing and for low-cost rented housing, but there is no documentation for general shortage of housing – if you do not want to live directly in the centre of the city. Studies say that in some areas there might be an increasing rental demand from older persons who need rental dwellings. Furthermore, increasing rental demand has emerged, caused by earlier departure of children from the parental home and an increasing tendency towards more single living. As a result there might be a demand for more rental housing in the future.<sup>31</sup> In the longer perspective, declining building activity in the recent years could also create demand for more rental housing in general.

There is a shortage of rental housing in Sweden, especially in Stockholm (the capital), but also in the larger cities of Göteborg and Malmö, but also in other cities with a university. Overall, there is a net shortage of 92,000 to 156,000 dwellings in the whole country, depending on which economic model is used. This means that the supply

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does not cause damage to other apartments or the house. Today it is regarded as a de facto ownership, even though it is formally a co-operative.

<sup>26</sup> According to calculations made by Statistics Sweden [http://www.scb.se/Pages/TableAndChart\\_\\_\\_\\_335518.aspx](http://www.scb.se/Pages/TableAndChart____335518.aspx).

<sup>27</sup> Swedish National Board of Building, Housing and Planning, "Boverkets lägesrapport - oktober 2012" pp. 7, 11.

<sup>28</sup> 2,517,000 at the end of 2009. Dwellings and Housing Conditions, Statistics Finland at [http://www.stat.fi/til/asas/2009/01/asas\\_2009\\_01\\_2010-11-12\\_tie\\_002\\_en.html](http://www.stat.fi/til/asas/2009/01/asas_2009_01_2010-11-12_tie_002_en.html).

<sup>29</sup> Dwellings and Housing Conditions, Statistics Finland at [http://www.stat.fi/til/asas/2012/01/asas\\_2012\\_01\\_2013-10-18\\_fi.pdf](http://www.stat.fi/til/asas/2012/01/asas_2012_01_2013-10-18_fi.pdf).

<sup>30</sup> Dwellings and Housing Conditions, Statistics Finland at [http://www.stat.fi/til/asas/2012/asas\\_2012\\_2013-05-22\\_fi.pdf](http://www.stat.fi/til/asas/2012/asas_2012_2013-05-22_fi.pdf).

<sup>31</sup> Morten Skak: *Projecting Demand for Rental Homes in Denmark*. European Journal of Housing Policy, Vol. 8, Nr. 3, 2008, s. 258. Hans Skifter Andersen, Morten Skak: "Privat boligudlejning - Motiver, strategi og økonom", SBI 2008:01. Hans Skifter Andersen: *Private udlejningsboligers rolle på boligmarkedet – en registeranalyse*. Statens Byggeforskningsinstitut 2007.

needs to increase by between 102,000 and 163,000 homes where there are shortages, and reduced by 7,000 to 10,000 homes in the regions where there is a surplus.<sup>32</sup>

In Finland 270,000 dwellings, or close to 10 % of the stock, are vacant. The problem of vacant dwellings affects municipalities in the northern and eastern Finland, with internal migration flowing into towns in the south and in the west. 23,000 dwellings are being built annually (on average 28,000 since 1990).<sup>33</sup> While new construction in the greater Helsinki region has slightly surpassed the increase of household-dwelling units in 2003–2009, in the city of Helsinki new construction has fallen below that rate, intensifying demand there.<sup>34</sup> The shortage of housing for middle-and-low-income classes in Helsinki has not constrained the desire to migrate there. Larger apartments, especially those with three rooms and a kitchen, may sometimes be vacant even in cities. This is because more and more people live alone, not only in Helsinki, making the demand for smaller apartments higher.<sup>35</sup>

Average useful floor area per dwelling in Denmark in 2009 was 114.4 m<sup>2</sup>. That equals 51.4 m<sup>2</sup> per person. This is probably a large area compared to other countries, but the Danes have been accustomed to living in large dwellings when possible, and because of this demand for larger apartments and houses, floor area in new-build houses has also increased. It is not uncommon that a family of two adults and two children have a house larger than 150 m<sup>2</sup>. This development has continued through recent years. Of course, students and other persons with lower incomes do not have the possibility to rent or buy larger homes. Therefore smaller apartments are still being built.

According to the OECD, 98.4% of the dwelling stock in Denmark in 2004 was equipped with central heating, 94.6% with a fixed bath or shower inside the dwelling, 99.5% with piped water inside the dwelling and 97.1% with a kitchen. In 2009 96% of the dwelling stock had a bath and a shower. The number of homes with installation deficiencies (owner and tenant) has been halved, from around 423,000 in 1980 to 208,000 in 1999. Today, there are around 178,000 dwellings without a bathroom, 58,000 without a toilet, and 52,000 without contemporary heating. Dwellings with deficiencies are particularly prevalent in the municipalities of Copenhagen and Frederiksberg (a total of 71,000).

In 2010, 100 percent of the total dwelling stock had bath or shower, hot running water and central heating in Sweden.<sup>36</sup> The average number of rooms per dwelling in 2008 was 4.2 rooms. The kitchen is usually not counted as a room in Sweden.<sup>37</sup> The average useful floor area per dwelling of the total dwelling stock in 2008 was 92.8 square meters.<sup>38</sup>

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<sup>32</sup> <http://www.boverket.se/Om-Boverket/Nyhetsarkiv/Vad-ar-bostadsbrist/>.

<sup>33</sup> 2011. Dwellings and Housing Conditions, Statistics Finland at [http://tilastokeskus.fi/til/asas/2011/01/asas\\_2011\\_01\\_2012-10-24\\_kat\\_002\\_en.html](http://tilastokeskus.fi/til/asas/2011/01/asas_2011_01_2012-10-24_kat_002_en.html).

<sup>34</sup> Kivistö, pp. 10–11.

<sup>35</sup> Dwellings and Housing Conditions, Statistics Finland, “Nearly one-quarter of the population lived in rented dwellings in 2011”, 24 October 2012, at [http://www.stat.fi/til/asas/2011/01/asas\\_2011\\_01\\_2012-10-24\\_tie\\_002\\_en.html](http://www.stat.fi/til/asas/2011/01/asas_2011_01_2012-10-24_tie_002_en.html).

<sup>36</sup> Housing statistics in the European Union 2010, p. 53.

<sup>37</sup> Housing statistics in the European Union, p. 52.

<sup>38</sup> Housing statistics in the European Union 2010, p. 51.

In Finland the quality – from the same measures – was almost at the same level in 2008: 99 % had bath facilities, 93 % central heating and 96 % flush toilet.<sup>39</sup> The average useful floor area per dwelling has grown by 20 square meters since the early seventies, but it is still relatively small (79.9 square metres per dwelling and 39.6 square metres per person).

### 1.1.3. Types of housing tenures

(Note: Give only a short overview here, as the questionnaire will return to this subject under 3)

- Compare, also on the basis of table 1, the most important tenure structures and indicate their share in the countries under review:
  - Home ownership, including
  - Intermediate tenures, e.g.
    - Condominiums (if existing: different regulatory types of condominiums)
    - Company law schemes: tenants buying shares of housing companies
    - Cooperatives

In Denmark as a percentage of the dwelling stock, approximately 44 % is home ownership – both single family houses and condominiums fall under this category.

In addition to conventional home ownership, Denmark has private co-operative ownership (*andelsboliger*) where owners buy a “society owner share” from the former owner of the dwelling (most often an apartment), and pay the owner society a comparatively low rent for the right of occupation . The price of the society owner share is set according to rules that keep the share price growing over the years, but usually below the market price. The monthly rent covers, among other expenditures, debt servicing and exterior maintenance. When owners want to leave and sell their share, they are free to do this, but potential buyers must – in some cases may – be taken from a waiting list. The board is elected by the shareholders/owners of the co-operative. The legal relationship between the co-operative housing association and the individual shareowner is regulated by the association’s articles of association and not by the rent legislation. In 2010 there were 202,000 co-operative ownerships in Denmark in approximately 10,000 co-operative associations. This equals approximately 7.4 % of the total dwelling stock.<sup>40</sup>

Nearly 70 % of the population are home owners in Sweden. Included in this figure is a form of tenure that is somewhat unique. A formally co-operative apartment (*bostadsrätt*) is a housing co-operative based on a tenant-ownership, where the tenant is a member of the housing co-operative and owns a share of the house. This form of tenure includes all important aspect of ownership in much the same way as condominiums. These became available in apartment buildings for the first time under Swedish law on the 1st

<sup>39</sup> [http://www.stat.fi/til/asas/2008/asas\\_2008\\_2009-12-15\\_tau\\_001\\_en.html](http://www.stat.fi/til/asas/2008/asas_2008_2009-12-15_tau_001_en.html).

<sup>40</sup> According to the Danish “BBR-register”. See “Rapport afgivet af en arbejdsgruppe under Erhvervs- og Selskabsstyrelsen: Arbejdsgruppe om panthavers grundlag for at overtage en andelsbolig”, 2011.

of May 2009. It had previously only been allowed in one or two dwelling houses. There were 182 condominiums in Sweden in 2010.

A small fraction, less than 1 % of the total dwelling stock, consists of co-operative rental dwellings. Co-operative rental dwellings are a mediate between rented and co-operative apartments where the tenant rents from an economic association but does not own a share of the house.

In Finland the basic form of direct property ownership contains both the land and the buildings on it, but tenure structure features prominently a legal entity, inserted between the owner-occupant and the property. Nearly all residential multi-storey buildings and many row and semi-detached houses are company-owned, usually through a specific limited-liability company called, here for short, “housing company” (limited-liability housing company, *asunto-osakeyhtiö*: literally “dwelling limited company”, although the word *taloyhtiö*, “house company”, is in wide colloquial use).<sup>41</sup>

Intermediate tenures in Finland are mainly right-of-occupancy dwellings and also partial-ownership (rent-to-buy) arrangements, which are in contemporary debates sometimes treated as a separate tenure. Modelled on the Swedish *bostadsrätt* (a “right of accommodation” in a housing cooperative) as it stood in the nineteen-sixties, the Finnish “right of occupancy” (*asumisoikeus*, literally “housing right”) was introduced by legislation in 1990.<sup>42</sup> The buyer of a right of occupancy disburses an up-front payment – fifteen per cent of the value of the dwelling – and a monthly residence charge – calculated based on the costs of maintenance and financing renovations in the buildings of the same owner. The holder of the right may not be served notice. The right is transferable, on a price no higher than the original, indexed, price. The departing resident notifies the owner and, if a new occupant cannot be found, the owner has the duty to redeem the right, within three months of notification, at the indexed price. While the responsibility for upkeep belongs in the owner, the right-holder may make improvements on the owner’s permission and claim reasonable compensation when moving out.

Right-of-occupancy dwellings have been state-subsidised, and they are all under permanent restrictions within the social housing production system. Half of the right-of-occupancy homes are in the Helsinki region.<sup>43</sup>

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<sup>41</sup> An alternative arrangement for mainly semi-detached houses is an “agreement of joint possession”, which can be registered, under the Land Code (*maakaari* 540/1995, unofficial translation at <http://www.finlex.fi/fi/laki/kaannokset/1995/en19950540.pdf>, section 14:3.), in the Land Register (*kiinteistörekisteri*, “real estate register”). Parties, who agree on joint ownership to an estate and a house, or to either one separately, may define, for instance, the parts of the estate and building that each owns. Two parties may prefer this arrangement to setting up a housing company. The benefits include the possibility of using as security the real estate rather than shares, the fact that a housing company can be costly to operate, and the eventuality that a fifty-fifty deadlock can cripple the use of property in a housing company. On the other hand, a housing company has the advantage of a “standard contract” called the Housing Companies Act and the by-laws drafted in accordance with it. In the absence of these, distributing the costs of water, waste disposal, energy and possible repairs may create additional transaction costs.

<sup>42</sup> Right-of-Occupancy Housing Act 650/1990; Act on Right-of-Occupancy Associations 1072/1994.

<sup>43</sup> Following the financial crisis of 2008, this form of tenure was among the supported by the counter-cyclical economic policies of the government and, for instance, 2,897 dwellings were started in 2009 and 2,123 dwellings in 2010, bringing the number of right-of-occupancy apartments close to 44,000.

Another intermediate tenure was initiated by banks and construction companies during the recession of the early nineties, when developers were left with unsold flats. In these ‘partial-ownership’ arrangements, the buyer invests a portion – lower than the normal upfront payment for a housing loan, say, ten per cent – of the purchase price, receives a corresponding minority of the shares, and becomes a joint-owner with the seller. The apartment is rented through a fixed-term tenancy contract, the lease conferring to the tenant the right to the possession of the apartment. During the time of the tenancy, the seller (or some institutional landlord to whom the shares have been transferred) remains the majority shareholder, while the tenant has the right to redeem up to 49 % of the shares. At the end of the fixed term, or during a further agreed period, the tenant may redeem the rest of the shares and can become the owner.

- Rental tenures
  - What types of rental tenures with and without a public task exist?
  - What is their share in the housing stock?
  - What can be said in general on the quality of housing provided (parameters: space, fittings and other equipment, state of maintenance/need of refurbishment etc.)?
  - Which actors own these dwellings (private persons, profit or non-profit organizations, etc.)?

From an overall formal perspective, the types of rental tenures in the three countries are very much alike – mainly due to the fact that the countries are “welfare states” where the aim of housing policies has been providing good-quality housing for the whole population, even though it seems like Denmark have had a larger focus on building special housing for low-income households. For historic reasons the Finnish and the Swedish types are also based on the same principles. However, the more one look into details the more differences appear.

In Denmark the private rental housing stock encompasses housing in three main types of property:

- 1) Housing in actual private-sector rental properties owned by professional landlords,
- 2) Rented owner apartments (condominiums) and single-family detached houses of various sizes owned by non-professional landlords
- 3) Rented cooperative housing

A quarter of all private-sector rented housing consists of rented owner apartments (condominiums) often owned by a non-professional landlord.

Within the rented housing market, there are also a total of approx. 595,000 social rented dwellings (equivalent to approximately 20 % of all housing stock). These dwellings fall under a category of rented houses which can be called “social housing” by Danish definition.<sup>44</sup> The non-profit housing covers more than “pure” social housing defined as

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<sup>44</sup> Social housing is the Danish non-profit rental housing sector (“almennyttige boligselskaber”) that amounts to approx. 55 % of the rental market (with private – or possibly for-profit – rental housing making up the rest).

homes for people in need. It is supposed to be subsidized housing for the low- and middle-income groups, and was one of the gems of the post-war “Danish Social Democratic welfare state”, yet today not only people in need of a home are placed in social-housing rented apartments, and a lot of low- or middle-income groups do not want or need (for economic reasons) to live in social housing. Everybody in general can apply for a home in a social housing apartment.

The same type of system applies in Sweden. Rental tenures with and without a public task are not distinguished, since the term social housing is not used in Sweden. There are no rental tenures for lower income households especially, since there is no higher income limit to become a tenant. But about half of the rental sector is owned by municipally owned housing companies, whose goal is to provide housing for all, regardless of gender, age, origin or incomes. After time on a waiting list, the dwellings are allocated. There is no upper income limit for potential tenants to avoid stigmatization, and as long as tenants afford the rent, no lower income limit. Some tenants will need a housing allowance though to be able to pay the rent.

In practice, the usual tenants are not wealthy people, but there are a lot of middle-income households living in houses owned by municipal housing companies. For Swedes in general, there is not much difference between private and public rental housing, perhaps mainly because rents do not differ significantly. The rents do not differ that much because dwellings of equal “utility value” should have about the same rent, according to the “utility value” principle.<sup>45</sup>

In Finland residential renting divides into two segments which are roughly equal in size. Besides private markets, there is a state-subsidised, social rental housing sector, distinct when it comes to the owners of the dwellings (municipalities and general-interest organisations), regulated rent, and an administrative tenant-selection procedure. The social rental housing system is grounded on temporary “avara restrictions”, which are conditions placed upon state subsidies and which last only for a number of years following the grant of a subsidy for production or renovation. Afterwards, the apartments can be rented normally in the market, and nothing protects the tenant beyond the ground rules of private law. Rents in social rental dwellings are regulated to cover the financing costs of constructing the building and the maintenance costs of the real estate (cost recovery rent). The same unitary tenancy contract regime applies to all other aspects of the landlord-tenant relationship.

#### **1.1.4. Other general aspects of the current housing situation in comparative perspective**

- (Are there lobby groups or umbrella groups active in any of the tenure types?)
- Is vacancy of dwellings a problem (if appropriate, also deal with countermeasures including sanctions)?

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<sup>45</sup> <http://www.europolitics.info/sweden-social-housing-under-businesslike-principle-art321378-3.html>.

- Are there important black market or otherwise irregular phenomena and practices on the housing market (especially the rental market)?

In all three countries there are active lobby and umbrella groups for private property owners/landlords as well as for tenants including cooperative housing societies as well. The largest organisations in all countries have been involved in political negotiations concerning major revisions to the legislation and have considerable political influence in relative terms.

In Sweden the number of vacant apartments decrease and the number of vacancies is much lower than in Finland and Denmark. In September 2011 1.9 % of all tenancies (27,000) were vacant in multi-family houses. In March 2013 approximately 0.9 % of the total stock of rented dwellings was registered as vacant (13.648 apartments).<sup>46</sup> A part of the difference might be explained by the use of different methods on registering when a dwelling is vacant. Otherwise the explanation can be that there is a general housing shortage most severe in the larger cities in Sweden. The vacant dwellings in Denmark and Finland are probably placed mainly in rural areas and smaller cities. With regard to Sweden 7,000-10,000 of the empty apartments is in rural areas and should be demolished. The near absence of other empty apartments is sign of the Swedish general housing shortage.

In Finland close to 10 % (270,000) of the dwellings are vacant.<sup>47</sup> The problem of vacant dwellings affects municipalities in the northern and eastern Finland, with internal migration flowing into towns in the south and in the west. But also in the city of Helsinki, around 24,000 apartments or between 7 and 8 % of the stock are vacant today.<sup>48</sup> Larger apartments, especially those with three rooms and a kitchen, may sometimes be vacant even in cities (see above as well – section 1.1.2).<sup>49</sup>

In 2011 approximately 187,246 households in Denmark where registered as vacant. That equals around 6.8 % of the total number of households.<sup>50</sup>

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<sup>46</sup> The number of apartments available for immediate rent was about 16 000 (or 1.1 %) in 2011. In March 2013 there were 13,648 dwellings vacant, 5709 in the public sector and 7939 in the private sector. Statistics Sweden Yearbook of Housing and Building Statistics 2012 p. 33. Of the 27.000 empty flats 7000-10.000 are empty because they are in rural areas were people do not need them. The other are empty because the landlord wants them to be (reparations, the landlord may need the apartment himself in the near future).

<sup>47</sup> 2011. Dwellings and Housing Conditions, Statistics Finland at [http://www.stat.fi/tup/suoluk/suoluk\\_asuminen\\_en.html](http://www.stat.fi/tup/suoluk/suoluk_asuminen_en.html). In most new multi-storey buildings, each apartment has an electric sauna, so the number of saunas is increasing rapidly.

<sup>48</sup> Any apartment without a recorded resident according to the Population Information System is counted as vacant, which means that secondary homes and holiday homes enhance the vacancy rate.

<sup>49</sup> Dwellings and Housing Conditions, Statistics Finland, "Nearly one-quarter of the population lived in rented dwellings in 2011", 24 October 2012, at [http://www.stat.fi/til/asas/2011/01/asas\\_2011\\_01\\_2012-10-24\\_tie\\_002\\_en.html](http://www.stat.fi/til/asas/2011/01/asas_2011_01_2012-10-24_tie_002_en.html).

<sup>50</sup> Statistics Denmark. Vacant households in Denmark are registered as households in which no persons are registered with an address. This means that the number includes households without residence requirements. This means that the figures do not actually show that there are many vacant dwellings that cannot be rented out or sold. For example, empty dwellings will be registered when tenants vacate properties, for new-builds or other interim circumstances. In 2007, there were 133,530 empty dwellings, a

In Sweden “black market” problems on the housing market exist. In Finland some minor problems of this character can also be identified. In Denmark the problem is not documented though unauthorized subletting and attempts on tax evasion exists. The reason why there are no significant black-market problems on the housing market in Denmark in general or the rental market specifically is mainly the fact that is no general housing shortage and because the system for buying, selling and renting of property appears to be fair and well balanced. In some areas a high demand for apartments for especially students may though cause some pressure on the housing market that may cause a black market situation on a small scale. There is no documentation though as to the size of this alleged problem.

There is no clear definition of what a black housing market is in Sweden, although the Swedish National Board of Building, Housing and Planning has made a definition which is divided into unauthorized subletting, trading with leases and fraud. The current law does not prohibit paying for a contract but it is illegal to sell a lease. A complaint is rarely made to the police when it comes to the parts of the black housing market dealing with unauthorized subletting and trading of leases. The cases which are reported to the police and leading to prosecution usually are concerned with fraud.<sup>51</sup> It is impossible to define the extent of the black housing market in number of transactions or financial turnover since it is a criminal activity. Therefore, the figures present in discussions and debates must be considered unsafe. The existence of a black housing market is mainly linked to areas with housing shortages and especially shortage of rental properties. A report from the Swedish Property Federation from 2006 indicated that the trade with leases is worth 1.2 billion a year in Stockholm.<sup>52</sup>

Some “black-market” phenomena have existed or exist in the surroundings of housing markets in Finland. One widespread practice has been the direct payment for repair and other household services (instead of rent payment or agreements in a contract), and to combat the tax evasion the government created a tax credit for domestic help. Among other cases, there are question marks over the number of vacant dwellings in the city of Helsinki and sometimes students living in apartments owned by their parents have received subject-based housing allowance by merely moving their home address to their friend's house.

## 1.2 Economic factors in comparison

### 1.2.1. Comparative view of the housing market

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fact which reflects the high level of activity in the housing market at the time, with the result that dwellings did not remain vacant for long between old tenants moving out and new tenants moving in.

<sup>51</sup> Swedish Board of Housing, Building and Planning, “*Dåligt fungerande bostadsmarknader*” (2011) pp. 11-21.

<sup>52</sup> This figure is based on an estimate by the landlord association and it is not independently verified. Swedish Property Federation, ”*Missbruket av bytesrätten*” (2006).

- To what extent does a free housing market exist and function - as opposed to managed public and/or social housing (i.e. housing with a public task not or only partially subjected to the market mechanism)?
- What is the current situation of the housing market? Is the supply of housing sufficient/ insufficient and where is this the case (possibly in terms of areas of scarcity of dwellings in growth areas versus shrinkage areas)? Which national market works best (in terms of demand and supply) and why?

In general the housing market in the three countries is free at the point of entry and not direct managed by public authority or specific legislation. Housing policies, housing law or tenancy law is not based on any particular political or legal philosophy – no person or political ideal has functioned as a specific driving force in any of the three countries.

The supply and demand situations in the three countries have led to housing shortage in the larger cities in Sweden and Finland (Helsinki) and to a smaller extend in Denmark. This can mainly be explained by the fact that building activity has been low in the recent years as well as the fact that more people want an apartment (often to themselves alone) in the larger cities. The reason for this is that more people want to live in the largest cities to get a job, study or to live close to relatives (mainly relevant for immigrants).

It seems like the Danish “system” works most effectively, but no figures really document this. As mentioned above there is no general housing shortage in Denmark.<sup>53</sup>

As mentioned as well above there is a shortage of rental housing in Sweden.<sup>54</sup> The shortage can partly be explained by the fact that housing construction has been very low in Sweden, from 1995 until today with a shorter peak right before the financial crisis of 2008. Particularly in Stockholm and in Malmö the population has grown faster than the number of apartments in the past two decades. There has been an increased housing density in Stockholm and Malmö over the last four years.<sup>55</sup>

In Finland 23,000 dwellings are being built annually (on average 28,000 since 1990).<sup>56</sup> While new construction in the greater Helsinki region has slightly surpassed the increase of household-dwelling units in 2003–2009, in the city of Helsinki new construction has fallen below that rate, intensifying demand there.<sup>57</sup> The shortage of housing for middle- and low-income classes in Helsinki has not constrained the desire to migrate there.

### **1.2.2. Comparative view on price and affordability**

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<sup>53</sup> Section 1.1.2.

<sup>54</sup> Section 1.1.2. [Http://www.boverket.se/Om-Boverket/Nyhetsarkiv/Vad-ar-bostadsbrist/](http://www.boverket.se/Om-Boverket/Nyhetsarkiv/Vad-ar-bostadsbrist/).

<sup>55</sup> The Swedish National Board on Building, Housing and Planning: *Bostadsbristen ur ett marknadsperspektiv*, p. 17

<sup>56</sup> 2011. Dwellings and Housing Conditions, Statistics Finland at [http://tilastokeskus.fi/til/asas/2011/01/asas\\_2011\\_01\\_2012-10-24\\_kat\\_002\\_en.html](http://tilastokeskus.fi/til/asas/2011/01/asas_2011_01_2012-10-24_kat_002_en.html).

<sup>57</sup> Kivistö, pp. 10–11.

- Prices and affordability:
  - What is the typical cost of rents and its relation to average disposable income (rent-income ratio per household)?
  - To what extent is home ownership attractive as an alternative to rental housing

The comparison on typical costs is difficult due to the fact that the figures presented (in the national reports) might not be based on the same prerequisites. It seems though that the rent-income ratio per household is on the same level in all three countries even though the average rent per square in Denmark is much higher than in Finland. Living standards seems to be basically the same as well as the rent-income ratio so it is not easy to explain the difference in average rent this way.

In 2012, the average rent in Sweden was 5,960 SEK (640 EUR) per month for an average apartment.<sup>58</sup> The average disposable income per household was 275,200 SEK (29,560 EUR) a year in 2011, or 22,900 SEK a month (2,460 EUR).<sup>59</sup> That makes a rent-to-income ratio of 25 %.

In Denmark the average rent per square metre i 2012 was approximately DKK 1,000 (134 EUR) in Copenhagen (and Aarhus). In general, approximately 29 % of the disposable income is used to pay housing expenses.<sup>60</sup> This is a little higher than in Sweden.

In Finland the average rent per square metre of non-subsidised rental dwellings was 11.98 EUR per square metre in the whole country. The average rent per square metre for non-subsidised rental dwellings was 15.33 EUR per square metre in Greater Helsinki and 10.36 EUR per square metre in the rest of Finland. The average rent per square metre of government-subsidised rental dwellings was 10.25 EUR per square metre in the whole country.<sup>61</sup> The most recent figures on rent-income ratio are from 2009, the ratio of housing costs<sup>62</sup> to disposable income averaged 14 % – for renter households, it was 27 %.<sup>63</sup> In comparison, the ratio was 13 % for homeowners with mortgage (9 % for those out of debt), while rising to 24 % when instalments of the loan are taken into

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<sup>58</sup> Statistics Sweden, Statistical Yearbook of Sweden 2013, p. 164.

<sup>59</sup> [http://www.scb.se/Pages/TableAndChart\\_\\_\\_\\_163552.aspx](http://www.scb.se/Pages/TableAndChart____163552.aspx).

<sup>60</sup> Year 2005. Dan Andrews, Aida Caldera Sánchez and Åsa Johansson: *Housing markets and structural policies in OECD countries*, Economics Department working paper No. 836. See as well a Danish survey on demand for owner or rental dwellings: Hans Kristensen og Hans Skifter Andersen: *Befolkningsens boligønsker*, Center for Bolig og Velfærd – Realdania Forskning, 2009. [http://boligforskning.dk/sites/default/files/Rapport.hsa-als\(5\).doc.pdf](http://boligforskning.dk/sites/default/files/Rapport.hsa-als(5).doc.pdf). According to *Housing statistics in the European Union 2010* housing consumption as a share of total household consumption in Denmark was 25.4 per cent (1980), 26.1 per cent (1990) and 26.6 per cent (2000). No more recent figures are available.

<sup>61</sup> These data derive from Statistics Finland's annual statistics on the rents of dwellings. The statistics are based on interview data collected in connection with the Labour Force Survey and data obtained from the Social Security Institution's housing register. Statistics on rents of dwellings include some 248,000 rental dwellings. [http://www.stat.fi/ttl/asvu/2012/asvu\\_2012\\_2013-03-08\\_en.pdf](http://www.stat.fi/ttl/asvu/2012/asvu_2012_2013-03-08_en.pdf).

<sup>62</sup> Housing costs (*asumiskustannukset*) are distinct from housing expenditure (*asumismenot*), which includes, for homeowners, instalments of the housing loan and finance charge.

<sup>63</sup> Statistics Finland, Income distribution statistics, 2009.

account. If the transfers of housing benefits from the state are factored in, the ratio falls to 24 % for renter households, and 13 % for all.<sup>64</sup>

The Swedish tax system encourages house purchase over other investment options because of the possibility of partly deduction of mortgage interest and tax rebate on 50% of the cost of repair, renovation and extension work.<sup>65</sup> A large part of the wealth of Swedish households (60 % in 2011) consists of wealth from home ownership. The price increases in Sweden on cooperative apartments and owner-occupied housing have been exceptional over the last couple of years. This means that both one and two dwelling houses and tenant-owner apartments have generated higher returns than shares over the past 16 years and the risk of negative returns have been quite small. This means that home ownership has been very attractive as an alternative to rental housing. The financial crises however have had an effect on this situation as well (see section 1.2.5 below).

In Denmark the situation is complex but in relative terms home ownership is attractive for the same reasons as in Sweden – the possibility of partly deduction of mortgage interest and rising prizes. No tax rebate on repaircost in all situations though. Fundamentally, it can be said that when the economy is strong, the system makes the purchase of property attractive as an alternative to renting. As an owner of property, it is possible – if prices are rising – to earn a tax-free profit on the sale of one's property. In addition, the “tax-free value” that arises when the value of the property exceeds the amount for it was purchased can also be mortgaged, enabling the homeowner to release money to fund purchases, for example. A tenant does not have this advantage. On the other hand, the tenant would not be able to borrow large amounts of money from a bank or mortgage company and therefore would be subject to very little financial risk. For some groups of the population, the demand for a rented dwelling is high, even though owner occupation is affordable for these groups. This could be e.g. well-educated people who want to live in the capital. Other groups live in rented dwellings because they cannot afford to buy a house or an apartment. Because of tax regulation, housing support and other aspects it is not easy to make a definitive calculation in general on whether it is more attractive to own or rent.<sup>66</sup>

In Finland various net present value (NPV, the discounted stream of future benefits plus the discounted future selling price, minus the current price) calculations – which ignore, of course, the benefits of renting in unpredictably changing life situations – support ownership over renting, some at all levels of wealth, others excepting the highest level. The most important cause seems also here to be taxation by the state – especially mortgage interest deduction.

### 1.2.3. Tenancy contracts and investment

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<sup>64</sup> Ibid.

<sup>65</sup> SOU 2014:1 - it shows that the tax system is unjust and that the rent sector is disadvantaged in comparison to owners of cooperative apartments and homeowners.

<sup>66</sup> Hans Kristensen og Hans Skifter Andersen: *Befolknings boligørnsker*, Center for Bolig og Velfærd – Realdania Forskning, 2009. [http://boligforskning.dk/sites/default/files/Rapport.hsa-als\(5\).doc.pdf](http://boligforskning.dk/sites/default/files/Rapport.hsa-als(5).doc.pdf).

- Is the return (or Return on Investment (RoI)) for rental dwellings attractive for landlords-investors?

The return seems significantly higher in Sweden and Finland than in Denmark. From the available figures it is not possible to extract the reason directly or to clarify whether the figures are calculated on basis of the same prerequisites.

In Sweden – in 2011 – residential properties returned 7.7%, and in 2012 7.5 %.<sup>67</sup> A study<sup>68</sup> has shown that 42 % of the respondents consider Sweden to be very attractive as a location for real estate investments and 58 % consider it to be attractive. Sweden has a low house building rate, one of the lowest in Europe along with the Netherlands and the UK. It is difficult to draw any direct conclusion of why, but there are explanations that are more likely than others. These are: high construction costs, the rental regulation<sup>69</sup>, taxes and subsidies and an inefficient planning and building permit process.<sup>70</sup>

In Denmark prior to the financial crisis investments in rental property were generally attractive to investors. Historically, property investments in rental dwellings have had given high rates of return and have not been adversely affected by inflation. The total return on investments in residential property since 2007 has developed as follows: 2007: 2.5 %, 2008: -6.5 %, 2009: -1.8 %, 2010: 2.5 % and 2011: 1.7 %. The growth in value throughout the period has been negative. The figures must be viewed in light of the explosive increase in rental property prices during the period leading up to the financial crisis. Since 2007, many property investors have gone bankrupt, which has meant that a high proportion of properties have been purchased at compulsory sale auctions or in connection with compulsory sales from bankrupt estates. This has had a negative impact on purchase prices, but could have a positive effect on the return in the long term.

In Finland the attractiveness of the rental residential sector has increased because of turbulence in the commercial property sectors.<sup>71</sup> State subsidies and, for instance, the growing demand for senior housing also attract investors. Residential has been the best performing sector for four consecutive years in the KTI Index, which measures the total return of directly held property investments in Finland.<sup>72</sup> In 2011, residential investments produced a total return of 9.2 %, consisting of capital growth of 3.6 % and net income of 5.4 %.

#### **1.2.4. Other economic factors**

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<sup>67</sup> IPD Svenskt Bostadsindex ([www.ipd.com/sweden](http://www.ipd.com/sweden)).

<sup>68</sup> Ernst & Young, "Real Estate Asset Investment Trend Indicator Sweden 2013" p. 8.

<sup>69</sup> However, a report by Christine Whitehead showed that a rent control system only has minor effects on housing construction. (*The Private Rented Sector in the New Century - a comparative approach*, Sept. 2012, p. 36).

<sup>70</sup> National Housing Credit Guarantee Board, "Finanskrisens påverkan på bostadsbyggandet i Europa", (2011) p. 20-24.

<sup>71</sup> *The Finnish Property Market 2012*, pp. 37 and 45–46.

<sup>72</sup> <http://www.kti.fi/index?PHPSESSID=dede44df44ccd6c84ee2027d708e5227>.

- What is the role of estate agents? Are their performance and fees regarded as fair and efficient?
- Which national regulation has proven most effective and just?

In Sweden estate agents mainly work with purchase and sale of property, but might in rare cases help a property owner letting his item if he's having problems getting it sold. They usually don't receive payment if an item is not sold. Vacant dwellings in Sweden are normally allocated by the owner, and municipal housing companies usually do it after time on a waiting list. MHC's sometimes provide rental allocation boards which may be used by private landlords. But their participation is voluntarily. Private rental allocation boards are allowed but are subject to a license. A real estate agent cannot legally handle a housing property for the sole purpose of renting it out unless they have a housing allocation license. According to section 65 a in the Tenancy Act no party may receive, make an agreement on or request payment from a tenancy applicant for the offer of a dwelling unit for other than recreational purposes.

The role of estate agents is limited in relation to the letting of apartments in Denmark. The estate agent can charge the landlord in accordance with their agreement. No rules regulate the size of this fee, but the fee must be fair. In some cases the agent will act as mediator for the landlord and charge the landlord for various services, e.g. advertising and drafting of tenancy agreements. The setting of the fee for this is limited only by the agreement between the parties. It is possible to appeal the amount of the fee to a professional appeal board. The number of appeal cases is limited in this regard. In connection with the purchase and sale of property, estate agents are involved in the vast majority of purchases. Many agents work according to the principle of "no cure, no pay". Under Section 6 of the Rent Act, in connection with the letting of premises for residential purposes, the provision of such tenancies or the exchange of flats, it is not permitted to receive from or charge a fee to the tenant, nor to require the tenant to enter into another contract which is not part of the tenancy agreement. Any amount paid in contravention thereof may be required to be repaid.

In Finland estate agent are also used in relation to letting. From the landlord's point of view, the most convenient way of finding a tenant is to use an estate agent. From year 2000 it has been regulated that the agent's fee must be reasonable, taking into account the character of the assignment, the amount of work carried out, the economically appropriate way of carrying out the assignment, and other circumstances.<sup>73</sup> The standard practice in residential leases is for the agent to charge one month's rent plus VAT. In a major reform of the then-prevailing practice, the act of 2000 provided that the only person who should pay the agent's fee is the principal, who purchases the service.<sup>74</sup>

The regulation in Finland seems to be the most thorough and – from the tenant's point of view – this will probably mean that it is the most effective and just regulation. As the role

<sup>73</sup> *Laki kiinteistöjen ja vuokrahuoneistojen välityksestä* [Real Estate and Rental Agency Act] 15.12.2000/1074, 20(3).

<sup>74</sup> *Laki kiinteistöjen ja vuokrahuoneistojen välityksestä* [Real Estate and Rental Agency Act] 15.12.2000/1074, 20(2).

of estate agents is very limited when it comes to letting of residential property this is not a problem though and it does not seem to be relevant to make any further regulations in Sweden or Denmark.

### **1.2.5. Effects of the current crisis in comparative perspective**

- What were the effects of the crisis since 2007?
  - Has mortgage credit been restricted? What are the effects for renting? Have repossession (in case of mortgage default) affected the rental market?
  - Has new housing or housing-related legislation been introduced in response to the crisis? What have been its effects?
  - Which state has overcome the crisis best and why?

Though the economy in all three countries where affected by the crisis, all three countries have placed formal or informal limits on their banks and other creditors.

The Swedish economy, and especially the housing market and housing construction, was significantly affected by the recession in the context of the financial crisis in the autumn of 2008. The lengthy rise in home prices began to slow down during the course of 2007, and in the second half of 2008 home prices began to fall. Between 2006 and 2009, housing construction decreased with 65 %. Interest rates remained at a historically low level.

The banks started to introduce stricter requirements on their customers, and in October 2010, the Swedish Financial Supervisory Authority (*Finansinspektionen*) introduced a mortgage cap. This further subdued lending growth by restricting mortgages to 85 % of the property's value.

The Swedish monetary policy has been strongly expansionary, which contributed to a rapid recovery in the economy and especially in the housing market. House prices in Sweden have continued to rise since, albeit at a slower pace in 2011, while most other countries saw the house prices fall. But during the latter part of 2011, the economy weakened in Sweden and there was great concern in the financial markets. Residential house prices began to decline slightly in 2011. Imposing stricter requirements on mortgage repayments were being discussed.<sup>75</sup> There is still a sense that prices are too high (a housing bubble) and that a continued controlled path downwards is preferred.

The rental market in Sweden have not been affected to a greater extend by the financial crisis directly. The reason for this is that the market forces do not affect rents directly. Reduced interest rates lower the rents in the long run and reduced housing production raises the rents in the long run. Repossessions have not affected the rental market in Sweden either.

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<sup>75</sup> [http://www.scb.se/Pages/Article\\_\\_\\_\\_333926.aspx](http://www.scb.se/Pages/Article____333926.aspx).

In the years before the financial crisis, Danish housing was characterised by very large increases in property prices. From 2000 until 2007, housing prices for single-family homes and condominiums rose by 85 % and 105 %, respectively, with the largest increases occurring in the Copenhagen area. Housing prices are mainly powered by economic fluctuations and interest rates. Decreasing interest rates and new mortgage loan types had been introduced and property value taxes were frozen in 2002. These factors all contributed to rising prices. The introduction of amortisation-free loans (2003) is considered to be the main cause of rapid price increases in the period before the most recent financial crisis.

When the crisis developed, prices fell dramatically. This was not anticipated by the Government (or by anyone in the financial sector). The cause of this has been that many Danish households have a large debt because they cannot sell their property – or they cannot sell it without losing a larger amount of money. The banks have become reluctant to lend money for financing house purchases; banks and mortgage companies have become subject to stricter government control, but no restrictions have been introduced concerning loan types, etc. Because a lot of Danish Bank where on the edge of bankruptcy (and some has gone bankrupt) a large amount of regulation towards the administration of the banking business has come in to force.

For letting, the crisis has not had any direct effects in this regard. It is possible that the demand for rented dwellings has increased (or has not decreased at least) because some people cannot lend money to buy a house.

Repossession has no direct effect on the rental market, but since 2007, many property investors have gone bankrupt, which has meant that a high proportion of properties have been purchased at compulsory sale auctions or in connection with compulsory sales from bankrupt estates.<sup>76</sup>

Finland seems to have been able to “handle” the financial crisis best. The housing bubble of 1987–1989 is still the foremost feature of housing prices over the past thirty years in Finland.<sup>77</sup> In 2008, the economic down-swing – caused by the international financial crisis – did lead to a fall in prices, but only for less than a year. In all, since the mid-eighties, the real housing prices have risen approximately 70 %.<sup>78</sup> In the spring of 2010, as a response to the crisis and the unremitting tendency of households getting into debt, the Financial Supervisory Authority<sup>79</sup> released a recommendation, according

<sup>76</sup> In 2012 there were 5,130 cases of repossession (where, in the event of default in payment or terms, property pledged for a debt is sold to (try to) pay the debt). The number of reposessions has been steady from 2011–2013. From 2006–2010, reposessions increased from less than 100 per month to more than 400 per month. Figures from Statistics Denmark. They indicate all cases of repossession – including privately owned houses and apartments as well as commercial premises. See as well: [http://www.realkreditraadet.dk/Statistikker/Generel\\_statistik/Tvangsauktioner\\_og\\_konkurserkl%C3%A6ring.aspx](http://www.realkreditraadet.dk/Statistikker/Generel_statistik/Tvangsauktioner_og_konkurserkl%C3%A6ring.aspx).

<sup>77</sup> Jarkko Kivistö, "Suomen asuntohintakehitys ja siihen vaikuttavat tekijät", BoF Online 4, 2012, Bank of Finland 28.2.2012, at

[http://www.suomenpankki.fi/fi/julkaisut/selvitykset\\_ja\\_raportit/bof\\_online/Pages/BOF\\_ONL\\_04\\_2012.aspx](http://www.suomenpankki.fi/fi/julkaisut/selvitykset_ja_raportit/bof_online/Pages/BOF_ONL_04_2012.aspx).

<sup>78</sup> Jarkko Kivistö, 'Suomen asuntohintakehitys ja siihen vaikuttavat tekijät,' p. 4–5.

<sup>79</sup> <http://www.finanssivalvonta.fi/en/Pages/Default.aspx>.

to which a housing loan should be at maximum 90 % of the purchase price ("loan ceiling"). At the time, loan to value exceeded that limit in 28 % of new housing loans.<sup>80</sup> The banks opposed restrictions, and the Ministry of Employment and the Economy declined, against the background of the opposition, from proposing legislation demanded by the Bank of Finland and the Financial Supervisory Authority in early 2013; but the opinion of banks was reportedly swayed, among other things, by the International Monetary Fund, which in the summer of 2013 recommended loan ceiling, and new proposal for legislation is now being deliberated between the government and the financial sector.<sup>81</sup>

Simultaneously with the crisis, the number of compulsory auctions rose. The nationwide figure climbed to 1,276 compulsory auctions of housing-company shares or real estate in 2010, up 55 % from 2008. This still pales in comparison with the hardest years of recession in the 1990's, when almost 3,000 dwellings were sold in public auctions annually.<sup>82</sup> Nonetheless, prices have doubled in the Helsinki region in less than two decades. Only in the second half of 2012 was the relative trend that house prices raise more rapidly in the Helsinki region than elsewhere reversed.<sup>83</sup> In Helsinki rents in new rental agreements rose 30 % between 2008 and 2012.<sup>84</sup>

### **1.3. Urban and social aspects of the housing situation in comparison**

#### **1.3.1. Urban aspects in comparative perspective**

- What is the distribution of housing types in the city scale (e.g.: are rented houses mainly in the city centres and owner occupied in the suburbs?) vs. the region scale (e.g.: more rented houses in the big cities, less in the villages?)
- Are the different types of housing regarded as contributing to specific, mostly critical, "socio-urban" phenomena, in particular ghettoization and gentrification
- Do phenomena of squatting exist? What are their – legal and real world – consequences?

Most rental dwellings are located in apartment buildings. But the main alternative form of tenure in the urban areas of the three countries is not the same. In Sweden, where 60 per cent of dwellings in apartment buildings are rented, 40 per cent are tenant-owned cooperative apartments.<sup>85</sup> The tenant-owned apartments dominate in 28 of the 290

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<sup>80</sup> Tiia Kyynäräinen, "Valvoja pettyi: Asuntolainat ovat yhä ylisuuria", Taloussanomat, 22 September 2010.

<sup>81</sup> Anni Lassila, "Pankit pyörsivät kantansa: Asuntolainojen katto lähellä toteutumista", Helsingin Sanomat, 17 January 2014.

<sup>82</sup> "Pakkohuutokauppojen määrä kasvanut yhä tuntuvasti", Turun Sanomat, 8 November 2011.

<sup>83</sup> The prices of homes in old multi-storey buildings and row houses declined in the Helsinki area while remaining constant or only slightly decreasing in the rest of the country. Talouselämä, 31 August 2012 and 28 December 2012.

<sup>84</sup> Bank of Finland, BoF Online, 26 August 2013, p. 37.

<sup>85</sup> The number of dwellings in apartment buildings by type of ownership; Sweden, 2013:

municipalities; 16 of these are located in Stockholm County.<sup>86</sup> The proportion of tenant-owned dwellings has been rising at the expense of rental dwellings.<sup>87</sup> In Denmark, owner-occupancy, less prevalent in urban areas, is significantly less widespread in Copenhagen: in Copenhagen and Frederiksberg (part of Greater Copenhagen), private rental dwellings constitute 34 per cent, social rental dwellings 18 per cent, cooperative apartments 30 per cent (their share rose from 4 to 30 per cent between 1982 and 2000, when private rental housing fell from 65 to 34 per cent),<sup>88</sup> owner-occupancy 18 per cent, and other owner dwellings 6 per cent of the stock. In Finland, the percentage of private rental dwellings in urban areas varies between 14 and 26, and that of social rental dwellings between 17 and 22 (in the city of Helsinki the total is highest: 48 per cent). The share of the main Finnish alternative, limited-liability housing company, is between 31 and 48 per cent in urban areas (44 per cent in Helsinki).<sup>89</sup> In Helsinki, the portions of private and social rental housing vary greatly between districts: 80 per cent of production-subsidised rental dwellings are in the suburbs, while hardly any production-subsidised rental dwellings are located in downtown Helsinki.

The meaning of 'ghetto' and ghettoisation is gradational so that, in Finland, the word 'ghetto' is too strong in reference to the level of segregation in some pockets in major towns and cities; in Denmark, there has been a tendency for 'ghettos' to develop in some residential areas of Copenhagen and the surrounding area and in the major provincial towns and cities;<sup>90</sup> in Sweden, there are no ghettos but segregated areas, in the suburbs of the three metropolitan areas: Stockholm, Göteborg, and Malmö. According to a recent Swedish analysis, the rapid population growth and low construction in the metropolitan areas has made it difficult for those without family wealth to enter the ownership market, while there are indications of certain

	2013
<b>Multi-dwelling buildings</b>	
Rented dwellings	1,399,913
Tenant-owned dwellings	930,835
Owner-occupied dwellings	458
Data missing	1,047

Source: Statistics Sweden, Statistical database,

[http://www.statistikdatabasen.scb.se/pxweb/en/ssd/START\\_\\_BO\\_\\_BO0104](http://www.statistikdatabasen.scb.se/pxweb/en/ssd/START__BO__BO0104) (2014).

<sup>86</sup> There are 13 municipalities in the country where the entire dwelling stock in apartment buildings consists of rental units (Kinda, Högsby, Färgelanda, Essunga, Ockelbo, Nordanstig, Ragunda, Berg, Nordmaling, Bjurholm, Dorotea, Överkalix, and Pajala). Statistics Sweden, 'Dwelling stock 2013-12-31: Number of dwellings according to the Dwelling Register,' 9 June 2014, at [http://www.scb.se/en/\\_Finding-statistics/Statistics-by-subject-area/Housing-construction-and-building/Housing-construction-and-conversion/Dwelling-stock/Aktuell-Pong/87476/Behallare-for-Press/374838/](http://www.scb.se/en/_Finding-statistics/Statistics-by-subject-area/Housing-construction-and-building/Housing-construction-and-conversion/Dwelling-stock/Aktuell-Pong/87476/Behallare-for-Press/374838/).

<sup>87</sup> Statistics Sweden, 'Tenant-owned dwellings continue to increase at the expense of rental dwellings,' 30 May 2012, at [http://www.iut.nu/Facts%20and%20figures/Sweden/SWEDEN\\_Statistics\\_May30\\_2012.pdf](http://www.iut.nu/Facts%20and%20figures/Sweden/SWEDEN_Statistics_May30_2012.pdf).

<sup>88</sup> Outside Copenhagen and the surrounding area, the number of cooperative dwellings is very limited. Only in some major towns and cities are there cooperative dwellings. [Report for Denmark, \_].

<sup>89</sup> The above figures in the text are from Jukka Hirvonen, Ari Kurlin, Etta Partanen and Paavo Tikkanen, *Näkökulmia ara-vuokra-asumiseen: Selvitys ara-vuokra-asuntojen asukasrakenteesta ja asukasvalinnasta ara-aso-asuntoihin*, Ministry of the Environment, Report 15/2014, 2014, 67, at [https://helda.helsinki.fi/bitstream/handle/10138/135161/YMra\\_15\\_2014.pdf?sequence=1](https://helda.helsinki.fi/bitstream/handle/10138/135161/YMra_15_2014.pdf?sequence=1).

<sup>90</sup> 'These areas are often inhabited by a high proportion of tenants who cannot afford to live elsewhere and/or who have been "placed" there by the local authority, which has the right to allocate people to some social housing.' [Report for Denmark, 30].

developments in the metropolitan rental markets: households wanting to move do not relinquish their tenancies, but trade them, sublet (legally or illegally), or sell their contract illegally; private landlords are increasing their requirements for incomes and references; and municipal housing companies are following in a broadly similar vein.<sup>91</sup> The analysis concludes about the metropolitan rental markets with a comment that can be regarded as abashed and surprised: Those households that cannot get apartments because of low or irregular incomes have three options, which are not mutually exclusive. They can go to the social authorities and ask for help [...], look for help from friends and relatives, or sublet legally or illegally. [...] Illegal subletting and overcrowding have been increasing in less attractive suburban areas, typically built during the Million Homes Programme and dominated by immigrant groups. Areas owned by private slumlords have been deteriorating very quickly and in ways thought impossible by many, given tenants' strong legal position in Sweden.<sup>92</sup>

Denmark is the only country with a legal definition of ghetto. Ghetto is defined as a residential area with at least one thousand inhabitants who fulfil three of the following five criteria:

1. The proportion of immigrants and descendants from non-Western countries exceeds 50 per cent.
2. The proportion of 18–64 year olds without any link to the labour market or education exceeds 40 per cent (average for the last two years).
3. The number of people convicted of various offences per 10,000 inhabitants aged 18 or over exceeds 2.7 per cent (average for the past two years).
4. The proportion of 30–59 year olds who have no longer education from school (ground school [9 years] only) exceeds 50 per cent.
5. Average income for 15–64 year olds (excluding those under education) is less than 55 per cent of the average income of the same group in the whole region.<sup>93</sup>

In 2012, there were 33 such residential areas in Denmark.<sup>94</sup> The type of housing associated with segregation is evident: rental apartments (Sweden), municipality-owned social rental dwellings (Finland), and areas dominated by social housing (Denmark). In Sweden, cases of gentrification are said to have been reinforced by the conversion of rental apartments to tenant-owned cooperative ones.<sup>95</sup>

Squatting does not, in any large scale, exist.<sup>96</sup> In the few past cases in these three countries, the police has removed the squatters. In Finland, the property has often been an estate of the municipality, and then negotiations can be undertaken with the

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<sup>91</sup> Hans Lind, 'Social Housing in Sweden' in Kathleen Scanlon, Christine Whitehead, and Melissa Fernández Arrigoitia (eds), *Social Housing in Europe*, John Wiley & Sons 2014, 90–102, 100.

<sup>92</sup> Ibid. Segregation is 'strong and increasing in most Swedish cities.' Ibid., 98.

<sup>93</sup> (Consolidation) Act on Social Housing no.1023 of August 21, 2013, 61a.

<sup>94</sup> [Report for Denmark, 30].

<sup>95</sup> [Report for Sweden, 29].

<sup>96</sup> Apart from Christiania in Copenhagen (which is an independent community of approximately 900 people founded in 1971 on the site of an abandoned military zone), organised squatting does not exist in Denmark. And Christiania cannot serve as a general example. Civic authorities in Copenhagen still regard Christiania as a large commune, but the area has a unique status in that it is regulated by a special law, the Christiania Law of 1989, which transfers parts of the supervision of the area from the municipality of Copenhagen to the state. [Report for Denmark, 30–31].

municipality. If the negotiations fail to lead to an outcome, the squatters are removed.<sup>97</sup> There is no special legislation covering squatting in the three countries.<sup>98</sup> Against the assertion that squatting gives no legal rights, the legal situation might be argued to be more complex in Finland from the point of view of constitutional interpretation and taking into account the case law under the European Social Charter (a broad definition of ‘forced evictions’).

- 1.3.2. Social aspects

### 1.3.2. Social aspects

- What is (are) the dominant public opinion(s) towards certain forms of rental types or tenure forms? (e.g. is renting considered as socially inferior or economically unsound in the sense of a “rental trap”?) In particular: Is only home ownership regarded as a safe protection after retirement?
- What is the typical attitude of tenants towards different forms of tenure (e.g. owners of privatized apartments in former Eastern Europe not feeling and behaving as full owners)

While evidence from Denmark is limited to a perceived general preference for owner-occupation over any renting<sup>99</sup> and some observations on social housing (its lower attractiveness because of ghettos, location, and at least a few years ago inferior-quality and less ‘stylish’ buildings),<sup>100</sup> Sweden and Finland participated in a mid-2000s interview study on the security of tenures.<sup>101</sup> It indicated that the Swedes (interviewed in Gävle) – quite exceptionally – differentiated very little between owning and renting, whereas the Finns (interviewed in Turku) held more diverse opinions. In Sweden, first of all, renting is not a socially inferior alternative, but it had become a less economic alternative – because of low interest rates, rapidly increasing house prices, and relatively high rents –

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<sup>97</sup> ‘Squatting is illegal in Finland, as it means trespassing to other’s premises and it is sanctioned in the Criminal Code. Many squats have ended up in evictions by the police, and some have even led to day-fine verdicts of trespassing and disobedience. However, several squats have ended up to a lease agreement with the owner, often the City of Helsinki, and the Youth Department has paid the rent.’ Eeva Kostainen, ‘Report Template: National Eviction Profiles: Finland,’ Pilot project – Promoting protection of the right to housing – Homelessness prevention in the context of evictions, Human European Consultancy, 24 March 2014, 18 (footnotes omitted).

<sup>98</sup> [Report for Sweden, 30]; [Report for Denmark, 31].

<sup>99</sup> ‘Danes generally prefer owner-occupation to living in private rented or social housing [ . . ].’ Hedvig Vestergaard and Kathleen Scanlon, ‘Social Housing in Denmark’ in Kathleen Scanlon, Christine Whitehead, and Melissa Fernández Arrigoitia (eds), *Social Housing in Europe*, John Wiley & Sons 2014, 77–89, 83.

<sup>100</sup> [Other types of rental housing do not have the same negative reputation. [Is the following survey also the source for the information on social housing in parentheses in the text:] the Danish survey on demand for owner or rental dwellings: Hans Kristensen and Hans Skifter Andersen: Befolkningsens boligønsker, Center for Bolig og Velfærd – Realdania Forskning, 2009, [http://boligforskning.dk/sites/default/files/Rapport.hsa-als\(5\).doc.pdf.\]](http://boligforskning.dk/sites/default/files/Rapport.hsa-als(5).doc.pdf.)

<sup>101</sup> [OSIS reference].

despite a previous equality between the tenures. Among the Finns, a strong conviction prevailed that ownership will naturally pay off.<sup>102</sup> Second, both the Swedes and the Finns reasoned similarly that mortgage payments accumulate wealth for oneself and not for someone else ('paying to oneself'). But third, the Finns preferred ownership because of values. Though privacy and security are common values to both owning and renting, homeownership embodies also independence, freedom to do what one wants, pride and a sense of achievement.<sup>103</sup> That is to say, while both an owner-occupier and a renter, in Finland and Sweden alike, attach the meanings of privacy and security against the outside world to housing (these might together be called 'exclusivity' – 'nobody is coming in unless I am letting him/her in'<sup>104</sup>), after that some variation was detected between the countries: Home owners in Finland, especially those living in detached housing, tend to associate housing not only with privacy but also with being independent and free of external control; especially important is the possibility to do as one wishes with the property without a landlord saying what to do. [...] The only freedom tenants associate with their housing is freedom from debt load and responsibility of maintenance. Moreover, while some owner-occupiers attach feelings of pride and a sense of achievement to their home, tenants speak of their homes more sparsely and much less emotionally, as only a roof over one's head. This is not so in Sweden; also some interviewees living as tenants in the municipal housing company's [...] apartments experience the kind of control over their housing space that home owners in Finland thought to be exclusive of their tenure.<sup>105</sup>

The difference of opinion favouring ownership in Finland does not mean that Swedes do not appreciate the fact that a tenant has no unexpected maintenance costs. But the security of ownership is in Sweden linked to equity and low housing costs (due to low interest rates and monthly fees), and in this economic sense an earlier tradition, where homeownership was seen as less secure and renting as more secure, may have been reversed.<sup>106</sup> Renting is still considered a financially acceptable alternative at both ends of the life cycle.<sup>107</sup>

Surprisingly, those Finns living in social rental dwellings had 'neutral' views similar to the opinions of Swedish tenants. For these Finns, their tenure was safe, even compared with ownership:

They experience their tenure as secure because they know they cannot be evicted without having misbehaved or committed a crime. They feel pretty secure also financially, because the housing company is obliged to do all the maintenance and, furthermore, they know that they will be eligible for receiving municipal housing allowance and/or social assistance in case of economic hardship. Some tenants reflect

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<sup>102</sup> [ ], 94.

<sup>103</sup> Hannu Ruonavaara and Päivi Naumanen, Report on Finland in *Origins of Security and Insecurity: the interplay of housing systems with jobs, household structures, finance and social security (OSIS)* (2004–2006), 93–94.

<sup>104</sup> Ibid., 159 ('Homeowner FIN, female, 56').

<sup>105</sup> Ibid., 159–160.

<sup>106</sup> [Report for Sweden, 30 / Elsinga, M., De Decker, P., Teller, N., Toussaint, J. (eds.), *Home ownership Beyond asset and security. Perceptions of housing related security and insecurity in eight European countries*, p. 238–253.]

<sup>107</sup> Ibid. In Denmark similarly, there is no evidence suggesting that only homeownership would be attractive after retirement. [Report for Denmark / Morten Skak: Projecting Demand for Rental Homes in Denmark. European Journal of Housing Policy, Vol. 8, Nr. 3, 2008, s. 258].

on the security by contrasting their present situation with the potential situation of home owner. They feel secure, because they know that there is not a big mortgage falling on their heads in case of unemployment or in case they became badly injured or sick.<sup>108</sup>

The fact that the social-sector renters' dwelling is subsidised and they can also receive housing allowance or income support or both illustrates the overlap of 'object-based' and 'subject-based' subsidies. The private renters' cases were more individualised as regards the security of their tenure. From the interviews, the Finnish researchers extract a fairly typical ethos, which they term a 'mixed model of responsibility': 'individuals bear the main responsibility of their housing problems, but if the individuals are not themselves the cause of the financial troubles they are suffering from, "society" should offer some sort of publicly funded aid'<sup>109</sup>. The researchers surmise in the end: 'Perhaps the view of individual responsibility coupled with collective responsibility for the deserving poor is the typical Finnish approach to housing.'<sup>110</sup>

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## 2. Housing policies and related policies in comparison

### 2.1. Introduction

- How is housing policy related to the structure and concept of the (national) welfare state, to other welfare policies and the tax system?
- What is the role of the constitutional framework of housing? (in particular: does a fundamental right to housing exist?)

All three countries have needs- and means-tested housing benefits. But the systems for providing housing to people with lower incomes differ fundamentally at the very level that Sweden has no social housing by definition. Its uniform policy is supported by a broad societal consensus – tested as late as in 2008–2010 – against a differentiated social housing regime. The difference between a more universal and a more selective system is central, but not the only difference between the Nordic countries.<sup>111</sup> In

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<sup>108</sup> [ ], 163.

<sup>109</sup> [ ], 92. About half of the homeowners and most tenants subscribed to this view. A minority of the tenants believed that the state should bear the main responsibility for helping households who have housing-related economic problems. The other half of the homeowners divided equally into those for whom the individual, without qualification, and those for whom the state has the responsibility.

<sup>110</sup> *Ibid.*, 96.

<sup>111</sup> 'Swedish, Danish and Norwegian housing policies have been described as "universal" and directed towards all types of households and segments of the housing market. Finnish and Icelandic housing policies on the other hand are seen as "selective" and oriented more directly towards households of lesser means and based to a large extent on individual means-testing.' Bo Bengtsson and Hannu Ruonavaara, 'Introduction to the Special Issue: Path Dependence in Housing,' *Housing, Theory and Society*, 27(3), 2010, 193–203, 197.

Sweden, housing policy is directed at rental housing, which is provided by municipal housing companies.<sup>112</sup> In Denmark, housing policy is likewise directed at rental housing, but the providers, social housing organisations, are self-governed and there are many more of them than the number of municipalities. In Finland, housing policy is not directed at any particular tenure, but it is expressly oriented towards households of lesser means – in line with the extracted social ‘approach to housing’ above.

Those paths diverged after World War Two, and ideologically, perhaps earlier. For instance, the Swedish universal type of non-profit housing evolved on the back of principles formed in the 1930s, when ‘social-democratic ideology shifted “from mass struggle to a politics which looked to all citizens, a new politics for the large home – the nation.”’<sup>113</sup> After World War Two, municipalities were encouraged to set up their own housing companies, and the housing policy of the dominating Social Democratic Party rested on subsidised loans and the municipal companies acting as developers. The Swedish Social Democrats were very market oriented. The rent regulations were supposed to be temporary and was not an integrated part of the housing policy.<sup>114</sup> When, in 1967, ‘historical cost’ rent regulation was abandoned, a model for the rental market was copied from the labour market: collective bargaining between tenants’ union and the municipal housing company, where the agreed rents were binding also on private landlords. State subsidies were dismantled in the 1990s.

The counterpointing Finnish social sector is an outgrowth of a more piecemeal development, which began from postwar state loans to new owner-occupied dwellings (the old dwellings would be vacated for lower income households) and took on social aspects that were grafted onto the production-oriented policy only in the late 1960s, when the country urbanised and the focus of state loans shifted to rental housing production. After this, the housing policy, and the production of social rental housing in particular, are said to have followed ‘much the same line as Denmark and Sweden’.<sup>115</sup>

But when state subsidies were taken down while the rent-setting system was kept in Sweden, in Finland rent regulation which had been introduced at the turn of the 1970s was abolished, but state subsidies were kept, when a centre-right government came into power in 1991. Subsidies were even promoted as an instrument of counter-cyclical economic policy in the recession of the 1990s and again in 2009–2010, targeting both rental housing and the intermediate tenures between renting and ownership.

None of the Nordic countries has a constitutional court. Constitutional rights are pondered in ordinary courts (rarely, in Sweden and Denmark; occasionally, and usually as one ground among other grounds, in Finland), by parliamentary ombudspersons, and in Finland primarily by the Constitutional Law Committee of Parliament, which reviews

<sup>112</sup> A Swedish municipal housing company may be owned directly by the municipality or it may be a limited liability company where the municipality holds the majority of the shares or it may be a foundation with statutes giving control to the municipality. The essence is that the company is controlled by a municipality. See Section 1 of the Municipal Housing Company Act (2010:879).

<sup>113</sup> Pal Castell, ‘The Swedish suburb as myth and reality,’ Chalmers University of Technology, Göteborg 2010, 2, quoting ethnologist Klas Ramberg. Available at [http://publications.lib.chalmers.se/records/fulltext/local\\_122741.pdf](http://publications.lib.chalmers.se/records/fulltext/local_122741.pdf).

<sup>114</sup> Quoted from Marja Elsinga and Hans Lind, ‘The effect of EU-legislation on rental systems in Sweden and the Netherlands,’ Working Paper 2012:01, Department of Real Estate and Construction Management, Royal Institute of Technology, Stockholm, Sweden, 5. For the Swedish postwar history in the text, see *ibid*.

<sup>115</sup> Martti Lujanen, ‘Main lines of Nordic housing policy’ in Lujanen (ed.), *Housing and Housing Policy in the Nordic Countries*, Nord 2004:7, Copenhagen: Nordic Council of Ministers, 2004, 15–22, 20–21.

legislation prior to enactment. The Constitutional Law Committee and the parliamentary ombudsperson are the most common sources of constitutional doctrine in Finland. The right to housing is goal-like in the constitutions of both Finland<sup>116</sup> and Sweden<sup>117</sup> and not constitutionally guaranteed in Denmark. In Finland, though, the constitutional right to social security comprises in its first paragraph a subjective right to ‘indispensable subsistence and care,’<sup>118</sup> which, it is argued in the government proposal for fundamental rights reform in 1993, includes ‘the arrangement of nutrition and housing which are necessary to sustain health and life.’<sup>119</sup> Apart from that argument for a right to ‘arranged housing,’ the concerns of a right to housing are handled in statutes: municipalities in Sweden must provide a dwelling under the social services act<sup>120</sup> and Finnish municipalities have duties to arrange housing for people with severe disabilities<sup>121</sup> and in certain situations involving child protection<sup>122</sup> (these entail subjective rights in Finland). In Denmark, local authorities have arguably an obligation to help an evicted tenant to get a new home.<sup>123</sup> In neither Denmark<sup>124</sup> nor Sweden<sup>125</sup> do constitutional rights apply between the landlord and tenant as private parties. The impact of constitutional rights has been greater in Finland particularly after the fundamental rights reform which took effect in 1995. For instance, it can be argued that, if a tenant encounters physical disability during tenancy, the instalment of necessary devices for coping may not be a ground for termination, because otherwise a person with disability would be discriminated against.<sup>126</sup>

## 2.2. Policies and actors

### 2.2.1. Governmental actors

- Which levels of government are involved in formulating and implementing housing policy (national, regional, local)?
- How effective are the various actors in the countries under review?

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<sup>116</sup> The Constitution of Finland (731/1999), 19(4).

<sup>117</sup> The Instrument of Government (*Regeringsformen*) (SFS 1974:152), 2 §.

<sup>118</sup> Those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care. The Constitution of Finland (731/1999), 19(1).

<sup>119</sup> Government proposal 309/1993, 69–70 (emphasis added).

<sup>120</sup> *Socialtjänstlagen* (SFS 2001:453), 4:1.

<sup>121</sup> *Laki vammaisuuden perusteella järjestettävästä palveluista ja tukitoimista* (380/1987), 8.

<sup>122</sup> *Lastensuojelulaki* (417/2007), 35.

<sup>123</sup> [Report for Denmark, 35]. Local authorities have the right to allocate up to one in every four vacant dwellings in public housing to persons in need of housing (excluding dwellings designated as housing for the elderly and housing for young people); see 4.3.1 below. The social service act, paragraph 80, also obliges local authorities to provide temporary shelter if a person or family is homeless. Housing Rights Watch, at <http://www.housingrightswatch.org/page/state-housing-rights-3#.VJRmGMAEONA>.

<sup>124</sup> [Report for Denmark, 35].

<sup>125</sup> [Report for Sweden, 34].

<sup>126</sup> According to the tenancy act, a notice must not be unreasonable and the landlord must have justifiable reason, and at least intuitively – even if constitutional rights were not included in an explicit analysis – opposition to discrimination prevents regarding the instalment of the devices as a justified reason for termination. The financing of the installation and removal of the devices is part of the legal duties of municipalities towards people with severe disabilities. [Report for Finland, 137–138].

The authorities forming housing policy are the government and municipalities.<sup>127</sup> Sweden and Finland have a government agency in this field: the Swedish National Board of Housing, Building and Planning (Boverket)<sup>128</sup> and the Housing Finance and Development Centre of Finland (ARA, the successor to the Finnish National Housing Board of 1966–1993). Swedish municipalities have a responsibility for housing supply in the sense that the municipality should plan the housing supply in order to create opportunities for everyone in the community to live in decent housing. Because of the shortage of housing in urban areas, the responsibility of the municipality for housing production is being debated in a number of government inquiries.<sup>129</sup> As there are no municipal housing or other property taxes in Sweden, municipalities do not gain from allowing housing development.<sup>130</sup> Danish municipalities approve decisions about the construction of new social housing and co-finance the construction by providing basic capital.<sup>131</sup> In Finland, municipalities control spatial planning<sup>132</sup> and set real-estate tax rates within limits given by the Ministry of Finance. Also, they own much of the state-subsidised housing stock, although the buildings and dwellings they own are ‘each municipality’s decision-makers’ own value choice and political decision, thus not a mandate prescribed for the municipality by the state.<sup>133</sup>

### **2.2.2. Housing policies**

- What are the main functions and objectives of housing policies pursued at different levels of governance? In particular:

[Overall: Which housing policies rank best in terms of formulation and implementation?]

- What is the stated objective of national housing policy in each country? (provision of affordable housing for all?; provision of affordable housing only for households in need?; residual provision of housing as a measure of last resort for only the neediest households?; no active and/or effective housing policy at all)
- In which country does the national policy favour rented housing, home ownership (owner-occupation), or where is neutrality of tenure recognised as an objective?

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<sup>127</sup> At present, housing is within the remit of the Ministry of Finance in Sweden, the Ministry of the Environment in Finland, and the Ministry of Housing, Urban and Rural Affairs in Denmark.

<sup>128</sup> Boverket is responsible for spatial planning, the management of land and water resources, urban development, building, and housing. The municipality prepares the comprehensive and detailed plan and area regulations; the County Board participates in the consultations, reviewing the final plan and providing input; and Boverket guides and monitors the planning.

<sup>129</sup> There is an investigation into ‘Regional planning and housing supply’ which will present its conclusions in March 2015 (Dir 2013:78).

<sup>130</sup> [Report for Sweden, 35–38].

<sup>131</sup> [Social Housing in Denmark], 78; [The Danish social housing sector], 6; [Report for Denmark, 35].

<sup>132</sup> The municipality is responsible for the master, detailed, and detailed shore plan; joint authorities of municipalities and the County Board plan regional starting points for planning; and the Ministry of the Environment provides national guidelines and objectives.

<sup>133</sup> Mäki-Fränti and Tuula Laukkanen, *ARA-vuokratalokanta murroksessa*, [ ], 11. In all three countries, the building supervision authorities are municipal.

- Are there experiences of the countries under review with special housing policies targeted at certain groups of the population (e.g. elderly people, migrants, Sinti and Roma etc)?
- Overall: Which national (or subnational) housing policies rank best in terms of formulation and implementation?

Both nationwide and regionally, the focus of Swedish housing policy today is on the shortage of housing in urban areas. In 2009, the government responded by investing in a new tenure, (joint-ownership-based) condominium, previously available for detached and semi-detached houses, but extended now to apartment buildings. (Only 700 condominiums have been built, though.) In another response, in 2013, owners of cooperative apartments, condominiums, and detached and semidetached houses were allowed to sublet at market rent.<sup>134</sup> The question whether government policies favour homeowners or tenants is not clear-cut. In Sweden, rent-setting favours tenants, but (30 per cent) interest deduction for home loans, deduction for repair and maintenance work done in an owned home, and ability to defer capital gains tax benefit homeowners. In Denmark, where many properties are subject to rent regulation, interest deduction for home loans, favourable forms of loan available to finance purchases of property, and exemption from tax on the sale of property one has lived in encourage homeownership. In Finland, the question of promoting homeownership has long been debated; when in 2010, a Ministry of Finance working group listed housing-policy aims, the first aim on the list – realising housing at a reasonable price for all households – was immediately followed by the next remark:

A second typical aim of housing policy seems to be to encourage homeownership. This is manifested, among others, in the fact that owner-occupancy is treated more lightly in taxation than rental housing is, and that first-home buyers, in particular, are allocated targeted tax subsidies.<sup>135</sup>

Since then, the going aim has been neutrality and the phasing out of interest deduction for home loans was announced by the government that came into office in 2011. In accordance with a gradually decreasing strategy, the deduction (28 per cent until 2011, 30 since, always 2 per cent more for first-home buyers) diminishes so that interests could be reckoned in full in 2011, but thereafter, over the election period, only 85 per

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<sup>134</sup> Rent regulation does not apply when individuals rent out their house or cooperative apartment provided that the letting is not part of a commercial activity. (If a person is letting three or more dwellings this is normally considered a commercial activity. When a person is letting several homes, the new rules apply only to the first lease.) The parties are in these cases free to agree on the size of the rent. If the agreed rent significantly exceeds the cost of capital (calculated as a reasonable rate of return on the market value of the property) and operating costs of the property, the rent tribunal can lower the rent after an application by the tenant. The landlord is not entitled to receive rent increases from the rent tribunal. See [Report for Sweden, 45].

<sup>135</sup> *Verotuksen kehittämistyöryhmän loppuraportti* (Final Report of the Working Group for Developing the Finnish Tax System), Valtionvarainministeriön julkaisuja 51/2010, Helsinki: Ministry of Finance 2010, 160.

cent of interest payments in 2012, 80 per cent in 2013, 75 per cent in 2014, and 70 per cent in 2015.

Finnish production subsidies – which have also served the aims of counter-cyclical economic policies – carry out the aim of ensuring housing possibilities for low-income households and the aim of preventing differentiation processes in residential neighbourhoods, both of which are integrated in the statutory purpose of tenant selection (assigning apartments to households with ‘the most acute need for a rental dwelling, whilst striving for a varied community structure in the building and a socially balanced neighbourhood’<sup>136</sup>). The standard rules of tenant selection apply to special groups, such as students and others, whose housing is subsidised through differentiated species of subsidies, and immigrants and Roma, who have difficulties in the free market.<sup>137</sup> Housing for the elderly is the only targeted policy in Sweden, while in Denmark the term ‘social housing’ is a collective designation for three types of housing: social family dwellings (82 per cent of the stock), social dwellings for the elderly (12 per cent), and social dwellings for young persons (6 per cent).<sup>138</sup> The statutory objective of the Danish social housing organisations is to provide appropriate housing for those in need, at a reasonable rent, and to allow tenants influence over their own living conditions.<sup>139</sup> During 2001–2011, when a liberal-conservative government was in power, the social sector in Denmark ‘changed from providing affordable housing to all groups in society, towards a more selective role of provider of housing for groups with special needs and the elderly’.<sup>140</sup> After the 2001 election, the power of the group whose cooperation had helped to keep social housing an insiders’ issue – social democrats, trade unions, and the national social housing organisation – dissolved.<sup>141</sup> When the new government led by social democrats took office in 2011, social housing is said to have gained momentum<sup>142</sup> and be still a priority.<sup>143</sup>

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<sup>136</sup> Act on Interest Subsidy for Rental Housing Loans and Right of Occupancy Housing Loans (June 29, 2001/604), 11a [‘The purposes of resident selection’] (August 18, 2006/717); correspondingly, *aravarajoituslaki* (17.12.1993/1190), 4a [‘The purposes of resident selection’] (August 18, 2006/716). Ensuring housing possibilities for low-income households is a policy aim on the ground that a dwelling is a necessity. *Verotuksen kehittämistyöryhmän loppuraportti*, Valtionvarainministeriön julkaisuja 51/2010, Helsinki: Ministry of Finance 2010, 160.

<sup>137</sup> See 4.3.1. below. The state is also subsidising the renovation of dwellings for elderly and disabled persons and the construction of lifts and other improvements enabling elderly or disabled persons to access and to move in the building. *Laki asuntojen korjaus-, energia- ja terveyshaitta-avustuksista* (1184/2005), 5(1), 6(1.1, 1.4, and 2), and 8(1).

<sup>138</sup> *The Danish social housing sector*, Ministry of Housing, Urban and Rural Affairs, 1–2, available at <http://www.mbb.dk/english>.

<sup>139</sup> (Consolidation) Act on Social Housing, 6(1). This is an objects clause that implements the overall objective of the Danish social housing sector, which is to solve urgent social problems in housing. *The Danish social housing sector*, 2.

<sup>140</sup> Hedvig Vestergaard and Kathleen Scanlon, ‘Social Housing in Denmark’ in Kathleen Scanlon, Christine Whitehead, and Melissa Fernández Arrigoitia (eds), *Social Housing in Europe*, John Wiley & Sons 2014, 77–89, 88.

<sup>141</sup> Ibid., 86. ‘[S]ocial housing advocates had to look for new ways of communicating with and influencing the government and the *Folketing* (parliament). They found a partner in the right-wing Danish People’s Party (*Dansk Folkeparti*), which had strong support among residents of social housing and was a key political ally of the liberal-conservative government in office until 2011. They might well have been the strongest political advocates for social housing.’ Ibid.

<sup>142</sup> Ibid., 88.

Even though the question of whether tenants or owners receives more support is not clear, as an overall assessment home-ownership as a form is favoured over tenancy as a form in all three countries. The main general support to this sector is tax deductions of interest and that is available in all three countries. It raises housing prices and output. The main general support to tenants is rent regulation. It reduces profitability and output.

### **2.3. Urban policies**

- Are there any measures/ incentives to prevent ghettoization and gentrification?
- How effective are they in the countries under review? Are there any means of control and regulation of the quality of private rented housing or is quality determined only by free market mechanisms?

In urban areas and elsewhere, distribution of places of residence is shaped indirectly by spatial planning. In Sweden, the planning rules are the most important tools to prevent segregation. Sometimes, builders are required to construct rental apartments as a condition for being allowed to construct cooperative or business properties.<sup>144</sup> Also, municipal social authorities run the informal practice of renting apartments from municipal housing companies and private landlords and subletting to socially vulnerable tenants.<sup>145</sup> In Finland, the criteria for tenant selection in state-subsidised dwellings realise the aim of diversified resident structure. This allocation is considered the strongest direct measure influencing residential patterns in Finland; urban planning is the more indirect measure.<sup>146</sup> The Danish initiatives to combat segregation have included funding to make social housing more attractive, permission to sell social dwellings so they could be converted to owner dwellings (which has been rarely used), and the right of housing organisations not to allocate tenancies to people out of work or others on the waiting list so as to achieve a more diverse resident composition.<sup>147</sup> In some municipalities, the local authorities have taken over all allocation in an effort to prevent ghettoisation.<sup>148</sup> The Danish legislation has not been directly aimed at any individual or named population groups.<sup>149</sup> The definition on whether an area is a ghetto was given above. The comparison of the effectiveness of these policies is complicated by the fact that Sweden – where there is a severe housing shortage – has received significantly more immigrants than Finland or Denmark.

### **2.4. Energy policies**

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<sup>143</sup> [Report for Denmark, 36].

<sup>144</sup> [Report for Sweden, 37].

<sup>145</sup> Ibid.; see 4.3.1. below.

<sup>146</sup> Mari Vaattovaara, Katja Vilkama, Saara Yousfi, Hanna Dhalmann and Timo M. Kauppinen, ‘Contextualising ethnic residential segregation in Finland,’ [ ], 234. Mixed tenure type estates are arduous to govern; but Finnish municipalities do own limited-liability housing company apartments, and let these.

<sup>147</sup> [Report for Denmark, 37].

<sup>148</sup> Vestergaard and Scanlon, ‘Social Housing in Denmark,’ 82.

<sup>149</sup> [Report for Denmark, 36].

- To what extent do European, national and or local energy policies affect housing in general and rental housing in particular in the countries under review?

Energy policies are designed and the various international measures in this field implemented at national level.<sup>150</sup> In Denmark, there have been two broad political agreements extending over elections; such commitments at the country level supplement supranational climate and energy commitments. In 2005, an agreement between the government and the Social Democrats, the Danish People's Party, the Social Liberal Party and the Socialist People's Party set a framework for energy-conservation efforts.<sup>151</sup> In 2012, a new agreement was reached among 95 per cent of the members of parliament, all parties but one.<sup>152</sup> The 2012 deal agreed by parliament commits the country to goals designed to detach it from oil and gas.<sup>153</sup>

In Sweden the Parliament set goals of energy preservation such as the reduction of 50% of energy use in the housing sector to the year of 2050. The two principal methods of reaching the goals of the housing sector are subsidies to energy improvement of old buildings and strict energy requirements on new buildings. Such legislation applies between the state and the owner of the house, thus tenants are not affected by energy legislation.<sup>154,155</sup>

Some examples of how energy policies affect renting can be given. Among the European Union climate-policy and energy-efficiency actions setting objectives and the pace for new regulation is energy performance certification.<sup>156</sup> In Finland, where the tenancy market is most liberal, a requirement such as the energy performance certificate<sup>157</sup> influences rental contracts mainly indirectly – to the extent that the costs of the certificate can be passed on in rents. (In contrast, what is said to have influenced private contracting directly is the development of measurement systems, such as

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<sup>150</sup> The lead ministry for energy policy in Sweden is the Ministry of Enterprise, Energy and Communications; the Ministry of the Environment is in charge of climate and environmental policy, and the Ministry of Health and Social Affairs is responsible for the Planning and Building Act. The Swedish Energy Agency (Energimyndigheten) is the central governmental agency for energy policy. The Danish Ministry of Climate and Energy was established in 2007 by de-merging energy issues from the Ministry of Transport and climate issues from the Ministry of the Environment; with the reshuffle following the 2011 election, it was assigned as a new area building department, and now it is the Ministry of Climate, Energy and Building. The Danish Energy Agency (Energistyrelsen) is responsible for energy and building policy. The Ministry of Employment and the Economy is the main responsible ministry in Finland, but a host of other actors are involved: the Ministry of the Environment, the Ministry of Agriculture and Forestry, the state-owned Motiva Group (which started as the Energy Information Centre in 1993–2000), and at the regional level fifteen Centres for Economic Development, Transport and the Environment (ELY Centres).

<sup>151</sup> Agreement on future energy-saving initiatives on 10 June 2005.

<sup>152</sup> Denmark's Energy Agreement for the period 2012–2020, 22 March 2012.

<sup>153</sup> ‘Denmark aims to get 50% of all electricity from wind power,’ *The Guardian*, 26 March 2012.

<sup>154</sup> Report for Sweden Section 2.2 (d).

<sup>155</sup> In Finland, a climate act is in preparation.

<sup>156</sup> Directives 2002/91/EC and 2010/31/EU.

<sup>157</sup> The certificate is purchased by the owner of the building, that is, typically a limited-liability housing company.

apartment-specific measurement of energy consumption.<sup>158)</sup> In Denmark, there is a regime under Section 5(2) of the Housing Regulation Act, which is applicable when improvements of a certain value have been carried out; the incentive for the owner is that she can set rent at a higher level than the rent charged before the improvements were made. From July 1, 2014, for Section 5(2) to apply, the entire property must at the time of rental attain an energy-performance-certification label A–D; or, the owner must have made and incurred expenses for energy improvements<sup>159</sup> covering the part of the property in residential use and exceeding a certain value, before the section is applicable.<sup>160</sup> It is not possible to present a calculation on rent increases under the section.<sup>161</sup> Finally, in Sweden, the landlord has the right to increase rent on grounds of improving the living quality of the single flat (for instance, a renovated bathroom), but improved energy efficiency in the building does not give the landlord the right. The sitting tenants would have to agree to a rent increase voluntarily, and they are in negotiations represented by the tenants' union. According to one tenants' union representative, the local union would face a hard time explaining to the tenants why they should 'pay a higher rent for the environment'.<sup>162</sup> Moreover, Swedish tenants normally pay a lump sum for rent, covering all energy-related costs. The energy bill is paid by the landlord, and so the tenants do not profit from the renovation and are even more unlikely to accept an increased rent voluntarily.<sup>163</sup>

## 2.5. Subsidization

- Compare the different types of housing subsidies available in the countries under review, in particular:
  - Distinguish between object and subject-related subsidies; *i.e.*, subsidies for (constructing and/or renting out) certain dwellings or certain tenants, (certain kinds of) landlords and, if relevant, housing associations or similar entities acting as intermediaries
  - Compare the way and procedure by which subsidization works (*e.g.* direct, by means of investment loans, tax privileges).
  - Is there a subjective right to certain subsidies (if yes: by whom) or does the public administration have discretion in whom to assign the subsidy?

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<sup>158</sup> Apartment-specific water meters have been mandatory in new buildings beginning from 2011. In apartment buildings, there is usually no apartment-specific heat consumption measurement, because of the high cost of these systems.

<sup>159</sup> Excluding maintenance in the meaning of Rent Act, Section 58 or 58a.

<sup>160</sup> Act nr. 439 of 06/05/2014, section 2, adding a new Section 5(3) to the Housing Regulation Act. Available (in Danish) at <https://www.retsinformation.dk/Forms/R0710.aspx?id=162910>.

<sup>161</sup> An apartment of 100 square metres could be rented out to 14,000–15,000 euros a year, perhaps. If the whole building is renovated including energy efficiency and a new kitchen and bath in the apartment in question, it might be rented out to up to 17,500 euros a year. But this is only a very rough estimate and many other factors are involved.

<sup>162</sup> André Landwehr, 'How can local governments push for ambitious energy-efficient renovation of privately owned million-program houses?' Master Thesis in Built Environment, Malmö University 2013, 21 (interview of a local tenants' union representative).

<sup>163</sup> Ibid.

- Which level of government is competent to assign the subsidies?
- Does subsidization reflect the principle of “neutrality of tenure” or are homeowners privileged?
- To what extent is the system of subsidisation effective in the various countries and addresses the really existing needs, particularly those of vulnerable groups (or contains just gifts to the middle class for example), on the housing market?

Housing subsidies can be divided into three groups: financial ('object-based') subsidies, direct ('subject-based') allowances, and tax subsidies. Tax subsidies, such as the interest deduction for home loans in all three countries, will not be presently considered any further, although they are part and parcel of all economic comparisons. For example, according to the Finnish government, housing was supported by a total of 2,160 million in 2008, 47 per cent of which consisted of housing allowances, 13 per cent of production subsidies and grants, and 40 per cent of interest deductions in taxation.<sup>164</sup> In Sweden, financial subsidies for production were phased down in the 1990s, and the remaining financial production subsidies were challenged, under European state aid law, beginning in 2002 and then discussed, including the notoriously difficult question of how to define a subsidy.<sup>165</sup> Outside the universal system, Sweden gives investment support

<sup>164</sup> [Government of Finland, 2011], 43.

<sup>165</sup> According to an account of European competition law in the area of social housing, '[i]n July 2002, the European Property Federation (EPF) lodged a complaint with the European Commission, objecting to the Swedish practice of allocating state aid to house well-off people. After a state inquiry and much debate, the Swedish parliament in 2007 abolished public service compensation for municipal housing companies in order to maintain the principle of universal access (although the phasing out of state subsidies for housing construction had begun in the early 1990s [...]).' Darinka Czischke, 'Social Housing and European Community Competition Law' in Kathleen Scanlon, Christine Whitehead, and Melissa Fernández Arrigoitia (eds), *Social Housing in Europe*, John Wiley & Sons 2014, 332–346, 340.

In the following excerpt, some light is shed on the reasons for, and arguments in, the complaint by the Swedish Property Federation:

'In 2005 the private property owners association filed a complain[t] to the European Commission arguing that the Swedish housing policy broke EU-laws concerning state subsidies and competition. This might seen as [sic] strange as state subsidies were dismantled in the 1990s and in a report published 2006 [...] a number of interviewed private housing companies said that there now was a leveled playing field. The "real" reason for the complaint was that the "Three-party agreement" wasn't implemented in Stockholm. The local Tenant Union in Stockholm, dominated by tenants living in central areas, refused to follow the agreement and the Property Owners Federation therefore needed some new leverage against the Tenant's Union.'

The innovation in the Property Owners complaint, based on a report from Ernst & Young (2004) was a new interpretation of the term "subsidy". Instead of focusing on traditional subsidies in terms of money going from one party (the state) to another party (the housing companies) or lending money at interest rates below the market level, subsidy now also included cases where the owner did not demand a market based rate of return on the market value of the assets in the company. This was measured by relating the net operating income of the company to the market value of the properties. As rental properties in attractive areas in the big cities had high market values because of the option to convert them to condominiums while the net operating income was low because of the rent regulation, the rate of return on market value was very low in the municipal housing companies in the large expanding cities. The difference between a market based rate of return and this actual rate of return was seen as a subsidy. Even if it was not formulated in this way, it meant that almost by definition there were subsidies if a company did not try to maximize profits and did not charge the price that would lead to maximum profits. There were also some other elements in the Ernst & Young investigation and the complaint and that

for producing senior housing and grants to adapt a rental or cooperative apartment to a disability encountered by its resident.<sup>166</sup> In Finland, interest-subsidy loan authorisations have since 2012 been granted over 1 billion in the annual state budget; together with guarantee-loan appropriations (285 million), the total of production subsidies in the 2013 budget was 1,325 million. Also, renovation and energy grants<sup>167</sup> were allocated 50.5 million in 2013, and 26.5 million in 2014 when a new start-up grant for renovation was allocated 100 million. ARA has the discretion in most cases.<sup>168</sup> The typical financial subsidy in Finland, interest-rate subsidy, is a pure subsidy, as the subsidy is not required to be repaid to the state. This arrangement seems different compared to that in Denmark, where social housing has since 1999 been largely financed by mortgages with debt repayments, set by law at 3.4 per cent of initial building costs plus bank charges, that go to the government which services the mortgages. As interest rates are low, the state is today making a profit from social housing built after 1999.<sup>169</sup> Financial subsidies in Denmark include, besides the financing of social housing construction, funding for the refurbishment of social housing areas, a subsidy scheme for solar energy, and an urban renewal programme concerning other than social housing<sup>170</sup>

Direct subsidies can be targeted allowances, such as are the housing benefits in Sweden (granted independent of tenure, paid by the state,<sup>171</sup> in two forms<sup>172</sup>), Finland (independent of tenure, paid by the state,<sup>173</sup> in three categories<sup>174</sup>), and Denmark (only

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focused on more traditional subsidies, e.g. a municipality guaranteeing the loans of the housing company without demanding payment for this.'

Elsinga and Lind, 'The effect of EU-legislation on rental systems in Sweden and the Netherlands,' 6–7.

<sup>166</sup> [Report for Sweden, 40].

<sup>167</sup> The state grants interest subsidies for renovation (to municipalities and general-interest organisations and, up to 40 or 50 per cent of the project costs, to limited-liability housing companies), and there are grants for the following: (1) renovations of the dwellings for the elderly and disabled persons (40 per cent of approved costs); (2) building-condition surveys in cases where the municipal health-protection authority has verified a health risk; (3) the construction of lifts and other improvements enabling elderly or disabled persons to access and move in the building; (4) the eradication of a health risk in exceptional cases; and (5) measures to save energy and to adopt renewable energy sources in small houses (of no more than two apartments) on means basis (and covering only other than cost of labour, which may be included in the tax credit for domestic help). The new start-up grant for renovation 2013–2014 is for limited-liability housing companies and rental housing companies.

<sup>168</sup> In cases (1), (2), and (5) in the previous footnote, the grants are applied from the municipality, after which ARA distributes the state subsidies to the municipalities, while ARA has the discretion in cases (3) and (4). The new start-up grant is 10 per cent of ARA-approved costs.

<sup>169</sup> Vestergaard and Scanlon, 'Social Housing in Denmark,' 80.

<sup>170</sup> Under the Act on Urban Renewal and Urban Development, financial subsidies are provided to two types of urban renewal activity: building renewal (which comprises initiatives for building renewal and for the condemnation of buildings constituting a health or fire hazard for their occupants) and area-based renewal (initiatives for recreational areas and for area renewal).

<sup>171</sup> The Swedish Social Insurance Agency (*Försäkringskassan*) is the government agency responsible.

<sup>172</sup> Housing allowance (*bostadsbidrag*) for families with children and young people aged between 18 and 29; the amount depends on household income, number of children, and housing costs. A person who receives activity or sickness compensation can be entitled to housing supplement (*bostadstillägg*); the same applies for pensioners. [Report for Sweden, 40.]

<sup>173</sup> An independent institution, the Social Insurance Institution of Finland, '*Kela*', grants the benefits. (The organisation was founded in 1937 as the National Pension Institution, in Finnish, '*kansaneläkelaitos*', abbreviated '*Kela*', still its Finnish names.) *Kela* is supervised by parliament, to whom a board of trustees reports annually.

for rental apartments, paid by municipalities, in two forms<sup>175</sup>). Or they can be more general kinds of benefit: ‘economic support’ in Sweden includes actual housing costs for a reasonably priced apartment; ‘income support’ in Finland covers a reasonable level of housing. In Sweden, housing allowances and other kinds of direct economic support are considered the ‘dominant paradigm for helping low-income households.’<sup>176</sup> For the numbers of recipients, 4 per cent of all households were receiving housing allowance in 2010;<sup>177</sup> 6 per cent of households received economic support in 2011, though this last share is higher among households with a foreign background.<sup>178</sup> In Finland, the state budget expenditure for housing allowances was 1.1 billion in 2013; in addition, housing was subsidised (approximately 300 million in 2010) through general income support.<sup>179</sup> Finnish debates on the overlap between direct subsidies and financial subsidies include a proposal from 2010 to steer people who depend on housing allowance to live in state-subsidised dwellings – the percentage of residents in these dwellings receiving housing allowance dropped from 70 in 1990 to 50 in 2009 – and the opposing worry about the adverse effect that an increase in the overlap of financial and direct subsidies would have on the resident structure of the state-subsidised rental buildings. It was pointed out

<sup>174</sup> (1) General housing allowance covers 80 per cent of the reasonable housing costs of the household, beyond a deductible based on the number of people and their income and wealth. (2) Student housing supplement is 80 per cent of established housing costs, but not granted for the monthly cost exceeding 252 euros: 201.60 euros monthly. (3) Pensioners’ housing allowance is 85 per cent of reasonable housing costs, minus 50,62 euros a month and minus 40 per cent of the amount that exceeds certain family income limits. [Report for Finland, 66.]

<sup>175</sup> All tenants (either in private or in social rented housing) can receive housing support calculated on the basis of the housing expenses, the size of the dwelling, the household income, and the size of the household. Housing support for other people than those on a state pension is called *boligsikring* ('housing security'). Another scheme, *boligydelse* ('housing benefit'), is for recipients of old age pension and dominant in the field of housing for elderly people. [Report for Denmark, 40–41.]

<sup>176</sup> Lind, ‘Social Housing in Sweden,’ 97.

<sup>177</sup> [B]y 2010 only 180 000 households (4% of the total) were receiving housing allowance, compared to 380 000 in 1992 and 570 000 at the bottom of the crisis in 1995.’ Ibid., 98. ‘[With the aim of] cutting the expense of the housing allowance scheme, the Swedish housing allowance system was reformed in 1996–1997 [...]. This resulted in an expenditure decrease of almost 50% or SEK 4 billion as well as stricter eligibility criteria than before, and the number of housing allowance recipients decreased by approximately 50% over the 1996–2001 period [...]. This reform introduced a dwelling size constraint, relative to household size, into the Swedish housing allowance system. With the implementation of this reform, recipients could receive a housing allowance only for the part of the useful floor space that is within the set limit; previously, no restrictions were placed on the physical size of recipients’ apartments. Households with floor space above this limit received a reduced housing allowance, while households with floor space under the limit were unaffected by the reform. [T]his size limit has been criticized for creating a lock-in effect [...].’ Cecilia Enström Öst, ‘Housing allowance, housing consumption and lock-in effects: Evidence from a natural experiment,’ Working Paper 2012:3, Stockholm: Swedish Social Insurance Inspectorate, 2012, 5.

<sup>178</sup> Lind, ‘Social Housing in Sweden,’ 98. ‘The share of households living on economic support is higher among households with a foreign background. For example, in Stockholm, 2.2% of Swedish-born persons received such support in 2011, as opposed to 9.2% of those born outside Sweden. In some Stockholm suburbs, the share of households dependent on economic support is almost 20% and in areas of Malmö the share reaches around 30% [...]. These are typically large suburban housing estates built in the Million Homes Programme between 1963 and 1972.’ Ibid.

<sup>179</sup> ‘There are no national statistics on the proportion of housing costs in income support. Estimates from the local level vary between 21 and 63 per cent and are on average 52 per cent. Considering that the expenditure on income support was 626 million euros in 2010, the mentioned average percentage would mean that housing is subsidised, through income support, an additional approximately 300 million.’ [Report for Finland, 66.]

that spirals of segregation had so far been avoided in Finnish towns and cities, but tightening the tenant-selection criteria would threaten this balance in individual areas and individual buildings.<sup>180</sup>

Types of housing subsidies are multifold beyond the above financial subsidies and needs- and means-tested direct subsidies. For example, a tenant with no or little income can get a rent guarantee from the municipality in Sweden and Finland; municipalities in Finland subsidise rental housing through loan guarantees and loans and through lighter real-estate taxes paid by general-interest owners; and tenants in Denmark can obtain loans to pay the deposit (sometimes 3 to 6 months rent) required when they move into a new dwelling.<sup>181</sup>

## 2.6. Taxation

- Compare the various tax systems applying to different types of tenure (ranging from ownership to rentals) and their effectiveness in the countries under review? In particular:
  - Tenants: Do tenants also pay taxes on their rental tenancies? If so, which ones?
  - Homeowners' income tax: is the value of occupying a house considered as a taxable income? Is the profit derived from the sale of a residential home taxed?
  - Is there any subsidization of rental tenures via the tax system? If so, how is it organized? (for instance, tenants being able to deduct rent from taxable income; landlords being able to deduct special costs; homeowners being treated favourably via the tax system)
  - In what way do tax subsidies influence the rental markets?
  - Is tax evasion a problem? If yes, does it affect the rental markets in any way?
  - Does the tax system reflect the principle of "neutrality of tenure" or are homeowners privileged?
  - To what extent is the tax system of subsidisation effective in the various countries and influences rental markets in a positive (or negative way)?

Tenants do not pay taxes on their tenancies in any of the three countries. Tenants are not taxed in connection with rent expenses; nor are there tax allowances for maintenance expenses or other expenses relating to the rental property. There is no connection between the landlord's payment of taxes and tenant's security of tenure.

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<sup>180</sup> [Committee Report reference].

<sup>181</sup> Loans for tenant deposits are generally only paid for social housing and certain older dwellings. For refugees and certain other groups, loans may also be granted for other dwellings.

There is no documentation of the direct effect tax subsidies have on the rental markets. This also means that it is not easy to determine whether the tax system of subsidisation is effective or whether it influences rental markets in a positive (or negative) way. Of course, if the subsidies described above were to be taken away, this could have an significant effect. In many cases, this would make investment in property much less profitable, thereby creating an impact on both investments in existing property and the incentives to construct new housing.

In Denmark – to some extent – landlords will be able to pass on their tax to tenants by including their expenses in the rent, and advance notice of rent rises can be given on the basis of certain taxes (when they increase).

The value of occupying a house is not considered as a taxable income in any of the three countries. Profits from sale are to some extend taxed.

In all three countries interest expenses relating to financing of the property can be deducted in the calculation of the owner's taxable income.

This possibility – combined with the fact that as an owner of property it is possible to earn a tax-free profit on the sale of one's property – the conclusion is that homeowners are being treated favourably via the tax system. In addition, the "tax-free value" that arises when the value of the property exceeds the amount for it was purchased can also be mortgaged, enabling the homeowner to release money to fund purchases, for example. A tenant does not have this advantage. On the other hand, the tenant would not be able to borrow large amounts of money from a bank or mortgage company and therefore would be subject to very little financial risk.

In Sweden owners of one or two dwelling houses and apartment buildings have to pay a property fee. In some cases stamp duty in order to receive a title deed for the property must be paid. If the house or apartment is sold, there is a capital gains tax of 30 % on two-thirds of any price rises. But this can be deferred as long as another item is bought for at least the same amount of money.<sup>182</sup> Apartment buildings are counted as commercial property and taxed as a commercial activity at a rate of 22 % on any excess. (Only one or two dwelling houses and land intended to be provided with such a house, can be counted as private residential property). The tax rate on the sale of commercial property is 27 % of earnings, compared with 22 % for private residential properties.<sup>183</sup>

For landlords in Denmark, the letting of property – regardless of the number of properties that are let – is generally considered a form of self-employment. For this reason, landlords are generally taxed on their running costs and on the profits they make from the sale of properties. The extent of the taxation will depend on whether the landlord is subject to the personal tax rules, corporate tax rules or special tax rules for pension institutions, i.e. the tax is determined by the "legal" basis under which the rental

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<sup>182</sup><http://www.skatteverket.se/privat/skatter/fastigheterbostad/fastighetsavgiftfastighetsskatt.4.69ef368911e1304a625800013531.html>.

<sup>183</sup> <http://www.skatteverket.se/download/18.18e1b10334ebe8bc8000115067/kapitel>.

property is owned. Owners of properties pay direct taxes for their properties as property value tax (in relation to the value of the property), basic rent (municipal tax) and also a number of "green taxes" concerning, for example, systems for heating and utilities, etc.

Any net profit on a property's running costs is deemed taxable income for landlords who are subject to personal or corporation tax. This is calculated as the income from the operation (primarily rent income) minus expenses for administration, refurbishment, insurance, maintenance and property taxes, etc., as well as interest costs. The cost of improvements that raise the standard of the property relative to its standard at the time of purchase cannot be deducted.

Capital gains in connection with the relinquishment of property are considered taxable income. Any profit from the sale of a property in which the owners themselves have lived is not taxed. If the owner have lived in the residential property that he own a profit from selling the property will not be taxed.

In Finland capital gain from the sale of one's home is exempted, if the dwelling was used as the subject's or the family's permanent home for at least two years.

Homeowners also pay Real-estate tax. The tax is based on the value of the property, and not on income derived from it. A specific tax of 1–3 % is levied for non-built construction sites. Special rates apply in the Helsinki region.

A transfer tax is generally paid by the purchaser. It amounts to 1.6 % of the price of housing-company shares and 4 % of the real estate price. First-home buyers are exempt from the tax on three conditions: if they buy at least fifty per cent of their dwelling, they acquire it to be their permanent home, and they are between 18 and 39 years of age.

It is unclear how the rental markets are affected by tax evasion in the three countries. In the case of property owners, tax evasion with respect to income for renting out the property cannot be documented as a significant problem. The possibility that some landlords do not declare their rental income cannot be ruled out, but the tax authorities can estimate taxable income on a discretionary basis if the property is being let. In the few cases where the landlord deliberately attempts to avoid tax, it will probably be of no direct consequence for the tenants, as they will be protected by the provisions of the rent legislation with regard to the payment of rent and the amount of rent that can lawfully be charged.

In Finland however one widespread practice surrounding housing has been the direct payment for repair and other household services. To combat the tax evasion, the government created a tax credit for domestic help (household, nursing and care work, repair and renovation work, and services in installing and advising on information technology).

### **3. Comparison of tenures without a public task (Regulation in Private Markets – points 3 and 4 have been exchanged as private tenancies work as default solutions in many national systems)**

**Key parameter: “Socio-economic equilibrium” between position of landlord and tenant – so as to accommodate both the tenant’s need to have access to decent housing at an affordable cost and the landlord’s profit-orientation and property rights**

### **3.1. Evaluative criteria for the landlord**

#### **3.1.1 Profitability**

- Does rent regulation impede a reasonable profit?
  - o Profit from renting compared to other investments?
- Taxation of income from rent (privileged or absence of taxation) ?
- Other expenses to be borne by the landlord
  - o Costs of repairs for which the landlord is responsible
  - o Costs of utilities, other charges and taxes for which the landlord is responsible
- Other relevant economic and financial advantages/disadvantages for landlords

In all of the three countries investments in property is considered attractive.<sup>184</sup> Investments in private rental properties (where there is rent regulation in Denmark and Sweden<sup>185</sup>) will be determined by the extent to which the investors can expect a return which can compete with other investments. This will mean that profit calculation will take the limitations in the possibilities for rent increases etc. into consideration. Prior to the financial crisis investments in rental property were generally attractive to investors because of rising prices – it was possible to make a profit on the value of the property alone without taking rent payments from the tenants into consideration. Historically, property investments in rental dwellings in the three countries have given high rates of return. The greatest risks associated with investment in residential property where there is rent regulation relate to developments in the price of the property and, to some extent, whether the rent has been determined on the correct basis and is optimised.

In Finland, where there is no rent regulation today, the attractiveness of the rental residential sector has increased because of turbulence in the commercial property sectors.<sup>186</sup> State subsidies and, for instance, the growing demand for senior housing also attract investors. Residential has been the best performing sector for four consecutive years in the KTI Index, which measures the total return of directly held property investments in Finland.<sup>187</sup>

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<sup>184</sup> See section 1.2.3 above as well for figures on return of investment in property in the three countries.

<sup>185</sup> According to a recent study (Ernst & Young, “Real Estate Asset Investment Trend Indicator Sweden 2013”), 42 % of the respondents consider Sweden to be very attractive as a location for real estate investments and 58 % consider it to be attractive. An annual survey conducted by the Swedish union of tenants shows that property owners in Scania consider it profitable to own and manage apartment buildings. But the Swedish Property Owner Federation claims that it is much more profitable to build cooperative apartments than rental dwellings and that the rent setting system is a major obstacle for new construction. See as well Hyresgästföreningen: ”Är det en bra affär att äga hyreshus?” (2012) and Fastighetsägarna: ”Varför byggs det så få hyresräatter?”(2012).

<sup>186</sup> The Finnish Property Market 2012, 37 and 45–46.

<sup>187</sup> <http://www.kti.fi/index?PHPSESSID=dede44df44ccd6c84ee2027d708e5227>.

- Taxation of income from rent (privileged or absence of taxation)?<sup>188</sup>

For landlords in Denmark, the letting of property – regardless of the number of properties that are let – is generally considered a form of self-employment. For this reason, landlords are generally taxed on their running costs and on the profits they make from the sale of properties. The extent of the taxation will depend on whether the landlord is subject to the personal tax rules, corporate tax rules or special tax rules for pension institutions, i.e. the tax is determined by the “legal” basis under which the rental property is owned.

Pension institutions in the form of life insurance companies and pension funds are taxed on an ongoing basis based on estimated property values. In the event of a property being sold, the profit made is determined as the cash value of the sale price minus the value of the property at the start of the year. There are relief rules for many properties which exempt the profits of pension institutions from taxation.<sup>189</sup>

Like other interest expenses, interest expenses relating to financing of the property can be deducted in the calculation of the owner's taxable income.<sup>190</sup>

In Sweden apartment buildings are counted as commercial property and taxed as a commercial activity at a rate of 22 % on any excess (only one or two dwelling houses and land intended to be provided with such a house, can be counted as private residential property). Rent are recognized as income and all expenses of the property may be deducted, even depreciation. Any interest on loans used for the acquisition of property or equipment is deductible. The tax rate on the sale of commercial property is 27 % of earnings, compared with 22 % for private residential properties.<sup>191</sup>

In Finland Real-estate tax was introduced in 1993 – when a tax on imputed rental income was abolished. The real-estate tax is collected by municipalities and imposed on the owner, landlord or owner-occupant..

Tax rates are decided municipally within limits set by Parliament. The rates are currently between 0.6 and 1.35 % of the taxable values of the building and the land, and between 0.32 and 0.75 % of the value of permanent residences. Given that the tax is based on the value of the property, and not on income derived from it, this is a partial substitute to a wealth tax that was abolished in 2006.

In Denmark any net profit on a property's running costs is deemed taxable income for landlords who are subject to personal or corporation tax. This is calculated as the

<sup>188</sup> See section 2.6 above as well regarding taxation.

<sup>189</sup> Borg Kristensen: *Konsekvenser af huslejeregulering på det private boligudlejningsmarked - en mikroøkonomisk undersøgelse*, DREAM 2012.

<sup>190</sup> Mortgage interest is currently deductible at a maximum rate of approximately 33 per cent. Years before, this rate was much higher (up to 60 per cent in the 1980's and around 45 per cent in the 1990's). Any profit from the sale of a property in which the owners themselves have lived is not taxed.

<sup>191</sup> <http://www.skatteverket.se/download/18.18e1b10334ebe8bc8000115067/kapitel>

income from the operation (primarily rent income) minus expenses for administration, refurbishment, insurance, maintenance and property taxes, etc., as well as interest costs. The cost of improvements that raise the standard of the property relative to its standard at the time of purchase cannot be deducted. Owners of properties pay direct taxes for their properties as property value tax (in relation to the value of the property), basic rent (municipal tax) and also a number of "green taxes" concerning, for example, systems for heating and utilities, etc. Profits are taxable income. Any profit from the sale of a property in which the owners themselves have lived is not taxed though.

In Sweden owners of one or two dwelling houses and apartment buildings have to pay a property fee. For one or two dwellings houses it is 7 074 SEK or 0.75 % of the assessed value if that provides a lower fee. For apartment buildings it is 1 210 SEK per apartment or 0.3 % of the assessed value. No fee is required for condominiums until 2016. When the house or apartment is sold, there is a capital gains tax of 30 % on two-thirds of any price rises. But this can be deferred as long as another item is bought for at least the same amount of money.<sup>192</sup>

Similar to the regulation in Denmark capital gain from the sale of one's home in Finland is exempted from taxation, if the dwelling was used as the subject's or the family's permanent home for at least two years.

- Other expenses to be borne by the landlord
  - o Costs of repairs for which the landlord is responsible
  - o Costs of utilities, other charges and taxes for which the landlord is responsible
- Other relevant economic and financial advantages/disadvantages for landlords

Under Danish law it is specifically stated in the Rent Act that the landlord shall keep the property and the premises in proper repair at all times. All installations for drainage, supplies of light, gas, water, heating and cooling shall be maintained in good and serviceable repair. The landlord shall likewise be responsible for keeping the premises clean and for usual lighting outside and inside the property, as well as the means of access to the premises; also, the landlord shall be responsible for cleaning of the pavement, courtyard and other communal facilities. The landlord's duty to maintain the apartment by whitewashing, painting and papering shall be deemed to be discharged upon payment from time to time by the landlord. The landlord is responsible for all cost of repairs relation to the items etc. mentioned. It is legal to make an agreement stating that the tenant is responsible for whitewashing, painting and papering. The tenant and the landlord may mutually agree on a different distribution of the maintenance obligations, so that the tenant assumes e.g. the responsibility for maintaining and, if necessary, renewing toilets, water taps, refrigerators, kitchen tables, mixer taps, window panes, floors, floor covering and the like. Arrangements, in accordance with which the tenant takes on the responsibility to maintain anything other than locks and keys, must be stated in the tenancy agreement.

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<sup>192</sup><http://www.skatteverket.se/privat/skatter/fastigheterbostad/fastighetsavgiftfastighetsskatt.4.69ef368911e1304a625800013531.html>

Landlords wishing to refurbish a property must carry out the refurbishment in accordance with general building legislation. If a property is uninhabitable, e.g. because of extensive damage, the local authority where the property is situated may intervene and condemn the property, preventing it from being occupied. The legislation contains no specific minimum requirements regarding the condition that a property must be in before it can be let. It is possible for the local municipality to make a claim to the Rent Tribunal (not just on behalf of the tenant) if a property owner fails to maintain a property so that it is fit for habitation.

In Sweden the same prerequisites apply. The landlord is also here responsible for all maintenance works and repairs and for keeping the dwelling in such condition that, according to the general view in the locality, it is fully serviceable for the purpose intended.<sup>193</sup> The landlord shall, at reasonable intervals of time, arrange for papering, painting and other customary repair in the dwelling because of the deterioration of the unit from age and use. What a reasonable interval of time is varies depending on the size of the apartment and how many tenants living there. When it comes to painting and wallpapering the interval has become wider and is now about twelve to fourteen years. It is important to note that the landlord's obligation to repair does not occur simply because a certain amount of time has elapsed since the previous repair, it is also required that the apartment is in need of maintenance. As in Denmark is it possible – in some cases – that the parties may agree that the tenant will be responsible for maintenance.<sup>194</sup>

A tenant in both private and municipal housing is protected by rules on minimum acceptable standard in the Tenancy Act,<sup>195</sup> such as access to hot and cold water, a toilet, shower, stove, refrigerator etc. If these requirements aren't met, a tenant can make an application to the Rent Tribunal and require the landlord to fix the errors. The Rent Tribunal may impose a penalty if the landlord does not comply with the injunction.

Also in Finland the landlord has the duty to ensure that at the commencement of the lease and throughout its duration, the apartment shall be in such condition as the tenant may reasonably require, taking the age of the apartment, the local housing stock and other local conditions into consideration, unless otherwise agreed regarding the condition of the apartment. The provision imposing this duty on the landlord (section 20) is dispositive, and so the parties may agree on an inferior condition of the apartment. The parties' freedom of contract in private rental markets is limited by the basic requirements for the apartment set in health-protection, land use and building and environmental legislation.

### 3.1.2. *Property rights respected de iure and de facto*

Background: potential risks:

- Risk of default with rent payment
- Risk of abuse or deterioration of the house by the tenant

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<sup>193</sup> *Hyreslagen* Section 15 in combination with section 9.

<sup>194</sup> If the rented property is a single family home or a holiday cottage or the tenancy agreement includes a bargaining clause and the derogatory provisions have been included in a bargained agreement. *Hyreslagen* section 15.

<sup>195</sup> Tenancy Act § 18a.

- Risk of inability to evict a tenant, even in case of protracted violations of the contract or default in rent payment
- Existence and effectiveness of protection/ guarantee mechanisms:
  - Deposit
  - Liens and pledges on the tenant's belongings
  - Personal securities (e.g. surety)
  - Insurances
- Possibility to terminate contract if house is needed for own use or close relatives or another economic use (e.g. converting residential into commercial building)?
- Effectiveness of the eviction procedure?
  - Court proceedings or availability of conciliation or ADR procedure

*Construction and rehabilitation capabilities*
- Availability of mortgage credit
- Public subsidies for construction/rehabilitation
- Private arrangements: tenant agrees to rehabilitate apartment (performance in kind) in lieu of paying rent

The regulation in the three countries is similar to some extent. In Denmark the landlord decides where and how the rent and related bills shall be paid. However, payment can always be made to a bank, including (if applicable) the postal service. The rent is normally due on the first day of each month, but the parties are free to agree upon any other date. The landlord may terminate the tenancy agreement without notice in the case of default in the punctual payment of rent or other monetary liability. The landlord cannot terminate the contract (without further notice), except due to late payment, and if the tenant has not paid the arrears within 14 days from the tenant's receipt of a written notice requiring such payment.<sup>196</sup> This notice shall be given after the last due date for payment and shall state explicitly that the tenancy may be terminated if the back rent is not paid within the time limit. Under Section 94 of the Rent Act, the only case where the landlord is not entitled to terminate the tenancy agreement without notice is one where the matter for which the tenant is blamed is deemed to be immaterial (of "minor significance"). This could be e.g. if the amount that the tenant has not been paid is very small or if the tenant is not to blame for the delay.<sup>197</sup> Some cases are dismissed because the notice has not been explicit enough, thus making it impossible for the tenant to determine exactly what amount must be paid to avoid eviction.<sup>198</sup> If the tenant does not move immediately the landlord can initiate enforcement proceedings.<sup>199</sup>

In Sweden the rent shall be paid not later than the last weekday preceding the beginning of each calendar month – unless the parties have agreed on more favourable terms for

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<sup>196</sup> Rent Act Section 93 subsection 2.

<sup>197</sup> Recent examples from case law references on this topic: Ugeskrift for Retsvæsen 2011 p. 2400 Western High Court decision, Grundejernes Domssamling 2012 no. 77 Eastern high Court decision, Tidsskrift for Bolig- og Byggeret 2012 p. 542 Western High Court decision.

<sup>198</sup> Recent examples from case law: Ugeskrift for Retsvæsen 2006 p. 1864 Supreme Court decision, Ugeskrift for Retsvæsen 2010 p. 88 Western High Court decision.

<sup>199</sup> See answers regarding termination of contract without notice below in Section 6.6.

the tenant.<sup>200</sup> If the payment is delayed more than one week after payment day the tenancy is forfeited and the landlord is entitled to give the tenant an advance notice of termination.<sup>201</sup> However, the landlord must also serve the tenant with a notice saying that paying the rent within three weeks will recover the tenancy, and the notice of cancellation and the reason for the same have been given to the social welfare committee in the municipality where the unit is situated, the tenant may not be divested of the unit if the rent is paid within this period of time or deposited with the County Administrative Board. The tenant cannot be divested of the unit if the social welfare committee, within the time indicated above, has notified the landlord in writing that the committee will take responsibility for payment of the rent. Nor yet if the tenant has been prevented from paying the rent within the three weeks due to illness or some similar unforeseen circumstance and the rent has been paid as soon as possible, though not subsequent to the eviction dispute being determined by the court of first instance.<sup>202</sup>

If a tenant repeatedly pay the rent to late, the landlord can give a notice of termination with a period of notice. Then he can apply to the rent tribunal claiming that the tenant has neglected his obligations to such an extent that in fairness the agreement ought not to be prolonged.<sup>203</sup> When determining if the tenant is entitled to a prolongation, the overall picture of the tenant's behavior during the lease is of interest. The landlord's interest vs. the tenant's interest of keeping the apartment shall be considered.

In Finland the regulation is almost similar. Unless otherwise agreed, rent must be paid no later than on the second day of the rent payment period (one month, unless agreed otherwise).<sup>204</sup> There is no legal obligation on the landlord to send reminders. The landlord may terminate the lease if the tenant neglects to pay the rent within the legally required or agreed time, unless the tenant's action has only minor significance (see below as well).

- Risk of abuse or deterioration of the house by the tenant

Where the tenant neglects the premises and fails to repair the premises without delay – upon notice by the landlord requiring the tenant to do so – the contract can be terminated without notice according to the Danish Rent Act section 93.<sup>205</sup> Termination without notice is also possible where the tenant has failed to comply with the rules of proper conduct and the non-compliance is such that the tenant must vacate the premises.<sup>206</sup>

There is a similar regulation in the Swedish Rent Act section 42 where the contract can be terminated e.g. where if the unit is used contrary to section 23 or 41 and the tenant

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<sup>200</sup> Section 20. With regard to dwellings it is only with regard to the rent for the first month that the parties may agree on an earlier date for payment, for instance a certain time after the contract was signed.

<sup>201</sup> Section 42, first paragraph

<sup>202</sup> Section 44

<sup>203</sup> Section 46 paragraph 2

<sup>204</sup> Act on Residential Leases 34(1).

<sup>205</sup> E.g. Ugeskrift for Retsvæsen 2002 p. 1899 Western High Court decision.

<sup>206</sup> cf. Section 79a (1)(i)-(viii) or (xi), cf. Section 79b(2) of the Rent Act. This also applies where the tenant has failed to fulfil the conditions of a conditional tenancy, cf. Section 79b (1) (i), and the non-fulfilment is such that the tenant must vacate the premises.

does not rectify the matter immediately after being called upon to do so, or if the tenant or any other party to which the tenancy has been transferred or the unit let causes, through negligence, the occurrence of vermin in the unit or, through omission to inform the landlord of this, contributes to the spread of vermin in the property unit. If the unit is otherwise neglected or the tenant or another party to whom the tenancy has been transferred or the unit sublet neglects any point to be observed under section 25 in the use of the unit or does not take the care stipulated in that section and the matter is not rectified without delay after being called for.

Under the Finnish Act on Residential Leases the contract can be terminated without notice if the tenant uses the apartment for any other purpose or in any other manner than that provided when the lease agreement was made; or if the tenant creates a disturbance with his or her way of life or allows others to do so in the apartment; if the tenant fails to take good care of the apartment; or if the tenant violates provisions or regulations for the maintenance of public health and order in the apartment (Section 61[1]). The landlord is only entitled to rescind the contract after issuing the tenant with a prior written warning (in accordance with the rules on serving a notification for notice (section 62).

- Risk of inability to evict a tenant, even in case of protracted violations of the contract or default in rent payment

Between landlords and tenants, no constitutional rights will be violated when the landlord wants to evict the tenant because the tenant has not paid the rent. There are no rules on protection from eviction in the Rent Act. In some cases, due to social legislation, the local authorities have an obligation to help the evicted tenant arrange a new home, e.g. if it is a family with children and/or with social problems. If the matter for which the tenant is blamed is deemed to be of minor significance, the landlord is not entitled to terminate the tenancy agreement without notice. What a "minor significance" is, when not paying the rent on time, is the basis for a lot of disputes in Denmark and the limits for the "significance" are based on case law. This protection of the tenant can be pleaded in only a very few cases under special circumstances, e.g. when the tenant's bank failed to transfer the amount to the landlord's accounts or if the tenant has been hospitalized and unable to make the transfer on time. Even if the amount in question is very small (less than a month's rent or even just a few DKK), this is not a valid reason alone to find the matter immaterial.<sup>207</sup>

The regulation on this subject in the three countries is similar on the matter of "minor significance" to a late rent payment (as a ground for termination of the contract). In the Finnish Act on Residential Leases section 61 and Swedish Tenancy Act section 42 a similar rule applies. The reason for these similar rules on this topic is probably the fact that contract laws in the three countries are based on the same principles.

In Finland (as in Denmark) there are no rules on protection from eviction if the grounds for an eviction in the Act on Residential Leases are fulfilled. But if the apartment reside

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<sup>207</sup> Niels Grubbe, Hans Henrik Edlund: *Boliglejemål*, 2008, p. 434 ff.

children, whose living circumstances are unclear, or people in need of direct care<sup>208</sup> (such as the elderly or mentally ill or intoxicated persons), the Enforcement Code requires that “the local housing and social welfare authorities shall be notified as soon as possible”.<sup>209</sup> This obligation arises if the bailiff discovers, during the proceedings or while carrying out the eviction that said persons reside on the premises, but the bailiff has no active duty to determine the situation.<sup>210</sup> The bailiff may fulfil the obligation by informing either the housing authorities or the social authorities or both.<sup>211</sup> Unlike in Denmark though, the tenant may ask for a postponement of the move day.<sup>212</sup> If the postponement does not cause considerable inconvenience to the applicant, the bailiff may postpone the move day.

Lastly, if, at the time when the eviction is carried out, there are still said people in the apartment, “the eviction shall not be carried out before the housing and social welfare authorities have been reserved the opportunity to arrange for housing or to determine the need for social welfare services”.<sup>213</sup>

In Sweden – if the tenancy is forfeited due to non-payment of rent – the tenant has a chance of recovering the tenancy by paying the rent within three weeks. This period of time starts when he is served with a notice explaining how he may recover it and a notice is sent to the social welfare committee in the municipality where the apartment is located. If the tenant does not pay on time, he will be evicted. However, a tenant may not be evicted from the dwelling if the social welfare committee notifies the landlord in writing that the committee will take responsibility for the payment of rent. This must be made within the three weeks of time. Nor may the tenant be evicted if he has been prevented from paying the rent within the three weeks due to illness or some other similar unforeseen circumstance and the rent is paid as soon as possible. This must be when the eviction dispute is being determined by a court of first instance at the latest.<sup>214</sup>

The social welfare committee in each municipality will in most cases help an evicted person to get a new dwelling, especially if it is a family with children.

- Existence and effectiveness of protection/ guarantee mechanisms:
  - o Deposit

In accordance with the Danish Rent Act the landlord may demand payment of a deposit held as security for the tenant's obligations upon vacating the premises. The deposit may not be used to cover e.g. rent payments while the tenant still lives in the rented apartment. The tenants obligations includes rent that has not been paid as well as any claims against the tenant regarding maintenance or breach of contract. The deposit may correspond to up to three months' rent. A deposit is almost always demanded – but not always the full three months' rent. At the time of the signing of the agreement, the landlord may also besides the deposit demand an advance payment of rent equivalent

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<sup>208</sup> Enforcement Code 7:3.

<sup>209</sup> Enforcement Code 7:3.

<sup>210</sup> Kanerva and Kuhanen, p. 351.

<sup>211</sup> Government proposal.

<sup>212</sup> Kanerva and Kuhanen, 351.

<sup>213</sup> Enforcement Code 7:5(2).

<sup>214</sup> Section 44 in the Tenancy Act.

to up to three months' rent. Such advance payment of rent may cover the rent of the three final months of the period of the tenancy.

In Finland the landlord may also demand a deposit equivalent or up to three months' rent. The tenant typically agrees to deposit security of one or two months' rent on a separate bank account. A security may be put up to cover all obligations arising from the contract or, as is less often done, only some obligations, such as rent payment. At the end of the tenancy, if the tenant is entitled to get the deposit back, it will be with interests, in line with case law on returns from property. In Denmark the tenant will not get any interests from the deposit even if the tenant can claim the whole deposit back after a long period.

In Finland the parties may also agree on an advanced payment. The legal maximum period of an advance rent payment is three months (or, if the rent payment period is longer, one rent payment period).<sup>215</sup>

In both Finland and Denmark a lot of disputes arise from claims on the return of deposits on grounds of the condition of the apartment. This is partly due to the fact that there is no direct legislation on this matter at present.<sup>216</sup>

There are no rules regarding deposits in the Swedish Tenancy Act.<sup>217</sup> The use of deposits is rare, but is usually used as a guarantee for future claims due to damage to the apartment or unpaid rents. If a tenant has a requirement of a security in his tenancy agreement, it is possible to get the fairness of the clause tried. If the clause is considered unreasonable, it will be repealed.<sup>218</sup> One can assume that the authorities applying the law will not accept conditions of security set out in a routine manner. Particularly high restrictiveness can be predicted on different conditions on deposits. If a collateralisation deteriorates, it does not give the landlord the right to terminate the contract - the tenant still has a protected tenancy.<sup>219</sup> As stated above, there is no lawful amount mentioned in the tenancy legislation but the most common amount of deposit is one to three months' rent.

In Sweden and Denmark there are no rules on how the landlord has to manage the deposit as to special accounts etc., and neither on how the landlord is allowed to use the deposit. In Finland the deposit is usually managed on a separate account – probably due to the fact that the tenant can claim interests when the deposit has to be paid back.

- Liens and pledges on the tenant's belongings

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<sup>215</sup> "Any stipulation under which the tenant is liable for advance payment for a period longer than three months or, if the rent payment period is longer, for more than one rent payment period shall be null and void".' Act on Residential Leases 36(2).

<sup>216</sup> In Denmark a bill has been proposed regarding more specific regulation on in what condition the tenant may deliver the rented apartment back to the landlord. The state of the rented apartment when the tenant moves in shall be described in a report etc. The regulation is planned to come into force in 2015.

<sup>217</sup> Besides section 28 a. This section states that the tenant is entitled to get his deposit back after two years from the date the commitment entered into force (a period of notice of nine months applies). This right cannot be derogated from by agreement.

<sup>218</sup> Such changes apply only for the future. If the deposit according to the contract covers things totally unrelated to the tenancy and the dispute has already arisen the landlord will be free to make use of the deposit.

<sup>219</sup> Nils Larsson et al.: *Bostadshyresavtal i praktiken*, 2010, p. 79.

In neither of the three countries the landlord has a lien on the tenant's (movable) property in the house. In Finland the landlord's lien on the tenant's property (which was already known in the 1734 Codification) was repealed in 1993 on the ground that it was not much used.

- Personal securities (e.g. surety)

The prerequisites are the same in the three countries on this matter. Directive 95/46/EC which aims to prevent the violation of personal integrity in the processing of personal data applies in all countries and it limits the landlords' possibilities on processing data on tenants. Besides this there is no general regulation on this matter.

In Denmark there are no rules regulating the landlords' possibilities on checking the personal and financial status of the tenant. Some landlords try to "screen" potential tenants on the Internet or ask the potential tenants (directly or indirectly) for information about their financial status, and some landlords probably try to keep some sort of registration of former tenants as well. The landlord could in principle ask for a salary statement, and it is becoming more common. The landlord can gather and keep information about tenants until they move. It is not legal to share information about tenants or former tenants electronically or otherwise due to data protection regulations.<sup>220</sup>

In Sweden the landlord is also free to check both the personal and financial status of an intended tenant. It is common that both private and municipal landlords request a credit report before entering into a rental contract. If a tenant does not have a fixed income, many landlords will require a guarantor or charge a deposit. Information on the potential tenant can be gathered lawfully simply by asking the potential tenant for it. Because freedom of contract prevails, it is in the potential tenant's interest to ensure that the landlord gets the right information. It is easy to buy credit information, where the taxable income for the last year, registered property and debts with the Swedish Enforcement Agency are registered. Lists of bad tenants are only in conflict with the Personal Data Act<sup>221</sup> if they are in electronic form. Hence, a list in writing and shared by mouth is allowed and many landlords most likely have some sort of list of tenants guilty of misconduct.

Also in Finland the regulation on this issue is limited. Landlords renting only a few dwellings may ask virtually any documentation from a prospective tenant, including identifying data, credit information, and information about a workplace or study place. As no ground needs to be stated for looking into documentation, a landlord may even query

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<sup>220</sup> The Act on Processing of Personal Data - Act no. 429 of 31 May 2000. An organisation for the protection of landlords' rights (SAPU) have made a members-only "blacklist" of tenants on their websites. The principles for this current blacklisting of tenants have been approved by the Danish Data Protection Agency (*Datatilsynet*). The original list made by SAPU was found invalid on ground of data protection. See Danish Data Protection Agency Journal 2011-43-0031 (in Danish only) e.g. on <http://www.datatilsynet.dk/afgoerelser/seneste-afgoerelser/artikel/register-over-lejere-der-har-misligholdt-lejemaal-eller-lejeaftale/>.

<sup>221</sup> SFS 1998:204.

about a domestic credit card or a domestic driving licence in order to differentiate among the candidates. Landlords are especially advised to enquire about who will be moving into the apartment along with the tenant.<sup>222</sup> For additional information about a possible tenant, a conscientious landlord will contact the tenant's previous landlord, or at least inquire about the previous landlord's contact details. Providing for the concrete rules under the right to privacy, which became a constitutional right in 1995, and implementing the directive of the same year, the Personal Data Act applies, as general legislation, to other than the processing of data "by a private individual for purely personal purposes or for comparable ordinary and private purposes".<sup>223</sup>

- Insurances

In Denmark the insurance burden on a private rental property will usually be split between the landlord and the tenant. The landlord must insure the property itself against damage, e.g. fire, etc., if the property is mortgaged.<sup>224</sup> The tenant must insure the items that she owns, including furniture. If the tenant installs his or her own domestic appliances on the rented property, he or she must insure these goods himself, e.g. to cover any damage that the installed goods may cause to the property. The tenant can choose the insurance company; the landlord has no say in this matter.

In Sweden, both the landlord and the tenant also need to be insured (for the same reasons). The landlord may insure for damages on the property, and the tenant needs household insurance to cover what he owns and his furniture.

As the maintenance of the common areas of a property and the shafts and wires mounted in the dwellings belongs in the responsibility of the housing company, its property insurance covers damage to these parts also in Finland. The interiors of the apartment, including fixtures and surfacing, are within the responsibility of the individual owner or tenant; home insurance is the same for either one. The landlord and tenant may agree that the tenant takes home insurance, and tenancy contracts are said to include more and more frequently a clause, requiring that the tenant must have home insurance.<sup>225</sup> Nevertheless, furniture and fixtures such as wooden flooring may be insured by the landlord's home insurance too.

- Possibility to terminate contract if house is needed for own use or close relatives or another economic use (e.g. converting residential into commercial building)?

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<sup>222</sup> For instance, the Finnish Association of Landlords (*Suomen Vuokranantajat*) at <http://www.vuokranantajat.fi/asuntosijoittaminen/vuokralaisenvalinta/>.

<sup>223</sup> Personal Data Act 523/1999, 2(3).

<sup>224</sup> If a cost-based rent is charged (Housing Regulation Act section 5 (1) and section 8), the landlord can include the cost of insurance in the running costs budget, so that the cost is paid by the tenants as part of the rent.

<sup>225</sup> According to the insurance company *Tapiola*, <http://www.lahitapiola.fi/www/Yksityisasiakkaat/Asiakkaana+Tapiolassa/Elamantilanteet/Asuminen/Asunnon+ostaminen+tai+vuokraaminen/Vuokra-asunnon+vakuuttaminen.htm>.

In Denmark it is not possible to terminate the contract with the tenant even if the house is needed for the use of close relatives or another economic reason. Tenancies shall not be terminated with notice by the landlord except in the circumstances mentioned in the Danish Rent Act Section 83. This means that the landlord cannot terminate the contract for any other reasons, even if they seem fair or even if they are included in the tenancy contract signed by the tenant. If the landlord intends to use the premises for his or her own purposes, the landlord can terminate the contract, with one year's notice. Where the tenancy relates to a flat, this is on the condition that only the landlord (and not the landlord's adult children, for example) intends to occupy the flat. Termination must be reasonable in view of the circumstances of both parties. In determining this factor, the duration of the landlord's ownership of the property and – for the purpose of terminating a residential tenancy – the tenant's possibilities of finding suitable alternative accommodation should be considered. The tenant's age, eventual illnesses and similar factors may be taken into consideration. Section 83 also applies where the landlord has inherited the dwelling or bought it after sale, including public auction.<sup>226</sup> Where the tenancy relates to a flat, it is a condition that the landlord intends to occupy the flat. Where the flat is owner-occupied and not previously occupied by the landlord, an additional condition stipulates that the tenancy agreement was entered into prior to 1 July 1986.<sup>227</sup> If the landlord is occupying a flat in the property when giving notice of termination, the landlord, at the time of such notice, shall offer the tenant the possibility to take over this flat. If the property is jointly owned by several persons, the owners may only give a residential tenant notice of termination.

In some cases the landlord is particularly anxious to be released from the tenancy on other substantial grounds – not only breach of contract. It is not easy to determine when "substantial grounds" exist, and this reason for terminating a contract is rarely used. It can be used e.g. if a mortgage bank is forced to take over the property and the rent income does not cover the expenses for the bank.<sup>228</sup>

In Finland – unlike Denmark – the provisions on the detailed grounds for legal notice were abolished along with rent regulation (in the early nineties). Today, the landlord may give notice even for the singular purpose of increasing the rent. On giving notice to the tenant, the landlord must deliver a written notification "stating ... the grounds for" the termination, otherwise the notice will be ineffective.<sup>229</sup> Consequently, the landlord should

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<sup>226</sup> Case law examples: Tidsskrift for Bolig- og Byggeret 1998 p. 264 Eastern High Court decision: a landlord wanted to use a condominium after his divorce. The termination was found reasonable even though the tenant was old, living alone and suffering from some serious health and mental problems. Ugeskrift for Retsvæsen 2006 p. 79 Eastern High Court decision: A landlord sold his single-family home to his daughter. The daughter terminated the contract with the tenants. The termination was found reasonable because of the daughter's relation to the house, her difficulties in finding proper mortgage funding, and the fact that a tenant would not normally be able to rent such a home without a fixed-term contract. Other decisions on the topic e.g. Tidsskrift for Bolig- og Byggeret 2000 p. 325 Eastern High Court decision, Grundejernes Domssamling 2009 no. 59 District Court decision.

<sup>227</sup> The date relates to the point in time when changes of the Rent Act came into force. Martin Birk: *Opsigelse af lejemål i ejerlejligheder* in Tidsskrift for Bolig- og Byggeret 2001 p. 173-76.

<sup>228</sup> Margrete Pump og Martin Preisler Knudsen: *Opsigelse og ophævelse af andre væsentlige grunde* in Tidsskrift for Bolig- og Byggeret 2001 p. 131 ff.

<sup>229</sup> "The lessor shall give notice on a lease agreement by delivering to the tenant a written notification stating the date of the lease termination and the grounds for it. A summons for eviction requesting

give at least some reason(s) for the notice to have effect. Although, as the grounds for legal notice are no longer laid down in legislation, any ground will do as long as it is not contrary to good rental practice. Prior to the end of a fixed term, a court may permit the landlord to give notice if:

- 1) the lessor needs the apartment for his or her own use or for the use of a member of his or her family for reasons of which he or she could not have been aware at the time when the agreement was made; or
- 2) If, for some comparable reason, the agreement's remaining in force until the agreed date would be patently unreasonable from the lessor's point of view.<sup>230</sup>

In Sweden terminating a contract if house is needed for own use or close relatives or another economic use is not an admissible reason in general. A landlord may only terminate the contract when any of the situations mentioned in section 42 or 46 in the Tenancy Act has occurred. In section 46 it is stated that if the tenancy refers to a unit in a single- or two-family dwelling and the grant does not form part of a commercially conducted rental activity and the grantor has such an interest in disposing of the unit that in fairness the tenant should move and that if the agreement refers to a cooperative or condominium apartment and the owner has such an interest in disposing of the apartment that in fairness the tenant should move.

- Effectiveness of the eviction procedure?
  - o Court proceedings or availability of conciliation or ADR procedure

In Denmark the eviction procedure seems to be effective though some landlords might argue that the proceedings are not fast enough. On termination by the landlord, the tenant shall vacate the premises immediately. If this does not happen, the landlord may start proceedings at the Bailiff's Court at once and evict the tenant through this procedure. This applies when rent or another monetary liability has not been paid on time, as stated above. Both formal and material objections will be tried by the Bailiff's Court. The court's decision can be brought before the High Courts.<sup>231</sup> In most cases eviction procedures in the Bailiff's Court are handled within 14 days after the landlord has brought the case before the court. The procedure can be delayed if the tenant has reasonable objections and needs to have a lawyer defending him or her in court. However, even in that situation the Bailiff's Court will try the case within a month or so. The reason for this is that the eviction procedure is caused – in most cases – by the tenant not paying the rent, and the landlord cannot re-let the rented property before the tenant has moved out.

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termination of the lease shall also qualify as a notice notification". "Any notice not given as provided in this section shall be ineffective". Act on Residential Leases section 54(1) and 54(5), respectively.

<sup>230</sup> Act on Residential Leases section 55 (3).

<sup>231</sup> In connection with any other reason for termination without notice, the landlord may start proceedings in the Housing Courts that will try the tenants' formal and material objections against the termination. The court's decision can be brought before the High Courts.

No voluntary or compulsory mechanisms of conciliation, mediation or alternative dispute resolution are being used to any extent. From 1 April 2008 the Danish Courts have offered mediation as an alternative to a traditional adversarial lawsuit.

In Sweden the eviction procedure is handled by the Enforcement Authority. If any of the grounds stated in section 42 of the Tenancy Act is fulfilled, the landlord may apply for an eviction at the Enforcement Authority without a previous notice of termination to the tenant. An application to a district court for the termination of the tenancy or for the eviction of the tenant counts as notice of termination after the tenant has been properly served. The same applies for an application under the Payment Orders and Enforcement Assistance Act<sup>232</sup> to the Enforcement Authority for the eviction of a tenant.<sup>233</sup> If the tenant objects to anything in the landlord's application to the Enforcement Authority the dispute must be referred to the district court. The court will try the tenant's formal and material objections to the termination. If the landlord has terminated the tenancy agreement due to any of the grounds stated in section 46, the question of prolongation must first be settled by the rent tribunal in favour of the landlord before an eviction can be made. The rent tribunal will try the tenant's formal and material objections to the termination.

There are no statistics for matters regarding solely judicial assistance from the Enforcement Authority, and it would not be very accurate considering that judicial assistance not only can be requested in tenancy matters. However, there are statistics on the processing time for matters regarding injunctions to pay and judicial assistance from the Enforcement Authority. The processing time from application to decision (when no objection was raised) was 59 days in 2012 and 58 days in 2011. In the cases where an objection was raised the processing time were 98 days in 2012 and 93 days in 2011.<sup>234</sup> However, in recent years there have been several cases where the Office of the Chancellor of Justice has granted a number of persons' damages due to long delays in the procedure. The average processing time of the court cases where the Office of the Chancellor of Justice has granted individuals damages is 4 years and 8 months.<sup>235</sup>

No voluntary or compulsory mechanisms of conciliation, mediation or alternative dispute resolution are being used to any extent.

In Finland the eviction procedure starts with the bailiff sending an exhortation to move to the address of the premises covered by the ground for enforcement and to other possible known addresses. The exhortation to move can also be left as a sealed or unsealed notice on the premises.<sup>236</sup> The exhortation to move includes the exact date on which the evictee(s) must move<sup>237</sup> – no earlier than one week and no later than two

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<sup>232</sup> Lagen om betalningsföreläggande (SFS 1990:746).

<sup>233</sup> Section 8 in the Tenancy Act.

<sup>234</sup> Årsredovisning 2012 - Kronofogden p. 18.

<sup>235</sup>[http://centrumforrattvisa.se/wpcontent/uploads/files/Rapport%20om%20JKs%20skadeståndsnivåer%2020120213\(1\).pdf](http://centrumforrattvisa.se/wpcontent/uploads/files/Rapport%20om%20JKs%20skadeståndsnivåer%2020120213(1).pdf).

<sup>236</sup> Enforcement Code 705/2007 (an unofficial translation available at <http://www.finlex.fi/en/laki/kaannokset/2007/en20070705>), 7:2.

<sup>237</sup> Enforcement Code 7:2.

weeks from the receipt of the exhortation to move.<sup>238</sup> The move day may come to pass more than a day earlier than the actual eviction: the bailiff has discretion to carry out the eviction at any time after the move day. Conventionally, the exhortation to move is delivered to the tenant together with the notice of the commencement of enforcement proceedings. In the notice of the commencement of proceedings, the tenant is given an opportunity to be heard. At that stage, the tenant may ask for a postponement of the move day.<sup>239</sup> If the postponement does not cause considerable inconvenience to the applicant, the bailiff may postpone the move day (once or several times) by up to altogether two months from the start of the proceedings. With the consent of the applicant, the eviction may be postponed for a longer period, at most six months from the start of the proceedings, if there is an especially important reason for a longer postponement.<sup>240</sup> The bailiff will consider the need for postponement and the inconvenience to the applicant on a case-by-case basis. The bailiff's decision on a postponement is not subject to appeal.<sup>241</sup> The tenant shall, if the landlord-applicant demands this, pay rent to the landlord for the period of postponement under the earlier terms.<sup>242</sup>

In general the sparseness of civil litigation has been caused, first of all, by the duration of the proceedings. The average length of the different stages of adjudication in district courts may vary from a few months to a year. The appellate-court procedure takes, typically, between one and two years and, if certiorari is granted, the Supreme Court takes from six months to two years in addition.<sup>243</sup>

The Consumer Disputes Board<sup>244</sup> has, since 2007, given recommendations also to resolve disputes concerning rental housing and right-of-occupancy housing in a variety of constellations: when the parties are private individuals, or when the claimant is a private individual against a business landlord, a consumer purchasing a right of occupancy, or a private individual selling a right of occupancy.

### 5.1.3. Construction and rehabilitation capabilities

- Availability of mortgage credit

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<sup>238</sup> "The bailiff shall not without an important reason set the move day earlier than one week nor later than two weeks from the receipt of the exhortation to move". Enforcement Code 7:4(1) first sentence.

<sup>239</sup> Kanerva and Kuhanen, p. 351.

<sup>240</sup> "The move day may be postponed, unless this would cause considerable inconvenience to the applicant. However, the eviction shall be carried out within two months of the pendency of the matter, unless there is an especially important reason for a longer postponement. With the consent of the applicant, the eviction may be postponed for at most six months from the pendency of the matter without that pendency lapsing as a result. The bailiff's decision on a postponement shall not be subject to appeal". Enforcement Code 7:4(1) second until last sentence.

<sup>241</sup> Enforcement Code 7:4(1) last sentence.

<sup>242</sup> "On the demand of the applicant, the evictee shall pay rent to the applicant for the period of postponement, beginning from the move day, under the earlier terms. Advance payment of the rent may be set as a condition for postponement, if this can be deemed reasonable from the point of view of the evictee". Enforcement Code 7:4(2).

<sup>243</sup> Kanerva and Kuhanen, p. 363.

<sup>244</sup> <http://www.kuluttajariita.fi/en/index.html>.

Generally the financial crises from 2007/2008 have had an effect on the availability of mortgage credit in the three countries. This also means that construction as well as selling and buying houses has been influenced by the crises.<sup>245</sup>

In the years before the financial crisis, Danish housing was characterised by very large increases in property prices.<sup>246</sup> The housing prices are mainly powered by economic fluctuations and interest rates. Decreasing interest rates and new mortgage loan types had been introduced and property value taxes were frozen in 2002. These factors all contributed to rising prices. The introduction of amortisation-free loans (2003) is considered to be the main cause of rapid price increases in the period before the most recent financial crisis. When the crisis developed, prices fell dramatically. This was not anticipated by the Government (or by anyone in the financial sector). The cause of this has been that many Danish households have a large debt because they cannot sell their property – or they cannot sell it without losing a larger amount of money. In addition, prices on commercial buildings with rented dwellings increased rapidly – by approximately 200 per cent from 2000 until 2007. After 2007 the decrease in prices for these commercial properties has been even larger than for single-family homes and condominiums. The banks have become reluctant to lend money for financing house purchases; banks and mortgage companies have become subject to stricter government control, but no restrictions have been introduced concerning loan types, etc.

For letting, the crisis has not had any direct effects in this regard. It is possible that the demand for rented dwellings has increased (or has not decreased at least) because some people cannot lend money to buy a house. Fundamentally, it can be said that when the economy is strong, the Danish system makes the purchase of property attractive as an alternative to renting. As an owner of property, it is possible – if prices are rising – to earn a tax-free profit on the sale of one's property. In addition, the “tax-free value” that arises when the value of the property exceeds the amount for it was purchased can also be mortgaged, enabling the homeowner to release money to fund purchases, for example. A tenant does not have this advantage. On the other hand, the tenant would not be able to borrow large amounts of money from a bank or mortgage company and therefore would be subject to very little financial risk.

The typical financing of home ownership in Denmark is based on a down-payment of 5 % (own equity or personal loan), 15 % from loans based on a mortgage from a bank or other financing, and 80 % from a mortgage-based loan from a mortgage bank. Financing is regulated by law; a mortgage bank can finance only up to 80 % of the trading price through mortgage loans. The usual length of contracts on new mortgage loans is 30 years. Building of “normal” private rental housing – without subsidies – is typically financed by loans based on mortgage from banks or other financing, e. g. mortgage banks. The law stipulates that a mortgage bank can finance only up to 80 % of the trading price through mortgage loans.

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<sup>245</sup> See section 1.2.5 and 2.6 above as well.

<sup>246</sup> From 2000 until 2007, housing prices for single-family homes and condominiums rose by 85 % and 105 %, respectively, with the largest increases occurring in the Copenhagen area.

In the spring of 2010, as a response to the crisis and the unremitting tendency of households getting into debt, the Finland Financial Supervisory Authority<sup>247</sup> released a recommendation, according to which a housing loan should be at maximum 90 per cent of the purchase price ("loan ceiling"). At the time, loan to value exceeded that limit in 28 % of new housing loans.<sup>248</sup> The banks opposed restrictions, and the Ministry of Employment and the Economy declined, against the background of the opposition, from proposing legislation demanded by the Bank of Finland and the Financial Supervisory Authority in early 2013; but the opinion of banks was reportedly swayed, among other things, by the International Monetary Fund, which in the summer of 2013 recommended loan ceiling, and new proposal for legislation is now being deliberated between the government and the financial sector.<sup>249</sup>

House loans in Finland are not assumable mortgages, but personal loans. Nevertheless, most Finnish house loans are secured by a home. The indebtedness of households is at an historical high, 119 % in relation to annual disposable income.

The financing of new homes in housing companies (the portion of new houses among home sales is considerable<sup>250</sup> although the housing stock is renewed slowly) is arranged as follows. New apartments are sold in the construction phase.<sup>251</sup> In one arrangement, the construction firm sets up a housing company, with which it enters into a construction contract – in effect making the contract with itself, as it administers and owns the housing company. Alternatively, the housing company may be established by another developer – a municipality, a non-profit, or another firm. In any case, the housing company pays the construction firm, by taking a bank loan, for instance, and then repays the bank with payments from homebuyers, who purchase the shares.<sup>252</sup> The shares are paid in instalments as the work progresses.<sup>253</sup> The founding shareholder of the housing company normally retains ownership to the shares until their price is fully paid, while the buyer holds a lien on the shares as security for repayment of the advance instalments (thus the importance of a proportionality requirement, legislated in the mid-nineties, to protect the buyer against the insolvency of the founding shareholder: the instalments may not be so large as to be clearly or continuously disproportionate to the value of the seller's performance, and no less than ten per cent of the price may only be due once possession is transferred).<sup>254</sup> By reserving title, the developer maintains authority over the company during construction. On completion of the work, the administration is transferred to the buyers.

+ section 2.7 in the *Finland report*?

In autumn 2010, new rules came into force regarding mortgage loans in Sweden. The Swedish Financial Supervisory Authority provided new guidelines for mortgage loans which stated that new mortgage loans should not exceed 85 % of the home's market

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<sup>247</sup> <http://www.finanssivalvonta.fi/en/Pages/Default.aspx>.

<sup>248</sup> Tiia Kyynäräinen, 'Valvoja pettyi: Asuntolainat ovat yhä ylisuuria,' *Taloussanomat*, 22 September 2010.

<sup>249</sup> Anni Lassila, 'Pankit pyörsivät kantansa: Asuntolainojen katto lähellä toteutumista,' *Helsingin Sanomat*, 17 January 2014.

<sup>250</sup> Mäki-Fränti et al 2011, p. 2.

<sup>251</sup> For the summary in this paragraph, see Government proposal 14/1994 for Housing Transactions Act, general grounds 1.2.

<sup>252</sup> The case Supreme Administrative Court 2002:57 describes this arrangement.

<sup>253</sup> Government proposal 14/1994 detailed grounds 4:29.

<sup>254</sup> Housing Transactions Act 4:29 (2–3) and Government proposal 14/1994 detailed grounds 4:29.

value. This became more commonly known as a mortgage cap. The rules took effect on October 1 2010 and the aim is to increase consumer protection and suppress unhealthy developments in the credit market. The new rules have been the subject of much debate because they risk shutting out first-time buyers who can't afford to get a second mortgage for the remaining 15%.

The financial crisis does not affect the rental sector in Sweden directly either. Market forces do not affect rents directly. Reduced interest rates lower the rents in the long run and reduced housing production raises the rents in the long run.

- Public subsidies for construction/rehabilitation

In Denmark landlords are subsidised directly only when building new housing and are subsidised indirectly by some general tax allowances. It is not possible to determine whether national policy on this matter favours rented housing or housing ownership, because both rented housing and housing ownership are subsidised in many different ways. A regulated and government-financed urban renewal programme can provide grants for selected maintenance and improvement purposes concerning private rental properties as well as support for the renewal of decaying urban areas and more recent residential areas with major social problems.<sup>255</sup>

In Finland housing subsidies can be divided into three kinds: "object-based" financial subsidies; "subject-based" direct subsidies; and tax subsidies. Among financial subsidies for housing production carried out by municipalities and general-interest organisations, where ARA has the discretion, interest-subsidy loan authorisations have since 2012 been granted over 1 billion per year (975 million in 2011, 1,025 million in 2012, 1,040 million in 2013).<sup>256</sup> Guarantee-loan appropriations are granted 285 million,<sup>257</sup> bringing the total social-housing-production subsidisation in the latest 2013 budget to 1,325 million.

The state also gives housing renovation and energy grants, subsidising (1) renovations of the apartments of elderly and disabled people,<sup>258</sup> (2) building-condition surveys in cases where the municipal health-protection authority has verified a health risk,<sup>259</sup> (3) the construction of lifts<sup>260</sup> and other improvements enabling elderly or disabled people to access and move in the building,<sup>261</sup> (4) the eradication of a health risk in exceptional cases,<sup>262</sup> and (5) measures to save energy and to adopt renewable energy sources in small houses (of no more than two apartments) on means basis (and covering only other than cost of labour, which may be included in the tax credit for domestic help).<sup>263</sup> The applicant must have the repair and maintenance responsibility of the object; the grants in cases (1), (2) and (5) are applied from the municipality, after which ARA

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<sup>255</sup> The Danish Act on Urban Renewal and Urban Development, which entered into force on 1 January 2004, serves as a tool for the Danish municipalities to make targeted efforts in urban and housing policy.

<sup>256</sup> *Budget review 2013*, p. 31; *Budget review 2012*, p. 30.

<sup>257</sup> *Budget review 2013*, p. 31.

<sup>258</sup> *Laki asuntojen korjaus-, energia- ja terveyshaitta-avustuksista* 1184/2005, 5(1), 6(1.1 and 2), and 8(1).

<sup>259</sup> *Laki asuntojen korjaus-, energia- ja terveyshaitta-avustuksista*, 6(1.5).

<sup>260</sup> *Laki asuntojen korjaus-, energia- ja terveyshaitta-avustuksista*, 6(1.4).

<sup>261</sup> *Ibid.*

<sup>262</sup> *Laki asuntojen korjaus-, energia- ja terveyshaitta-avustuksista*, 2(1.3) and 5(2).

<sup>263</sup> *Laki asuntojen korjaus-, energia- ja terveyshaitta-avustuksista*, 2(1.6), 5(3), 6(1.7) and 7.

distributes the state grants to the municipalities, while ARA has the discretion in cases (3) and (4).<sup>264</sup> 2013 budget allocation to these renovation grants is 50.5 million.<sup>265</sup>

Besides the above financial subsidies by the state, many municipalities, especially large cities and towns, subsidise social rental housing through lower price terms in land sales and land leases. Municipalities also subsidise rental housing through loan guarantees and loans and through lighter real-estate taxes paid by general-interest owners.

When it comes to financing for building rental housing in Sweden, there are no state loans provided for the construction of housing. It is possible to apply for investment support for projects that create senior housing through new construction or remodelling. This applies for the adoption of co-operative, rental and co-operative rental dwellings.<sup>266</sup>

Formally, there is a possibility to get a purchase guarantee for first-time buyers, which is a government guarantee covering interest payments on home purchases. The purpose is to provide assistance to households who want to buy a home but aren't able to get home loans even though they have a long-term solvency. It may be due to individual risk factors such as not being known at the bank in the past, individual credit history and more. The guarantee works as an insurance policy for the lender who insure against the risk of losing interest income for a home loan.<sup>267</sup> However, this possibility is not used in practice.

- Private arrangements: tenant agrees to rehabilitate apartment (performance in kind) in lieu of paying rent

In all three countries it is possible to make contractual agreements on the tenants right or duty to rehabilitate the rented apartment. In neither of the countries this the tenant has a statutory right to this.

The Danish Rent Act applies whether rent is payable in money or otherwise, e.g. by way of work or services rendered. If it is specified in the contract how the rent has to be paid, the landlord can terminate the contract even if the rent is not paid in money. No special rules apply and such agreements are very rare. There is no statutory right for the tenant to replace a rent payment with a performance.

Under Finnish law it is not unlawful to replace rent payment, wholly or partly, by performance in kind. But the tenant has no statutory right to this effect (so the situation falls to be treated in line with private-law principles which do not impose an obligation to accept work performance any more than they do an obligation to accept an offer). Conceivably, the parties' agreement may be a "mixed" contract, in effect, consisting of two contracts, a tenancy agreement and a contract of employment, but a contract of employment requires other elements, such as the employer's direction and supervision. Dwellings provided by the employer are again separately regulated in the Employment

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<sup>264</sup> *Laki asuntojen korjaus-, energia- ja terveyshaitta-avustuksista*, 9(1).

<sup>265</sup> *Budget review 2013*, p. 31.

<sup>266</sup> <http://www.boverket.se/Bidrag--Stod/Hyreshus/Investeringsstod-till-aldrrebostader/>.

<sup>267</sup> <http://www.boverket.se/Bidrag--Stod/Forvarvsgarantier/>.

Contracts Act (“accommodation benefit”).<sup>268</sup> Overall, replacing rent payment by payment in kind is not very common in Finland as it is not in Denmark. Experiences of tenant’s improvement have been mixed.

The Swedish word “ersättning” which is used in section 1 of the Tenancy Act refers both to payment in kind and payment in money. It is thus legal for the landlord to require work through the term of the contract. However a tenant may go to the rent tribunal and ask it to remove such a clause from the rent contract.

### **3.2. Important evaluative criteria for the tenant**

#### **3.2.1. Affordability**

- Initial rent
  - o Free or
  - o Regulated / controlled in some effective way?
- Possibilities of rent increase
- Regulation of deposit
- Regulation of expenses (utilities etc)
- Regulation of repairs: who is responsible for what kind of repairs?
- Other fees (e.g. registration fees or taxes to be paid by tenant)
- Rent subsidies for poor tenants [if relevant, a reference to the above findings is sufficient]

##### a. Initial rent

The starting point in all three countries is the contractual freedom in connection with the establishment of tenancy agreements. However, the rent legislation contains a number of mandatory invalidity rules which mean that the rent may be reviewed at any time if the agreed rent violates the legislation. Both Sweden and Denmark have rent control for most tenancies. In Finland no direct rent control systems exist any longer. Rent control was abolished in Finland in the early 1990's, and today rent is, in the private sector, determined on the basis of what is agreed. This freedom of contract is only limited by the legal power of courts to examine whether the rent, or a stipulation on determining it, is reasonable.<sup>269</sup>

In Sweden the rents are determined through a utility value system (*bruksvärdessystem*), which determines what a reasonable rent for an apartment is. Before 2011 the municipal housing companies had a normative role for all rents (including apartments owned by private landlords) but they have now been replaced with the normative role of collectively negotiated rents instead.<sup>270</sup> The Tenancy Act states that the rent shall be established at a reasonable amount. The rent cannot be considered to be reasonable if

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<sup>268</sup> *Työsopimuslaki* 55/2001 (an unofficial translation available at <http://finlex.fi/en/laki/kaannokset/2001/en20010055>).

<sup>269</sup> Section 27[1] and 30 of the Act on Residential Leases.

<sup>270</sup> Prop. 2009/10:185.

it is palpably higher than the rent for units of equivalent utility value.<sup>271</sup> (The meaning of the term "palpably" will vary depending on the circumstances, but approximately 2-5 percent). Setting the rent according to the utility value system is done in two steps. First of all other apartments whose rent has been determined in a bargaining agreement and that have a utility value as similar as possible to the apartment in question must be found. The rent for the apartment in question is then based on the highest rents of the comparable apartments. It is the parties who must provide data for the comparison. If relevant comparative material is missing the rent tribunal will make an equitable assessment instead. If the parties have agreed on an excessive rent the tenant shall start by informing the landlord of what new terms and conditions he requests. If an agreement cannot be reached, the tenant is entitled to apply to the regional rent tribunal. This application may be made one month after the opposite party has been informed at the earliest. A landlord who has a bargaining agreement with the Swedish Union of Tenants cannot agree on an excessive rent. He is bound by the collective rent bargain agreement with the Union. If the landlord still agrees with the tenants on an excessive rent the agreement is invalid and he must repay the excess plus interest.<sup>272</sup>

In Denmark rent regulation/control applies for almost all tenancies except for properties built after 1991. The system is based on different complex regulation methods and it is based on statutory provisions in the Rent Act and the Housing Regulation Act which are the two main acts regulation Danish tenancy law. There are four types of rent regulation for private rental properties, of which market rent is the only one which actually relates to market forces and therefore to supply and demand. The principal form of regulation is the cost-based rent. Cost-based rent is determined on the basis of the running costs attributable to the property concerned.<sup>273</sup> In addition, the owner can add a number of statutory provisions, a profit and a surcharge for any improvements made to the rented property since the property were originally constructed. The rent is therefore an estimate.

This system means that a very large number of tenancies pay a rent below – or at least under no influence of – market rates. The system is effective – rents are controlled – and it is easy for a tenant to challenge the initial rent if it is not set in accordance with the law. The system has not been challenged on the constitutionality of the respective legislation, relying on the principle of equality.

#### b. Possibilities of rent increase

When it comes to rent increases the landlord and tenant may expressly agree on rent increases by making contractual amendments. Both Denmark and Finland have systems for automatic increases of the rent when agreed upon in the tenancy contract. This is not the case in Sweden. Here all rent increases are carried out in the same way and it depends on whether or not the landlord has a principal bargaining agreement with the Swedish Union of tenants and the tenants have a bargaining clause in their tenancy agreements, or if the landlord lacks such an agreement and then has to negotiate the

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<sup>271</sup> Section 55.

<sup>272</sup> Section 23 in the Tenancy Bargaining Act.

<sup>273</sup> Housing Regulation Act Sections 7-9.

rents with the tenants individually. A principal bargaining agreement requires the landlord to negotiate rents, terms and conditions of housing with the union. If the landlord is bound by this type of agreement he must send the union a written notice about what new terms he requests. Then the landlord and the union negotiate what conditions that should apply. If they do not agree, an application to the rent tribunal must be made. A tenant is bound by the new negotiated rent or term if there is a bargaining clause in the tenancy agreement regarding this matter, but can apply to the rent tribunal for an amendment of the agreement. A landlord without an agreement with the union must negotiate the rent with each tenant individually.

In Finland the only constraint on the parties' power to agree in common on rent increases is contained in the Act on Indexing Restrictions.<sup>274</sup> Nevertheless, courts can always examine the reasonableness of the rent and other contract terms. The most commonly used indices are the cost of living -index and the consumer price index.<sup>275</sup> The consumer price index was employed in the Act on Residential Leases as the index for the transition period, and the cost of living -index was widely used during the dismantling of the rent-regulation system. Combinations of various indices are also lawful.<sup>276</sup> Similarly, other comparable arrangements are lawful, such as percentage or monetary increases and variations of these (three per cent annually in the first two years, two per cent after that). Index clauses may also lawfully be combined with other increases (an index point change plus one per cent). For instance, rent could be linked to an index, with an additional clause stipulating a minimum adjustment to ensure that the rent will increase annually.<sup>277</sup>

In principle, the ground of increase must simply be agreed in the contract, precluding any blanket right for a private landlord to increase rent unilaterally.<sup>278</sup> If the reasonableness of the rent is disputed in court, evidence of reasonable market-level rent should be presented, but statistics are often available only for larger areas than those arguably meant by "the current market rate charged *in the area*" in section 30(1) of the Act on Residential Leases.<sup>279</sup>

In Denmark it is possible to agree on rent increases by specific amounts at specific dates – a so-called "stepwise rent increase".<sup>280</sup> In the case of tenancies subject to the rules on rent not exceeding the amount required to cover the necessary operating costs for the property, the stepwise rent increase must not exceed the said amount at any time. For other tenancies the stepwise rent increase, as a principal rule, must not

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<sup>274</sup> Laki indeksiehdon käytön rajoittamisesta (21.12.2000/1195).

<sup>275</sup> Kanerva and Kuhanen, p. 150.

<sup>276</sup> Government proposal 304/1994, p. 64.

<sup>277</sup> Government proposal 304/1994, general grounds 2.2.3.3; examples in brackets in the text, Kanerva and Kuhanen, p. 151.

<sup>278</sup> Act on Residential Leases 27(2); Kanerva and Kuhanen, pp. 34 and 151.

<sup>279</sup> Kanerva and Kuhanen, p. 159 n. 263.

<sup>280</sup> Rent Act Section 53 subsection 2. Rent increases for properties covered by Section 53 subsection (3)-(5) of the Rent Act and The Housing Regulation Act Section 15a may be demanded on the basis of an agreement regulating the rent by certain amounts at certain dates or of the net retail-price index, and may be implemented by the landlord's written notice thereof to the tenant – but only if, after the increase, the rent does not exceed a level in accordance with the legislation.

substantially exceed the value of the property at any time.<sup>281</sup> If an agreement on free regulation of the rent has been made (where applicable), it may be agreed that the rent in the period of the tenancy shall be regulated either in accordance with the net retail price index or by specific amounts on specific dates (stepwise rent increase). The agreement must be stated in the tenancy agreement; otherwise it is not valid.

In Finland, during the lease, the parties may also freely agree to a higher rent only for a few months, for instance, to cover the costs of renovation.<sup>282</sup> In Denmark – when the landlord has improved the premises – the landlord may demand a rent increase by an amount corresponding to the increase of the value of the premises.<sup>283</sup>

### c. Regulation of deposit

In Denmark and Finland the regulation on deposits are almost similar. In both countries it is regulated by rules that may not be derogated from by agreement to the detriment of the tenant. The landlord may demand payment of a deposit held as security for the tenant's obligations upon vacating the premises. The deposit may correspond to up to three months' rent. This includes rent that has not been paid as well as any claims against the tenant regarding maintenance or breach of contract.

At the time of the signing of the agreement, the landlord may also demand an advance payment of rent equivalent to up to three months' rent. Such advance payment of rent can cover the rent of the three final months of the period of the tenancy. In Finland an advance rent payment can be agreed only at time the tenancy contract comes in to force (and not during the duration period), and only for a special cause<sup>284</sup> (such as the financing of future repairs<sup>285</sup> or, evidently, used as an extra security for rent payments).<sup>286</sup> In Denmark, in case of rent increases (or decreases), an adjustment of deposit and advance payment of rent may be required.

In Sweden there are no rules regarding deposits in the Tenancy Act besides section 28a. This section states that the tenant is entitled to get his deposit back after two years

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<sup>281</sup> Jakob Juul-Sandberg: *Det lejedes værdi*, 3. edition, 2014. In regulated municipalities a mutually agreed regulation of the stepwise rent increase may be set aside in properties comprising at least seven flats if, based on an overall assessment, the terms and conditions of the stepwise rent increase imply that the overall terms and conditions for the tenancy agreement are more onerous for the tenant than the terms which apply to the other tenancies in the property.

<sup>282</sup> Courts can always examine the reasonableness of the rent. Kanerva and Kuhanen, p. 145.

<sup>283</sup> The terms "improvement" and "increase of the value of the premises" in the Rent Act are not defined or described further in the Rent Act. This means that in many cases it is not possible for lay persons to properly calculate the rent increase applicable to a particular tenancy. For instance, if the landlord decides to change the kitchens in all the apartments in a property, the rent increase which will be possible will depend on the existing state of the kitchens in the apartments (the newer or better the existing kitchen, the smaller the scale of the improvement), which will mean a deduction in the amount on which the calculation of the improvement can be based. The final decision on the size of the deduction will be made by the Rent Tribunal or the courts if the landlord and the tenant disagree.

<sup>284</sup> "When the lease agreement is made, advance payment of rent for more than one rent payment period may be agreed on if special cause exists. Any stipulation under which the tenant is required to pay rent in advance while the lease is in force shall be null and void. The tenant shall, however, be entitled at any time to pay rent in advance for rent payment periods not yet falling due". Act on Residential Leases 36(1).

<sup>285</sup> Government proposal 127/94, p. 44.

<sup>286</sup> Kanerva and Kuhanen, p. 174.

from the date the commitment entered into force (a period of notice of nine months applies). This right cannot be derogated from by agreement. This means that the use of deposits is rare, but is usually used as a guarantee for future claims due to damage to the apartment or unpaid rents. The most common amount of deposit is one to three months' rent. There are no rules on how the landlord has to manage the deposit as to special accounts etc., and neither on how the landlord is allowed to use the deposit.

In Finland – and in Denmark to a smaller extend – disputes concerning the landlord's refusal to give back the deposit on grounds of the condition of the apartment are one of the most problematic areas. The fact that there is no regulation on this topic in the Swedish Tenancy Act implies that this is not a problem in Sweden. The most likely reason is that tenants use their right to get the deposit back when the tenancy has existed for two years or more.<sup>287</sup>

#### d. Regulation of expenses (utilities etc.)

Denmark has the most restrictive system of the three countries on this matter. Here the landlord may (only) make the tenant pay for power, heating, water, wireless signal transmission and cable TV. No other utility is under the authority of the Rent Act and therefore cannot be charged to the tenant. As a principal rule, in properties where the landlord supplies heating and hot water, and in properties where payment for water is made in accordance with consumption meters, the tenant pays an amount on account to cover the landlord's expenses. The costs of the heating and hot-water supply for the property cannot be included in the rent. The same applies to the water consumption expenses, if these are apportioned on the basis of meters. It can be arranged for the tenant to pay the supplier directly. This may be possible when the rented property is an independent house or a condominium. Otherwise, the landlord shall forward accounts for the actual expenses and amounts paid on account during the accounting period upon the expiry of the accounting period for water and heating consumption.

In Sweden the amount of rent shall be determined in the tenancy agreement, or if the agreement contains a bargaining clause, in the bargaining agreement. However, this does not apply to compensation for expenses relating to the supply of heat, hot water or electric current or charges for water and sewerage, if the tenancy agreement includes a bargaining clause and the basis of payment computation has been established through a bargained agreement or through a decision from the rent tribunal. This is also the case if the unit is situated in a single- or two-family dwelling, or if the cost of the utility is charged to the tenant by individual metering. Usually, when renting an apartment in an apartment building, most tenancy agreements have a total rent where the heat and water supply are included in the rent, as well as waste collection. The household electricity is usually charged separately by a separate contract between an electricity supplier and the tenant. An increase of prices of utilities may be carried out through an increase of the rent, but the rent increase must be negotiated with the Swedish Union of Tenants if the landlord has a principal bargaining agreement or if there is no such agreement, with each tenant individually. If the parties cannot agree, the rent tribunal must make a decision about the increase.

Another cost that usually is in addition to the rent, is the cost of broadband which usually

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<sup>287</sup> See section 3.1.2 on deposits above as well.

is supplied by an external provider. When individuals rent one or two dwelling houses from other individuals they usually conclude contracts directly with the supplier. Gas stoves are relatively uncommon in Sweden.

In Finland the parties may agree on charges such as electricity, water, and heating. All charges paid to the landlord are regarded as part of the rent, no matter how they are called, and the provisions on rent payment and the reasonableness of rent apply. The parties may agree in the tenancy contract on any charges. While the use of a parking lot, sauna, and so on, can be agreed to, one charge too distant from the use of the apartment to be agreed on in the same contract is that for the use of a car, even if it were agreed upon in the same document.<sup>288</sup>

e. Regulation of repairs: who is responsible for what kind of repairs?

Basically the same regulation applies in the three countries. The regulation is non mandatory in Finland and Denmark and semi mandatory in Sweden as derogations are possible in collective bargaining agreements but not in individual contracts. In all three countries the principal rule is that the landlord is obliged to maintain the property to keep it in a proper condition.

In Denmark the obligations on maintenance are regulated in the Rent Act. It is specifically stated that the landlord shall keep the property and the premises in proper repair at all times. All installations for drainage, supplies of light, gas, water, heating and cooling shall be maintained in good and serviceable repair. The landlord shall likewise be responsible for keeping the premises clean and for usual lighting outside and inside the property, as well as the means of access to the premises; also, the landlord shall be responsible for cleaning of the pavement, courtyard and other communal facilities. Papering, painting, plastering or other repairs inside the rented premises occasioned by deterioration due to wear and tear shall be carried out as often as necessary in view of the character of the property and the premises.

The landlord's duty to maintain the apartment by whitewashing, painting and papering shall be deemed to be discharged upon payment from time to time by the landlord.<sup>289</sup> It is legal to make an agreement stating that the tenant is responsible for whitewashing, painting and papering. The tenant and the landlord may mutually agree on a different distribution of the maintenance obligations, so that the tenant assumes e.g. the responsibility for maintaining and, if necessary, renewing toilets, water taps, refrigerators, kitchen tables, mixer taps, window panes, floors, floor covering and the like. Arrangements, in accordance with which the tenant takes on the responsibility to maintain anything other than locks and keys, must be stated in the tenancy agreement. During the term of the tenancy the tenant shall maintain and, where required, replace

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<sup>288</sup> This is the example given in the government proposal 304/1994 detailed grounds 1.1 ("Scope of application of the Act").

<sup>289</sup> The necessary amounts for this are specified in Sections 22 and 23 of the Rent Act and the amount shall be registered in a "maintenance account" for each apartment. The tenant may require the landlord to whitewash, paint and paper the flat as and when required, and any costs incidental thereto may be paid out of the balance available on the maintenance account. The landlord shall not pay more than the amount available in the maintenance account at any time.

locks and keys unless otherwise agreed. No matter an agreement on duties to maintain the apartment. It cannot be agreed that the property shall be in better condition at the termination of the tenancy, than it was at the commencement of the tenancy.

Under the Finnish Tenancy Act the same starting point applies and the regulation is generally based on the parties agreement as the provisions are dispositive: The landlord has the duty to ensure that at the commencement of the lease and throughout its duration, the apartment shall be in such condition as the tenant may reasonably require, taking the age of the apartment, the local housing stock and other local conditions into consideration, unless otherwise agreed regarding the condition of the apartment. If the parties agree that the tenant is responsible for the condition of the apartment and that the apartment should be in the exact same condition at the end of the lease, then the tenant may be responsible for ordinary wear and tear.<sup>290</sup> The parties may also agree that the tenant is responsible for the upkeep of any facilities or equipment available to her or the parties may divide the responsibility.

In Sweden the landlord is responsible for all maintenance works and repairs and for keeping the dwelling in such condition that, according to the general view in the locality, it is fully serviceable for the purpose intended. The landlord shall, at reasonable intervals of time, arrange for papering, painting and other customary repair in the dwelling because of the deterioration of the unit from age and use.<sup>291</sup> If the rented property is a single family home or a holiday cottage, the parties may agree that the tenant will be responsible for maintenance. Through a collective bargaining agreement it can be determined that the mandatory rule of the landlord's obligation to do customary repair shall not apply.<sup>292</sup>

Residential tenants entitled to carry out painting, wallpapering and comparable measures in the dwelling at their own expense. This means that a tenant has a right to exchange perfect fittings with other fittings, if he so prefers. The idea is that the tenant shall be allowed to change the apartment to accommodate his or hers taste. But if the utility value of the apartment thereby is reduced, the landlord is entitled to compensation for the damage. But a judicial review regarding whether or not the utility value has deteriorated cannot be made until the tenant moves out. However, the landlord's duty to repair what is broken is not affected by these rules.

#### f. Other fees (e.g. registration fees or taxes to be paid by tenant)

In Denmark and in Sweden no registration fees or taxes are to be paid by the tenant. In connection with the letting of premises for residential purposes it is not permitted to

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<sup>290</sup> Kanerva and Kuhanen, pp. 102 and 134.

<sup>291</sup> What a reasonable interval of time is varies depending on the size of the apartment and how many tenants living there. When it comes to painting and wallpapering the interval has become wider and is now about twelve to fourteen years. It is important to note that the landlord's obligation to repair does not occur simply because a certain amount of time has elapsed since the previous repair, it is also required that the apartment is in need of maintenance. The same assessment applies in Denmark.

<sup>292</sup> Nils Larsson et al, *Bostadshyresavtal i praktiken*, 2010, pp. 87-88. The idea is that a residential tenant who is being offered repair is able to abstain it, and in return be able to get lower rent or a rebate. This is called tenant-controlled apartment maintenance and is quite common among the municipal housing companies.

receive from or charge a fee to the tenant, or to require the tenant to enter into another contract which is not part of the tenancy agreement.<sup>293</sup> In Finland no registration or fee payment is needed either.

g. Rent subsidies for poor tenants [if relevant, a reference to the above findings is sufficient]

See section 2.5 above.

### ***3.2.2. Stability***

- Is the position of the tenant under the contract or real property law stable?
  - o Are insecure instruments such as licences instead of leases usual?
  - o Effect of the lack of a written agreement
  - o Effect of omitted registration
  - o Are there incentives for the landlord to conclude an unofficial, hidden, "black market" contract giving less stability to the tenant?
- Has a tenant a guarantee to stay as long as he respects the contract?
  - o Open ended lease: adequate protection against unilateral termination by landlord?
  - o Fixed term leases possible so as to circumvent the protection of the tenant in case of open ended leases
  - o Protected periods effective and long enough (are there adequate prolongation rights?)
  - o Emptio non tollit locatum
  - o Right of first refusal (call option) of the tenant in cases of sale of the house to a third party
- Indirect impediments: if massive rent increases allowed, the tenant may be forced to leave
- Are additional "social defences" available in the eviction procedure?

### ***3.2.3. Flexibility***

- Unilateral termination by tenant possible within reasonable delay?
- Non-abusive subletting allowed?

Conclusion of contracts in the three countries are based on a Nordic cooperation – and in general the same rules on contract formation apply in all Nordic countries. This means e.g. that oral contracts are as binding as written contracts and general rules on contract interpretation and invalidity apply. There is no difference between how a tenancy

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<sup>293</sup> Under Section 6 of the Danish Rent Act. Section 65 a in the Swedish Tenancy Act.

agreement and any other type of contract is concluded, the Contracts Act apply for both types.

If sufficient evidence is given of the existence of a tenancy agreement, nothing else is required. Both Section 4 of the Danish Rent Act and section 2 of the Swedish Tenancy Act states that a tenancy agreement and any other agreements concerning the premises shall be executed in writing if either party require it. If the agreement is not in writing the provisions of the Acts applies. This means that a tenancy agreement shall be deemed to have been concluded subject to the provisions of the Rent Act, unless otherwise provided in the agreement. Oral or unfinished written agreements are therefore valid and the Rent Act will apply. According to the Act on Residential Leases in Finland a fixed-term tenancy agreement must be made in writing, when it concerns other than a holiday home. If not made in writing, a tenancy agreement may only be valid for an unlimited term.<sup>294</sup>

Registration in the Land Registry is not obligatory in Denmark. Under Section 7(1) of the Rent Act, a tenant's rights stated in the Rent Act are enforceable against anyone without registration. This means that if the (former) landlord has charged a higher rent than allowed, the tenant can make his or her claim against the new landlord – even if the landlord is in good faith. It makes no difference whether the tenant has moved away before the property is sold. However, on termination of the tenancy, any proceedings to enforce the tenant's claims shall commence within 12 months from the date of termination. If the tenant has been granted special rights – better than what is stated in the Rent Act – he has to register the tenancy agreement in order to be protected against any new owners and the creditors of the landlord.

There are no registration requirements for tenancy agreements in Sweden either. A tenant has a dynamic third party protection even without registration. Chapter 7 section 13 in the Land Code states that [...] “a grant referring to a lease or tenancy shall be valid against a new owner of the property unit if the grant was made by written agreement and possession was taken prior to the transfer”. This means that the new owner of the property must respect the general rights of the tenant under the tenancy laws.

In Finland it is possible to have a mortgage registered as security for the permanence of lease rights<sup>295</sup> in the title and mortgage register, which is part of the Land Information System of Finland. But this option is not much used. The reason is that the registration under the Code of Real Estate requires the real-estate owner's consent, and the owner usually is, in other cases than the lease of an entire real estate, the housing company rather than the landlord, and the housing company cannot give the consent – put its property up for another person's debt – under the Housing Companies Act.

In Denmark sub-letting agreements shall be made in writing, and the tenant shall submit a copy of the sub-letting agreement to the landlord prior to the commencement of the

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<sup>294</sup> Act on Residential Leases 5(1).

<sup>295</sup> “Any stipulation in the lease agreement stating that no mortgage can be applied for as security for the permanence of the leasehold ... shall be null and void.” Act on Residential Leases section 9.

sub-letting period. There is no specific regulation on contracts regarding sub-letting in Finland or Sweden.

There are no real incentives for the landlord to conclude an unofficial, hidden, “black market” contract given the fact the regulation the countries tenancy acts respectively covers the relation between the landlord and the tenant no matter if the contract is in writing or not. In the tenant were to go to court with a dispute this would be possible. An incentive for the landlord to hide a contract could be tax evasion. But this would not affect the contractual relation with the tenant.

In Sweden there are cases of “rogue” landlords who will try to circumvent the legal rules and offer the tenant a sublease contract only. This is often arranged by the use of a front man, such as a separate company or a relative, which in turn will sublet to the tenant. In these situations the subtenant can have the same right as a primary tenant under certain conditions.<sup>296</sup> In Denmark the Rent Act was changed in 2010 to avoid such situations.<sup>297</sup>

Unauthorized sub-letting, when a tenant is subletting a flat without permission from the landlord, creates an unsafe situation for the person who subleases the flat. The tenant who subleases is liable to pay too much in rent and also lacks a security of tenure. Furthermore, sub-letting an apartment without prior permission constitutes grounds for termination of the “master” tenancy agreement. The principle is that the rent the holder of the master lease is allowed to charge when subletting should be the same rent as he or she is paying. It is not intended that tenant of the “master” lease makes money when subletting even though it is not directly prohibited. This seems to be a larger problem in Sweden than in Denmark and Finland probably due to housing shortage there. The current Swedish law does not prohibit paying for a contract but it is illegal to sell a lease. A complaint is rarely made to the police when it comes to the parts of the black housing market dealing with unauthorized subletting and trading of leases. The cases which are reported to the police and leading to prosecution usually are concerned with fraud.<sup>298</sup> No regulation on this matter is potential in either Denmark or Finland because the problem does not seem to be very big here.

- Has a tenant a guarantee to stay as long as he respects the contract?
- Open ended lease: adequate protection against unilateral termination by landlord?
- Fixed term leases possible so as to circumvent the protection of the tenant in case of open ended leases

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<sup>296</sup> Under Chapter 7 section 31 in the Swedish Land Code

<sup>297</sup> If an apartment was let out to a company exclusively for residential purposes before 13 June 2010, the contract will be regulated by the Business Rent Act. The tenant who actually lived in the apartment, e.g. a shareholder or an employee, was considered a sub-lessee. The relation between the company (tenant) and the sub-lessee was regulated by the Rent Act. This could be legal, but in some cases this “construction” could be made only because the regulation in the Business Rent Act is not so radical. After 13 June 2010, letting apartments to a company exclusively for residential purposes is regulated by the Rent Act as well (Rent Act Section 1, subsection 1 changed by Act no. 632 of 10 June 2010).

<sup>298</sup> Swedish Board of Housing, Building and Planning, “*Dåligt fungerande bostadsmarknader*” (2011) pp. 11-21.

- Protected periods effective and long enough (are there adequate prolongation rights?)
- Emptio non tollit locatum
- Right of first refusal (call option) of the tenant in cases of sale of the house to a third party
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In general the regulation in the three countries grants the tenant a guarantee to stay as long as he respects the contract.

In Denmark and in Finland there are no mandatory minimum or maximum duration of the contract period. Theoretically, there is a maximum duration for limited in time contracts of 50 years or for a person's lifetime under Swedish law, but the prolongation rights apply. Tenancy contracts can be entered into for a limited or unlimited period.<sup>299</sup> They are unlimited unless otherwise agreed. In general, immediate termination of the contract is possible only if one of the parties has committed a fundamental breach of contract.

The regulation on the tenant's possibilities for giving notice is almost similar in Denmark and Sweden. In Denmark unlimited tenancies may normally be terminated by the tenant giving three months' notice,<sup>300</sup> while the landlord can give notice (also three months as the main rule)<sup>301</sup> only if certain indispensable conditions are met. Agreements on longer notice periods are legal. In Sweden the period of notice for the tenant is usually three months. This applies provided that no other period has been agreed upon. If a period of notice of e.g. one month has been agreed the tenant may choose between the statutory and the agreed period. If the parties have agreed on a period of notice of more than three months, that period applies for the landlord but not for the tenant – he may choose the statutory period of three months instead.<sup>302</sup> An ordinary period of notice is three months for a landlord as well, unless another period is agreed. However, a shorter period of notice than three months for an open-ended contract (or a fixed term contract lasting for more than three months) is not valid when the landlord terminates the contract. If the tenant and the landlord agree on a period that is less advantageous for the tenant than the statutory right, that agreement is void.

In Finland the tenant's notice period is one month in non-fixed-term contracts, no matter for how long the lease has lasted, and the period cannot be extended in the contract. Ordinarily the landlord may give notice in (i) no less than six months' time, if the lease

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<sup>299</sup> As stated just above according to the Act on Residential Leases in Finland a fixed-term tenancy agreement must be made in writing, when it concerns other than a holiday home. If not made in writing, a tenancy agreement may only be valid for an unlimited term.

<sup>300</sup> It is not legal to agree on a shorter term. Agreements on longer terms are legal. See e.g. Niels Grubbe, Hans Henrik Edlund: *Boliglejemål*, 2008, p. 362.

<sup>301</sup> Under section 82 of the Rent Act the period of notice shall be one month for separate rooms for residential purposes, where the room forms part of the landlord's flat or a single- or double-occupancy house occupied by the landlord, and for flats in buildings in which only two flats exist at the time of the tenancy agreement and where the landlord occupies one of these two flats. This rule applies even in cases where the owner is using one or more rooms in the house for non-residential purposes, and even where one or more rooms in the property are let for residential purposes.

<sup>302</sup> Section 3 of the Tenancy Act.

has lasted uninterruptedly for at least one year immediately prior to the giving of notice (not prior to the end of the notice period), or otherwise in (ii) no less than three months' time.<sup>303</sup> The notice period cannot be reduced in the contract.<sup>304</sup> The landlord may give notice even for the singular purpose of increasing the rent. On giving notice to the tenant, the landlord must deliver a written notification stating the grounds for the termination; otherwise the notice will be ineffective.<sup>305</sup> Consequently, the landlord should give at least some reason(s) for the notice to have effect. Although, as the grounds for legal notice are no longer laid down in legislation, any ground will do as long as it is not contrary to good rental practice.

In Denmark neither party can give notice to terminate a fixed-termed contract unless otherwise agreed (in the tenancy agreement). If the tenant moves out during the fixed term, it is considered breach of contract and the tenant is liable for damages. This is the main rule in Finland as well. Exceptionally, a court may, after providing the other party an opportunity to be heard, permit the tenant or the landlord to give notice on special grounds.<sup>306</sup> If the court permits one party to give notice on a fixed-term agreement, the other party is entitled to reasonable compensation for any loss incurred as a result of the premature termination of the contract.

Under Swedish law the legislation is different on this particular field. Here the tenant will always be free to move with three month notice even in fixed term contracts. Furthermore in Sweden a tenant cannot be evicted merely because the time limit has elapsed, the tenant has the same protected tenancy as tenants with open ended contracts have. If the parties have a fixed term agreement the landlord is bound by that term and he cannot give an advance notice of cancellation. He can only terminate the contract to the date the rental period expires or in case of a breach of contract of the tenant.<sup>307</sup> If the landlord is aware of and accepts that the tenant remains in possession of the dwelling for more than 1 month after expiry of the term, without requiring the tenant to vacate the premises, the tenancy will continue for an indefinite term. Such a provision applies in Denmark as well.

Under Danish Regulation the Housing Court may set aside any provision for a fixed term, where such provision is not found to be warranted by the landlord's own situation.<sup>308</sup> This means that the landlord – at the time when the contract is concluded – must have reasonable grounds to make the contract for a limited period only. It is possible to prolong a limited contract if it is warranted by the landlord's own situation at

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<sup>303</sup> Act on Residential Leases 52(2).

<sup>304</sup> "Any stipulation reducing the lessor's notice period or extending the tenant's notice period shall be null and void". Act on Residential Leases 52(4).

<sup>305</sup> "The lessor shall give notice on a lease agreement by delivering to the tenant a written notification stating the date of the lease termination and the grounds for it. A summons for eviction requesting termination of the lease shall also qualify as a notice notification". "Any notice not given as provided in this section shall be ineffective". Act on Residential Leases 54(1) and 54(5), respectively.

<sup>306</sup> Act on Residential Leases 55(2) and (5).

<sup>307</sup> Section 4 of the Tenancy Act.

<sup>308</sup> Rent Act Section 80, subsection 3.

the time of the prolongation. In Finland only very short fixed-termed contracts may be considered void.<sup>309</sup>

It is possible to make contracts “for life”. Unless otherwise agreed by the parties, such a contract cannot be terminated before the tenant dies. The tenant may register the tenancy agreement with such a right to be protected against any new owners and the creditors of the landlord.<sup>310</sup> Lifespan can be a valid – what is elsewhere called “relative” – fixed term under Finnish tenancy law.<sup>311</sup> A contract valid for the tenant’s life is a fixed term contract in Sweden according to a case from 1999.<sup>312</sup> This means that the landlord cannot bring about a change in the rental conditions against the will of the tenant during the tenant’s lifetime.

The tenant can stay in the rented premises until the end of the notice period unless otherwise agreed upon after notice has been given. The tenant does not have any statutory right to stay for an additional period of time (prolongation). If the termination of the contract – after the landlord has given notice – is found valid (in court), and the tenant does not move out at the end of the given notice period, the landlord may proceed and evict the tenant without further notice or delay. It is not possible for the tenant to stop the eviction proceedings when there is a final judgment stating that the termination stands. This goes for Denmark and Sweden with the additional remark that in Sweden there is the possibility of a period of grace. If the rent tribunal decides that the tenancy shall cease, a reasonable respite for vacation may be granted in the decision if the landlord or tenant so requests. But if the tenancy is forfeited without the landlord having cancelled the agreement in advance, a respite may only be granted at the tenant’s request if the landlord approves of it.<sup>313</sup>

In Finland the system seems to be a little different. A date for removal of the tenant after the end of the notice period can be deferred. The deferral of the removal date is a special action, which the tenant may bring no less than one month prior to the removal date.<sup>314</sup> The tenant may also attach this claim to another claim, which has already been brought before the court. If the tenant has substantial difficulty in obtaining another dwelling, the district court may defer (once) the removal date by up to one year.<sup>315</sup> The deferral must not cause the landlord or some other person (a new tenant) substantial inconvenience or loss, and it is precluded to defer the removal date after (i) a buyer in a

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<sup>309</sup> Act on Residential Leases 4(1), third sentence: “If a fixed-term lease of no more than three months is agreed on with the same tenant more than twice consecutively, the lease shall be considered a non-fixed-term lease notwithstanding the fixed-term provision”.

<sup>310</sup> Section 7(2) of the Rent Act: “Where a tenant acquires more extensive rights by agreement, e.g. contractual security of tenure, a right of assignment or a right to compensation upon vacation under section 63, below, the tenant may demand registration of such agreement. The agreement so registered shall be subject to the largest possible public loans and any other charges and encumbrances on the register at the time of application for registration of the said agreement”.

<sup>311</sup> According to a commentary on the Act on Residential Leases, Kanerva and Kuhanen, p. 55.

<sup>312</sup> RH 1999:60.

<sup>313</sup> Section 52 in the Tenancy Act.

<sup>314</sup> Act on Residential Leases 70(1).

<sup>315</sup> “If a tenant with a non-fixed-term lease encounters substantial difficulty in obtaining another dwelling by the removal date, the court can, at the tenant’s request, defer the removal date by up to one year. Deferral of the removal date can be restricted to apply to only part of the apartment”. Act on Residential Leases 69(1–2).

compulsory auction has given notice, (ii) the landlord has the right to rescind the contract, or (iii) the tenant has herself given notice of termination or rescinded the agreement.<sup>316</sup> On making the decision, the court simultaneously announces a new removal date and includes in its decision the duty that the tenant moves out when the lease is terminated.<sup>317</sup> The decision cannot be appealed to a higher court.<sup>318</sup>

Under Danish tenancy law no specific restrictions in general are given in favour of certain tenants or for a certain period or after sale including public action (or inheritance). The general rights of the tenant as stipulated in the tenancy laws have validity without registration against the landlord's creditors and assignees in good faith.<sup>319</sup> Tenant's rights are therefore ensured if, for example, the property is resold. A new owner of the property must respect the general rights of the tenant under the tenancy laws – a tenancy cannot be terminated because the property has been sold. The new owner has no right to do so. The same applies to changes of agreements on advance payment of rent, deposits, and the like within the terms of the law.

The same regulation applies in Sweden – the transferral of a property to a new owner will generally not affect the validity of the tenancy agreements concluded between the former owner and tenants of the transferred property. The new owner will in most cases be bound by the agreements and will become the new landlord.<sup>320</sup> Tenants do not get a specific right to terminate the contract in this situation either.

When the ownership to the apartment in Finland is voluntarily transferred (by sale, gift, etc.), the tenancy agreement is binding on the new owner if any one of the following three conditions is met: the tenant has taken possession of the apartment before the transfer takes place; the agreement transferring ownership includes a provision on the continuance of the lease agreement; or a mortgage has been taken out to secure the permanence of the lease.<sup>321</sup> As an exception to the rule, the buyer of a property sold in a compulsory auction has the right to give notice on any tenancy agreement within a month of having taken possession of the property, unless the property is sold subject to a stipulation guaranteeing the continuance of the lease.<sup>322</sup> The tenant will have the benefit of the landlord's notice period.

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<sup>316</sup> "The removal date shall not be deferred if this causes the lessor or some other person substantial inconvenience or loss. Nor shall the removal date be deferred if the lessor has given notice pursuant to section 39, or if the lessor has the right to rescind the lease agreement under paragraph 1 or 2 of section 61, or if the tenant himself, herself or itself has given notice or rescinded the agreement". Act on Residential Leases 69(3).

<sup>317</sup> Act on Residential Leases 71.

<sup>318</sup> Act on Residential Leases 70a (599/2002).

<sup>319</sup> Rent Act section 7.

<sup>320</sup> If a written tenancy agreement exists and the tenant has accessed the apartment, the new owner is bound by the agreement according to Chapter 7 section 13 in the Tenancy Act. If there is no written contract or if there is a written contract but the tenant has not acceded the apartment the new owner is bound under certain circumstances – Chapter 7 section 11-14.

<sup>321</sup> Act on Residential Leases 38(1).

<sup>322</sup> Act on Residential Leases 39(1). If the buyer was unaware of the existence of the lease, she may give notice within a month of the later date on which she received notification of the existence of the lease. Ibid.

This exception has in Finland been justified on the ground that debtors could otherwise make – perhaps long-term – lease agreements in the face of bankruptcy, which might diminish the value of the property considerably.<sup>323</sup> In Denmark this potential problem has been dealt with in two ways:

- i) Where a tenant acquires more extensive rights than those that follow from the Rent Act by agreement, e.g. contractual security of tenure, the tenant may demand registration of such agreement in the land register. If the tenant does not, buyers in good faith may be bound by these extensive rights.
- ii) In some cases the new owner may be released from the tenancy contract on “other substantial grounds”. This reason for terminating a contract is rarely used though. It can be used e.g. if a mortgage bank is forced to take over the property and the rent income does not cover the expenses for the bank.<sup>324</sup>

In Denmark no regulation on a right of first refusal of the tenant in cases of sale of the house to a third party applies in general. It would be legal to make an agreement on this in the tenancy contract. In properties used wholly or in part for residential purposes though, the landlord shall offer the property to the tenants on a co-operative basis before disposing of the property to a third party. The provisions on the obligation to offer a property to existing tenants applies to properties used exclusively for residential purposes, containing six or more flats, and other properties containing not less than 13 flats.<sup>325</sup> The purchase must take place subject to the same conditions under which the property would otherwise have been purchased, and the tenants will have to form a co-operative and fulfil the requirements in Chapter 16 of the Danish Rent Act.

Under certain conditions (some of them the same as in Denmark – e.g. forming a co-operative) the tenants may acquire an apartment building on the same terms that would be offered to a buyer who wants to continue with the rental management.<sup>326</sup>

In Finland a residential lease does not give rise to any statutory pre-emption rights or rights of first refusal.

- Indirect impediments: if massive rent increases allowed, the tenant may be forced to leave

This is not directly regulated on in the three countries. If the landlord has given notice on a massive rent increase this can always be tried in the Rent Tribunal (Denmark, Sweden) and/or in court.

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<sup>323</sup> Kanerva and Kuhanen, p. 183–184.

<sup>324</sup> Margrete Pump og Martin Preisler Knudsen: *Opsigelse og ophævelse af andre væsentlige grunde* in Tidsskrift for Bolig- og Byggeret 2001 p. 131 ff.

<sup>325</sup> Introduced in the 1970s, this legislation gave the tenants in a rental property a right of pre-emption if the owner wished to sell the property. See Danish Rent Act chapter 16.

<sup>326</sup> SFS 1982:352. The Property Acquisition Rights (Conversion to Tenant-Ownership) Act (*lag om rätt till fastighetsförvärv för ombildning till bostadsrätt eller kooperativ hyresrätt*).

- Are additional “social defences” available in the eviction procedure?

In both Denmark and Sweden the tenant shall be given notice regarding a late payment of the rent (Denmark two weeks, Sweden three weeks). In Sweden the local social welfare authorities must be notified at this point as well (in Denmark this also applies for Social Housing). In Sweden the tenant may not be evicted from the dwelling if the social welfare committee notifies the landlord in writing that the committee will take responsibility for the payment of rent. This must be made within the three weeks of time. Nor may the tenant be evicted if he has been prevented from paying the rent within the three weeks due to illness or some other similar unforeseen circumstance and the rent is paid as soon as possible. This must be when the eviction dispute is being determined by a court of first instance at the latest.<sup>327</sup> The social welfare committee in each municipality will in most cases help an evicted person to get a new dwelling, especially if it is a family with children.

In Denmark it is not possible – without the landlords acceptance – for the tenant to stop the eviction proceedings when there is a final judgment stating that the termination stands. If the local social welfare authorities want to help it must be before this time. When the landlord gets the verdict that the termination was valid, the landlord may proceed through the Bailiff's Court without further delay and get the tenant evicted with no possibility for the tenant to mount an objection even if he offers to pay (or the Social welfare authorities do). The Bailiffs Court will notify the municipal social welfare authorities if the tenant have children in the rented premises at the time of eviction, but this does not postpone the eviction for more than a very short time (hours) unless the landlord accept this.

Legislative changes and measures have been implemented though to limit the number of evictions due to the non-payment of rent.<sup>328</sup> But this is related to the time before the eviction proceedings start. Evictions procedures have never been the cause of any disputes from a human-rights point of view in Denmark.

In Finland is it possible to postpone an eviction procedure. If the postponement does not cause considerable inconvenience to the applicant, the bailiff may postpone the move day (once or several times) by up to altogether two months from the start of the proceedings. With the consent of the applicant, the eviction may be postponed for a longer period, at most six months from the start of the proceedings, if there is an especially important reason for a longer postponement.<sup>329</sup> The bailiff will consider the need for postponement and the inconvenience to the applicant on a case-by-case basis. The bailiff's decision on a postponement is not subject to appeal.<sup>330</sup> The tenant shall, if

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<sup>327</sup> Section 44 of the Tenancy Act.

<sup>328</sup> This was partly due to the fact that the number of evictions was rising. Statistics from the Courts of Denmark: 2,849 evictions in 2006, 3,377 in 2007, 3,762 in 2008, 3,912 in 2009, 4,382 in 2010.

<sup>329</sup> “The move day may be postponed, unless this would cause considerable inconvenience to the applicant. However, the eviction shall be carried out within two months of the pendency of the matter, unless there is an especially important reason for a longer postponement. With the consent of the applicant, the eviction may be postponed for at most six months from the pendency of the matter without that pendency lapsing as a result. The bailiff's decision on a postponement shall not be subject to appeal”. Enforcement Code 7:4(1) second until last sentence.

<sup>330</sup> Enforcement Code 7:4(1) last sentence.

the landlord-applicant demands this, pay rent to the landlord for the period of postponement under the earlier terms.<sup>331</sup>

The same “social defences” (as in Denmark) apply in Finland. If the bailiff is aware that in the apartment reside children, whose living circumstances are unclear, or people in need of direct care,<sup>332</sup> the Enforcement Code requires that “the local housing and social welfare authorities shall be notified as soon as possible”.<sup>333</sup>

This obligation arises if the bailiff discovers, during the proceedings or while carrying out the eviction that said persons reside on the premises, but the bailiff has no active duty to determine the situation.<sup>334</sup> The bailiff may fulfil the obligation by informing either the housing authorities or the social authorities or both.<sup>335</sup> Lastly, if, at the time when the eviction is carried out, there are still said people in the apartment, “the eviction shall not be carried out before the housing and social welfare authorities have been reserved the opportunity to arrange for housing or to determine the need for social welfare services”.<sup>336</sup>

### 5.2.3. *Flexibility*

- Unilateral termination by tenant possible within reasonable delay?
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The prerequisite for the answers to this question are that the question referrers to termination in the case of the landlords breach of contract. The regulation on termination by giving notice is answered above (in all three countries it is possible to terminate the contract by giving notice (one or three months) at all times – with respect of the contract stating otherwise (Denmark, Finland fixed-termed contracts)).

Immediate termination of the contract (without a notice period) is possible only if one of the parties has committed a fundamental breach of contract. Determination whether there has been a fundamental breach of contract is based on case law and on general contract law. An example of fundamental breach could be where the premises are defective, and where the landlord fails to repair the effect immediately, or where it cannot be repaired within a reasonable time. Then the tenant may terminate the agreement without notice if the defect is deemed to be material, and the landlord is deemed to have acted fraudulently. Termination without notice means that the tenant shall move as soon as possible and that the tenant may stop paying the rent from the day the contract is terminated. The tenant might eventually also make a claim for damages.

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<sup>331</sup> “On the demand of the applicant, the evictee shall pay rent to the applicant for the period of postponement, beginning from the move day, under the earlier terms. Advance payment of the rent may be set as a condition for postponement, if this can be deemed reasonable from the point of view of the evictee” Enforcement Code 7:4(2).

<sup>332</sup> Such as the elderly or mentally ill or intoxicated persons. Enforcement Code 7:3.

<sup>333</sup> Enforcement Code 7:3.

<sup>334</sup> Kanerva and Kuhanen, p. 351.

<sup>335</sup> Government proposal.

<sup>336</sup> Enforcement Code 7:5(2).

In case of unilateral termination by the tenant this is possible within reasonable delay as the tenant may choose to move out before an eventual dispute with the landlord is settled.

- Non-abusive sub-letting allowed?

In Denmark (non-abusive) sub-letting is a right for the tenant according to mandatory provisions in the Rent Act.<sup>337</sup> The tenant of a house or an apartment (not a single room) is entitled to sub-let up to one-half of the rooms of the flat for residential purposes. The total number of occupants of the house or apartment shall not exceed the number of rooms. A tenant is also entitled to sub-let a house or apartment for a period not exceeding two years, when the property is let exclusively for residential purposes and where the absence of the tenant is temporary and due to illness, business, studies, placement, etc. The landlord may (only) object to the sub-letting when the property comprises less than 13 apartments; when the total number of persons in the flat will exceed the number of rooms; or when the landlord may object to the sub-letting on any other reasonable grounds. Sub-letting agreements shall be made in writing, and the tenant shall submit a copy of the sub-letting agreement to the landlord prior to the commencement of the sub-letting period. Otherwise, sub-letting is considered a breach of contract in the relationship between the landlord and the tenant.<sup>338</sup> This also means that the sub-lessor will have to move out.<sup>339</sup>

The Danish Rent Act regulates sub-letting on the same conditions as "normal" letting. The tenant who is sub-letting will be considered as the landlord in relation to the sub-lessee. This means that in general there are no grounds for speculation about offering the tenant only a sublease contract and not an ordinary lease contract. The sub-lessee will not be protected against the landlord's (the owner of the property) creditors and assignees in good faith. This is the major difference between the tenant's and the sub-lessee's right.<sup>340</sup>

In Finland the tenant's right to sublet is also mandatory. Provided that the sub-letting does not cause significant inconvenience or disturbance to the landlord, the tenant may assign no more than half of the apartment to another person's residential use<sup>341</sup> (not, for instance, office use)<sup>342</sup>; when this occurs for a consideration, the chapter on sub-letting<sup>343</sup> in the tenancy act applies to the relation between the tenant and the sub-tenant. The regulation of sub-letting is different from that of tenancy in several respects:

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<sup>337</sup> Rent Act Section 69-72. On sub-letting in Denmark – see: Anne Louise Husen, Tove Flygare: *Lejemålets ophør og brugsretten overgang*, 2. udg., 2011, p. 479 ff., Mogens Dürr, Timmy Witte and Kristin Jonasson: *Boliglejemål*, 2010, p. 748 ff., Niels Grubbe, Hans Henrik Edlund: *Boliglejemål*, 2008, p. 116 f.

<sup>338</sup> Rent Act Section 69, subsection 3 and Section 70, subsection 4 and Rent Act Section 93, subsection 2 *litra f.*

<sup>339</sup> E.g. Grundejernes Domssamling 1995 no. 22 District Court decision.

<sup>340</sup> As described in Louise Faber: *Fremlejetagerens retssikkerhed – in Retssikkerhed i konkurrence med andre hensyn*, Carsten Munk-Hansen og Trine Schultz (red.), 2012, p. 95-117.

<sup>341</sup> In Act on Residential Leases 17(1).

<sup>342</sup> Kanerva and Kuhanen, p. 96.

<sup>343</sup> Act on Residential Leases 80–85.

the sub-tenant may not assign the rented space to another person's use,<sup>344</sup> the mandatory minimum notice period of the sub-lessor is either one or three months, and the mandatory maximum notice period of the subtenant is fourteen days;<sup>345</sup> the sub-tenant must always move out of the apartment when notice has been served, and can only claim damages afterwards;<sup>346</sup> and the sub-lease is terminated without notice at the same time as the sub-lessor's leasehold or other right of use.<sup>347</sup>

In Sweden the right to sub-let is not mandatory. A tenant is normally not allowed to sublet his or hers apartment without prior consent from the landlord. If the landlord does not give permission for the sub-letting the tenant can apply to the rent tribunal.<sup>348</sup> The tenant must have notable reasons for the grant; age, illness, temporary employment in another locality, special family circumstances or comparable circumstances and the landlord may not have any justifiable reasons to refuse consent.<sup>349</sup> The permission from the rent tribunal shall be limited to a fixed term and may be combined with provisions.<sup>350</sup> When the permission has expired, the tenant can reapply for a new permission from the rent tribunal. Permission is normally given for one year at a time and seldom for more than a total of three years.<sup>351</sup> The landlord does usually not have any justifiable reasons to refuse a permission to sublet. The subtenant's solvency normally lacks significance because it is the primary tenant that remains liable for the payment of the rent. The decisions from the rent tribunal in these matters cannot be appealed.

## 4. Comparison of tenures with a public task

### 4.1. Generalities

- Please compare the regulatory types of rental and intermediary tenures with public task (typically non-profit or public/social housing allocated to need), by commenting on their effectiveness, (sufficient or insufficient) supply and market share:
  - Municipal tenancies
  - Housing association tenancies
  - Social tenancies
  - Social housing agencies
  - Privatized or restituted housing with social restrictions

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<sup>344</sup> Kanerva and Kuhanen, 312.

<sup>345</sup> Act on Residential Leases 83.

<sup>346</sup> Act on Residential Leases 84; Kanerva and Kuhanen, pp. 312 and 317.

<sup>347</sup> Act on Residential Leases 85.

<sup>348</sup> A general exception to this rule is found in section 39, which applies when a tenancy leased by a municipality. Such an apartment may be sublet without requiring the consent of the landlord. The landlord shall nevertheless immediately be notified of the sublease. If the tenant still sublets without a permission, and does not take corrective action after being given a reprimand or ask for permission to the lease without delay, he or she risks forfeiting the tenancy.

<sup>349</sup> "Beaktansvärda skäl". The rent tribunal can give permission under the conditions specified in section 40 of the Tenancy Act.

<sup>350</sup> For example, a tenant usually receives permission for one year when he or she wants to try the life as a cohabitant. Nils Larsson et al, *Bostadshyresavtal i praktiken*, 2010, pp. 168-169.

<sup>351</sup> Charlotte Andersson, *Lägenhetsbyten och andrahandsuthyrning*, 2008, pp. 51-52.

- Public entities (e.g. municipalities) taking over private contracts, typically for poor tenants to counteract homelessness
- Etc.

The distinction between housing with a public task and housing without it is most pronounced in Finland with the Arava system. Both municipal and private landlords can apply for state loans on favourable terms. During the time the landlord repays the dept he or she must abide by a rent regulation and by criterias for tenant selection (taking need into account). When the loans is repaid the houses returns to the free pricing sector. The Arava system covers half of the rented housing in Finland.<sup>352</sup> The state creates selection criteria and persons risking homelessness have the highest priority. If the need is equal than income and wealth are important factors.<sup>353</sup> Municipal housing companies are bound by these criterias even if they have repaid Arava loans.

In Denmark a cost based rent regulation principles apply to most private landlords. Municipal housing companies (social housing) also set rents in relation to their costs. The difference in rents is thus not the important difference between social housing and private housing.

Danish housing associations (price regulated co-operative apartments covering 7,4 % of the housing market distributes apartments on the basis of a waiting list with regard for family size as well. The municipal council may avail itself of 25 % of the free apartments to give preference for persons with great need.<sup>354</sup>

The Danish municipal housing companies (almennyttige boligselskaper) have 20% of the housing stock and have waiting lists as the basic system. Some groups of individuals have a right of pre-emption on the waiting list: Families with children have a right of pre-emption concerning larger apartments, and the elderly and disabled have a right of pre-emption concerning certain dwellings that are suitable for the elderly and disabled.<sup>355</sup> .

In Sweden, the municipal sector must operate on business like principles and has no special legislation with regard to either rents och tenant selection. The special legislation that exists regards details like tenants' influence over their environment.<sup>356</sup> A tenant can

<sup>352</sup> National Report for Finland section 1.4.

<sup>353</sup> National Report for Finland section 4.3

<sup>354</sup> National report for denmark section 4.3.

<sup>355</sup> Social housing is regulated by the Consolidation Act on Social Housing (Consolidated Act no.1023 of August 21 2013) and the Consolidation Act on the Rent of Social Housing (Consolidated Act no. 961 of 11 November 2010) – as well as a number of executive orders. Recent key litterature: Jakob Juul-Sandberg, Martin Birk, Marianne Kjær Stolt: *Kommenteret Lov om leje af almene boliger*, 2008. Both Acts are thoroughly commented on in KARNOV. National Report for Denmark section 6.2

<sup>356</sup> SFS 2010:879 section 1.

thus not claim better right to a free apartment in relation to another tenant. The municipal housing company is free to decide when to side step the waiting list.

In Sweden housing co-operatives (owner-tenant apartments) have 20 % of the market but should not be considered an intermediate form anymore. Due to important reforms in 1969 regarding free selling prices and a gradual increasing of freedom to change the apartment, it should today be considered to be a form of full ownership. If the municipality wants to provide such an apartment to a person in need they have to buy it from the owner first.<sup>357</sup>

Privatised or restituted housing does not exist as a category in any of the three countries.

Finland has created a special scheme for selling empty to tenants with part-ownership.<sup>358</sup> Sweden has a system with co-operative apartments where the purchase price is returned to the housing association and a new person on a waiting list gets the opportunity to buy the apartment.<sup>359</sup> Neither of these systems give the municipalities a special tool to make houses available to persons in need. Such forms of social housing is not discussed here.

Having the municipality taking over the contract to avoid homelessness is rare in all three countries. In Denmark and Finland, there is no special legal advantage in doing so. In Sweden the municipality can take over the duty to pay the rent within three weeks of notification and thus avoid eviction of the tenant. Otherwise there is no favour given to the municipalities if they take over all duties or part of the duties according to the contract. Any grave misbehaviour of the tenant would still give the landlord just cause to terminate the contract. However the landlord may in all three countries prefer to have the municipality on the contract knowing that any damages resulting from the tenants misconduct in the rental relationship will always be paid promptly. Financial support to the tenant is the most important tool for avoiding homelessness in all three countries.

#### **4.2. Evaluative criteria for public/social/private subsidized landlords**

- Funding by state or other bodies
- Typical contractual arrangements and regulatory interventions into rental contracts (if appropriate: findings on profitability and respect of property rights as specified below in the context of market rentals)

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<sup>357</sup> The Act on Cooperative Apartments (Bostadsrättslagen, SFS 1991:614) states that a municipality can never be denied membership in a housing cooperative (Chapter 2 Section 4), and always has the right to sublet its apartment (Chapter 7 Section 10).

<sup>358</sup> Finnish National Report, Section 1.4

<sup>359</sup> SFS 2002:93.

In Sweden limited state funding that still exist is available for private as well as public landlords on equal terms. Municipalities can not subsidise their own housing companies. They must be run on business like principles.<sup>360</sup> Contractual arrangements regarding problematic tenants are sometimes made both between the municipality and its housing company and with regard to private landlord. Offering the same deal to all actors is a way of showing that no illegal subsidy is involved. One way which is not uncommon is that the Municipal Social Board rent the apartments from the landlord (sometimes at a premium) and then sublets to the person needing a dwelling.

In Finland the situation is somewhat similar. Special funding for Arava apartments are available to both public and private landlords and they undertake the same social restrictions, if they chose to accept this form of favourable financing. If a landlord owns any house with arava loans some social restrictions apply.<sup>361</sup> One difference in relation to Sweden is that municipalities may subsidize their housing companies with their own money as well.

In Denmark there is state support for dwellings for the young and elderly that is available only to social housing.<sup>362</sup> However, the major part of the financing comes from the municipalities and like in Finland the municipality may subsidize their own housing. .

Overall, in all three countries investment in property is considered, attractive.<sup>363</sup> Swedish property owners has had significantly better returns compared to Danish and Finnish property owners in the latest years,<sup>364</sup> which probably is related to the growing Swedish housing shortage. The rent to income ratios are similar in the three countries, 25 % in Sweden 29 % in Denmark and 27 % in Finland. The similarity of the levels may be partly explained by the fact that subsidies for the landlords play only a small role and that social housing in all three countries is mainly financed through loans that must be repaid and thus create a need for rent income.

### 4.3. Evaluative criteria for the tenant

#### 4.3.1. Access

- *Is supply of various forms of dwellings with a public task sufficient*
- *What is the selection procedure (fair, transparent, effective etc) and what are the criteria of eligibility for tenants?*

Neither of the three countries has a specialised social housing. Instead social housing is for middle income families as well as for families with greater need. The biggest difference is that social housing in Denmark and Finland and Swedish municipal housing

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<sup>360</sup>

<sup>361</sup> Natioinal report for Finland p. 27. The private landlord must set up a general interest association and the regulation for such associations apply if any of the houses it owns have Arava loans.

<sup>362</sup> National report for Denmark, p. 13

<sup>363</sup> See above section 3.1

<sup>364</sup> See above section 1.2.3

companies distributes apartments according to formal criteria, while private landlords are free to choose their tenants.

The total housing supply is as a general rule sufficient in Denmark and Finland. Both the Arava system and Danish municipal housing companies (*almennyttige boligselskaber*) can thus perform their tasks. In Sweden, there is a genuine housing shortage. There are more households than dwellings and people have to share apartments with family or friends. There is a long waiting list for municipal apartments in most cities.

In Sweden most municipal companies use a waiting list and complement this with preferences for persons in great need. There is no state specific state regulation on who has great need. In Finland state selection criteria apply to social housing. The criteria is primarily housing need (persons risking homelessness) and secondary income and wealth.<sup>365</sup> Income and wealth thus complement the waiting list.

In Denmark waiting lists are the prime tool with municipal housing and housing associations. Anyone (above the age of 15) can put themselves on the list.<sup>366</sup> In Denmark priority is awarded in the municipal sector (*almennyttige boligselskaber*) only in relation to housing need, big families can have right to move ahead with regard for larger apartments and elderly och disabled persons can move ahead with regard to apartments that are well adapted to their problem. With regard to housing associations the municipal council may use 25 % of free apartments for persons with great need.<sup>367</sup>

As a general rule transparency in the social sector is adequate. A normal applicant will not know the detailed reason if somebody moves ahead of them (private integrity), but they will know approximately how long it takes to get an apartment in a certain area in Sweden or Denmark or if their wealth or income is too big to get a social apartment in Finland. The Swedish housing shortage mainly strikes at young persons entering the housing market.

#### *4.3.2. Affordability*

- Initial rent: how is it Regulated / controlled in some effective way?
- Possibilities of rent increase
- Regulation of deposit
- Regulation of expenses (utilities etc)
- Regulation of repairs: who is responsible for what kind of repairs?
- Rent subsidies for poor tenants [if relevant, a reference to the above findings is sufficient]

Both the rent and the rent increases are determined directly by the need for the housing association to cover its cost with regard to social housing in Denmark and Finland. There is a principle of cost coverage with regard to the social sector (explicitly if arava

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<sup>365</sup> Se above section 4.1

<sup>366</sup> National report for Denmark section 4.3

<sup>367</sup> National report for Denmark section 4.3.

funding is accepted in Finland<sup>368</sup> and implicitly in Denmark). The same principle applied in Sweden before 2010. The municipal housing companies entered into the collective bargaining with a view to get cost coverage. The true meaning of the new principle that municipal housing companies must act according to business like principles has so far not meant anything more than that subsidies are not allowed. They use cost and a reasonable return on investments as a goal in their negotiations. Though technically very different, the end result is the same in all three countries. Even if a municipal housing company sometimes has a freedom to strive to maximise their profits, they do not act in that way.

Deposits are the subject of many conflicts in Denmark and Finland. If the landlord refuses to repay them when the tenant leave, the tenant must go to court. They are generally allowed in all three countries. In Sweden, the landlord must upon the tenants request repay the deposit after two years even if the tenancy continues and therefore deposits are less common in Sweden. The regulation on deposits is the same for social housing as for private landlords so the reader is referred to section 3.2.1 (c) above.

In Sweden utilities (except electricity and internet connections) are generally included in the rent and if they are not, the norm is individual metering. Charging separately for utilities is only allowed if individual metering applies or if the pricing is regulated in a collective bargaining agreement. The rent regulation is not directly affected by utility prices.

Finish and Danish landlords who are under a cost based rent regulation or in a similar situation will be compensated for increased cost. Finnish landlords not bound by the arava rent regulation are allowed to charge what they want for utilities. Utility costs are regarded as rents. Danish landlords can only charge their tenant for certain enumerated utilities and they must provide detailed accounts of their cost for these utilities.

Again in all three countries there is no difference between social housing and ordinary housing with regard to utilities so the reader can be referred to section 3.2.1 (d).

#### 4.3.3. Stability

- Is the position of the tenant under the contract or real property law stable?
- Has a tenant a guarantee to stay as long as he respects the contract?
- Has the tenant an option to buy the dwelling and, if yes, under what conditions?

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<sup>368</sup> See above section 4.1

As a general rule the tenant has the same rights and duties in social housing as they have towards ordinary private landlords. In practice there are differences. A municipal housing company or a housing association can not terminate a contract because they need the dwelling for their own personal needs, neither are they charging maximum rents in all situations. This difference is most important in Finland where private landlords can terminate rented contracts upon any objective justification like a personal need for the apartment or a wish to increase the rent.<sup>369</sup>

It is less important in Denmark where only landlords with houses built after 1991 are allowed to charge market rents and where the right for landlords to terminate the contract because they need the contract for themselves are limited to the landlord him- or herself (not other family members).<sup>370</sup> It is of least importance in Sweden where a landlord can not evict a tenant on the ground of personal need if the tenant use the apartment as a home and where no rent setting are entirely free of the rent regulation and the collective bargaining system.

As a general rule the individual tenant has no right to buy the apartment in any of the three countries, regardless of whether the landlord is private or social. In Sweden and Denmark two-thirds majority of the tenants (Denmark 50 % of the tenants)<sup>371</sup> can form a housing association and it can get a pre-emption right to buy the whole house and convert it to a co-operative if the landlord (municipal/social or private) decides to sell. Finland has created a system of part ownership where a tenant can gradually increase his or her ownership and eventually become the owner of the dwelling, but the landlord must have freely chosen to use this form of tenancy. Municipal housing companies can choose to do so.

#### *4.3.4. Flexibility*

- Unilateral termination by tenant possible within reasonable delay?
- Non-abusive subletting allowed?

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<sup>369</sup> National Report for Finland section 6.1.

<sup>370</sup> See above section 3.1.2., the landlords right to terminate is restricted by a proportionality test as well.

<sup>371</sup> National Report for Denmark section 6.3.

Again there is no special legislation. Naturally, in social housing, the tenants are not bound through long fixed term contracts. This is of no practical importance in Sweden, where the tenant can always terminate the contract with three months notice. This applies even if the parties have agreed on a long fixed term contract.<sup>372</sup>

In Finland fixed term contracts are generally permitted and if the tenant leaves early and the landlord loses money as a result the tenant must pay damages according to contract law principles. Having a social housing landlord can thus be very favourable for the tenant with regard to flexibility

Denmark comes in the middle as the landlord's right to use fixed term contract is restricted. Under Danish Regulation the Housing Court may set aside any provision for a fixed term, where such provision is not found to be warranted by the landlord's own situation, and thus free the tenant of liability for damages.<sup>373</sup>

Non abusive subletting is again not specially legislated for social housing in any of the three countries. In Sweden a tenant may share the apartment with anyone as long as the landlord suffers no damage. Leaving the apartment and sub-letting the whole apartment requires the landlords permission or a just cause proven to the rent tribunal (such as temporary employment elsewhere, where a time limit of three years apply).<sup>374</sup>

The legislation is almost as generous towards the tenant in Denmark and Finland where half of the rooms can be sublet and there must not be more persons than rooms in the apartment (Denmark). If the tenant leaves the apartment due to temporary employment the time limit for subletting is two years (Denmark) ....<sup>375</sup>

Flexibility with regard to subletting is thus big in all three countries but does not depend upon having a social landlord.

## 5. Conclusion

- Selective interesting features of the countries under review at the choice of the author of the comparative report
- In particular: legal solutions and factual practices working particularly well or badly
- Statement on which countries perform best and/or have promising solutions in the various large fields (i.e. housing with and without a public task etc)

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<sup>372</sup> The Rent Act Section 5.

<sup>373</sup> Rent Act Section 80, subsection 3.

<sup>374</sup> National report for Sweden section 6.4

<sup>375</sup> National report for Denmark and Finland section 6.4

The overall conclusion is that at a fundamental level, the three countries are very similar, though the technical regulation differs. Tenancy law is built upon contract law principles and market principles apply. A tenant not paying the rent will lose the apartment. The possibilities to delay the enforcement of such rules are very limited and neither country requires the landlord to wait until another dwelling is available.

The Municipality may take over the responsibility to pay the debt or guarantee it directly in another way (usual in Sweden and Finland) or may lend money to the tenant so that he or she can make a deposit covering non-paid rent (usual in Denmark). It is up to the municipality to find a way to help tenants pay for their home in all three countries. What's usual in one country is legally possible in the other two. Municipalities in all three countries have a principal freedom to make different kinds contractual agreements with private landlords on behalf of tenants.

It is not really meaningful to divide between housing with a public task and housing without a public task in any of the three countries. Both Sweden and Finland involve the private landlords in the social sector, in Finland through the Arava system and in Sweden through contractual obligations with the municipality. Some municipalities do not have a municipal housing company. In all three countries the municipalities are able to provide housing for the persons who have the greatest need.

All three countries are successful in the sense that the housing standard is good. Almost all houses are safe and contain all necessary amenities. Those persons who live on social benefits, still live in an adequate dwelling.

The technical construction of rent regulation and subsidies is very complicated and different in the three countries but the end result is quite similar. Denmark has the highest rent-to-income ratio of 29 % even though Finland has free rents for half of the rented apartments. Finland's rent to income ratio of 27 % suggests that the subsidies and rent regulation within the Arava system works towards the same end result as in Denmark.

Both Finland and Denmark can be said to be successful. There is no general housing shortage in either country. Local areas with excessive demand is natural in a market (for instance the city centres of Aarhus, Copenhagen and Helsinki). The problems look manageable and at least in Helsinki new construction in the region seems to keep pace with population growth. People seem to be able to find housing even if they may dislike the commute into the city centre. Finland has many empty houses in rural areas but it is not an example of a market failure (i.e. the market producing newly built houses where people do not want to live or with rents they can not afford). It is a consequence of people moving to cities and leaving the houses in the rural areas they once lived in.

Sweden has the lowest rent-to-income ratio (25%). It also has a general shortage of housing with more households than dwellings. It is difficult to find rented accommodation in Sweden. A person not able to pay the market price in the ownership sector, and not knowing a private landlord, will have to stay on a waiting list with a municipal housing company and the waiting lists gets longer even for the least attractive apartments.

The question then arise if one should look at Sweden and conclude that Finland and Denmark have better regulations. High construction costs and a inability to produce a growth of dwellings that matches the growth of the population is a serious problem.

Refugees and family re-union of persons who arrived as refugees are the main reasons for this population growth. It means that demand for cheap housing is growing and it is much more difficult to construct new and cheap housing compared to new housing in the top end of the housing market. We do not know what would have occurred in Denmark or Finland if they have had the same level of population growth as Sweden.



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

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### **Intra-team Comparison Report for ESTONIA, LATVIA, LITHUANIA**

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**NOTICE.** This comparative report discusses various aspects of housing policies and legal framework of rental market in Baltic States. Substantial part of this report is based on the national reports available at <http://www.tenlaw.uni-bremen.de/reports.html>. For full list of sources please see respective national report.

# 1. THE CURRENT HOUSING SITUATION

## 1.1. General Features

### 1.1.1. Historical evolution of the national housing situation and housing policy

ESTONIA, LATVIA and LITHUANIA share **common inheritance of Soviet regime** (1940-1991). After WW II, the former housing policy based on private ownership of land and housing was largely replaced by **state-ownership of land and housing**.

Only dwellings that did not exceed certain limits of living space<sup>1</sup> were left as private property. Rented<sup>2</sup> dwellings belonging to enterprises, the state or other public entities became the dominant tenure types in the urban centres. There were also housing associations (co-operatives) that provided right to use a dwelling against certain amount of contribution.<sup>3</sup> All aspects of housing and urban policy were subordinated to central planning, since the Constitution comprised the right to housing<sup>4</sup>. Housing law was understood as legal rules about management, operation and repair of the housing fund, registration of individuals whose housing conditions have to be improved, distribution and provision of residential premises, as well as rental relations, participation in housing construction cooperatives and property rights on a single family living house.<sup>5</sup>

**Immigration** from rural areas to urban areas, as well as immigration from other areas of the Soviet Union resulted in **expansion of the urban population**.<sup>6</sup> At the same time, period of 1950-1990 can be characterized as the period of **active residential construction** (mainly multi-stored apartment houses) in all three countries.<sup>7</sup>

<sup>1</sup> The individuals could have only one house as their private ownership, which could be not bigger than 130 sq/m area. Lithuanian Report, 4.

<sup>2</sup> Once the dwelling was allotted to a given tenant, public housing tenants enjoyed almost unlimited occupancy rights for their dwellings comparable to “owning” the dwelling: open-term leases, the right to inherit or transfer to relatives, the right to carry out maintenance work, etc. In fact, such ‘personal use’ became an institution separate from that of rental tenure. Cf. Kährik & Kõre (2013), 164-165, Lux et al (2012), 143.

<sup>3</sup> Cooperative housing was often organised via employers, being partly subsidised. Maintenance, however, was mainly the responsibility of members of the cooperative. approx. E.g. in Estonia, 5% of the total housing stock in 2000 belonged to cooperative housing sector.

<sup>4</sup> SSR Constitution of 1978 (unlike the 1922 constitution), provided the right to housing. This right included fair distribution under the state supervision of residential dwellings according to the program of building of comfortable living residences, a low-rent payment price and payment for rent and utilities. Еран, П.П. (ed.) Советская Латвия. Рига: Главная редакция энциклопедий, 1985, 27, 461 through Latvian Report, 55.

<sup>5</sup> Юридический Энциклопедический словарь. Главный редактор А.Я. Сухарев. Москва: Советская Энциклопедия, 1984, 96-98, through Latvian Report, 61.

<sup>6</sup> E.g., in Estonia, by 1989 the share of urban population was already 71%. Statistics Estonia, Population, 1881, 1897, 1922, 1934, 1959, 1970, 1979, 1989 (urban population, %) <<http://www.stat.ee/26385>>, (last visited 15 Dec. 2013);

<sup>7</sup> E.g., in Estonia, residential construction peaked between 1960 and 1990, when an average of 13,000 new dwellings (approx. 700,000–800,000 m<sup>2</sup>) were built annually. For comparison, in 2013 only 2,079 new dwellings were registered.

Construction was the primary method for solving the housing shortage in that period and only little attention was paid to renovation and maintenance of existing dwellings. Also, the building quality was quite low and no professional maintenance was carried out during 50 years of Soviet regime. As a result, housing stock in all Baltic States was in need of a large-scale comprehensive energy efficient renovation.

**The period after regaining independency in 1991** signifies a radical turning point in the housing policies in the Baltics. More particularly, over the last 25 years, the availability of residential housing in Baltics has been influenced by wide-range **privatization<sup>8</sup>**, **restitution<sup>9</sup>** and general **liberalization** of housing market.

As a result, the housing market in Baltics is commonly characterized by a **high rate of private ownership** of housing stock (up to 97 % of the housing stock in ESTONIA and LITHUANIA) and **high rate of owner-occupancy**.<sup>10</sup> In LATVIA, as a particularity, the split of property rights<sup>11</sup> and the compulsory lease<sup>12</sup> which is characteristic for the current rental market are the main problems which followed denationalisation and privatisation.

As to the **migration** processes, firstly, high positive net migration rate during the period of Soviet regime should be emphasized. Second significant turn in migration was

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<sup>8</sup> In Estonia, privatization of public housing stock was launched by the Privatization of Dwellings Act and Privatization Act adopted in 1993. All adult residents had a right to a specific amount of National Capital Bonds (rahvakapitali obligatsioonid, RKO) based on their years of active employment and service to the economy. Public tenants, except tenants of dwellings subject to restitution, were entitled to privatise their dwellings at a calculated price using RKOs as privatization vouchers until December 1st 1994. Cf. Purju, The Political Economy of Privatisation In Estonia. Centre for Economic Reform and Transformation, 32. <<http://www.sml.hw.ac.uk/cert-repec/wpa/1996/dp9602.pdf>> (last visited 16 Dec. 2013).

<sup>9</sup> E.g. in Latvia (as also in other Baltic States) tenants of the denationalized houses could not privatize the apartments, therefore the restriction of rental payments was one of the mechanisms, which ensured balance between the interests of the tenants and landlords and reached a socially fair aim. The restrictions of rental payment should be temporary, but only in the year 2007 the Constitutional Court declared the said lease restrictions as unconformable with the Constitution and invalid (Judgement of the Constitutional Court of the Republic of Latvia of 8 March 2006, Case No. 2005-16-01, <[www.satv.tiesa.gov.lv](http://www.satv.tiesa.gov.lv)> (last visited 2 Nov. 2014)).

<sup>10</sup> For further data, see section 1.1.2 below.

<sup>11</sup> The split property means that there are at least two different owners of an immovable consisting of a (living or non-residential) building and land plot who are not co-owners, since one of them owns the building, another one – the land plot. The law concerning denationalisation or restitution of land plots offered an opportunity to receive compensation or an equal land plot unit if during the Soviet time a building or several buildings has been constructed, thus the person applying for restitution of a land plot could choose if it wishes to acquire the particular land plot owned before confiscation or denationalisation by the Soviet authorities. Nevertheless, there were owners or heirs who chose to acquire the land plot together with an “encumbrance” - residential house on it. In practice, it means that tenants have to compensate the immovable tax which shall be paid for the land plot and they shall also pay compulsory lease payments for using the land plot in addition to rent and payment for utilities as well. Latvian Report, 3, 7, 18.

<sup>12</sup> Owners of a building (or buildings) and a land plot are forced to enter lease contracts with owners of land on which buildings are situated. Judgement of the Constitutional Court of the Republic of Latvia of 13 February 2009, Case No. 2008-34-01, <[www.satv.tiesa.gov.lv](http://www.satv.tiesa.gov.lv)> (last visited 2 September 2013); Latvian Report, 17.

marked by the beginning of 1990s, following the collapse of the Soviet Union, when migration from the Baltic States to the Russian Federation from 1989 to 1996 totalled 215,000 persons<sup>13</sup>. Next waves of emigration were witnessed after joining EU, and then as a reaction to the economic crisis of 2007.<sup>14</sup> In 2013, the largest decreases due to natural change and net migration among EU member states were observed in LATVIA (-4.0‰ and -7.1‰) and LITHUANIA (-3.9‰ and -5.7‰).<sup>15</sup>

The **number of population** in Baltic states **has decreased** by 13.4 % from 2001 to 2014 (from total 7,228 thousand inhabitants to 6,259 thousand inhabitants).<sup>16</sup>

Futher decline has been projected.<sup>17</sup> Due to the trend towards smaller households, the number of households is expected to decrease relatively less than the size of the population.

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<sup>13</sup> Romaniszyn, K. "Current migration in central and eastern Europe: peculiar or integrating into European migration system?" Institute for Social Studies, University of Warsaw, (Warsaw, 1997); Lithuanian Report, 5.

<sup>14</sup> E.g. after Latvia's accession to the European Union, emigration increased, however, before the crisis migration sank again and immigration grew due to wage increase: 9.7% (2005), 15.6% (2006), 19.9% (2007) and 6.2% (2008). In the year 2008 emigration started to grow again and decreased only recently, thus, if in 2008 approx. 1.1 million people between 15 and 64 years lived in Latvia, in 2013 the number decreased for approx. 10.1% or 111 000 inhabitants. The reason of emigration was a high level of unemployment when people were forced to look for jobs in other countries. In the group of young people (23-31 years old) emigration is the highest at the moment. Reduction of this social group amounts to more than 14%. The most popular destination is the United Kingdom and Ireland. Central statistical bureau of Latvia: <<http://www.csb.gov.lv>> (last visted 2 September 2013); Housing Europe Review 2012. <[http://www.housingeurope.eu/www.housingeurope.eu/uploads/file/HER%202012%20EN%20web2\\_1.pdf](http://www.housingeurope.eu/www.housingeurope.eu/uploads/file/HER%202012%20EN%20web2_1.pdf)> (last visited 2 March 2014). In general, starting from 2000 13% or 307000 of population left Latvia because of low salaries, opening of EU labour markets to Latvian workers and a sudden increase in unemployment. The Latvian government tried to eliminate the negative consequences working out the re-emigration plan and focusing on young families with kids and, specialist necessary fo the Latvian internal market and young people studing abroad. Latvian Report, 12.

<sup>15</sup> Respective numbers for Estonia: -1,3 % and -2,0‰; EU28: 1,5 and 1,3. The crude rate is calculated as the ratio of the number of events to the average population in a given year. For easier presentation, it is multiplied by 1 000; the result is therefore expressed per 1 000 population. <[http://epp.eurostat.ec.europa.eu/cache/ITY\\_PUBLIC/3-10072014-BP/EN/3-10072014-BP-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-10072014-BP/EN/3-10072014-BP-EN.PDF)> (last visited 27 Nov. 2014).

<sup>16</sup> Statistics Estonia <[www.stat.ee](http://www.stat.ee)> (last visited 29 Nov. 2014); Central statistical bureau of Latvia <[http://data.csb.gov.lv/pxweb/en/Sociala/Sociala\\_ikgad\\_iedz\\_iedzskaitis/IS0020.px/table/tableViewLayout1/?rxid=562c2205-ba57-4130-b63a-6991f49ab6fe](http://data.csb.gov.lv/pxweb/en/Sociala/Sociala_ikgad_iedz_iedzskaitis/IS0020.px/table/tableViewLayout1/?rxid=562c2205-ba57-4130-b63a-6991f49ab6fe)> (last visited 29 Nov. 2014); <[http://epp.eurostat.ec.europa.eu/portal/page/portal/pgp\\_ess/news/ess\\_news\\_detail?id=157815786&pg\\_id=2737&cc=LT\\_LITHUANIA](http://epp.eurostat.ec.europa.eu/portal/page/portal/pgp_ess/news/ess_news_detail?id=157815786&pg_id=2737&cc=LT_LITHUANIA)> (last visited 29 Nov. 2014).

<sup>17</sup> By 2030 EE - 1.2 million; LV – 1,7 million; LT - 2,6 million, <<http://www.euromonitor.com/countries-and-consumers>> (last visited 27 Nov. 2014).

### 1.1.2. Current situation

In the Baltics, the **overall offer of dwellings is sufficient** and over the two last decades the housing conditions have been improved steadily.<sup>18</sup> Yet, the access to the housing market is **problematic mainly in bigger cities**.<sup>19</sup> Young households encounter housing problems more frequently than other groups who mostly participated in housing privatization and have now become owners of their housing. Also, there is lack of housing options for **families of lower income**, as residualized social housing sector run by municipalities does not cover the demand for low-cost or specially accommodated (e.g. for persons with disability) housing.<sup>20</sup> In practice, it has been observed that it is more complicated to find suitable place to live in Tallinn than in Vilnius or Riga.<sup>21</sup>

The main dwellings' characteristics in Baltic States are presented in Table 1.

**Table 1 Current housing situation in Baltic States.**

	EE	LV	LT
No of conventional dwellings (thousands, 2011) <sup>22</sup>	649,7	1018,5	1298 <sup>23</sup>
Conventional dwellings per 1000 inh (2011)	502	492	441
Useful floor area of dwellings per capita, in sq m	30,1	27,2	29,5 <sup>24</sup>
Vacant <sup>25</sup> dwellings, %	14,4	20	14,4
Private ownership, % of total stock <sup>26</sup>	96	94	98
Housolds having home-ownership, % of all households <sup>27</sup>	79	67	91

<sup>18</sup> E.g. in Estonia, since 2000, the number of dwellings has increased by 5.2%. The number of dwellings counts for 502 dwellings per 1000 inhabitants (compared to 453 in 2000). The average area of dwellings per inhabitant had increased from 24 m<sup>2</sup> in 2000 to 30.5 m<sup>2</sup> by 2011. At the same time, the number of permanent residents has decreased by more than 5% compared to 2000, but the number of households has grown by 3% (size of the average household decreased from 2,33 persons to 2,13 persons). Estonian Report, 15, 29.

<sup>19</sup> Marika Kivilaid, Mihkel Servinski. Urban Audit. 4/13. Quarterly Bulletin of Statistics Estonia, <<http://www.stat.ee/65375>> (last visited 29 Nov. 2014), 78.

<sup>20</sup> National Statistics, Census 2011; <<http://osp.stat.gov.lt/services-portlet/pub-edition-file?id=2348>>, last visited 29 Nov. 2014; Statistical Yearbook of Lithuania 2014 Statistics Lithuania 2014, <<http://osp.stat.gov.lt/services-portlet/pub-edition-file?id=2910>>, last visited 29 Nov. 2014.

<sup>21</sup> Answers to the statement "It is easy to find good housing at a reasonable price in [city name]" in EU capitals, 2012 Marika Kivilaid, Mihkel Servinski. Urban Audit. 4/13. Quarterly Bulletin of Statistics Estonia, <<http://www.stat.ee/65375>> (last visited 29 Nov. 2014), 78.

<sup>22</sup> National Statistics, Population and Housing Census 2011.

<sup>23</sup> (2013) Statistical Yearbook of Lithuania 2014 Statistics Lithuania 2014, <<http://osp.stat.gov.lt/services-portlet/pub-edition-file?id=2910>> (last visited 29 Nov. 2014).

<sup>24</sup> Ibid.

<sup>25</sup> Dwellings without permanent resident, possibly reserved for secondary or seasonal residence.

<sup>26</sup> In Latvia (Census 2011): 86.1% of all housing stock belongs to natural persons, 7.7% to legal persons, 7.2% to persons with different status, 1.5% to local municipalities, 0.1% to the State; In Lithuania (Census 2011): 96.6% of conventional dwellings were owned by natural persons, 1.4% by the State or municipalities, 0.3% by private legal persons; 0.5% by other entities (joint ownership of natural and legal persons etc.); Estonia (Census 2011): 96 % private, 4% public (state – 1 %, local gov – 3 %).

<sup>27</sup> National Statistics, Population and Housing Census 2011.

New constructions per 1000 inhabitants (2013)	1,6	1,1	2,0
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LITHUANIA has a comparatively disadvantaged position in terms of number of dwellings per capita, but relatively intensive construction activity creates basis for further improvement. At the same time, LITHUANIA holds highest private ownership rate: as of 31 December 2013, private property accounted for 97.9 % of the total stock of dwellings, State and municipal property only 2.1 %.<sup>28</sup>

By statistics, there is an oversupply of dwellings, although the situation of housing demand and supply varies between regions and municipalities. For example, the total share of unoccupied dwellings<sup>29</sup> in ESTONIA is 14% (in Tallinn 9%, in urban areas 11%, rural areas 21%)<sup>30</sup>. There are no specific measures foreseen to induce landowners to offer vacant dwellings for rent in any of the three countries under review.

As to the **housing quality**, ESTONIA has relative advantage, but in general, the housing quality in Baltics is below EU average. Randomly chosen quality parameters in **Table 2** show that housing conditions in Estonia are better than in other Baltic States.

**Table 2 Type of dwelling and housing quality.**

	EE	LV	LT	EU28
<b>Type of dwelling<sup>31</sup></b>				
Proportion of population living in flat, (2012), %	65,1	64,4	56,9	41,3
Average size of the dwelling sq m (2012)	74,2	69,1	68,1	102,3
Average size of the dwelling sq m (2012), tenant at market price	53,2	48,3	45,4	78,6
<b>Housing quality<sup>32</sup></b>				
Overcrowding rate <sup>33</sup> (2012)	14	36,6	19	17,0
Severe housing deprivation rate <sup>34</sup> (2012)	4,7	16,4	7,1	5,1
Households having indoor flushing toilet, %	88 <sup>35</sup>	85 <sup>36</sup>	81 <sup>37</sup>	97 <sup>38</sup>

<sup>28</sup> Statistical Yearbook of Lithuania 2014 Statistics Lithuania 2014, <http://osp.stat.gov.lt/services-portlet/pub-edition-file?id=2910>, 219.

<sup>29</sup> However, the figure for unoccupied dwellings does not reflect the housing supply available for new occupants, since part of the units (approx. 25%) are occupied for some secondary use or may not be in suitable condition for habitation.

<sup>30</sup> Statistics Estonia database, <[http://pub.stat.ee/px-web.2001/I\\_Database/Population\\_census/PHC2011/02Dwellings/02Dwellings.asp](http://pub.stat.ee/px-web.2001/I_Database/Population_census/PHC2011/02Dwellings/02Dwellings.asp)> (last visited 5 Dec. 2013).

<sup>31</sup> Eurostat.

<sup>32</sup> Eurostat.

<sup>33</sup> Percentage of the population living in an overcrowded household, i.e the household does not have at its disposal a standard minimum number of rooms ( one room for the household; one room per couple in the household; one room for each single person aged 18 or more; one room per pair of single people of the same gender between 12 and 17 years of age; one room for each single person between 12 and 17 years of age and not included in the previous category; one room per pair of children under 12 years of age).

<sup>34</sup> Percentage of population living in the dwelling which is considered as overcrowded, while also exhibiting at least one of the housing deprivation measures. Housing deprivation is a measure of poor amenities and is calculated by referring to those households with a leaking roof, no bath/shower and no indoor toilet, or a dwelling considered too dark.

<sup>35</sup> Statistics Estonia database. <<http://pub.stat.ee/px-web.2001/Dialog/statfile1.asp>> (last visited 29 nov. 2014).

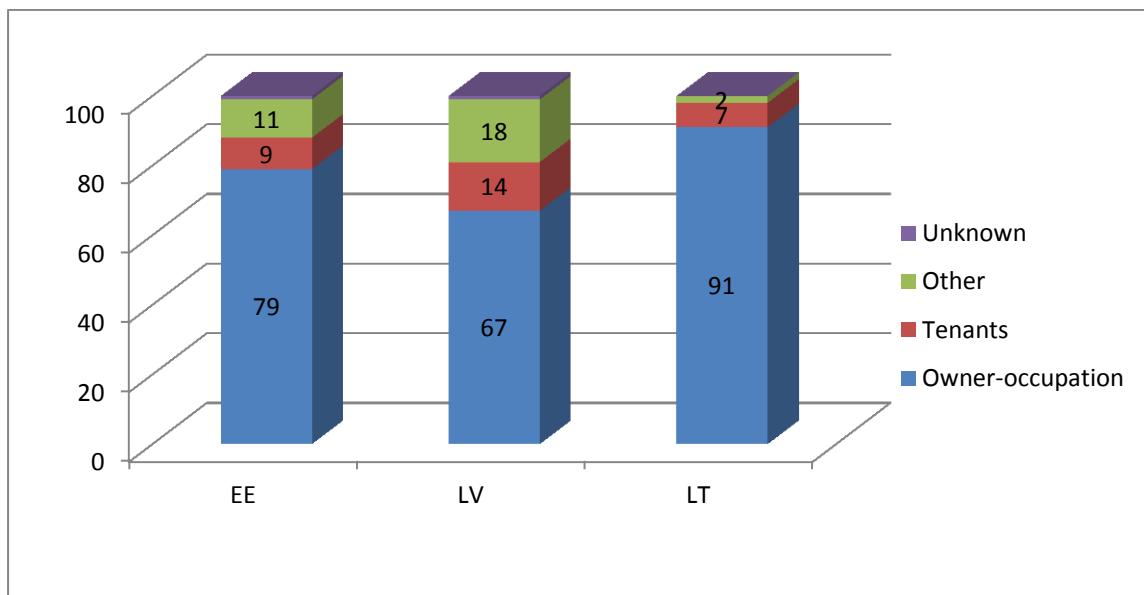
Households having bath or shower, %	87	82	82	97 <sup>39</sup>
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Relatively high proportion of the population lives in flats.<sup>40</sup> This is because of shared history of extensive multi-apartment housing construction in Soviet period.

As a result of wide-range privatization and restitution carried through in 1990s, **owner-occupancy is strongly prevailing tenure type** in all three countries.

**Figure 1** illustrates the structure of households by tenure status according to national censuses in 2011<sup>41</sup>.

**Figure 1 Households by tenure status (2011).**<sup>42</sup>



<sup>36</sup> Income and Living Conditions in Latvia 2013. EU-SILC SURVEY 2013, <<http://www.csb.gov.lv/en/dati/e-publikacijas/income-and-living-conditions-latvia-2013-40554.html>> (last visited 29 Nov. 2014).

<sup>37</sup> Statistical Yearbook of Lithuania 2014, 420. <<http://osp.stat.gov.lt/en/statistikos-leidiniu-katalogas?publication=2910>> (last visited 29 Nov. 2014).

<sup>38</sup> Source: SILC [ilc\_mdho03] <[http://appssso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc\\_mdho03&lang=en](http://appssso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc_mdho03&lang=en)> (last visited 29 Nov. 2014).

<sup>39</sup> Source: SILC [ilc\_mdho02] <[http://appssso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc\\_mdho02&lang=en](http://appssso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc_mdho02&lang=en)> (last visited 29 Nov. 2014).

<sup>40</sup> In 2012, the share of persons living in flats was highest among the EU Member States in Estonia (65.1 %), Spain (65.0 %) and Latvia (64.4 %). <[http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Housing\\_conditions#Type\\_of\\_dwelling\\_and\\_tenure\\_status](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Housing_conditions#Type_of_dwelling_and_tenure_status)> (last visited 24 Nov. 2014).

<sup>42</sup> National Statistics, Census 2011; <<http://osp.stat.gov.lt/services-portlet/pub-edition-file?id=2348>> (last visited 29 Nov. 2014).

Statistical Yearbook of Lithuania 2014 Statistics Lithuania 2014, <<http://osp.stat.gov.lt/services-portlet/pub-edition-file?id=2910>> (last visited 29 Nov. 2014).

By estimatitons<sup>43</sup>, proportion of the **rental housing** is 15 % in ESTONIA and LATVIA, and 12 % in LITHUANIA<sup>44</sup>. Thus, by any statistic or estimation, LITHUANIA has the highest owner-occupancy rate and relatively modest rental market.

### 1.1.3. Types of housing tenures

Although there is a slight trend in favour of renting, specifically in segment of young couples, the general mentality in Baltics is clearly **in favour of home ownership** as the only reliable way to guarantee permanent housing.

As stated earlier, relatively high proportion of population lives in apartments. In LATVIA, apartments are qualified as the **residential property**. Similarly, in ESTONIA, condominium as a single unit of real estate in a multi-unit development is known as **apartment ownership**, i.e. space of the physical share of a construction together with a legal share of common ownership to which the physical share belongs.<sup>45</sup>

Most common source of financing the building of family homes or apartments is mortgage loan. According to Eurostat<sup>46</sup> the share of the tenures financed by mortgage and loan is highest in ESTONIA - approx. 18,9 % of all tenures (LATVIA - 9,1 %, LITHUANIA – 7,7 %).<sup>47</sup>

In LATVIA<sup>48</sup> and ESTONIA **intermediate forms of tenures** between ownership and renting in regards to residential premises are **not relevant**. There are limited amount of cooperatives (partnership for construction of residential buildings) left in LITHUANIA.<sup>49</sup>

According to ESTONIAN law only a **building association** can be considered as a special (intermediate) type of tenure. Residential building associations (co-operatives) are being transferred into apartment ownership (privatized), and by 2011 there were no longer any cooperatives in existence.

Mostly informal **private rental market** exists in all three countries. There is one major type of **private rental tenure** - contracts which are concluded between the private

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<sup>43</sup> As it is unclear how many respondents did not admit the tenancy relations because of their informatlity. As there is no need for registration, there is no official reliable data on private renting available either. Without exact data for the number of people living in rented dwellings, we have to rely on information from reports based on surveis and/or evidence from other sources.

<sup>44</sup> Swedbank, <<http://www.swedbank.lt/lt/articles/view/1647>>, Lithuanian Report, 8.

<sup>45</sup> Estonian Report, 18.

<sup>46</sup> Source SILC [ilc\_lvho02].

<sup>47</sup> For comparison, according to a survey released by Swedbank, 69 % of Lithuanians have purchased their dwelling using their own funds, 18 % have inherited the dwelling or live in the dwelling which belongs to their relatives (family members), remaining 13 % Lithuanians purchased their dwellings using mortgage based loans/personal loans. <<http://www.swedbank.lt/lt/articles/view/164>> (last visited 02 Feb. 2014).

<sup>48</sup> Latvian Report, 20.

<sup>49</sup> Partnership for construction of residential buildings may be founded by municipalities, companies, institutions, organizations and individuals with the aim to supply their member's with residential houses or apartments. There were 408 registered Partnerships for construction of residential buildings at the beginning of 2012. Its activity is regulated by the Resolution No. 280 of the Government of Lithuania, 23 April 1993. Lithuanian Report, 15.

parties in market terms within the framework of civil law. However, **regulatory basis** for contracts on market rent is structured quite differently.

In ESTONIA, since 1 July 2002, residential lease contracts as a special kind of lease contracts are regulated in the Law of Obligations Act<sup>50</sup> (hereinafter LOA) Part 3 (Contracts for Use), Chapter 15 (Lease Contracts) Arts. 271-338. General rules regulating the lease contracts are applicable in so far as there are no special, mainly tenant-protective rules applicable to residential lease contracts as *lex specialis*. In most of the aspects, the regulation is mandatory and could not be modified by the parties to the detriment of the tenant.<sup>51</sup>

Similarly in LITHUANIA, residential lease contracts are regulated within the Civil Code (2000), but in special Chapter XXXI „Lease of dwellings“ as *lex specialis* in relation to Chapter XXVIII Lease and General Part of CC. In most of the aspects, the law is dispositive.

Somewhat differently, in LATVIA, special law – Law on Residential Tenancy (1993) - governs residential tenancy agreements. In essence, the contents of tenancy contracts are left subject to parties' agreement. Civil Law<sup>52</sup> as *lex generalis* apply in the matters not governed by the Law on Residential Tenancy. The non-consistency of the norms as *lex specialis* and *lex generalis* has been brought out as the reasons for contradicting case law and legal commentaries.<sup>53</sup>

**Estimated share of the private rental market** is to 10-15 % of the total occupied dwelling stock.

In ESTONIA, for example, the ownership of the dwellings offered for rent in the private sector is divided as following: (1) resident(s) of Estonia - 80,7 %, (2) resident(s) of foreign country - 8,5 % and (3) other<sup>54</sup> – 10,7%. Similar structure of the ownership of the dwellings offered for rent may be presumed also in case of LATVIA and LITHUANIA.

**Public rental tenure** in the Baltics comprises of all state or municipally owned dwellings let for leases. **Social housing is a targeted residual system** whereby only the most vulnerable social groups are beneficiaries. In the countries under review, **share of social housing is marginal**, maximum of 2-3 % of the total housing stock.

In 2011, the market share of public rental tenures in ESTONIA was only 1,7 % of all occupied dwellings.<sup>55</sup> It should be noted that Tallinn is the only municipality which offers public housing to targeted groups (young families and key municipal workers) which can not strictly be categorized as persons in need of social welfare services in the meaning

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<sup>50</sup> Model for the regulation was taken from German BGB and Swiss Civil Code.

<sup>51</sup> This is considered as one of the shortages of the existing regulation.

<sup>52</sup> Adopted 1937, restored 1991.

<sup>53</sup> Latvian Report, 175.

<sup>54</sup> I.e. company, non-profit association, legal person governed by public law, etc. (except state or local government).

<sup>55</sup> Statistics Estonia. PHC 2011.

of Social Welfare Act.<sup>56</sup> In LATVIA the share of social apartments and social dwelling houses in the housing stock amounts approx. to 0.4% of the total housing stock and only 2.5% of the rental stock. In LITHUANIA, after the privatisation of the housing stock, only ca 2% remained as public social housing, which is now let for rent to particularly disadvantaged groups.

#### **1.1.4. Other general aspects of the current housing situation in comparative perspective**

It is characteristic to Baltic rental market, that the **role of institutional investors is marginal** or almost non-existent. Majority of the apartments for rent are offered by private (small) investors or just by 'incidental' landlords. Private landlords, however tend to have no proper means for professional maintenance, often opt for tax evasion, are more risk averse and may face urgent need to get the dwelling back for own use.

There are **no influential lobby groups of tenants** in any of the Baltic States. There are no lobby groups or umbrella groups specifically active in any of the tenure types in LATVIA. Associations aimed at supporting management of the housing stock exist in LITHUANIA<sup>57</sup> and in ESTONIA.<sup>58</sup> Additionally, interests of home owners are forcefully represented by Estonian Central Association of Owners.

**Tax evasion** by landlords is a common phenomenon in all three countries. The housing market is in general an open market as all purchases with immovable property must be entered into the Land Register. Rental contracts are not subject to registration, neither is written form obligatory<sup>59</sup>. Therefore, there is also no official reliable data on private renting. Rental income from renting out private dwellings by individual households is not officially declared to tax authorities. This unfortunately leads to the practice of oral contracts resulting in disputes over contract terms, constraints for the tenants to register the place as their permanent place of residence, or blackmailing from the part of the tenant.

### **1.2. Economic factors in comparison**

#### **1.2.1. Comparative view of the housing market**

As the home-ownership is favourable type of tenure for permanent residence, rental market in the Baltic countries has only share of 10-15 % from total housing stock. At the same time, only marginal proportion (2-3%) of the dwelling stock is owned and rented out by the public sector, mainly municipalities.

It can be generally concluded, that despite the possible regional or seasonal disparities, overall supply of housing (incl. rental housing) in Baltics is sufficient. Yet it is commonly reported, that housing for low-income groups is not sufficient.

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<sup>56</sup> Sotsiaalhoolekandeseadus. - RT I 1995, 21, 323.

<sup>57</sup> Lithuanian Chamber of Housing Management and Maintenance; Lithuanian Report, p 15.

<sup>58</sup> Estonian Union of Cooperative Housing Associations.

<sup>59</sup> Written form is obligatory in Lithuania, but courts recognize factual tenancy relationships.

### 1.2.2. Comparative view on price and affordability

House prices, as measured by the **House Price Index**<sup>60</sup> (HPI), remained stable in the euro area and rose by 1.7% in the EU in the second quarter of 2014 compared with the same quarter of the previous year. It is noteworthy, that among the Member States for which data are available, the highest annual increases in house prices in the second quarter of 2014 were recorded in ESTONIA, i.e. +14.5%.<sup>61</sup> Obviously, if real estate prices continue to rise, Baltics may face next real estate boom.

Changes in the rents of residential property are directly related to their selling prices – rising residential property prices lead to an increase in rents. Rent prices in ESTONIA in 2013 grew 10-15% depending on the location, being 6-7 EUR per sq m, and 9 EUR per s qm in the centre.<sup>62</sup> Also in LATVIA, due to the growing demand, average rents increased by 10% to 15% in 2013. The typical monthly rent for an unfurnished, renovated three-room apartment (approximate size 70 sqm) in a pre-war building in the city centre ranges from 750 EUR to 900 EUR per month and in a newly built project from 800 EUR to 950 EUR per month.<sup>63</sup> In LITHUANIA, rent prices 2013 saw an average 4% increase in apartment rents, after rising 8% in 2012 in Vilnius. Typical two-room old construction apartment in Vilnius residential districts rents for 160 to 230 EUR per month in the end of 2013. The same size new construction apartment rent starts from 260 EUR per month. Rents for fully equipped two-room apartments (old or new) in the central part and prestigious districts of Vilnius range from 230 to 430 EUR per month, and for three-room apartments from 260 to 700 EUR per month.<sup>64</sup>

Next, the comparison of the HAI (**housing affordability index**)<sup>65</sup> in three Baltic States deserves attention (see **Figure 2**). Apparently among Baltic capitals the affordability of

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<sup>60</sup> The House Price Index (HPI) measures the price changes of all residential properties purchased by households (flats, detached houses, terraced houses, etc.), both newly built and existing, independently of their final use and independently of their previous owners.

<sup>61</sup> Respective figures for LATVIA were +8.2 and +6,5 for LITHUANIA. Eurostat newsrelease 151/2014 - 9 October 2014, [http://epp.eurostat.ec.europa.eu/cache/ITY\\_PUBLIC/2-09102014-AP/EN/2-09102014-AP-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/2-09102014-AP/EN/2-09102014-AP-EN.PDF) (last visited 27 Nov. 2014).

<sup>62</sup> Ober House: Real Estate market report Baltic States Capitals, <[http://ober-haus.lt/wp-content/uploads/2014/09/Ober-Haus\\_Market\\_Report\\_Baltic\\_States\\_2014.pdf](http://ober-haus.lt/wp-content/uploads/2014/09/Ober-Haus_Market_Report_Baltic_States_2014.pdf)> (last visited 29 Nov. 2014).

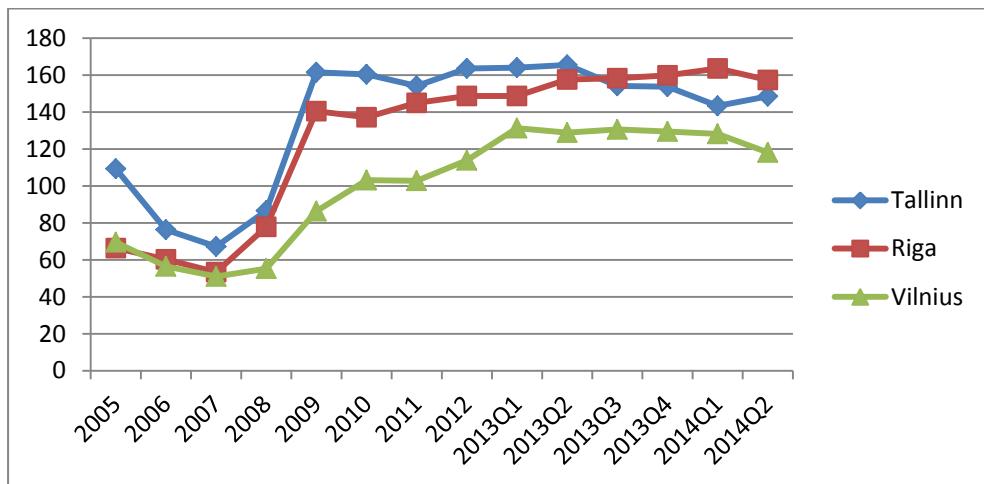
<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> The housing affordability index (HAI) is calculated for a family whose income is equal to 1.5 of average net wages with an average-sized apartment of 55 square meters. The HAI is 100 when households use 30% of their net wages for mortgage costs. When the HAI is at least 100, households can afford their housing, according to the established norm. The higher the number, the greater the affordability. Swedbank, Baltic Housing Affordability Index <[http://www.swedbank-research.com/english/baltic\\_housing\\_affordability\\_index/2014/q3hai\\_2014q2.pdf](http://www.swedbank-research.com/english/baltic_housing_affordability_index/2014/q3hai_2014q2.pdf)> (last visited 28 Sept. 2014).

housing is greatest in Riga. The time needed to save for a down payment is 24,8 months in Riga compared to 28.3 months in Tallinn and by 37.4 months in Vilnius.<sup>66</sup>

**Figure 2 Housing affordability index (HAI) in Baltic capitals (2005-2014).**<sup>67</sup>



The average **interest rate of housing loans** in ESTONIA and in LITHUANIA is on a **very low** level (2,5 % p.a.). In 2014, there is still room for the interest rates to fall in LATVIA.<sup>68</sup>

Selection of affordability parameters can be found in **Table 3**.

**Table 3 Selected housing affordability parameters.**

	EE	LV	LT	EU28
<b>Housing affordability</b>				
Housing cost overburden rate <sup>69</sup> (2012)	8	11	9	11
Share of housing costs in disposable household income (2012) <sup>70</sup>	19	22	20	22
Share of rent related to occupied dwelling in disposable household income (2013) <sup>71</sup>	20	10	13	25

<sup>66</sup> Changes over the past year (2013Q2- 2014Q2) are commented as follows: In Tallinn, affordability diminished by 16.3 points in the second quarter this year compared with the same period in 2013, due to a 16.3% annual increase in apartment prices. In Riga, the HAI declined marginally (by 0.3 point) because of a 10 basis point increase in mortgage interest rates. Contrary to other Baltic countries, wages in a year rose faster than apartment prices in Riga. In Vilnius, the HAI fell by 10.7 points because of a 14.4% annual increase in apartment prices. Swedbank: Baltic Housing Affordability Index.

<[http://www.swedbank-research.com/english/baltic\\_housing\\_affordability\\_index/2014/q3/hai\\_2014q2.pdf](http://www.swedbank-research.com/english/baltic_housing_affordability_index/2014/q3/hai_2014q2.pdf)> (last visited 27 Nov. 2014).

<sup>67</sup> Ibid.

<sup>68</sup> [http://www.seb.ee/sites/default/files/web/files/uudised/BHO\\_aprill2014\\_tallinn.pdf](http://www.seb.ee/sites/default/files/web/files/uudised/BHO_aprill2014_tallinn.pdf) .

<sup>69</sup> The housing cost overburden rate is the percentage of the population living in households where the total housing costs ('net' of housing allowances) represent more than 40 % of disposable income ('net' of housing allowances).

<sup>70</sup> Source: SILC [ilc\_mded01]

<sup>71</sup> Source: SILC [ilc\_mded02].

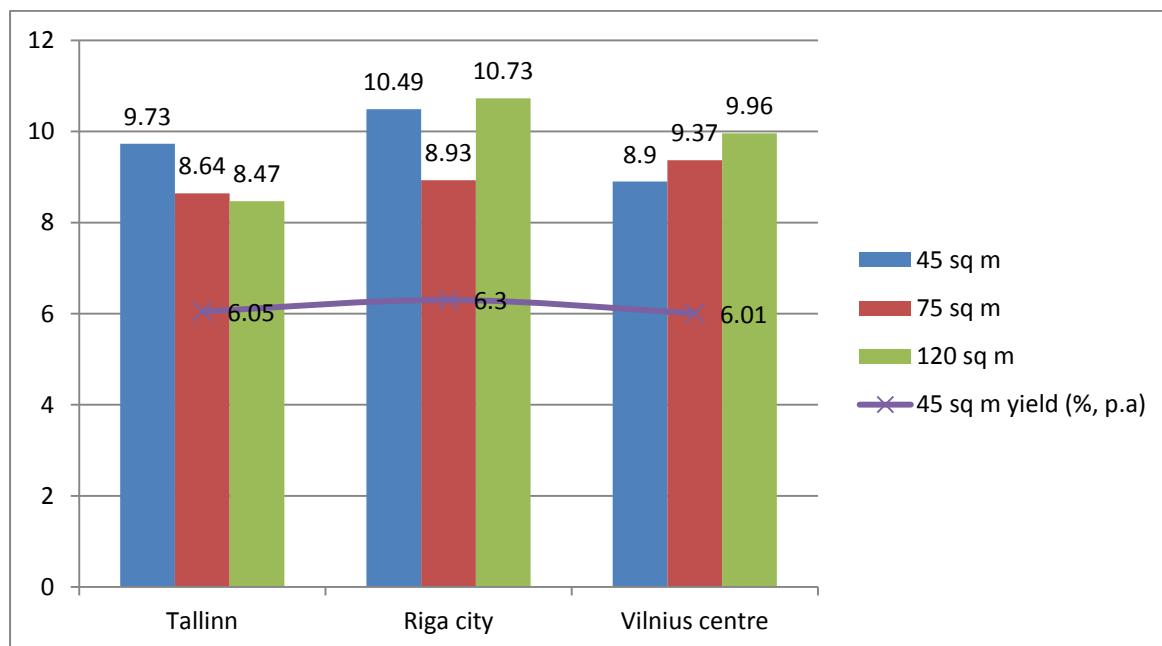
In ESTONIA and LITHUANIA, the share of any kind of arrears (on utility bills, rent, hire purchase or loan repayment) is close to the EU average (11.4 %).<sup>72</sup> Unfortunately, this does not apply to LATVIA, as as much as 24.4 % of total population report arrears.<sup>73</sup> In ESTONIA, 30% of all households feel heavy financial burden of total housing costs (expenses on utilities, rent or mortgage payments) which is lower than the EU average (38%).<sup>74</sup> In LITHUANIA, the respective figure is 36 % and exceptionally high in LATVIA – 46 %. Hence, there are more households which can improve their living conditions without facing difficulties in ESTONIA than in its Baltic neighbouring countries.<sup>75</sup>

### 1.2.3. Tenancy contracts and investment

**Return for rental dwellings** in Baltic residential market is commonly valued as **moderate** in between 4-6 % p.a. average. Average figures of residential investment yield is 4.8% for LITHUANIA, 4.3% for LATVIA and 5.2% for ESTONIA.<sup>76</sup> Average rent prices and rental yields for 45 sq m apartment in the city centre are shown in

**Figure 3.**

**Figure 3 Rent prices (EUR/sq m) and rental yields (% p.a. for 45 sq m apartment) in Baltic capitals (2014).**<sup>77</sup>



<sup>72</sup> [http://www.seb.ee/sites/default/files/web/files/uudised/BHO\\_aprill2014\\_tallinn.pdf](http://www.seb.ee/sites/default/files/web/files/uudised/BHO_aprill2014_tallinn.pdf)

<sup>73</sup> Ibid.

<sup>74</sup> 2013, source: SILC) [ilc\_mded04].

<sup>75</sup> Ibid.

<sup>76</sup> Ober Hous Market Report Baltic States 2014, <[http://www.ober-haus.com/files/lt/files/reports/Ober-Haus\\_Market\\_Report\\_Baltic\\_States\\_2014.pdf](http://www.ober-haus.com/files/lt/files/reports/Ober-Haus_Market_Report_Baltic_States_2014.pdf)> (last visited 29 Nov. 2014).

<sup>77</sup> Global Property Guide, <<http://www.globalpropertyguide.com/>> (last visited 29 Nov. 2014).

Tenancy contracts are not relevant to professional and institutional investors because return on rental dwellings is not attractive. Considering higher rates of return for alternative investments and unfair competition due to the large proportion of black market rentals (for tax evasion purposes), the rental market will remain dominated by private landlords for many years.

#### 1.2.4. Other economic factors

The **role of estate agents is modest** in all Baltic States.<sup>78</sup> Potential parties to the rental relationship often do not use services of real estate agents since rental contracts do not have to be registered by notary, fees of the agents are quite high (normally equal to one month's rent), and the quality of their services is not always guaranteed. As already mentioned earlier, landlords tend to avoid to conclude written lease contracts because the taxes. It also means that they tend to avoid using agents' services as the agents in their practice work only with written contracts between lessor and lessee – only the concluded contract gives ground for claim for the commission. There are professional associations<sup>79</sup> which perform supervision over their members' activities, but it is not prohibited to act as a broker even without any official attestation.<sup>80</sup>

The agent's usual fee is 50 %-100 % of the amount of one month base rent. There are no statutory limitations on the commission.

If the size of the brokerage fee has not been agreed, it shall be deemed to be the size of the standard local brokerage fee or, in the absence thereof, a reasonable amount of remuneration. The person - landlord or tenant - assigned a task to the estate agent usually pays the commission. As it is a common practice, at least in ESTONIA, to „agree“ that the commission fee is paid by the lessee even if the agent was assigned by the landlord, most prospective tenants prefer to negotiate directly with the owner of the dwelling.

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<sup>78</sup> Lithuanian Report, 91; Latvian Report, 26; Estonian Report, 42.

<sup>79</sup> Estonian Chamber of Real Estate Brokers was founded as a non-profit organization in 1997. The Lithuanian Association of Real Estate Agencies was established in 2007.

<sup>80</sup> E.g. The Estonian Chamber of Real Estate Brokers is authorized to grant professional qualification to a real estate broker. The professional title of a real estate broker who has successfully passed the professional examination is Licensed Real Estate Broker. Yet, through the number of acting brokers is around 2000, there are only about 150 Licensed Real Estate Brokers since it is not forbidden to act as a real estate broker without a licence. There are no legal requirements about education, knowledge, experience, reputation, etc. of estate agents in Latvia. Basically, anyone can become an estate agent, even if this person is not a merchant in the meaning of the Commercial Law, that is, a person who is registered in the Commercial Register.

### 1.2.5. Effects of the current crisis in comparative perspective

The global financial crisis hit the Baltic States much harder than other countries in the EU.<sup>81</sup> **Households of LATVIA were hit the most** during the crises while **households in ESTONIA suffered the least.**

More than 50 per cent of households in all Baltic countries experienced some kind of drop in their income. There is very slow recovery after the recession regardless the drop of unemployment rate and the rise in average real wage.

High and accelerating house price inflation was a characteristic of many European countries during the decade preceding the crisis, with the Baltic States experiencing increases above those of the euro area. Both supply and demand factors played important roles. Favourable lending standards, the absence of a cap on loan-to-value ratios and low real interest rates created easy access to finance and growing demand for housing. The demand for housing was reinforced by low real estate taxation, partial deductibility of mortgage interest payments, nominal convergence and rather underdeveloped rental markets.<sup>82</sup>

A strong correction in house prices started in 2007-2008 and was particularly pronounced from mid-2008 to mid-2010 when the housing prices in LATVIA dropped over 52%. Rent prices also decreased, but not so dramatically. All this put pressure on the banking system and, combined with lower disposable incomes, led to a deterioration in the quality of the banks' loan portfolios.<sup>83</sup> The share of **non-performing housing loans** (NPL) has been at **very high level in LATVIA**. The highest peak in non-performing loans (NPL) was in Latvia (16.5% in 2011 Q3) while the ESTONIAN households have showed the least difficulties in repaying their housing loans.<sup>84</sup>

December 2008 to March 2013 the **home loan portfolio decreased** by 11.1% in Estonia, by 15.6% in Lithuania and as much as by 34% in LATVIA. As a result, the home loan portfolio grew most in LITHUANIA (ca 6 times in 2005-2008), whereas the **setback has been greatest in LATVIA.**<sup>85</sup>

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<sup>81</sup> The cumulative output loss in 2008 and 2009 was 18.3% in Estonia, 21.0% in Latvia and 11.9% in Lithuania.<sup>81</sup> In all three countries, unemployment rates at least trebled from 2007 to 2009. Latvia—from the 2007 level of 6.0% to 18.7%, making it the largest increase in the EU—but closely followed by Estonia (from 4.7% to 16.9%) and Lithuania (from 4.3% to 17.8%). Rainer Kattel & Ringa Raudla (2013): The Baltic Republics and the Crisis of 2008 – 2011, Europe-Asia Studies, 65:3, 426-449, <[http://www.networkideas.org/featart/apr2013/pdf/Kattel\\_Raudla.pdf](http://www.networkideas.org/featart/apr2013/pdf/Kattel_Raudla.pdf)>, (last visited 29 Nov. 2014), 249

<sup>82</sup> Real estate price dynamics, housing finance and related macro-prudential tools in the Baltics. ECFIN Country Focus, vol. 9, Issue 2, December 2012.

<[http://ec.europa.eu/economy\\_finance/publications/country\\_focus/2012/2012/cf\\_vol9\\_issue2\\_2012.pdf](http://ec.europa.eu/economy_finance/publications/country_focus/2012/2012/cf_vol9_issue2_2012.pdf)> (last visited 29 Nov. 2014).

<sup>83</sup> SEB: Baltic Household Outlook, <[http://www.seb.ee/sites/default/files/web/files/uudised/BHO\\_aprill2014\\_tallinn.pdf](http://www.seb.ee/sites/default/files/web/files/uudised/BHO_aprill2014_tallinn.pdf)> (last visited 29 Nov. 2014).

<sup>84</sup> In Estonia, the peak was at 4.5% in 2010 Q3. The repayment problems are related to the income declines during the recession which were experienced by majority of households.

<sup>85</sup> Ibid.

Banks in Baltic countries have been more reluctant to grant new housing loans in view of worsening perceptions of risk and tighter credit standards, while demand for housing loans declined, resulting in higher debt financing costs, greater uncertainties about future incomes, job insecurity and thus increased risk regarding the future affordability of mortgages.<sup>86</sup> The pronounced reduction of the bank lending activity has had significant implications for the housing market, leading to a dramatic decrease in housing prices and implicitly the diminishing real estate collateral, which threatened the financial stability.<sup>87</sup>

No current figures on **repossession** are available for LATVIA and LITHUANIA. In ESTONIA, since 2007, the number of forced seizures of dwellings due to mortgage loan default by the buyer has been on the rise year by year: in 2007 - 222, in 2009 – 631 and in 2012 the number of repossessed dwellings was already 1300.<sup>88</sup>

Effective **real estate taxation** (in particular in ESTONIA and LITHUANIA) is below the euro area average and the supervisory constraints are milder than in most of the euro area countries (seemingly with an exception for Lithuania). LITHUANIA is the only Baltic country that has introduced measures aimed at ensuring responsible lending. Since November 2011, banks - when granting new mortgage loans – have been obliged to respect an 85% cap on the loan-to-value ratio, a 40% cap on the debt-to-income ratio and a 40 year maturity limit. In addition, requirements have been tightened for the assessment of creditworthiness and transparency with regard to possible risks affecting the borrower.<sup>89</sup> However, Eesti Pank (Bank of ESTONIA) is planning to introduce three limits on the issuing of housing loans by commercial banks at the start of 2015, as a precautionary measure to reduce the risks of a lending boom in the future.<sup>90</sup>

All Baltic countries are still below the EU average in housing conditions and the improvement of housing conditions implies new home purchases. As home purchases and improvements were postponed during the crisis, households are expected to show

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<sup>86</sup> E.g. in 2010, the value of outstanding housing loans in Estonia was 41% of GDP. Since 2010, the household debt-to-GDP ratio has decreased considerably, due to both the decrease in the loan portfolio and GDP (income) growth, and stands currently at 30 per cent.

<sup>87</sup> Lithuania and Estonia - 46%.

<sup>88</sup> Bank of Estonia. Statistical data is only partly correct because the purchase of mortgaged property will be registered not as transaction in expropriation proceedings but as regular purchase by notary

<sup>89</sup> Ibid.

<sup>90</sup> The first limit is on LTV (loan-to-value), and states that the loan amount can only be up to 85% of the value of the collateral. If the loan is guaranteed by KredEx then the loan amount can be for up to 90% of the value of the collateral. The second limit is on DSTI (debt service-to-income), and states that all the monthly loan and lease principal and interest payments of the borrower taken together may amount to only 50% of the borrower's monthly net income. Net income is regular income that reaches the bank account after taxes have been deducted. The third limit is that the maximum maturity of housing loans is to be 30 years. Real estate price dynamics, housing finance and related macro-prudential tools in the Baltics. ECFIN Country Focus, vol. 9, Issue 2, December 2012.

[http://ec.europa.eu/economy\\_finance/publications/country\\_focus/2012/2012/cf\\_vol9\\_issue2\\_2012.pdf](http://ec.europa.eu/economy_finance/publications/country_focus/2012/2012/cf_vol9_issue2_2012.pdf) > (last visited 29 Nov. 2014).

increased interest in enhancing their living conditions.<sup>91</sup> Currently, only in Estonia real interest rates on mortgages are negative and are significantly below the euro-area average. Accordingly, lending conditions remain favourable for the uptake of mortgage debt in ESTONIA, in particular.<sup>92</sup>

Quite a few regulatory changes introduced in response to the crisis also has direct or indirect effect to housing market.

Firstly, home-owners subsidy in the form of **mortgage interest deductibility** was limited in all Baltic States. In ESTONIA, the limit on deductible interest expenses was reduced by 40%<sup>93</sup> from 2012 onwards. In LATVIA and LITHUANIA, mortgage-interest deductibility was phased out.<sup>94</sup>

Secondly, the recession prompted several changes to **insolvency proceedings for private individuals** in Baltics.<sup>95</sup> In ESTONIA, separate law on restructuring personal debt<sup>96</sup>, in addition to a more established bankruptcy procedure was introduced.<sup>97</sup> The act which was primarily aimed at protecting overly indebted (and possibly unemployed) home owners, however, did not prove to be very useful in practice.<sup>98</sup> In LITHUANIA<sup>99</sup> the Law on the Bankruptcy of Natural Persons which came into force in Lithuania on 1 March 2013. Until then, there was no law regulating insolvency of private individuals at all. In LATVIA, new insolvency regulation of natural persons was introduced in 2010 in

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<sup>91</sup> <[http://www.seb.ee/sites/default/files/web/files/uudised/BHO\\_aprill2014.pdf](http://www.seb.ee/sites/default/files/web/files/uudised/BHO_aprill2014.pdf)> (last visited 29 Nov. 2014).

<sup>92</sup> Ibid. The gap between the interest rates in Latvia and other Baltic countries is still ¾ percentage points. Due to higher repayment problems and borrowing risk in Latvia compared to other Baltic countries the interest rate will not yet reach the same level as in Estonia and Lithuania.<sup>92</sup>

<sup>93</sup> From 3196 EUR to 1920 EUR per taxpayer during a period of taxation. Income Tax Act § 28<sup>2</sup>.

<sup>94</sup> On 1 January 2009 the Law on Profit Tax of Republic of Lithuania came into force and the housing credit benefit was withdrawn. Real estate price dynamics, housing finance and related macro-prudential tools in the Baltics. ECFIN Country Focus, vol. 9, Issue 2, December 2012.

<[http://ec.europa.eu/economy\\_finance/publications/country\\_focus/2012/2012/cf\\_vol9\\_issue2\\_2012.pdf](http://ec.europa.eu/economy_finance/publications/country_focus/2012/2012/cf_vol9_issue2_2012.pdf)> (last visited 29 Nov. 2014)

<sup>95</sup> Cf. Ruda, Kallas, Petkevicius. Treatment of insolvency for private individuals: developments in the Baltics. Insolvency and Restructuring International, Vol 5 No 2, September 2011, available at: <<http://www.sorainen.com/UserFiles/File/Publications/article.treatment-of-insolvency-for-private-individuals-developments-in-the-baltics.2011-09-30.eng.insolvency-and-restructuring-international.girts-kadrik-mantasp.pdf>> (last visited 29 nov. 2014).

<sup>96</sup> Debt Restructuring and Debt Protection Act (DRDPA) was adopted in November 2010 and entered into force 5 April 2011.

<sup>97</sup> The major idea behind the new legislation was to prevent massive reposessions of mortgaged houses by facilitating the restructuring of the debts of a natural person having solvency problems (debtor). The law tries thereby to take account of the legitimate interests of the debtor as well as of the creditor. In debt restructuring proceedings, the financial obligations of a debtor are made more manageable by extension of the term of performance of an obligation, by performing the obligation in instalments or by reducing the size of the obligation (Art 2 of DRDPA). The respective procedure should be initiated by the debtor by application to the county court.

<sup>98</sup> Since the enforcement of the law, 102 applications have been filed (as at 30 Nov. 2013), of which only 7 were resolved positively (at least partially).

<sup>99</sup> The Law on the bankruptcy of natural persons of the Republic of Lithuania (amended and supplemented). Official Journal, 2012, No. 57-2823.

order to makes process available to more individuals by aiming at shorter duration and lower costs. Indeed, under this new law more individuals have been decared in comparison to the previous one.<sup>100</sup> Futhermore, another set of amendments will come into force on thr 1<sup>st</sup> of January 2015. Continues reforms are targeted at reducing the term for abolition of debts, but most important change would be the introduction principle of "dropped-off keys"<sup>101</sup>. In sum, while one of the aims of the new law in ESTONIA was to help individuals avoid bankruptcy, changes in LATVIAN personal bankruptcy treatment has made these types of bankruptcies easier.

In LATVIA, additional requirements regarding credit contracts in which consumers are involved, in particular purchase of residential dwellings for living purposes were introduced via amendments into the Consumer Protection Law. Furthermore, licensing of private companies, which are not banks (credit institutions), were introduced and as a result activities of private credit grantors were restricted. The amendments also determine that a creditor is not allowed to ask to return a debt in full amount before the appointed time by a credit contract or ask for additional securities, if the consumer has not essentially infringed<sup>102</sup> the credit contract. The further amendments concern the Credit Register which now provides information on capacity of a prospective borrower to return a debt. Also a new law on recovering of debts out-of-court was passed.<sup>103</sup>The Civil Law amendments are the first results of the intensive discussion over onerous and

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<sup>100</sup> 2009 – 53, 2010 – 199, 2011 – 845 and 2012 - 979 proceedings were commenced. As of 25 September 2012. Source: The Insolvency Register.

<[https://www.ur.gov.lv/urpubl?act=MNR\\_STAT&stat\\_id=533](https://www.ur.gov.lv/urpubl?act=MNR_STAT&stat_id=533)> through Edvins Draba, Modernizing Insolvency Law in Latvia: Successes and Failures. The new regulation has resulted in a dramatic increase of commenced proceedings. <[http://www.insol-europe.org/download/file\\_7782](http://www.insol-europe.org/download/file_7782)> (last visited 28 Nov. 2014).

<sup>101</sup> This principle requires that after the property which was serving as a security is sold, the secured creditor is going to lose the right of claim and all of the remaining obligations are going to be extinguished along with the acceptance of auction act. By extinguishing the basic obligations, additional obligations are going to lapse as well. This order is only referable to cases when the selling object of debtor's insolvency process is his dwelling. As a dwelling in the concept of the law is considered a property belonging to debtor in which for the last six months before the day when an insolvency process application has been submitted to the court he has declared his residence. This principle can only be applied during a natural person's insolvency process to the property to which a security will be established after the 1<sup>st</sup> of January 2015. Lextal. Amendments to the Insolvency law of Latvia (Nov. 14, 2014) <<http://legalknowledgeportal.com/2014/11/14/amendments-to-the-insolvency-law-of-latvia/>> (last visited 28 Nov. 2014).

<sup>102</sup> Essential breach of credit contract is assumed if the consumer delayed payments for more than 60 days or for more than three times in a year and each time for more than 30 days. The essential breach is also using not in compliances with a contract.

<sup>103</sup> This law helps to solve the following problems which a consumer can face: (1) It eliminates costs which sometimes can considerably exceed an amount of a debt; (2) The law prohibits the use of aggressive methods recovering debts, for example, threats, coming to a working place of a debtor etc.; (3) The new law requires to provide full and true information about a debt or its component parts.

disproportionate contractual penalties.<sup>104</sup> Seemingly, LATVIA has been most radical in implementing new regulations in response to the crisis.

All three Baltic States implemented sizable fiscal consolidations<sup>105</sup> in 2008–2010. In 2010, the Baltic States started to recover and recorded GDP growth between 5.5% and 7.6% in 2011. In the light of such temporal sequences of events, there has been a temptation in policy circles, both inside the Baltic States and internationally, to draw a causal conclusion and to claim that it was the austerity that led to growth.<sup>106</sup> Moreover, the peaceful reaction of society to austerity policy in the Baltics is also emphasized.<sup>107</sup>

In 2003 there was a huge gap in average wages between ESTONIA and other Baltic countries, even exceeding 50%. The gap narrowed during the last boom years. Despite increasing inflation, during five years (2003-2008) real wages rose by 66 per cent in Latvia and Lithuania, followed by Estonia with a 54% increase. Latvians and Lithuanians experienced the largest drop in real income during the economic downturn. In Latvia and Estonia real wages started to increase in 2011, while in Lithuania real wage growth resumed only in 2013.<sup>108</sup> ESTONIA is very close to the pre-crises level in terms of real wages.<sup>109</sup> Apparently, ESTONIA was significantly more successful with fiscal consolidation than other Baltic States.<sup>110</sup>

**Table 4** illustrates the situation in 2013. LATVIA is still in relatively weak position in terms of recovery from the crisis.

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<sup>104</sup> On 1 January 2014, amendments to the Latvian Civil Law will come into force significantly affecting all contracts where the parties have agreed on a contractual penalty. For tenancy contracts it is important, that contractual penalty imposed for undue or late performance of obligations can be set as an increasing amount, though the total would be limited to 10% of the principal debt or the amount of the main obligation. Court can reduce the amount of a contractual penalty, even where neither party applies for it. For more details, see e.g. Amendments to Latvian Civil Law limit contractual penalties. Sorainen Newsflash/Latvia (Sep 2013) < <http://www.sorainen.com/UserFiles/File/Publications/newsflash.latvia-dispute-resolution.2013-09-17.eng.html> > (last visited 29 Nov. 2014).

<sup>105</sup> By fiscal consolidation we mean the improvement of government's budget-deficit-to-GDP ratio via discretionary changes in fiscal policy (i.e. by expenditure cuts and/or revenue increases). <[http://www.networkideas.org/featart/apr2013/pdf/Kattel\\_Raudla.pdf](http://www.networkideas.org/featart/apr2013/pdf/Kattel_Raudla.pdf)> (last visited 29 Nov. 2014).

<sup>106</sup> Rainer Kattel & Ringa Raudla (2013): The Baltic Republics and the Crisis of 2008 – 2011, Europe-Asia Studies, 65:3, 426-449. <<http://dx.doi.org/10.1080/09668136.2013.779456>> (last visited 17 Nov. 2014).

<sup>107</sup> Kinga Dudzińska, The Baltic States' Success Story in Combating the Economic Crisis: Consequences for Regional Cooperation within the EU and with Russia, No.6(54), March 2013 © PISM <[https://www.pism.pl/files/?id\\_plik=13084](https://www.pism.pl/files/?id_plik=13084)> (last visited 29 Nov. 2014).

<sup>108</sup> SEB: Baltic Household Outlook, <[http://www.seb.ee/sites/default/files/web/files/uudised/BHO\\_aprill2014\\_tallinn.pdf](http://www.seb.ee/sites/default/files/web/files/uudised/BHO_aprill2014_tallinn.pdf)> (last visited 29 Nov. 2014).

<sup>109</sup> Ibid.

<sup>110</sup> Estonia's apparent success can be attributed to a combination of political, institutional and economic factors like: (1) early timing of reforms; (2) the availability of reserves; (3) ownership structure of banks; (4) the electoral cycle in Estonia favoured starting adjustment as early as 2008, and (5) significantly smaller revenue shock. Rainer Kattel & Ringa Raudla (2013): The Baltic Republics and the Crisis of 2008 – 2011, Europe-Asia Studies, 65:3, 435. <<http://dx.doi.org/10.1080/09668136.2013.779456>> (last visited 17 Nov. 2014).

**Table 4 Recovery from the crisis (2013).**

	EE	LV	LT	EU28
GDP per capita in PPS (EU-28 = 100) <sup>111</sup>	72	67	74	100
Unemployment rate (Sept. 2014) <sup>112</sup>	7,5	10,8	9,7	10,0
Average montly gross wage, EUR	931	715	646	
The share of NPL at the end of 2013 (%) <sup>113</sup>	1,4	10,2	7,5	
The share of households who have difficulties to cover their everyday expenses (%) <sup>114</sup>	7,5	25,4	9,6	12,1
The share of households who are not able to cover unexpected expenses of 200-300 EUR (%) <sup>115</sup>	41,9	69,5	56,9	39,7
Severe material deprivation rate - tenants at market price <sup>116</sup>	14,8	33,9	23,2	13,7

### 1.3. Urban and social aspects of the housing situation in comparison

#### 1.3.1. Urban aspects in comparative perspective

There are more rented dwellings in inner cities, as well as in large-scale housing estates, compared to lower-scale suburbs. On the regional scale, there is concentration of rental dwellings, according to a settlement hierarchy – larger concentration in bigger cities<sup>117</sup>, and lesser concentration in smaller towns and rural areas.<sup>118</sup>

During the first decade after regaining independence the urban development of the Baltic cities was marked mainly by active commercial development. The second decade showed a significant trend of agricultural areas massively being converted and divided into smaller residential plots. From the beginning of the 2000s single-family houses were

<sup>111</sup> Gross domestic product (GDP) is a measure for the economic activity. It is defined as the value of all goods and services produced less the value of any goods or services used in their creation. The volume index of GDP per capita in Purchasing Power Standards (PPS) is expressed in relation to the European Union (EU-28) average set to equal 100. If the index of a country is higher than 100, this country's level of GDP per head is higher than the EU average and vice versa. Statistics Estonia, <<http://www.stat.ee/29956>> (last visited 29 Nov. 2014).

<sup>112</sup> Eurostat. Unemployment rate by sex and age groups - monthly average, % [une\_rt\_m].

<sup>113</sup> SEB: Baltic Household Outlook

<[http://www.seb.ee/sites/default/files/web/files/uudised/BHO\\_aprill2014\\_tallinn.pdf](http://www.seb.ee/sites/default/files/web/files/uudised/BHO_aprill2014_tallinn.pdf)> (last visited 29 Nov. 2014).

<sup>114</sup> Source: SILC [ilc\_mdes09].

<sup>115</sup> Source: SILC [ilc\_mdes04].

<sup>116</sup> Source: SILC [ilc\_mddd17].

<sup>117</sup> However, in Estonia the highest concentration of private rental residential housing is not in capital, but in university town Tartu.

<sup>118</sup> E.g. in case of Lithuania, almost two-thirds of people (about 60 percent), who have rented apartments live in the biggest cities (Vilnius, Kaunas, Klaipéda). About one-third of people, who have rented apartments, live in the small cities, and only about one-tenth (about 9 percent) live in villages. Cf. generally Kährik, Novák et al (2013); Tammaru, Leetmaa et al (2009); Leetmaa, Brade et al (2012); Leetmaa & Tammaru (2007); Also: Tammaru, Kulu, et al. (2004).

built in larger groups, which sometimes assumed characteristics of gated communities.<sup>119</sup>

Apart from an ageing population and a moderate decrease in the size of the population, **slow urbanisation**<sup>120</sup> is likely to continue. Urbanisation is favouring larger cities and towns.<sup>121</sup> The prevalent directions of migration are tied to a person's life cycle: the young are moving primarily into the large cities and towns, families with children into suburbs, and older working-age people and retirees into the countryside.

Even though the segregation of the Russian speaking population in ESTONIA on an intra-urban level is noticeable (there are mainly historical reasons for that, related to Soviet immigration policy and location of industrial areas) it does not translate into the phenomenon of **ghettoization**.<sup>122</sup> Although public rental (incl. social) housing tends to be concentrated in clusters in the capital city, this directly does not lead to ghettoisation.<sup>123</sup> However, ghettoization of districts where social dwellings and houses are situated is characteristic for LATVIA.<sup>124</sup> In LITHUANIAN capital city Vilnius, in district of Kirtimai for about 50 years there has been a local Roma's settlement called Tabor. This encampment is a unique phenomenon in Lithuania and indeed in the other Baltic countries. Elsewhere, Roma's live in families, but also with other nationalities. Vilnius Roma's Tabor is completely separate – geographically, socially and culturally closed community<sup>125</sup>. Today in Tabor there are more than 500 Roma.<sup>126</sup>

There is also some evidence of the **gentrification** as a new phenomenon that started mainly during the 2000s in bigger cities.<sup>127</sup> Gentrification processes are most evident in

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<sup>119</sup> Hence, the urban development of major Baltic cities generally assumes the characteristics of a phenomenon called "sprawl without growth", which defines the extensive urban sprawling in the context of rapid demographic and economic decline. Ibid., 78.

<sup>120</sup> Growth in the urban population is relative: its absolute numbers are not increasing significantly yet its proportion is being boosted by the decrease in the rural population.

<sup>121</sup> Urbanisation statistics are being distorted also by urban sprawl, since residents in new urban regions constructed beyond the limits of a city yet in its vicinity are classified as rural population.

<sup>122</sup> Ghettoisation means spatial isolation of one social or ethnic group (usually cultural aspects overlapping with social). Compared to the socialist era it could be said that social differences have indeed increased at the intraurban level, and pockets of concentration of groups based on social status have emerged, these urban dynamics still do not constitute ghettoisation. Cf. Kährik and Tammaru (2010); Hess, Tammaru, et al (2012), Ruoppila and Kährik (2003).

<sup>123</sup> The clients of public housing come from quite different backgrounds, not from a particular ethnic or social group. It does lead to accumulation of some urban social problems, but not ghettoization. E.g. in Tallinn, analyses have revealed a highly spatially segregated pattern of social housing dwellings on the intraurban level, with the highest concentration of social housing in certain inner-urban neighbourhoods made up of poor quality pre-1946 housing. Kährik and Köre (2013).

<sup>124</sup> It happens because social dwellings are often situated in districts with poor infrastructures to lower the construction costs of such dwellings. Ekonomikas Ministrija. Sociālo mājokļu koncepts. <[www.em.gov.lv](http://www.em.gov.lv)>, (last visited 2 Sept. 2013), through Latvian Report, 30.

<sup>125</sup> They are enclosed in the sense that Romas have virtually no links to the city and do not use the city's infrastructure.

<sup>126</sup> See also first Romany Internet Site <<http://www.roma.lt>> (last visited 28 Nov. 2014)

<sup>127</sup> For example, in Vilnius this phenomenon can be found in Užupis and Žvėrynas neighbourhood, similar trend has been identified in Tallinn and Tartu.

more attractive historical housing with well sustained physical structures, where prior residents are being voluntarily or involuntarily displaced after restitution of the property to its former owners.<sup>128</sup>

**Squatting** does not appear to be a significant social or legal problem in neither of three countries.

### 1.3.2. Social aspects

The **homeownership is the most attractive tenure type** in all three Baltic States.<sup>129</sup> In general only home ownership is regarded as a safe protection for entire life.

As much as 96 percent of the population in LITHUANIA would want to live in their own property and those who rent a house or a flat see it as a temporary arrangement.<sup>130</sup> Payment of rent is considered as a waste of money if there is an affordable alternative to buy home as an investment in property for the same amount of monthly payments. Only in the age group of 16-29 is the attitude towards rental more favourable.<sup>131</sup>

Usually middle-income people would choose to rent dwelling when they search to acquire appropriate house, and young families and younger people prefer the lease when they accumulate down payment for own home purchase. Private rental is generally conceived as an unstable tenure, since private landlords often do not offer long-term tenancy contracts which is necessary in order for a renter to feel that dwelling is really a home.<sup>132</sup>

Social housing as a tenure form is often associated with asocial segment of population. But there are several reasons why attitudes towards tenants are not always positive even in private market. First and foremost is the understanding that the law protects tenants more than rights of the owners, which encourages misconduct by the tenants. Owners are afraid of the possibility that tenants will abuse their rights as for example the right to register their leased residence in the Population Register, cause damage to the property or oppose eviction for unlawful reasons causing.

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<sup>128</sup> Hiob, Nutt et al, Risen From the Dead: from Slumming to Gentrification, <<http://rtsa.ro/en/files/TRAS-36E-2012-7HIOB,%20NUTT,%20NURME,%20DE%20LUCA.pdf>> (last visited 7 Jan. 2013).

<sup>129</sup> About pluses and minuses of the dwelling rent and ownership. Available at (in Lithuanian): <<http://www.swedbank.lt/lt/articles/view/1647>> (last visited 29 Oct. 2012); Survey conducted by Eesti Konjunkturiinstituut (December 2013).

<sup>130</sup> Lithuanian Report, 23.

<sup>131</sup> As per most recent survey, 46 % of students in ESTONIA who currently rent from private landlords, would buy a home as the next step in meeting their housing needs. Even though more than half of the respondents (54%) consider buying a home as an important investment necessary to insure economic certainty in the future (60%), despite the accompanying risks (56%), many continue to view rental tenure as an alternative that is not entirely excluded. Ministry of Economic Affairs and Communications. Affordability and demand for rental housing. Analysis of the opinions of the students. (*Üürieluaseme kättesaadavus ja vajadus Üliõpilaste hinnangute analüüs*) 2013, 28 <[http://www.mkm.ee/public/Uliopilaste\\_eluasemeuring2013\\_Raport..pdf](http://www.mkm.ee/public/Uliopilaste_eluasemeuring2013_Raport..pdf)> (last visited 21 March 2014).

<sup>132</sup> Ibid.

ESTONIAN residents prefer the status of owner to the greater flexibility that renting offers.<sup>133</sup> They also prefer real estate as an investment compared to financial instruments: 90% of investors considered buying their own home as an investment.<sup>134</sup> However, home ownership cannot be regarded as a safe protection after retirement without any reservation as it usually associated with maintenance costs far bigger than the pension would cover. Furthermore, there are problems regarding administration ownership as the mentality of many owners of the apartments remain as being tenants.<sup>135</sup>

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<sup>133</sup> Swedbank news (04.02.2014): Uuring: Eestimaalaste arvates on kindlaim investeering kinnisvara, <<https://www.swedbank.ee/private/home/more/newsandblog/news>> (last visited 21 March 2014).

<sup>134</sup> Since 1997, real estate prices have increased by 115%, returning a profit of 5% yearly. Turmoils and reforms, incl. monetary reforms over past 70 years have taught the lesson, that investments in real estate were best at maintaining their value the best. Ibid.

<sup>135</sup> In the year 2009 the Law Maintenance of Residential Houses was passed. The law states that the administration (management) of a residential apartment house (including taking of decisions, entering into transactions related to the administration of the residential house) is the duty of the owner of the residential house. But only few houses started to administrate their property – apartment houses according to the proposed by the self-administration models, others prefer to use services of organisations which were established by local municipalities and which help to administrate residential houses. Private managers of residential apartment houses are not controlled effectively, i.e., law rules are insufficient, what may cause different problems, including the obligation to pay double for utilities due to unlawful conduct of their manager. There have been a number of cases when owners and tenants of apartments were not aware whether managers of residential apartment fulfil their duties. In the worst cases managers disappeared with all money, but owners and tenants had to cover payments for utilities once more.

## **2. HOUSING POLICIES AND RELATED POLICIES IN COMPARISON**

### **2.1. Introduction**

It seems that dominating basic principle behind the housing policies in Baltic States is neo-liberalism. It is generally assumed that a person tries to provide him- or herself with a residential dwelling. If a person cannot secure himself or herself with the dwelling, a respective local municipality should provide assistance. Thus current housing policy targets its measures to support home ownership and limited interference rental market, targeting social housing only to low-income segments of the population within the component of social policy. Municipalities should secure the minimum standard of the right to housing. In order to fulfill this obligation, the central government finances social housing measures organised by municipalities. However, the capability of the state to create an efficient and functioning social security system depends on the budgetary feasibility and the general economic situation.

The Constitutions of the Baltic States do not directly address universal right to housing.<sup>136</sup>

State provides assistance in case of need in a form of social housing or other housing support measures.<sup>137</sup> Hence, recognizing principle of welfare state as constitutional principle, in wider terms, housing policy in Baltics is not typical of a welfare state.

### **2.2. Policies and actors**

#### **2.2.1. Governmental actors**

LATVIA and ESTONIA differentiate two levels of housing policy actors – national and local (municipal), while in LITHUANIA, also regional level is important<sup>138</sup>.

In LITHUANIA, the Ministry of Social Security and Labour of Lithuania, which is responsible for the (national) welfare state, takes care of some housing policy aspects – specifically of Government-sponsored mortgage programs. In LATVIA, Ministry of Economics is responsible for housing policy on the national level. In ESTONIA, housing policy documents are compiled by Ministry of Economic Affairs and Communications.

Local municipalities realize the housing policy direct to inhabitants of their territories.

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<sup>136</sup> From time to time it is suggested to include the right to housing in the constitution of Latvia, last time in 2012. Till now no amendments of the constitution were made.

<sup>137</sup> E.g. The Constitution of Lithuania Article 52: The State shall guarantee to citizens the right to receive old age and disability pensions as well as social assistance in the event of unemployment, sickness, widowhood, loss of the breadwinner, and in other cases provided for by laws. Art. 28 of the Estonian Constitution: Everyone is entitled to protection of his or her health. Every citizen of Estonia is entitled to government assistance in the case of old age, incapacity for work, loss of provider, or need. Article 109 of the Latvian Constitution provides for the specific and distinctive rights such as the right to social guarantees for old age, work disability, unemployment and other cases determined by law (Article 109 of the Constitution).

<sup>138</sup> National, regional and local levels of government are responsible for designing housing policy instruments. Regional and local levels of government submit the proposals for housing policy and the national level of government adopts legal acts.

## 2.2.2. Housing policies

In ESTONIA, three main objectives set in Development Plan 2008-2013 were to: (1) ensure access to suitable and affordable housing<sup>139</sup>; (2) achieve high quality and sustainable housing in attractive residential areas and (3) ensure diversity, along with balanced and sustainable development of residential areas. However, in ESTONIA, during the year 2014, certain steps have been taken in order to facilitate state-supported private rental sector.<sup>140</sup> The national housing policy document for 2014-2020 will be integrated into The National Development Plan of the Energy Sector. It is generally acknowledged that there is need to support labor force mobility by providing more rental dwellings, and make the rental market more transparent.<sup>141</sup>

In LATVIA, following aims have been set regarding existing dwellings: (1) the legal basis concerning maintenance and supervision of apartment houses should be amended and improved; (2) the state earmarked subsidies for measures which raise power efficiency of apartment houses should be granted; (3) the mechanism concerning crediting of renovation of apartment houses should be introduced; (4) the educational system of managers of apartment houses should be introduced; (5) the informational system for the society concerning dwellings should be introduced. As to the development of the housing sector, the following objectives should be achieved: (2) the legal basis concerning construction should be improved; (3) the social housing system which complies with current demands should be created; (4) competition in the private rental

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<sup>139</sup> Measures implemented include: deduction of housing loan, interest paid from taxable income, state guarantees to housing loans, home support for large families.

<sup>140</sup> Estonian Economy and Infrastructure Minister Urve Palo, who has been recently promoting a state subsidised rental apartments programme, said that the money spent on building such rental apartments will come back as additional tax revenues and will keep quite a few families from leaving Estonia to live in Finland. Palo said that participants of a wide-based round table meeting in the ministry on November 4 decided that the state-supported rental housing programme must be included in the forthcoming Energy Sector Development Plan 2030. The minister said all the parties agreed that publicly supported rental homes are needed in Estonia. Palo said in public television ETV's morning news programme on Wednesday that public rental housing is needed because three times more housing depreciates in Estonia than is built. Because, in Estonia the housing market is outdated, and the state has not seen any role in its development in 20 years. Today the situation is such that 2,000 new homes are built in Estonia a year, but 6,000 depreciate. The gap is 4,000. There should be demand, but they [new housing] don't emerge. People do not have the resources for that," said the minister. Palo said that it is one thing, but the other side is that the scientists believe that the state should intervene much more actively in housing policy: among other things, support the renovation of old houses and building apartment building to rent. Palo said that the situation differs in municipalities: while in Tallinn and Tartu, the problem is very high cost of decent housing, in rural areas and provincial towns, as a rule, however, no apartments in a normal condition are offered for rent at all. Consequently, it inhibits the mobility of people. Palo stressed that municipalities have the leading role in the plans as they have to show how getting state support for building rental housing would develop the economy and local environment. <[http://www.baltic-course.com/eng/real\\_estate/?doc=98851](http://www.baltic-course.com/eng/real_estate/?doc=98851)  
<http://epl.delfi.ee/news/arvamus/urve-palo-turg-ei-lahenda-koiki-eesti-eluasememajanduse-probleeme?id=70132485>> (last visited 29 Nov. 2014).

<sup>141</sup> ENMAK 2030+ Eesti energiamajanduse arengukava aastani 2030 (draft), <[https://www.mkm.ee/sites/default/files/enmak\\_2030\\_eelnou\\_23.10.2014.pdf](https://www.mkm.ee/sites/default/files/enmak_2030_eelnou_23.10.2014.pdf)> (last visited Nov. 20, 2014).

market should be improved; (5) tax privileges in case of apartment house renovation and acquisition of property should be granted.

The LITHUANIAN Housing Strategy declares that one of its goals is to expand housing options for all social groups and considers important to: (1) increase the supply of non-profit and social housing to medium-and low-income households. The aim is to have share of the rental housing 18 percent of the total housing stock in by 2020, from this housing social housing amount must be ca 4-5 %; (2) construct more new dwellings for middle-and high-income households to buy or rent better dwellings, to increase the annual construction volume from the current – about 12.000-15.000 apartment in 2020; (3) increase financial support will be provided to low-income households – to cover part of their housing and rental costs, especially for families with children and disabled persons. Only in LITHUANIA, there exist housing policies targeted at foreigners who have been granted asylum, and at the Roma.

For LATVIA it can be said that the policy still favours home-ownership or is tenure neutral. In ESTONIA, lately state-supported rental sector emerged as topical issue. LITHUANIAN national housing policy does not favour certain types of tenure: the goal is to develop different housing tenure forms in order to ensure all social groups interests and for that, *inter alia*, to enlarge rental sector.

### **2.3. Urban policies**

No specific urban policies to prevent ghettoization and gentrification exist in ESTONIA.<sup>142</sup> However, the city of Tallinn has purposefully refurbished public rental housing in certain inner city areas in order to prevent ghettoization and to upgrade certain inner city areas. The policy aims at improving living conditions in areas already dominated by low-income groups. Social mix will probably be the result, since, inner-city areas also tend to attract wealthier groups, but it is not aim of the policy. Ghettoization of districts where social dwellings and houses are situated is characteristic in LATVIA. Although the phenomenon of gentrification exists also in bigger cities of LITHUANIA, it is not officially recognized as a problem to address with special policies.<sup>143</sup>

Generally, it is up to tenant to file a civil claim based on lease contract insisting that the landlord should guarantee the proper (agreed) status of the dwelling (e.g. by performing repairs or improving the dwelling). In case of ESTONIA, however, this is practically the only possibility, as the quality of the private rental dwellings is determined mainly by free market mechanisms as apart form the requirements set by Building Act<sup>144</sup> and various

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<sup>142</sup> National Spatial Plan Estonia 2013, <<http://eesti2030.files.wordpress.com/2014/02/estonia-2030.pdf>> (last visited 29 Nov. 2014).

<sup>143</sup> For example, in Vilnius this phenomenon can be found in Užupis and Žvėrynas Today these neighbourhoods are considered to be prestigious. The media very often report that low-income residents, who live in these neighbourhoods, receive proposals to sell their houses and if they do not agree with such proposals their houses are fired by unknown persons.

<sup>144</sup> Building Act (*ehitusseadus*), passed 15.05.2002, entry into force 1.01. 2013, RT I 2002, 47, 297.

standards<sup>145</sup> for new and reconstructed dwellings, there are no special regulations regarding the quality of private rented housing as to minimum floor area, equipment, access to technical and/or social infrastructure and/or public transport.

In LATVIA, a residential dwelling shall be fit for rent, i.e., shall comply with the mandatory construction and hygiene requirements, be suitable for long-term human accommodation, as well as for placing household items. Tenants should receive the basic services.<sup>146</sup> The criteria like minimum floor area, equipment, access to technical and/or social infrastructure and/or public transport are of no importance. Beside the tenant within the framework of the lease contract, also Rental boards<sup>147</sup> and local municipalities control the fulfilment of the requirements. Administrative commissions of a local municipality are entitled to examine the possible evasion from the duty as specified by law to maintain and manage a residential house, failure to provide basic services to a tenant of a residential premise, violation of construction regulations etc.

In LITHUANIA, the housing should correspond to Hygiene standards<sup>148</sup> and to Construction Technical Regulations.<sup>149</sup> These standards are verified and controlled in two ways. Firstly, according to the Law on the construction of Lithuania<sup>150</sup>, when the construction of dwelling is terminated, the dwelling must be assessed by special institutions<sup>151</sup>, which must confirm that dwelling is suitable to use. Secondly, there is the Construction Technical Regulation STR 1.12.05:200265<sup>152</sup>, which indicates the procedure and mandatory requirements for the dwellings use and maintenance. According to this Technical Regulation the owners of dwellings must periodically hire specialists who verify if the dwelling corresponds to special requirements.

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<sup>145</sup> EVS-EN 15251:2007- parameters for design and assessment of energy performance of buildings. EVS 839:2003 - values to assess the relative humidity of indoor air. EVS 894:2008+A1:2010 - daylight in dwellings and offices. Vabariigi Valitsuse 27. oktoobri 2004 määruse nr 315 „Ehitisele ja selle osale esitatavad tuleohutusnõuded”.

<sup>146</sup> I.e. services which are inseparably related to the use of the residential space (heating, cold water, sewerage and removal of municipal waste) and which are necessary for the Latvian climatic circumstances.

<sup>147</sup> At the moment there is only one Rental board - in Riga. Local municipalities may establish a Rental Board, which perform the following functions: (1) In the cases provided for by law and the regulations issued by a local municipalities, draw up administrative protocols for persons who have violated laws, provisions of the Cabinet of Ministers and the binding regulations issued by a local municipalities, which regulate the renting out, maintenance and management of residential space; (2) Provide consultations and recommendations to house owners (leasers), apartment tenants (owners) and tenants (owners) of the non-residential space of residential houses; (3) Perform other functions referred to in the binding regulations issued by the relevant local municipalities.

<sup>148</sup> Approved by the orders of the Minister of Health of Lithuania,

<sup>149</sup> Approved by the orders of the Minister of Environment of Lithuania.

<sup>150</sup> The Law on the construction of the Republic of Lithuania (amended and supplemented). Official Journal, 1996, No. 32-788.

<sup>151</sup> Always – by the State Territorial Planning and Construction Inspectorate; by the State Energy Inspectorate; by the Public Health Centre; by the State Fire Supervision; in some cases – by the Regional Environmental Protection Department; by the Disability Organization; by the Municipality's authorized representative.

<sup>152</sup> Approved by the order of the Minister of Environment of Lithuania No 351, 1 July 2002.

## 2.4. Energy policies

National and local energy policies affect housing in the spheres of the energy utility requirements of the dwellings, requirements for the dwellings modernization, etc.

In case of ESTONIA, measures promoting residential energy efficiency on the national level are targeted at the renovation of apartment buildings and at raising awareness of energy conservation. The most influential measures are loans (supported by European Regional Development Fund) and renovation grants.<sup>153</sup> As of the 9 January 2013, the owner of the residential building with indoor climate control or a part of it, has to ensure, in the event of lease, the presence of an energy performance certificate where such is required and must allow it to be inspected.

## 2.5. Subsidization<sup>154</sup>

In ESTONIA, housing policy measures are mainly state level instruments implemented either on a national or local level. They are financed from the state budget through the state credit agency KredEx. Municipalities are responsible organizing social housing as a subsidized form of tenancy. Measures implemented through the municipalities include allocation of subsidized social supply-side housing and demand-side distribution of subsistence benefits (including compensation for housing and utilities cost) (tenure neutral).

There are no special subsidies for tenants (except some local measures for tenants living in restituted houses). While generally a tenure neutral measure, the **subsistence benefit** is most important demand-side incentive. However, the subsistence level is too low to enable the recipient households to live a normal decent life.

Principal **subsidies for owner-occupiers** are: (1) housing loan guarantee<sup>155</sup>, (2) home support for large families (until 2013)<sup>156</sup> and (3) tax incentives (deduction of housing loan interest from taxable income; land tax exemption).

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<sup>153</sup> The state will support residents with 15%, 25% or 35% of the total project costs depending on energy class (according to Energy Performance Certification classification) and relative energy savings intended to be achieved by renovation. Policy Paper on Renewable Energy and Energy Efficiency of Residential Housing,

<[http://ec.europa.eu/regional\\_policy/sources/docgener/evaluation/pdf/eval2007/expert\\_innovation/2011\\_s\\_ynt\\_rep\\_ee.pdf](http://ec.europa.eu/regional_policy/sources/docgener/evaluation/pdf/eval2007/expert_innovation/2011_s_ynt_rep_ee.pdf)> (last visited 7 Jan. 2014).

<sup>154</sup> The information provided by the National Reports is not sufficient for deeper comparative analysis.

<sup>155</sup> Could be considered as the most effective state measure favouring owner-occupation as the preferred form of tenure. Since the establishment of the instrument in year 2000, 21 176 households have benefited. This measure is aimed at following target groups:

- 1) young families (a parent or parents raising a child of up to 15 years (incl.));
- 2) young specialists (up to 30-year-old (incl.) persons, who have acquired at least secondary level education, and has permanent jobs occupation or have operated as registered self-employed entrepreneurs for at least a year);
- 3) tenants of restituted residential premises;
- 4) veterans of the Defence Forces or Defence League.

<sup>156</sup> The measure is targeted to allowing large families to acquire a home or improve their housing conditions (minimum of 4 children under age of 19) with average income less than 300 euros per member of the household. About 300 families have benefited yearly (since 2008) in amount of some 2,2 million euros

There are several measures aiming at increasing the quality and energy efficiency of the housing stock which apply equally to **both home-owners and landlords**:

1. a renovation grant for small houses is suitable for landlords/homeowners of small one- or two family dwelling. The grant is aimed at promoting energy efficiency and use of renewable energy;
2. renovation loans for the reconstruction and improvement of energy efficiency of apartment buildings constructed before 1993 is available from KredEx;
3. apartment building loan guarantee (KredEx);
4. reconstruction grants for apartment associations planning full-scale reconstruction (KredEx);
5. energy audit, building design and expert evaluation grants (KredEx) available for apartment associations.

LITHUANIAN Law on State Support<sup>157</sup> sets two forms of state supports to individuals and families who have a permanent residence: (1) municipal social rented housing and (2) support for housing purchase, construction (reconstruction)<sup>158</sup>. More specifically:

(i) **Subsidies for tenants** – low-income persons (families) may apply to the municipal social housing rent.<sup>159</sup>

(ii) **Subsidies for owners** – few types of loan are guaranteed by the State:

1. the loan to buy or built the dwelling if the property of the dwelling will be transferred to the borrower in 2012;
2. the loan for house construction;
3. the loan for dwelling reconstruction;
4. the loan for dwelling adaptation for needs of the disabled.

There are no specific subsidies for the landlords.

The following subsdization forms are applicable in LATVIA:

1. Allocation of allowance to cover payment for residential tenancy and payment for utilities associated with usage of the residential space<sup>160</sup>;
2. Allocation of a one-time allowance for vacation of a residential space<sup>161</sup>;

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<sup>157</sup> The Law on the Lithuanian state support for housing purchase or lease and apartment buildings renovation (modernization) of the Republic of Lithuania (amended and supplemented). Official Journal, 2002, No. 116-5188.

<sup>158</sup> According to the Statistics Lithuania in the year 2011 there were 80 households which received state supported housing credits. The amount of the subsidies allocated was 806,3 thousand Lithuanian litas (LTL).

<sup>159</sup> The Municipalities for these persons (families), who meet the requirements, settled in the Law, grant of rent social housing for specialty rental price set by the Government. This subsidy is not of the pecuniary nature.

<sup>160</sup> I.e. *accommodation allowance*. A local municipality has the right according to the procedures and the amount specified in city council (parish council) binding regulations to pay an accommodation allowance to persons who in a denationalised house or a house returned to a lawful owner use residential space, which he or she has used up to the restoration of ownership rights;

<sup>161</sup> A local municipality has the right according to the procedures and the amount specified in city council (parish council) binding regulations to grant a once-only allowance for vacating residential space to persons:

3. Allocation of a one-time allowance for renovation of a residential space or residential house<sup>162</sup>;
4. Assistance in the renovation and restoration of residential housing<sup>163</sup>;
5. Assistance in purchase or construction of a residential space<sup>164</sup>;
6. Renovation of a residential space<sup>165</sup>.

## 2.6. Taxation

Real estate (incl. housing) **taxation remains below the EU average** in the Baltic States.<sup>166</sup>

In LITHUANIA and ESTONIA **tenants do not directly pay taxes** on their rental tenancies. In LATVIA, tenants pay directly the **immovable tax** which is an obligatory part of the rental contract<sup>167</sup>. Tenants pay indirect taxes such as the value added tax (VAT) for utilities.

The value of occupying a house is not considered as a taxable income, but the **profit derived from the sale** of a residential home is taxed with **income tax**. E.g. in ESTONIA, income tax (21 %, since 2015 - 20 %) applies to sale of dwellings in which the owner did not reside prior to the sale or exchange. Furthermore, in order for there to

<sup>162</sup> A local municipality has the right to grant a once-only benefit for the repair of residential space or residential houses rented or owned by a person, as well as the amount of such benefit shall be determined in the binding regulations of the local municipality city council (parish council);

<sup>163</sup> The State in conformity with the amount of resources provided for in the annual State budget also provides assistance to an owner (owners) of a residential house or an apartment owner for the following purposes:

- For the restoration of residential houses recognised as a cultural monument of State significance;
- For the renovation of a residential house if the technical condition thereof has been recognised as dangerous to human life or health;
- For such renovation of a residential house in which the consequences of an act of terror, accident, natural disaster or other catastrophes must be liquidated;
- For the performance of energy-efficiency measures in the residential house.

<sup>164</sup> The State provides assistance in the purchase or construction of residential space by issuing a relevant guarantee. In case of purchase or construction of residential space, local municipalities may provide assistance by fully or partly covering interest payments. A tenant or its family member may receive the mentioned assistance in purchase of construction of a residential space referred, if they are using a residential space in a denationalised house or in a house returned to a lawful owner and have been using it until the restoration of the property rights.

<sup>165</sup> A local municipality may provide assistance for low-income persons by repairing the residential space they lease if the local government is not the lessor of this space, or by repairing the residential space in the ownership of these persons. The local municipality does not have the right to provide the assistance of this type to those persons who have already received a one-time allowance for renovation of a residential space or residential house;

<sup>166</sup> Real estate price dynamics, housing finance and related macro-prudential tools in the Baltics. ECFIN Country Focus, vol. 9, Issue 2, December 2012.

<[http://ec.europa.eu/economy\\_finance/publications/country\\_focus/2012/2012/cf\\_vol9\\_issue2\\_2012.pdf](http://ec.europa.eu/economy_finance/publications/country_focus/2012/2012/cf_vol9_issue2_2012.pdf)> (last visited 29 Nov. 2014).

<sup>167</sup> Section 11 of the Law On Residential Tenancy. From 1 January 2014 the living property owned by proprietors are eligible for reduced rates (0.2% to 0.6%), but only in cases the property is rented out and the rent rights are properly registered within the Land Register of Latvia.

be an obligation to pay income tax, the selling price has to be higher than the cost of acquiring it. Additionally, the taxpayer has the right to deduct certified expenses directly related to the sale or exchange of property from the taxpayer's gain or to add such expenses to the taxpayer's loss.

Residential lease to individuals for dwelling purposes is exempted from **VAT**. Only in LITHANIA, a VAT payer is entitled to opt for taxation residential premises, i.e. VAT can be charged on rent of the property if the customer is registered for VAT purposes and performs economic activities.

In ESTONIA, rental income received by companies only becomes subject to (21 %, since 2015 - 20 %) **corporate tax** upon distribution of profits. Rental income received by corporate entity in LATVIA is taxed at a rate of 15%. Companies can deduct all expenses related to their rental business, and the value of real estate used for commercial purposes can be depreciated for tax purposes at a rate of 10% a year under the reducing balance method. LITHUANIAN corporate income tax rate 15%.

**The most favourable taxation can be enjoyed by the private landlords in LITHUANIA**, where "passive housing rent" by a non-professional landlord<sup>168</sup> is not the object of the **personal income tax** at all, whereas rental income form "active housing rent" by a professional natural person is taxable by income tax only in the rate of 15 %.

LATVIAN taxation can be rated as second best, as for a non-professional landlord<sup>169</sup>, the income tax rate is only 10% instead of ordinary 24 %. However, in that case only immovable tax can be deducted. Landlord registered as a self-employed person in the State Revenue Service may deduct management expenses and other expenses connected with economic activity from taxable income, including, but not limited to social tax payments. If an amount of the income from rent is rather small, i.e., amount to EUR 14226.00, then the fixed tax fee – 5% can be chosen. The standard taxation rate is 24%.

In ESTONIA personal income tax is (21 %, since 2015)<sup>170</sup> from the rent payments irrespective of the status on the natural person as a landlord. The difference lies in the deduction regime: passive landlord as a regular taxpayer (natural person) has no possibility of deducting any expenses from taxable income, while landlord registered as a sole proprietor has a right to deduct expenses and amortization, but has an obligation

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<sup>168</sup> When a natural/private person rents out the dwelling, which was acquired for him or his family needs and which temporarily become unnecessary for the family use.

<sup>169</sup> A natural person who does not register as a self-employed person. However, he has to inform the State Revenue Services on the conclusion of a (sub-)rental contract.

<sup>170</sup> 20 % from 2015.

to pay social tax (33 %) on net income.<sup>171</sup> In this way **ESTONIAN tax system is most unfavourable.**<sup>172</sup>

Rental agreements are not subject to any state or notary fees.

Tenants are not able to deduct rent from taxable income, neither is tenancy as tenure specifically subsidized in any of the countries. The significantly modest subsidization measures discussed above do not have any remarkable effects on rental markets. It can rather be acknowledged that greater influence is caused by the **lack** of tax subsidies for private landlords.<sup>173</sup>

Homeowners were treated favourably via the tax system. For example, **deduction of loan interest** from taxable income was most common subsidization of the homeowners. However, recently, some steps were taken in order to contain housing demand, including phasing out mortgage interest deductibility in all Baltic States. In Estonia, the limit on deductible interest expenses was reduced by 40% from 2012 onwards. In Latvia and Lithuania, mortgage-interest deductibility was phased out.<sup>174</sup>

Secondly, homeowners profit from the **exemption from land tax.**<sup>175</sup>

**Tax evasion** is a topical issue in all Baltic States.

Rental income from renting out private dwellings by individual households is not officially declared to tax authorities. For example, in ESTONIA, it has been estimated, that maximum of 25 % of the landlords declare their income from leases. Anyway, rental markets are the ones that suffer. Tax evasion has created a situation where landlords ignoring their tax obligations have had a remarkable competitive and price advantage. The lack of written and transparent contracts creates distrust and uncertainty against both landlords and tenants, i.e. it renders the whole rental market unstable and untrustworthy, incapable of providing long-term secure housing. If the tenant agrees to pay rental and other payments in cash later he can face the situation that the landlord terminates the contract, if the tenant cannot prove that he has made payments for four

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<sup>171</sup> There is certain initiative in the Ministry of Finance to set lump sum as possible deduction from the rental income received by the non-professional landlord (natural person), e.g. <http://aripaev.ee/blog/2014/01/09/renditulult-on-raske-makse-katte-saada>.

<sup>172</sup> It has even been suggested that landlords should have the ability to deduct some expenses –such as land tax, insurance, maintenance and repair costs –made to the leased property from taxable income without the prerequisite of registering his-/herself as a sole proprietor in the commercial register.<sup>303</sup> Alternatively, there have been suggestions that rental gains should be taxed with a lower tax rate –e.g. 10% rather than 21% in force today –or exempted from taxation altogether. Yet, so far these suggestions have been rejected by the Estonian Ministry of Finance.

<sup>173</sup> Estonian Report, 65.

<sup>174</sup> Ibid.

<sup>175</sup> ESTONIA: The most important measure in subsidizing home-ownership is the opportunity to deduct housing loan interest paid from taxable income. Since 2013, all land owners and land users are exempted from the obligation to pay land tax on residential land in the use of such persons to the extent of 1500 m<sup>2</sup> in cities and 2000 m<sup>2</sup> in rural municipalities if the taxpayer's residence is in the residential building located on this land pursuant to the residence data entered in the population register. Exemption favours homeowners as it does not apply, if the respective building is rented out and not used as landowner's residence

months. The landlord can be confronted by the tenant's blackmailing to disclose all information to the State Revenue Service. At least in case of ESTONIA, landlords do not allow tenants to register their domicile and apply for subsistence benefit because some of the municipalities have responded tax authorities request to share information in tenancy contracts.

In LITHUANIA, however, due to the favourable tax regime for "passive housing rent", the majority of landlords provide rental services without a business license. This phenomenon makes rental markets non-transparent and there are no precise data about supply and demand in these markets. In Lithuania, there are only a few percent of people who are renting housing officially. Complicated personal tax on real estate procedures is one of the reasons why Lithuania has a large informal rental housing market. Landlords do not register the rental agreements in the registers in order to avoid paying taxes.

### **3. COMPARISON OF TENURES WITHOUT A PUBLIC TASK**

#### **3.1. Evaluative criteria for the landlord**

##### **3.1.1. Profitability**

**Rent regulation** in itself does not impede reasonable profit in any of the three countries. Rent control was abolished in year 2004 in ESTONIA<sup>176</sup> and 2007 in LATVIA<sup>177</sup>. There is no general control of the **initially agreed amount of rent** in those countries.

In general, rent is set based on current market conditions. Amount of rent supposedly covers justified management (incl. maintenance) expenses and provides reasonable profit. In LITHUANIA, in case the landlord is a legal person, theoretically the maximum amount of rent payment may not exceed the level determined in accordance with the procedure established by the Government. But this rule is not realized because the Government of the Republic of Lithuania has not yet adopted its resolution on the maximum amount of the commercial lease payment.<sup>178</sup> However, amount of rent should pass the reasonability test at any time.

In case of **contracts for unspecified term**, the **rent increase**<sup>179</sup> is relatively easier for the landlords in ESTONIA as an option for the rent increase every after 6 month is foreseen by the law by default. However, such an increase should be justified by the reference to changed market conditions or an increase in the expenses incurred in relation to the dwelling. Excessive increase may be contested by the tenant. Landlords in LATVIA and LITHUANIA could not increase the rent unless respective clause agreed

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<sup>176</sup> In Estonia, rent control was abolished by the “Act to Amend the Dwelling Act and § 121 of the Republic of Estonia Principles of Ownership Reform Act” passed by the Riigikogu on 15 June 2004. With this amendment, the delegation norm that gave authority to a local government council to establish maximum rents on its administrative territory in regard to dwellings situated in restituted houses was repealed. The respective delegation norm, Article § 371, had been inserted into the Dwelling Act on 10 June 1998. Before adoption of the referred Act (1998) the calculation of rent for a dwelling was regulated by “Methodological principles of calculation of rent for dwellings upon the lease thereof”, approved by Government Regulation no. 254 of 12 August 1993, which established the bases for calculating the amount of rent for all lessors of residential spaces on the territory of the Republic of Estonia, irrespective of the form of ownership of the dwelling. According to clause 3 of this legal act a rent exceeding the rent margin established by a local government body could not be imposed. The right to establish rent margins was given to local governments by Government Regulation no. 69 of 6 March 1992 “Amendments to procedure for calculating rent for dwellings and establishment of rent margins”. According to the explanatory letter to the draft of the Dwelling Act Amendment Act (628 SE), passed on 10 June 1998, the right of local governments to establish rate margins was to create opportunity “to gradually start to free up the rent amounts, thanks to which an actual housing market will be created as well as the interest of the owners to take better care of houses” (3-4-1-20-04 (2 Dec. 2004), available in English: <<http://www.nc.ee/?id=396>> (last visited 25 Dec. 2013).

<sup>177</sup> After the judgement of the Constitutional Court in case No. 2005-16-01351 (Judgement of the Constitutional Court of the Republic of Latvia of 8 March 2006, Case No. 2005-16-01. <[www.satv.tiesa.gov.lv](http://www.satv.tiesa.gov.lv)>, 2 September 2013), explicit rent control as the determination of the highest possible rental payments in relations of two private persons does not exist in private renting, but at the moment the Law on Residential Tenancy uses other means that can be regarded as rent control means.

<sup>178</sup> Lithuanian Report, 122.

<sup>179</sup> See section 3.2.1. for more details.

in the contract. Provided that there is an agreement to such effect, the minimum interval for rent increase may be set minimum at 6 months in LATVIA and 12 months in LITHUANIA. In case of **contracts for specified term**, respective agreement is also necessary under ESTONIAN law. Such agreement is only valid for contract with minimum term of 3 years, provided that the minimum interval for rent increase is not set shorter than 12 months and basis for calculation are precisely determined (i.e. stepped, indexed).

**Taxation of rental income** differs considerably. ESTONIAN tax regime is most unfavourable to the natural persons as passive private landlords, i.e. the largest group of landlords. See 2.6 above.

Under LATVIAN and LITHUANIAN law, the **cost of utilities** are, by default, borne by the tenant. On the contrary, under ESTONIAN law, tenant bears the accessory expenses (i.e. charges for the services and acts of a lessor or a third party which are related to the use of property) only if so explicitly agreed, which is usually the case.<sup>180</sup>

As to the other expenses to be borne by the landlord first the cost for **capital repair** should be mentioned; those costs are for the landlord in all three countries. Additionally, under ESTONIAN and LATVIAN law, also the costs of **routine repair** are borne by the landlord. ESTONIAN law is mandatory in favour of the tenants, while parties are free to agree otherwise in LATVIA and LITHUANIA. See section 3.2.1 for more details about distribution of the responsibilities and expenses related to the repair work.

Under ESTONIAN law, all taxes and duties related to a thing shall be borne by the lessor unless shifted to the tenant by agreement.<sup>181</sup>

In LATVIA, the tenant has to pay the immovable tax levied by local municipalities.

### 3.1.2. Property rights respected *de iure* and *de facto*

**Delay in rental payments** is valid ground for termination in all three countries. The basic criteria is that the tenant is delayed with payment of rent (and utilities) three month. LATVIAN law protects the interest of the landlord the most as the only prerequisite for termination is giving a notice 1 month in advance.

Under ESTONIAN and LITHUANIAN law, the landlord has to set additional period for performance first. ESTONIAN law sets clear that a lessor does not have the right of extraordinary termination if the lessee performs the delinquent obligations before receiving the notice. In all three countries the landlord may claim interest on money due. Under LATVIAN law, contractual penalty for delay may not exceed 10% of a principal claim and interest arisen<sup>182</sup>, while in ESTONIA, any agreement on contractual penalty upon violation of a contract by the tenant is void altogether.

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<sup>180</sup> Art 292 of the LOA.

<sup>181</sup> Art 293 of the LOA.

<sup>182</sup> Latvian Report, 104.

In general, the following actions by the tenant are treated as breach of contract and as such, form **other basis for the (extraordinary) termination** of the contract by the landlord in all three countries:

- 1) causing damage to or demolition of dwelling;
- 2) disturbance of neighbors;
- 3) use of dwelling not in accordance to the intended purpose;
- 4) unauthorized sublease.

Differences lie in the details which are summarized in **Table 5** below. It is important to add, that the landlords in LITHUANIA should bring an action for dissolution of the contract into court. However, if the tenant refuses to free the dwelling, court proceeding for eviction is inevitable also in ESTONIA and LATVIA.

**Table 5 Termination by the landlord in case of breach of contract by the tenant.**

	ESTONIA	LATVIA	LIHTUANIA
Causing damage to the dwelling	Violation is material or caused intentionally or continues regardless of any prior warning; <b>30 days</b> advance notice, unless violation is intentional	Systematic and essential violation; Termination without prior notification	Intentionally or through negligence; the right to bring an action into a <b>court</b>
Disturbance of neighbors	Violation is material or caused intentionally or continues regardless of any prior warning; <b>30 days</b> advance notice	Systematic and essential violation; Termination without prior notification	(no direct norm)
Use of dwelling against intended purpose	Violation is material or caused intentionally or continues regardless of any prior warning; <b>30 days</b> advance notice	Systematic and essential violation; Termination notice <b>1 month</b> in advance	The right to bring an action into a <b>court</b>
Unauthorized sublease.	If, as a result, the lessor or neighbours are so affected that the lessor cannot be expected to continue the lease contract; <b>30 days</b> advance notice	Systematic and essential violation; Termination notice <b>1 month</b> in advance	The right to bring an action into a <b>court</b>

Regulation of **deposit** varies in the countries under the comparison considerably. ESTONIAN regulation of deposit<sup>183</sup> resembles to the one in German BGB § 551, entitling the landlord to ask for the security deposit in the amount of up to **three months'**

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<sup>183</sup> Art. 308 of the LOA.

rent. In practice, a deposit in the amount of 1-2 month rent is usually demanded.<sup>184</sup> The lessee may pay the deposit within three months in equal instalments. The first instalment shall be paid after entry into the lease contract. The deposit shall be kept by the lessor in a credit institution separately from the assets of the lessor and at least at the local average interest rate. The interest belongs to the lessee and increases the deposit. The lessee may demand repayment of a deposit if the lessor does not inform the lessee of a claim of the lessor against the lessee within **two months** after expiry of the lease contract. Also LATVIAN regulation<sup>185</sup> recognizes similar concept of deposit, but there is **no limitation** as to the amount of deposit that the landlord may claim for. The amount of the deposit usually equals the amount of rental and/or payments for utilities for 2-3 months.<sup>186</sup> As the law in LATVIA does not provide detailed regulation, the procedures and time periods for the payment as well as the principles of refunding are subject to agreement. If the tenant, upon the expiration of the rental agreement, owes the renter rental payments or payments for services, as well as for caused losses, the debt shall be extinguished and losses shall be compensated from the security deposit. If, upon the expiration of a rental contract, the security deposit for ensuring the fulfilment of obligations of the agreement is not used or is used partially, the whole amount of the security deposit or the remaining part thereof shall be returned to the tenant not later than **on the same day when the residential space is vacated**, unless the rental agreement states otherwise. By contrast, LITHUANIAN law **does not recognize the concept of deposit** as the security for future claims, but regulates<sup>187</sup> advance payment stating that the lessor shall have no right to demand the payment of lease in advance, with the exception of the lease payment for the **first month**. The clause of the contract for more than one month deposit payment will be null, but the contract itself will be valid.<sup>188</sup>

ESTONIAN law<sup>189</sup> recognizes a **right of security** (pledge) of the lessor comparable to *Vermieterpfandrecht* as set in § 562 BGB.<sup>190</sup> In LATVIA<sup>191</sup>, the landlord has a **lien** as a

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<sup>184</sup> Estonian Report, 130.

<sup>185</sup> Art.12.1 para 1 of the Law on Residential Tenancy.

<sup>186</sup> Latvian Report, 137.

<sup>187</sup> Art. 6.583 para 5 of the CC.

<sup>188</sup> Lithuanian Report, 126.

<sup>189</sup> Arts. 305-307 of the LOA.

<sup>190</sup> Landlord has the right of security over movables located on the leased property and, upon the lease of a room, over movables which are part of furnishings or are used together with the room. This right is accorded in order to secure claims arising from a lease contract even if the movables are not in the possession of the lessor. Claims for the payment of rent for the current year and the previous year and claims for compensation are secured by a pledge.

<sup>191</sup> Latvian Report, 128.

retention right as a personal right.<sup>192</sup> The LATVIAN CC does not provide any limitations of the retention rights in connection with a value of a claim or in cases, if other security means (deposit, pledge, personal guarantee, contractual penalties) have been contracted. Retention rights are applicable to property of the tenant which the tenant has brought into the building, but not in relation to intangible property and claims of the tenant. In LITHUANIAN CC, there are no direct articles which established the landlord's lien on the tenant's (movable) property in the house.

**Personal securities** (e.g. surety) are principally possible to agree, but this is not the common practice in the Baltics. Neither is **insurance**, although available, very widely used as a risk management tool in the context of tenancy contracts.

Summary of the risk management tools can be found in **Table 6** below.

**Table 6 Summary of the risk management tools available for the landlord**

	ESTONIA	LATVIA	LITHUANIA
Payment term	After expiration of each of the corresponding periods of time, unless the parties have agreed otherwise.	As agreed by the parties	Not later than by the 20th calendar day of the following month unless other agreed otherwise.
Advance payments	May be agreed		Only first month
Earnest money	Possible	Possible	
Deposit	Up to 3 month Usual 1-2 months' rent	No limitation Usual 2-3 months' rent	-
Statutory pledge (security rights)	Covers claims for the rent of the current year and the previous year and claims for compensation	<b>NO</b>	?
Retention rights	Not applicable, see security rights	<b>YES</b>	?
Bankruptcy of lessee	The lessor may demand security. If security is not given to within reasonable term, the lessor may terminate the contract immediately.	The landlord may terminate the contract because of debts, but cannot enforce recovery of monetary claims.	?

<sup>192</sup> For this reason it does not influence *in rem* rights; consequently, the rules about pledge or acquisition of the ownership are not applicable when the retention rights are exercised. The possibility is a compulsory measure which grants the right to the creditor who is in possession of property may keep it until his claim is satisfied; the creditor has no right to sell the property in cases of the retention rights exercised in accordance with law. Retention means that the creditor gains actual control over movables which the tenant has placed in the dwellings. If the tenant does not allow to obtain actual control over his movables, the landlord may use force observing the rules about self-help, i.e., use of force should be proportional to resistance and character of actions of the tenant (Article 1733 of the Civil Law).

Interest on money due	<b>YES</b>	<b>YES</b>	<b>YES</b>
Agreement on contractual penalty	<b>NO</b> , prohibited	Up to 10% of the principal claim and interest	<b>NO</b> , prohibited

As to the **possibility to terminate contract if house is needed for own use** or close relatives or another economic use, contracts for specified and unspecified terms must be differentiated. Firstly, in case of contracts for unspecified term, under ESTONIAN and LITHUANIAN law, the landlord may terminate (ordinary termination) by giving at least three months' notice in former and at least six months in advance in latter case, unless longer term is agreed. Under LATVIAN law, controversially, contract for unspecified term may, at the initiative of the landlord, be terminated only in the cases set by the Law on Residential Tenancy<sup>193</sup>, i.e. in case of breach of contract from the part of the tenant.<sup>194</sup> Secondly, it should be emphasized that in case of the lease contract for specified term, under LATVIAN and LITHUANIAN law unilateral termination by the landlord is excluded altogether. In ESTONIA, in very rare cases extraordinary termination with good (compelling) reason is possible. In assessing the reason for the termination, one should take account all the circumstances and consider the interests of both parties. In reality, the landlord, for example, returning from abroad a year earlier than expected may not terminate the lease contract for specified term. Overview of the conditions for unilateral termination by the landlord can be found in **Table 7** below.

**Table 7 Unilateral termination by the landlord (except for breach of contract by the tenant).**

	ESTONIA	LATVIA	LITHUANIA
Contracts for unspecified term	<b>YES</b> Ordinary termination Minimum <b>3 month's</b> notice	<b>NO (?)</b> Does <i>lex generalis</i> (Art. 2166 of the CC) apply? If yes - <b>6 months</b> notice.	<b>YES</b> 6 month's notice <sup>195</sup>
Contracts for specified term	<b>YES</b> , but only extraordinary termination with (very) good (compelling) reason .	<b>NO</b>	<b>NO</b>
Damage claim by the tenant?	<b>YES</b> , as self-induced termination is considered a breach of the contract.		

<sup>193</sup> Latvian Report, p 157.

<sup>194</sup> Section 28 of the Law On Residential Tenancy.

<sup>195</sup> Article 6.614 of the CC.

### **3.1.3. Construction and rehabilitation capabilities**

There are several **public subsidies** to support reconstruction of the apartment houses as well as detached houses in all three countries. See 2.5 above.

Private arrangements in effect that the **tenant agrees to rehabilitate apartment** performance in kind) in lieu of paying rent is principally possible in all three countries through different regulation schemes. In LITHUANIA<sup>196</sup>, the law<sup>197</sup> clearly states that upon the agreement of the parties, the lease payment may be established, *inter alia*, by the duty of the lessee to improve the state of the leased thing at his own expense.

Under ESTONIAN law, firstly it should be noted that the repair works are all responsibility of the landlord.<sup>198</sup> It is possible that a lessee may remove a defect or obstacle and demand reimbursement of the necessary expenses incurred therefor if the lessor delays removal of the defect or obstacle or if the defect or obstacle only restricts the possibility of using the thing for the intended purpose to an insignificant extent.<sup>199</sup> Private arrangements about the tenant performing the lease agreement are possible and the tenant has the right for set-off. Also in LATVIA similar arrangements are subject to parties' agreement.

## **3.2. Important evaluative criteria for the tenant**

### **3.2.1. Affordability**

There is no specific definition of term "rent" under ESTONIAN law or LITHUANIAN law. LATVIAN law stipulates that rent consists of residential house (space) management expenses<sup>200</sup> and profit.<sup>201</sup> It follows that all other payments which are not residential house management expenses and profit, though they are agreed or have to be made because of law, are not rent in the meaning of the Law on Residential Tenancy.

There is no general **control of the initially agreed amount of rent** neither in ESTONIA<sup>202</sup> nor in LATVIA.<sup>203</sup> In LITHUANIA, the amount of rent for dwellings leased out on commercial grounds by enterprises, offices, organizations and legal persons shall be determined upon the agreement of the parties, though the maximum amount of the lease payment may not exceed the maximum lease payment determined in accordance with the procedure established by the Government.<sup>204</sup> However, it is reported, that the

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<sup>196</sup> Lithuanian Report, 124.

<sup>197</sup> Under the Art. 6.487 of the CC.

<sup>198</sup> This rule is mandatory in favour of the tenant.

<sup>199</sup> Art. 279 para 3 of the LOA

<sup>200</sup> Management expenses shall consist of: 1) the expenses necessary for the maintenance of a residential house (sanitary servicing and technical maintenance of the house, maintenance of administrative and service staff); 2) a deduction of depreciation (amortisation) of a residential house specified by regulatory enactments for the renovation of the house; 3) the mandatory payments specified by laws (immovable property tax, etc.); and 4) a land lease payment for land parcel use if the residential house is located on land owned by another owner.

<sup>201</sup> Art. 11 of the Law on Residential Tenancy.

<sup>202</sup> Estonia Report, 123.

<sup>203</sup> Latvian Report, 44, 123.

<sup>204</sup> CC Art 6.583 (4).

Government of the Republic of Lithuania has not yet adopted its resolution on the maximum amount of the commercial lease payment. Thus, nobody does follow this rule and nobody does control the following of the rule.<sup>205</sup>

Both in ESTONIA and LATVIA it is possible to apply general civil law concepts such as good faith, usury, violation of *bonos mores*, unconscionability, and also fairness control in standard terms in consumer law in order to indirectly control the rent level. Under LITHUANIAN CC Art. 6.223, the lessee may negotiate with lessor for change of contract condition about which establishes an excessive rent pay. If the lessor does not agree to change this condition, the lessee may apply to the court and ask to change this contract's condition.

As to the possibilities for **rent increase**, ESTONIAN law seems most liberal, but offers also most detailed regulation of how the tenant could contest the excessive rent increase.

ESTONIAN law makes difference between the contracts for specified or unspecified terms. In case of the lease contract of unspecified term the landlord may, by default, unilaterally raise the rent after each **six months** following entry into the contract. Parties may agree on a longer interval but not a shorter one.<sup>206</sup> Landlord of the lease contract of specified term may raise the rent only if an agreement on a periodical increase in the rent of a dwelling has been entered into, provided that (1) the lease contract is entered into for at least a three year term, (2) the rent increases not more than once a year, and (3) the amount of the increase in the rent or the basis for its calculation are precisely determined (i.e. stepped, indexed).<sup>207</sup> By contrast, in LATVIA and LITHUANIA the law does not make difference between the contracts for specified or unspecified terms as in any case, rent increase may only take place, if a rental contract contains the respective clause. Under LITHUANIAN law<sup>208</sup> clauses providing the lessor with the right to unilaterally perform modification of the lease payment or to demand such recalculation before the expiry of a **twelve-month** period from the date when the contract was formed or more often than once a year shall be null and void.<sup>209</sup>

#### *Procedure*

LATVIAN law provides that the landlord should notify the tenant in writing regarding such increase at least **six months** in advance, unless the rental agreement states otherwise. The reason and the financial justification of the rental payment increase shall be specified in the notification.<sup>210</sup> The rent increase may not be justified by a possible inflation, other planned costs etc. The tenant has to notify the landlord within six months from the day of the receipt of the warning, if he agrees with the proposed new amount of rent, otherwise it will be presumed that the tenant has consent to rent increase. It will be

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<sup>205</sup> Lithuanian Report, 121.

<sup>206</sup> Art. 299 para 1 of the LOA.

<sup>207</sup> Art. 300 of the LOA.

<sup>208</sup> CC Art 6.583 (6).

<sup>209</sup> Lithuanian Report, 124.

<sup>210</sup> Art.13 para 1 of the Law on Residential Tenancy.

also assumed that the tenant agreed, if the tenant starts paying the new increased amount. After the consent has been given or presumed, the tenant may not withdraw it because it would be contrary to the principle of stability of civil relations.

No particular procedure is prescribed under LITHUANIAN law (?). Under ESTONIAN law, in case of open-ended lease contracts, the landlord should notify the tenant of an increase in the rent not less than **thirty days** before the increase in the rent in a form which can be reproduced in writing.<sup>211</sup> Such notification should set out terms and justification of the rent increase.

#### *Possible objections of the tenant*

ESTONIA: Provided that the landlord has delivered formally valid notice of an increase in rent, the lessee may contest an excessive increase in the amount of the rent for a dwelling within thirty days of being informed of the proposed increase.<sup>212</sup> The rent for a dwelling is excessive only if an unreasonable benefit is received from the lease of the dwelling, except in the case of a luxury apartment or house. However, if the amount of the rent for a dwelling does not exceed the usual rent for a dwelling in a similar location and condition, it cannot be considered excessive. Furthermore, an increase in the rent is not excessive if it is based on an increase in the expenses incurred in relation to the dwelling (e.g. cost of utilities, if borne by the landlord) or an increase in the obligations of the lessor or if the increase in rent is necessary in order to make reasonable improvements or alterations, including improving the condition of a part of a leased room or building such that the room or building is in the usual condition for such rooms and buildings.<sup>213</sup>

In LATVIA the tenant may raise objection against the financial justification.<sup>214</sup> Under LITHUANIAN law, the tenant can argue that increased rent payment will be contradictory to the price commonly charged of the contract for such performance in comparable circumstances in the sphere of business concerned or to a reasonable price with reference to Article 6.198 para 1 of the CC.<sup>215</sup>

Summary of the important aspects of rent regulation is presented in **Table 8**.

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<sup>211</sup> Art. 299 para 2 of the LOA.

<sup>212</sup> Art. 303 of the LOA.

<sup>213</sup> Art. 301 para 3 of LOA, Estonian Report, 140-141.

<sup>214</sup> Latvian Report, 147.

<sup>215</sup> Art. 6.198 para 1 of the CC: where a contract does not fix the price or establish an order for determining the price, the parties shall be considered, in the absence of any indication to the contrary, to have made reference to the price commonly charged at the moment of the conclusion of the contract for such performance in comparable circumstances in the sphere of business concerned, or if such price does not exist, to a reasonable price.

**Table 8 Rent regulation.**

	ESTONIA	LATVIA	LITHUANIA
Initial rent agreement	<b>NO</b> fixed rent.	<b>NO</b> fixed rent. Rent = (justified) management expenses + (reasonable) profit.	<b>YES/NO</b> Theoretical limit of maximum in case the landlord is a legal person.
Is unilateral rent increase possible?			
Contracts for unspecified term	<b>ONLY</b> if agreed, provided that: (1) minimum a 3 year term contract; (2) minimum interval 12 month, and (3) basis for calculation are precisely determined (i.e. stepped, indexed)	<b>ONLY</b> if agreed. Minimum interval 6 months.	<b>ONLY</b> if agreed. Minimum interval 12 months.
Contracts for unspecified term	<b>YES</b> , by default, min interval 6 months.		
Rent control by courts possible?	<b>YES</b> , (also lease committee) • excessiveness of rent increase.	<b>YES</b> • management expenses justified? • profit reasonable?	<b>YES</b> • reasonability test

For regulation of **deposit**, please see section 3.1.2. above.

Starting point for regulation of **expenses for utilities** diametrically differs in the countries under scrutiny. In ESTONIA, by default, rent covers also utilities and the lessee shall bear charges for the services and acts of a lessor or a third party which are related to the use of a thing (accessory expenses) **only if so agreed**, while in LATVIA, as a rule, the basic, as well as all auxiliary utilities<sup>216</sup> agreed in a rental contract may be **charged from the tenant**.<sup>217</sup> LITHUANIAN law leaves the issues of payment for cold and hot water, electric energy, gas, heating and public utilities shall be determined upon

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<sup>216</sup> The basic utilities are inseparably related to use of the residential space (heating, cold water, sewerage and removal of waste), while the auxiliary utilities are all other services (hot water, gas, electricity, garage, parking place, etc.). When one or several of the basic services are lacking, a residential house (residential space) does not fit for living.

<sup>217</sup> Latvian Report, 131.

the **agreement of the parties**<sup>218</sup>, considering provisions of procedure for the payment for public utilities as an essential term of the contract.<sup>219</sup>

As to the **regulation of repairs**, it is useful to analyse the division of responsibilities and expenses as per categories of the maintenance and repair works.

Firstly, as to the **minor defects**. ESTONIAN law uniquely sets clear, that a lessee shall only remove the defects of a leased thing at the expense of the lessee if these defects can be removed by light cleaning or maintenance which is in any case necessary for the ordinary preservation of the thing.<sup>220</sup> As it is a half-mandatory law in favour of the tenant, obligation of expenses of other repair works can not be shifted to the tenant.

Secondly, regulation also differs as to the responsibility for **natural wear and tear**, as well as to the obligation for **routine repair**<sup>221</sup>. Tenants are most under pressure to repair the dwelling in LITHUANIA, where by default, the tenant shall be obliged to maintain the leased thing in a proper state and to bear expenses for the maintenance of this thing and to make its *current repair at his own expense*. However, the parties may agree otherwise.<sup>222</sup>

Although the tenant in LATVIA is not responsible for the natural wear and tear of the property<sup>223</sup>, by default, he/she is responsible for the routine repairs and has the duty to maintain the occupied residential space<sup>224</sup>. The parties may also agree otherwise.<sup>225</sup> However, law does not stipulate that the tenant has to make routine repairs *at its own expense*. Thus, it can be concluded<sup>226</sup> that, if the tenant has done capital repairs or routine repairs, i.e., made necessary or useful expenditures, these expenditures shall be compensated in full by the landlord.<sup>227</sup> As said before, in ESTONIA, the tenant shall not be liable for the natural wear or deterioration of the thing or changes which accompany the contractual use.<sup>228</sup> From this mandatory rule, it follows that, at least within the legal framework of lease contract, the lessee cannot be burdened with the obligation to make routine repair at his own expense or cover any expenses thereof. This solution may not evaluated as the flexible solution as in case the long-term contract, the tenant may well be ready to take care of routine repairs.

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<sup>218</sup> Art. 6.584 para 3 of the CC.

<sup>219</sup> Art. 6.580 of the CC: Content of a contract.

<sup>220</sup> Regulation resembles to OR Art. 259 and ABGB § 1096 para 2.

<sup>221</sup> Routine repairs are, for example, handing of wall-papers, painting of ceiling etc. The law does not determine how often routine repairs shall be performed or specify circumstances under which the routine repair must be done, therefore a court decides upon those questions in case of disputes.

<sup>222</sup> Art. 6.493 para 1 of the CC.

<sup>223</sup> Art. 2150 of the Civil Law.

<sup>224</sup> Art. 42 of the Law on Residential Tenancy.

<sup>225</sup> Art. 42 of the Law on Residential Tenancy.

<sup>226</sup> Examining Article 40 of the Law on Residential Tenancy in connection with Article 2140 CC.

<sup>227</sup> However, in the legal literature it is also suggested that useful expenditures, i.e., expenditures which are connected with repairs (Article 42 of the Law on Residential Tenancy), are reimbursed in the cases, if the landlord was aware and consented to them. All other expenditures which are not necessary or useful, as well as have not been approved by the landlord are not reimbursed.

<sup>228</sup> Art. 334 para 2 of the LOA.

As to the **capital repairs**<sup>229</sup> common general principle that in order to secure that the tenant can use the rented dwelling for the period for which he/she contracted for, the landlord must perform capital repairs and maintenance of the dwelling is recognized by all three jurisdictions under review.<sup>230</sup> However, there is a difference in a degree of freedom of contract.

In LATVIA, landlord and the tenant *may agree* that the tenant performs the necessary capital repairs or fully or partially covers the costs thereof, and then the tenant has the right to an appropriate deduction of rental payments.<sup>231</sup> In LITHUANIA, even though the lessor shall be obliged to make capital repair at his own expense, the parties are free to agree otherwise.<sup>232</sup> On the contrary, freedom of contract, at least in the framework of lease contract, is limited under ESTONIAN law, as the referred provision is mandatory, i.e. parties can not agree to the detriment of the lessee.<sup>233</sup> However, it is questionable, whether in all cases individual agreement that tenant performs routine or capital repair, would be contrary to tenant's interests as far as the tenant holds the right for compensation (and may set-off with the claim of rent payment). Summary of the regulation of repair can be found in **Table 9** below.

**Table 9 Regulation of repairs** (Who's responsibility? / At who's expense?).

	ESTONIA	LATVIA	LITHUANIA
Minor defects	Tenant/Tenant	Tenant/?	Tenant/Tenant
Natural wear and tear/routine repair	Landlord/Landlord Mandatory in favour of the tenant	Tenant/Landlord Dispositive	Tenant/Tenant Dispositive
The capital repairs	Landlord Mandatory in favour of the tenant	Landlord Dispositive	Landlord Dispositive

In ESTONIA, the general principle is that a **lessee may make improvements and alterations** to a leased thing only with the lessor's consent submitted in a format which can be reproduced in writing.<sup>234</sup> However, the lessor is not permitted to refuse consent if the improvements and alterations are necessary in order to use the dwelling or manage it reasonably.<sup>235</sup> If the lessor consents to improvements and alterations, he loses the right to demand that the original condition be restored, unless parties have agreed otherwise in a format which can be reproduced in writing.<sup>236</sup> In principle, upon

<sup>229</sup> Repairs of the constructional elements, engineering and communications systems of the residential house or residential space.

<sup>230</sup> LATVIA: Art. 2131 of the Civil Law; LITHUANIA: Article 6.483 of para 1 of the CC; ESTONIA: Art. 276 para 1 of the LOA.

<sup>231</sup> Art. 40 of the Law on Residential Tenancy.

<sup>232</sup> Art. 6.492 para 1 of the CC.

<sup>233</sup> Art. 275 of the LOA.

<sup>234</sup> Art. 285 para 1 of the LOA.

<sup>235</sup> Art. 285 para 1 of the LOA.

<sup>236</sup> Art. 285 para 2 of the LOA.

expiry of a lease contract, the lessee may remove an improvement or alteration made to a dwelling, if this is possible without damaging the property. However, the lessee does not have such right if the lessor pays a reasonable compensation therefor, unless the lessee has a legitimate interest in removing the improvement or alteration.<sup>237</sup> If the landlord consents to improvements and alterations, he loses the right to demand that the original condition be restored (and respective expenses borne by tenant), unless he reserves such right in the giving of consent. Furthermore, if, upon expiry of a lease contract, it becomes evident that the value of the thing has increased considerably (i.e. dwelling can be leased for a higher rent or sold for higher price) due to the improvements or alterations made by the tenant with the consent of the lessor, the tenant may demand reasonable compensation therefor.<sup>238</sup> The limitation period of such claim is six months as of the return of the possession. Compensation for other expenses may be demanded pursuant to the provisions regarding *negotiorum gestio*.<sup>239</sup>

Similarly in LITHUANIA<sup>240</sup>, in the instances where the lessee with the permission of the lessor has made improvements of the leased thing, he shall have the right to compensation of the necessary expenses incurred by him for that purpose. In the event where the improvements made by the lessee without the permission of the lessor are separable without harm to the leased thing, and where the lessor does not agree to compensate for them, they may be taken out by the lessee. The value of improvements which are not separable without harm to the leased thing made by the lessee without the permission of the lessor shall not be subject to obligatory compensation.<sup>241</sup>

LATVIA – no special provision (?), see repair.

ESTONIA - a lessee has to tolerate **improvements and alterations made by the landlord** to a dwelling only if the work is done and its effects are not unfairly burdensome to the lessee.<sup>242</sup> Improvements and alterations could be carried out provided that lessor has informed lessee about the forthcoming changes at least two months before commencement of improvements and alterations.<sup>243</sup> A lessor shall notify the lessee of the nature, extent, time of commencement and expected duration of the measures planned for making the improvements and alterations, and of any potential increase in the rent which may arise therefrom. Such notice should be delivered in a format which can be reproduced in writing. If the improvements and alterations are significant and bring about an increase in the rent, the lessee may terminate a contract within fourteen days as of receipt of a notice by giving at least thirty days' advance notice. If a lessee terminates a contract, the making of improvements and alterations shall not commence before termination of the contract.<sup>244</sup> Upon making improvements

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<sup>237</sup> Art. 285 para 3 of the LOA.

<sup>238</sup> Art. 286 para 1. of the LOA.

<sup>239</sup> Art. 286 para 2 of the LOA.

<sup>240</sup> Art. 6.501 of the CC.

<sup>241</sup> Lithuanian Report, 142.

<sup>242</sup> Art. 284 para 1 of the LOA.

<sup>243</sup> Art. 284 para 2 of the LOA.

<sup>244</sup> Art. 284 paras 3 and 4 of the LOA.

and alterations, the lessor shall take the interests of the lessee into account. Even if the interests of the lessee are taken into account, the right of the lessee to reduce the rent or demand compensation for damage is not precluded or restricted. Reasonable expenses incurred by the lessee as a result of the improvements and alterations are also matters that can be reimbursed and payed in advance, upon request by the lessee.<sup>245</sup>

LITHUANIA – no special provision (?), see repair.

LATVIA – no special provisions (?), see repair.

**Possible rent increase after renovation.** See generally section 3.2.1. above (possibilities of rent increase).

ESTONIA: If the agreement has been made for an unspecified term, the rent can be raised (among other things, due to renovations) under § 299 of the LOA once every six months by giving 30 days of advance notice thereof. The lessee can contest the increase of the rent on the basis of § 303 of the LOA if the rent is excessive. An increase in rent is not excessive if the increase is necessary for the making of *reasonable improvements or alterations*, including improving the condition of a part of a leased room or building such that the room or building is in the usual condition for such rooms and buildings.<sup>246</sup> There is no special procedure. Upgrading the energy performance of the house is presumably a “reasonable improvement”, but it is critical to assess the period necessary to recover the expenses. It would be reasonable to assume that the landlord finances the repair works with a long-term loan and the increase in rent correlates with the repayment schedule. In any case, cost of constructive repair works should not be covered by the current tenant, which should instead be amortized over the period of some 10-20 years.<sup>247</sup> Renovation does not give the lessor the right to raise the rent in the event of a fixed-term lease agreement, unless the parties have agreed otherwise.

LITHUANIA: Rent increases to compensate inflation/ increase gains, rent increase after renovation or similar are legal, but according to the Article 6.583 para 6 of the CC the rent payment modification should be agreed beforehand cannot be more frequent than once a year.

LATVIA: The same rule is applicable in these situations, i.e., rent increase after renovation measures, e.g. upgrading the energy performance of the house, or similar will be lawful, if there is a respective clause. If not, the landlord may offer his tenant to amend the contract, this may happen according to a mutual agreement. It would be possible that the landlord can bring a court action, asking a court to settle a new rent payment amount, as well as determine the day from which the tenant is obliged to pay this new rent. The court will evaluate all circumstance and decide whether increase is justified, as well as to what amount rental payments may be increased. review.

As to the form of **rent subsidies for poor tenants**, please see 2.5 above.

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<sup>245</sup> Art. 284 para 5 of the LOA.

<sup>246</sup> Art. 301 para 3 of the LOA.

<sup>247</sup> Estonian Report, 139.

### 3.2.2. Stability

Effect of the lack of a written agreement in ESTONIA is that contract with a term exceeding 1 year is deemed to have been entered into for an unspecified term with limitation not to be terminated earlier than **1 year<sup>248</sup>**. LITHUANIA: a **fixed-term** contract of lease of a dwelling irrespective of who is the lessor should be concluded in written form. Under LATVIAN law, in absence of written contract the tenant should provide proof of the factual rental relations.

There is **no duty to register** lease contracts in either of three countries.<sup>249</sup>

Entry into Land Register in ESTONIA and Real Property Register and Cadastre in LITHUANIA plays role only in the context of transfer of ownership of the dwelling. See below, *emptio non tollit locatum*.

For „black market“, see 2.6 above.

In all three countries the parties are free to choose between fixed term or open-ended contracts. There are no minimum duration set by the regulation.

In case of contracts for unspecified term, the tenant should be prepared that, under ESTONIAN and LITHUANIAN law, the landlord may terminate (ordinary termination) by giving, respectively, at least three months' in advance notice. However, the longer term could be agreed. Under LATVIAN law, controversially, contract for unspecified term may, at the initiative of the landlord, be terminated only in the cases set by the Law on Residential Tenancy , i.e. in case of breach of contract from the part of the tenant. See **Table 7** for summary.

The institute of **tacit renewal** subject to different technicalities is known in all three countries. In LATVIA, the clause on prolongation (without the landlord's consent) has to be included into contract.<sup>250</sup> The prolongation clause can be drawn up in a different manner. The clause may state that the contract is prolonged upon unilateral request of the tenant or with the consent of the landlord; if the consent of the landlord is necessary, the landlord may refuse to prolong the rental contract without providing reasons for this answer. But even if no prolongation clause exists, Article 1488 of the Civil Law could be applicable, i.e., the tenant continues using the rented dwelling, covers all payments, but the landlord has not objected to it, has not demanded that the tenant vacates the dwelling, as well as accepts payments. In LITHUANIA<sup>251</sup>, upon expiration of the term of the contract of lease, the lessee shall have priority right to conclude a contract of lease of the dwelling for a new term providing that he duly performed the conditions of the

<sup>248</sup> Source: BGB § 550.

<sup>249</sup> Latvian Report, 83; Lithuanian Report, 89; Estonian Report, p 95.

<sup>250</sup> Nevertheless the landlord has the right to refuse the prolongation, if at least one of the alternative circumstances exists: the tenant does (did) not fulfil the obligations specified in the rental contract (1); the landlord or the landlord's family members need the residential space for private use (2); the residential house is to be demolished or capital repairs have to be made (Article 6 Paragraph 2 of the Law on Tenancy) (3).

<sup>251</sup> The Art. 6.607 of the CC.

contract. The contract shall be renewed for the same term, and where the previous term of the contract exceeded twelve months, the contract shall be renewed for a term of twelve months unless the parties agree otherwise.<sup>252</sup> In ESTONIA, however we can talk about the tacit renewal as well as right to demand extension. Generally, a residential lease contract which is entered into for a term of at least two years becomes a lease contract entered into for an unspecified term after expiry of the term, unless any of the parties give notification at least two months before expiry of the term that the party does not wish to extend the contract.<sup>253</sup> Additionally, the tenant may demand that the landlord extend the lease contract for up to three years for the reason that termination of the contract would result in serious adverse consequences to the tenant or his or her family. If the landlord does not consent to the extension of the contract, the lessee may demand extension of the lease contract before a lease committee or in court. The tenant has this right even if the landlord has valid reasons for termination and the termination could not be considered to be contrary to good faith. It can be concluded, ...

In ESTONIA<sup>254</sup> a **right of pre-emption** is created on the basis of law or by contract. The only statutory right of pre-emption of the tenant is constituted by Art 121 para 10 of Republic of Estonia Principles of Ownership Reform Act.<sup>255</sup> Otherwise such a right of pre-emption is only an obligatory right subject to contract.<sup>256</sup> Neither is statutory pre-emption right acknowledged in LATVIA; however, parties may establish a contractual pre-emption right.

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<sup>252</sup> The lessor shall be obliged not later than three months in advance before the termination of the contract of lease to inform the lessee in writing about his proposal to conclude a new contract of lease on the same or different conditions or about his refusal to renew the contract where he does not intend to lease out the premises concerned at least for a period of one year. In the event of failure by the lessor to perform this duty, and if the lessee does not refuse to renew the contract, the contract of lease shall be deemed to be renewed for the same period and under the same conditions. In the instances where the lessor, after having refused to renew a contract of lease, leases the same dwelling within a period not exceeding one year to another person under the same conditions, the lessee shall have the right to demand acknowledgement of such contract null and void and claim compensation of damages caused by the refusal to renew the contract. This provision shall not apply in the event where the lessee refused to renew the contract under the conditions proposed by the lessor and did not apply to the court for the approval of the conditions of the contract.

<sup>253</sup> In other cases, more general rule applies: if, after expiry of the term of a lease contract, the lessee continues to use the property, the lease contract is deemed to have become a lease contract entered into for an unspecified term unless the lessor or lessee expresses some other intention to the other party within two weeks after the lessor learns that the lessee is continuing to occupy the property (Art. 310 para 1 of the LOA).

<sup>254</sup> Arts. 244-253 of the LOA. Estonian Report, 112.

<sup>255</sup> Tenants living in a returned residential building at the time of restitution have a joint right of pre-emption in the transfer of a returned residential building and of a corresponding registered immovable or a part thereof. The right of pre-emption does not apply upon transfer to a spouse, descendants, parents, sisters and brothers and their descendants. Right of pre-emption entered in the land register has the same legal force with regard to third persons as a preliminary notation securing a claim for the transfer of ownership.

<sup>256</sup> Basically, upon exercising of the right of pre-emption, the contract of sale between a person with a right of pre-emption and the seller is deemed to be entered into on the same conditions which the seller agreed with the buyer. A contract of sale entered into with a purchaser or obligations arising therefrom, do not become invalid upon the exercise of the right of pre-emption.

***Emptio non tollit locatum*** is generally recognized principle in tenancy law of Baltic States, but the practical consequences of the sale and measures of protecting landlord's interest are quite different, mainly because different role of the registration of the lease contracts.

Under ESTONIAN law, if a lessor transfers ownership of an immovable after receipt of the immovable into the possession of a lessee, or if the owner of a leased thing changes after transfer of the thing into the possession of the lessee in the event of the transfer of ownership upon compulsory execution or in bankruptcy proceedings, the rights and obligations of the lessor arising from the lease contract are transferred to the new owner.<sup>257</sup> The new owner has a special right to terminate the residential lease contract within three months if the transferee **urgently needs** the premises for himself.<sup>258</sup> According to the case law to date, 'urgent need' for oneself is difficult to prove, because, due to the lessee's possession, the transferee needed to take into account the fact that he may not be able to use the premises himself. However, the new owner does not have the special right to terminate the lease contract, if there is an entry of the lease contract in the Land Register. Tenant's request for entry of the lease contract can be enforced by judgment if refusal to permit registration is not justified.<sup>259</sup>

In LITHUANIA, there is no duty to register lease contracts, but the contract of lease of a dwelling may be invoked against third persons only in the event of it being registered in the Public Register.<sup>260</sup> It follows, that in the event of the right of ownership to a dwelling having passed from the lessor to another person, the contract of lease of a dwelling shall remain valid in respect of the new owner, providing the contract of lease of a dwelling was registered in the Public Register within the procedure established by laws.<sup>261</sup> Transfer of the right of ownership to the leased property from the lessor to another person is a ground for the termination of the contract of lease in case of a demand of the essee.<sup>262</sup> There are no specific statutory restrictions on notice after sale including public, or inheritance of the dwelling. In this case there are applicable statutory restrictions on notice settled in the CC.

Under LATVIAN law, the change of the landlord through inheritance, sale or in other cases, when the immovable is alienated in accordance with free will of its owner, does not affect the position of the tenant.<sup>263</sup> The lack of publicity of rental contracts, since there is no duty to register them in a public register, results into the problem that a new

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<sup>257</sup> Art. 291 of the LOA.

<sup>258</sup> Subsection 1 of Art. 323 of the LOA,

<sup>259</sup> Art. 324 para 2 of the LOA.

<sup>260</sup> Real Property Register and Cadastre. Lithuanian report, p 82. Art. 6.579 para 4 of the CC.

<sup>261</sup> Art. 6.585 of the CC.

<sup>262</sup> Art. 6.494 para 3 of the CC.

<sup>263</sup> Art. 8 of the Law on the Residential Tenancy.

owner is not always aware of the rental contracts concluded by the previous owner.<sup>264</sup> There are specific provisions regarding public auctions when the court bailiff sells the property because of debts, as in this case the alienation takes place against the will of the owner (landlord).<sup>265</sup>

**Table 10 *Emptio non tollit locatum.***

	ESTONIA	LATVIA	LITHUANIA
Registration requirements	<b>NO</b> , but possible notation in the Land Register.	<b>NO</b>	<b>NO</b> , but possible registration in the Public Register
Contract binding for the new owner	<b>YES</b> , but only if tenant has acquired a possession	<b>YES</b> • Draft law 2013 – based on Land Book	<b>YES</b> , but only if contract registered in the Public Register
New owner has special right to terminate	<b>YES</b> • in case of ‘urgent personal need’; • within 3 months’ period. ... unless entered into Land Register.	<b>NO</b>	<b>NO</b>
Tenant has special right to terminate	<b>NO</b>	<b>NO</b>	<b>YES</b>

There are additional “**social defences**” available in the eviction procedure in all three countries.

In ESTONIA, the tenant may apply for postponement of enforcement action in two ways: first, a bailiff may postpone an enforcement action on the basis of an application of the claimant or a corresponding court decision, or when there has been a substitution in the person conducting the enforcement proceedings. Secondly, on the basis of an application of a debtor, a court may suspend enforcement proceedings or extend or defer enforcement if continuation of the proceedings is unfair to the debtor. In such case, the interests of the claimant and other circumstances shall be taken into account, including the family and economic situation of the debtor.

Article 36.1 of the Law on Residential Tenancy of LATVIA establishes which groups of tenants are entitled to receive social aid from a local municipality in cases of private

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<sup>264</sup> On July 7, 2014 the Constitutional Court of Latvia passed the judgment deciding that the rule in question has a legitimate aim (safeguarding tenants' rights to unhindered use of residential premises) and complies with the principle of proportionality and is thus valid and conforms with the Constitution. <http://www.satv.tiesa.gov.lv/?lang=2&top=1&rid=1187> However, new draft law prepared by the Ministry of Economics at the end of 2013 foresees that all rental contracts shall be registered in the Land Book in order to ensure that the rental contract concluded by the previous owner is binding for a new acquirer of the property. Article 26 of the new tenancy law.

<sup>265</sup> Article 601 of the Civil Procedure Law, Latvian Report, 111.

renting. If eligible persons are evicted because of debts for rental payments or payments for basic services and a judgment is entered into force, the eviction is postponed till the local government provides the eligible tenant with other residential space. However, the landlord – private person - may claim costs connected with postponement of eviction which the tenant has to cover. At the same time, if the tenant does not carry out the activities provided for by law in order to receive assistance of a local government or delays the provision of assistance without a justified reason, the judgement shall be executed.<sup>266</sup>

When the tenant is not eligible to receive the social help in accordance with law, still he may ask to postpone execution (eviction) in accordance with Article 206 of the Civil Procedure Law, in this case the tenant have to submit an application of eviction postponement, sometimes the prosecutor, institution of the State or a local municipality may apply for this instead of the tenant.<sup>267</sup> The court which has rendered a judgment in a matter is entitled, taking into account the financial situation of the parties, children's rights or other circumstances, to take a decision to postpone the execution of the judgment, the tenant may apply for postponement after the court bailiff has started compulsory execution of the eviction judgement<sup>268</sup>.

Also in LITHUANIA, upon justified reason, the court, the prosecutor who has given sanction to evict, as well as higher-ranking prosecutor upon the application of persons concerned or the bailiff's application has the right to postpone the eviction.<sup>269</sup>

### 3.2.3. Flexibility

**Unilateral termination by tenant** within reasonable delay is guaranteed in case of fundamental non-performance by the landlord or in case the tenant cannot use the dwelling because of its condition. However, if the reason for unilateral termination is not attributable to the landlord but belongs to tenant's sphere of risk, the solutions vary.

Under LITHUANIAN law, the tenant of time-limited lease contract has the right to bring an **action to a court** for dissolution of a contract of lease before time in case of breach by the landlord or there exist other grounds provided for by the contract of lease.<sup>270</sup> Previous tenant in proposing the new tenant can avoid the claim on no-received lessor's income if the previous tenant interrupted the time limited dwelling's rent contract before the time without any legal grounds.<sup>271</sup> In case of open-ended lease contracts, the lessee of a dwelling has the right to dissolve the contract of lease by warning the lessor in writing **1 month** in advance. In the event of failure by the lessee to comply with this requirement, the lessor shall have the right to compensation of damages caused.<sup>272</sup>

<sup>266</sup> Article 36.3 of the Law on Residential Tenancy.

<sup>267</sup> Civilprocesa likuma komentāri. I daļa (1.-28.nodaļa). Sagatavojis autoru kolektīvs. Prof. K. Torgāna zinātniskajā redakcijā. Rīga: Tiesu namu aģentūra, 2011, 450-451.

<sup>268</sup> Ibid.

<sup>269</sup> Lithuanian Report, 164.

<sup>270</sup> Art. 6.498 of the CC.

<sup>271</sup> Lithuanian Report, 152.

<sup>272</sup> Art. 6.609 of the CC.

Under ESTONIAN law<sup>273</sup>, tenant may terminate a lease contract entered into for an unspecified term by giving at least **3 months'** advance notice (Arts. 311 and 312 para 1 of the LOA) (*ordinary notice*), unless parties have agreed shorter period of notice. In case of a lease agreement of specified term, only *extraordinarily termination* (without advance notice) with good (compelling) reason is possible<sup>274</sup>. Extraordinary termination is permitted mainly under the circumstances specified in Arts. 314–319 of the LOA, i.e. compelling reasons for extraordinary termination may foremost relate to the fundamental non-performance by the landlord, basically if the tenant cannot use the premises for a reason dependent on the landlord, after having granted the lessor a reasonable term to render the dwelling usable. A reason is "good" if, upon occurrence thereof, a party seeking termination cannot, given all the circumstances and considering the interests of both parties, be reasonably expected to continue performing the contract.<sup>275</sup> Thus, it should be waged if interest of the party wishing to terminate the contract is more significant and would be more severely damaged if the contractual relationship continued. The reason is "compelling" if it is unexpected to the parties. If those conditions are fulfilled, the lessee has no duty to cover any damages to the lessor. However, in case the lessee needs larger dwelling space or has to move due to personal or professional reasons, those reasons may well be valid for extraordinary termination (yet disputable), but as self-induced termination of a lease agreement is also considered a breach of the agreement the lessor is entitled to demand compensation for damage caused by the breach. Differently from Estonian law, LATVIAN law does not distinguish ordinary and extra-ordinary notice of the tenant or make differentiation of termination of time-limited or open-ended rental contracts. In LATVIA, the tenant's rights for unilateral termination, or actually its consequences is highly disputable subject. Article 27 of the Law on Residential Tenancy stipulates that unless the contracting parties have agreed otherwise and all adult family members of a tenant consent thereto, the tenant of a residential space has the right to terminate a rental contract at any time, notifying the renter thereof in **writing 1 month** in advance. The obligation to pay

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<sup>273</sup> Art. 313 para 1 of the LOA.

<sup>274</sup> Art. 312 para 1 of the LOA.

<sup>275</sup> Ibid.

outstanding rental and other payments or compensate losses, if the tenant terminates the contract before the end of the agreed term, is not established.<sup>276</sup>

**Table 11 Unilateral termination by the tenant (except for breach of contract by the landlord).**

	ESTONIA	LATVIA	LIHTUANIA
Contracts for unspecified term	YES Maximum of <b>3 months'</b> notice (mandatory in favour of the tenant)	YES 1 month (dispositive)	YES 1 month' notice
Contracts for specified term	<b>YES</b> , but only <b>extraordinary termination with good (compelling) reason</b> taking into account all the circumstances and considering the interests of both parties. Application disputable!		Right to bring an <b>action to a court</b> ...there exist other grounds <b>provided for by the contract</b> of lease.
Damage claim by the landlord?	<b>YES</b> , as self-induced termination is considered a breach of the contract.	<b>ONLY</b> if so agreed initially. Highly disputed – does CC as lex generalis apply?	<b>YES</b> , if terminated <b>without any legal grounds</b> (Previous tenant in proposing the new tenant can avoid the claim on no-received lessor's income.)

**Subletting** is generally allowed subject to the consent of the landlord. Law in LITHUANIA<sup>277</sup> and in LATVIA<sup>278</sup> additionally prescribes, that tenant has the right to contract for sub-lease only with the consent of the adult family members living together with the tenant. ESTONIAN law<sup>279</sup> provides for more details as to the procedure and

<sup>276</sup> Considering the newest jurisprudence of the Supreme Court in the similar questions, the tenant is obliged to make rental payments and payments for utilities only for the time period when the rental contract was valid, unless the contract does not contain further contractual terms on the legal consequences of the termination. If the rental contract does not comprise the obligation to cover losses in cases of pre-term termination, the answer if losses may be claimed is disputable. Regarding damage or loss compensation the following two points of view have been expressed. One author thinks that the tenant is obliged to pay rent payments for actual use of the rent dwelling. Another author indicates that the tenant has to pay rent payments for the whole period of time on which parties have agreed. Nevertheless, the second opinion does not specify if it relates to residential tenancy which is regulated by the Law on Residential Tenancy. Namely, since the Law on Residential Tenancy does not regulate the issues following from termination notice of the tenant in detail, Article 2144 of the Civil Law could apply. That article differentiates legal consequences in cases of the tenant's unilateral termination according to the fact, whether a termination ground was justified or unjustified. Ground for termination is justified if the tenant cannot use the premises for a reason dependent on the landlord or use is not possible because of possible harm to health. Other reasons may well be classified as unjustified.

<sup>277</sup> Art. 6.595 of the CC, written consent is required.

<sup>278</sup> Art.17 (1) of the Law on Residential Tenancy.

<sup>279</sup> Art. 288 of the LOA.

consequences of the landlords consent. First, the lessor does not have to give consent without knowing the details of the contract of the sublease. The lessor may refuse to grant consent for the sublease of the thing only if the lessor has a good reason, especially if:

- (1) the tenant does not disclose the conditions of the sublease to the landlord,
- (2) the sublease would cause significant loss to the landlord,
- (3) the sublease would be unreasonably burdensome on the leased premises,
- (4) the landlord has good reason therefor arising from the identity of the sublessee.

Furthermore, if the sublease of a thing may be expected only in conjunction with a reasonable increase in the rent, consent may be subject to the condition that the lessee agrees to the increase in the rent.<sup>280</sup>

However, if a landlord refuses to grant consent for the sublease without good reason, lessee may terminate the contract in accordance with the terms provided for ordinary termination of lease contract for indefinite term (i.e. by giving at least three months' notice, but he has no other recourse. At the same time, subletting without the consent of the lessor may give ground for extraordinary termination of the lease contract by the lessor, but only if, as a result, the lessor or neighbours are so affected that the lessor cannot be expected to continue the lease contract.<sup>281</sup>

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<sup>280</sup> Art. 288 para 4 of the LOA.

<sup>281</sup> Art. 315 para 4 of the LOA.

## 4. COMPARISON OF TENURES WITH A PUBLIC TASK

### 4.1. Generalities

**Public rental tenure** in the Baltics comprises of all state or municipally owned dwellings let for leases. **Social housing is a targeted residual system** whereby only the most vulnerable social groups are beneficiaries.

In ESTONIA social housing is understood as local government providing dwellings for persons or families who are unable or incapable of securing housing for themselves or their families and to create, if necessary, the opportunity to lease social housing on the basis of Article 14 of the Social Welfare Act. The procedure for the provision and use of social housing as well as the terms of the actual tenancy agreement are established by each rural municipal council or city council. Legal framework of the lease contract is the same as for the contracts in market terms, but certain tenant-protective provisions of residential lease contract do not apply and all regulation is dispositive also in favour of the municipality.<sup>282</sup> Other public (municipal or state) housing (i.e. social housing in large terms), dependent on the housing policy of the municipality may benefit e.g. young families, key workers of the municipality, etc. For example, the capital city of Tallinn is the only LA in Estonia that applied two new public housing programs created in the post-1990 era. Moreover, there is a plan, at least in the case of Tallinn, to extend eligibility also to other below-average income groups in future. Thus there is an important turn in the neoliberal housing policy that had existed in Estonia: there was an effort to encompass a broader range of population groups in the allocation of social housing.<sup>283</sup> As there is no uniform regulation as to the conditions set for the eligibility of tenants and terms of social lease contracts each municipality elaborates its own terms.

In LATVIA, at the moment, assistance in solving apartment matters is the sole competence of local municipalities, before the assistance was also provided by the State. The Law on Assistance in Solving Apartment Matters<sup>284</sup> establishes who is eligible to receive assistance in solving residential apartment matters and determines the procedures by which a local municipality rents out apartments. Social rental contracts are concluded by a local municipality on the basis of an administrative act<sup>285</sup>. Law on Social Apartments and Social Houses of June 12, 1997<sup>286</sup> contains specific provisions about the subject matter, terms, rent amount and termination of such contracts. Nevertheless, the Law on Residential Tenancy and the Civil Law are subsidiary applicable in all social rent cases insofar as Law on Social Apartments does not regulate such relations.

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<sup>282</sup> Art. 272 para 4 (4) of the LOA.

<sup>283</sup> Kährik & Kõre (2013), 170.

<sup>284</sup> 06.12.2001. Likums "Par palīdzību dzīvokļa jautājumu risināšanā" <<http://likumi.lv/doc.php?id=56812>> (last visited 2 September 2013).

<sup>285</sup> A decision taken by a local municipality about the conclusion of a social rental contract is supposed an administrative act.

<sup>286</sup> 12.06.1997. Likums "Par sociālajiem dzīvokļiem un sociālajām dzīvojamām mājām". <<http://likumi.lv/doc.php?id=44160>> (last visited 2 September 2013).

In LITHUANIA, rental tenures with a public task are called social housing (non commercial, municipality owns living premises that are rented based on the governmental order of determining the rent fee). They are allocated to a low income persons and families. In Lithuania there is no other form of support (like rental housing in private housing market for people with low income). The social housing in Lithuania is considered as the part of the social support and the social integration, which is provided by the Municipalities, so Municipal tenancies are equivalent to social tenancies, i.e. they are the synonyms in the Lithuanian rental regulation. The rent of social housing is regulated by the Law on the Lithuanian state support for housing purchase or lease and apartment buildings renovation (modernization) and by the Municipalities executive authorities acts.

#### **4.2. Evaluative criteria for public/social/private subsidized landlords**

In the Baltics, the allocation and management of the social housing is in sole competence of the municipalities. A social rent contract is a part of private law, although the conclusion of the social rent contract is based on an administrative act, which is already public law.

Funding problems can be illustrated by the example from ESTONIA: Since 2003, KredEx has been implementing the national policy of building municipally owned housing. A total of 102.8 million EEK from the state budget and the ownership reform reserve fund was earmarked for expanding municipally owned housing stock in 2003-2007. By the end of 2008 the local governments had used these funds for building 371 municipally owned dwellings for tenants in houses returned to their legitimate owners and other social housing target group, and 41 new municipal dwellings for the target group of new labor arriving in the country. Estonian National Housing Development Plan for the years 2008-2013 also prescribed support for increasing municipally owned housing stock, but this measure has not been implemented since 2008 due to lack of political will and/or financial means.

According to the recent practice, other types of ownership/financing schemes are also used to develop public housing. For example, the municipality of Tallinn has implemented special residential housing programs set up as PPP projects, whereby the municipality supported the construction of the buildings by providing right of superficies to the land and taking completed buildings into use under the conditions of long-term (20-30 years) operative leases.<sup>287</sup>

As typical contractual arrangements, and regulatory interventions into rental contracts example of LITHUANIAN regulation may be presented<sup>288</sup>:

- if the social housing contract is interrupted because the family or individual breached its conditions, the family or individual have right to conclude the new one social housing contract only after 5 year from the contract interruption's day;

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<sup>287</sup> Estonian Report, 20.

<sup>288</sup> Similar provisions may be found in social housing contract prepared by ESTONIAN municipalities.

- parties of the contract may include conditions on the tenant's relocation to housing with smaller area. When the family and the person acquire ownership of housing, social housing contract is terminated in accordance with the contract conditions;
- social housing tenant is required every three years, under the Law on Resident's property/assets declaration, to submit declaration of assets and income received for the last 12 months. If the social housing tenant's (or his family member's) assets or income received in exceed the maximum levels set by the Government, the lease is terminated. Data on declared assets and income received during the month from the date specified in this paragraph must be provided to the Municipality's executive authority;
- the fee for cold and hot water, electricity, gas, thermal energy and utilities (trash removal, elevators, common areas and exterior cleaning, etc.) is taken separately from the social housing rent;
- for temporarily departure of the tenant, family member or a former member of the family, the right of social housing is left for six months on condition that they will pay the rent and charges for utility services. In cases, indicated in the right of social housing could be left for all period of departure.

ESTONIA: In case of contracts for social housing, municipalities have to take into account the Government's Regulation on Requirements to the Dwellings.<sup>289</sup> Accordingly, dwelling provided for social housing should meet the following regulations. The purpose of the requirements of the dwelling is to guarantee safety and a healthy environment to the residents.<sup>290</sup>

### **4.3. Evaluative criteria for the tenant**

#### **4.3.1. Access**

Common problem in Baltic States is that there are not enough dwellings to provide social housing for all families in need, especially in bigger cities.

E.g. in LITHANIA, in 2012, 6283 persons were waiting for a social housing.

In general, applicants of social housing are registered in priority lists of different categories. For example, in Tallinn, the following households have priority for social

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<sup>289</sup> Government Regulation of 7 Feb. 1999 Adoping Standards for Dwellings (*Eluruumidele esitatavate nõuete kinnitamine*). - RT I 1999, 9, 38.

<sup>290</sup> According to the regulation, dwelling is defined as a residence house, apartment or other separated room, that meets requirements for living quarters. Dwelling should be in the condition allowing persons to stay there round the clock. Dwellings must have a separate entrance door. Minimum floor area is 8 m<sup>2</sup>. Each room should have at least one window, which provides the opportunity to ventilate the premises and ensures adequate natural lighting. The window and the floor area ratio should not be less than 1:8. Dwelling should have natural or mechanical ventilation. The air temperature in the dwelling must be optimal to create a warm cozy feeling for the residents. In case of people's prolonged stay in the room, the indoor air temperature should not be below 18 ° C. Optimal indoor air humidity is 40-60 percent. A dwelling must be equipped with a closet or in the absence of it there should be possibility to use the toilet in the immediate area. Access to cold water of suitable quality for drinking) should be guaranteed in the same building or in the immediate area. Socially justified housing size is 18 m<sup>2</sup> living area for each family member, and an additional 15 m<sup>2</sup> for family.

housing: families whose dwellings have been destroyed in an accident, catastrophe, or by demolition; orphans; disabled persons or persons with special needs; and former tenants in restituted housing. In other cases, eligibility of each applicant is assessed individually using multiple evaluation criteria, such as the applicants' current housing situation and his/her socioeconomic status. In LATVIA following social groups would be listed as candidates for social housing: persons in need, persons suffered from a natural disaster, disabled persons, inhabitants of the denationalized or privatised houses etc. are entitled to get assistance in solving of apartment matters.

#### **4.3.2. Affordability**

In case of social rent, the municipality in LATVIA may determine an amount of rent which does not include profit and reduce payments for maintenance; besides, the respective municipality is entitled to cover payments for utilities in part.<sup>291</sup> The Law on Social Apartments and Social Houses does not contain specific rules or procedure on rent payment increase, therefore it is performed according to the Law on Residential Tenancy which is reviewed above, if necessary. In addition, the aims of social renting has to be observed.

Under the Article 6.583 of the CC of LITHUANIA payment of lease for the state and municipality dwellings shall be calculated in accordance with the procedure established by the Government. The municipality can increase the rent payment only in such case if the Government's Resolution was changed and according to the new procedure of the rent payment calculation the rent payment is increased.

In ESTONIA, majority of social housing contracts are contracts for a specified term and provide only for the cost of utilities.

In LATVIA local municipality may offer social housing dwelling without cold water and/or sewerage.<sup>292</sup>

Usually municipalities impose the maintenance and routine repair obligations to social housing tenant.

For subsidies for poor tenants, see 2.5 above. In ESTONIA, for example, upon necessity, tenants of municipal dwellings are equally eligible for subsistence benefits. Public tenants are subsidized by free use of dwelling (tenants paying only the cost of utilities) or very low rent. Over 90 per cent of local authorities subsidize rent to cover the costs of the housing.

#### **4.3.3. Stability**

Under ESTONIAN law, tenant of the social housing may stay till the end of contract term as long as he respects the contract.<sup>293</sup> Usual term is 1-2 years.

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<sup>291</sup> Article 11.1 of the Law on Residential Tenancy, Article 12 of the Law on Social Apartments and Social Houses.

<sup>292</sup> Latvian Report, 83.

<sup>293</sup> E.g. standard social lease contract of Tallinn, section 21.1; standard social lease contract of Tartu, section 9.4.

In case of LITHIANA, there are also contracts of indeterminate term and contracts for a fixed term. Contracts for a fixed term usually are valid until the person receives the dwelling rent for indeterminate term and concludes indeterminate contract. However, the tenant must every three years to declare his income and if his income exceeds the limits settled by the Government of the Republic of Lithuania the dwelling lease contract must be interrupted.

In LATVIA, the rental agreement with public tasks is usually concluded for six months<sup>294</sup>, i.e., is time-limited. After the six-months term of a social rental contract is expired, competent institutions must reevaluate, whether circumstances of a particular tenant or family have been changed and whether the tenant or family may continue renting a social apartment<sup>295</sup>. If the answer is positive, the rental agreement is prolonged for more six months.<sup>296</sup>

There is no statutory pre-emption rights of the tenant in public housing, because the tenant right to lease the dwelling depends only on the fact if he has or sustains the criteria settled in the specific law.<sup>297</sup>

#### 4.3.4. Flexibility

LATVIA: The right of the tenant to terminate the term contract in cases where the matter concerns social renting is not provided. The Law on Social Houses and Social Apartments stipulates that, if a tenant is no longer entitled to receive assistance in solving apartment matters, the social rental agreement has to be terminated, unless, upon the request of the tenant, the respective local municipality agrees to conclude a new "normal" rental agreement.<sup>298</sup>

In ESTONIA, social housing term contracts my be terminated by the lessee giving 1 month advance notice.<sup>299</sup>

In LATVIA<sup>300</sup> as well as practically in ESTONIA<sup>301</sup> in case of social housing lease contract **subletting is not allowed**. Neither would, in general, subletting be an option

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<sup>294</sup> Art. 11 of the Law on Social Apartments and Social Houses.

<sup>295</sup> Art. 11 of the Law on Social Apartments and Social Houses.

<sup>296</sup> Art.14 para 4 of the Law on Social Apartments and Social Houses.

<sup>297</sup> In case of Lithiania: the Law on the Lithuanian state support for housing purchase or lease and apartment buildings renovation (modernization) of the Republic of Lithuania.

<sup>298</sup> Art. 14 para 4 of the Law on Social Houses and Social Apartments. Latvian Report, 155

<sup>299</sup> E.g. standard social lease contract of Tallinn, section 19.2; standard social lease contract of Tartu, section 9.2.

<sup>300</sup> Since social rent is a part of public law, the lack of a provision about subletting indicates that it is not allowed. Furthermore, the opposite conclusion that subletting might take place would not comply with the aims of social renting. It is recognized by the jurisprudence of administrative courts that assistance in apartment matters is only provided, if a person or family does not have a place to live and cannot find a residential space themselves because of justified objective reasons. If a person were entitled to sub-rent a social residential space, it would mean that it has found another place for living. Moreover, the option to sublet a social dwelling would mean that a local municipality could not rent a living dwelling to other persons. Considering that social houses and apartment are not numerous, subletting would endanger the provision of assistance in apartement matters by local municipalities. Latvian Report, 119-120.

for the public tenant in LITHUANIA. However, in LITHUANIA, if the dwelling is retained in case of temporary departure or reserved with the consent of the municipality in the event of departure of the lessee and all of his family members, the lessee shall have the right to permit the dwelling to be used by other persons under a contract of sub-lease.<sup>302</sup> Upon the return of the person who was temporarily absent, the sub-lessee must immediately vacate the dwelling, and the persons who fail to vacate the dwelling concerned shall be evicted without prior notice and without another dwelling being provided.

## 5. CONCLUSION

Informality of the rental relations is common problem in Baltic States. This leads to distrust and uncertainty of the conditions of the relationship, inability to prove rent payments by the tenant. As the common reason for not concluding written contract is the aim to avoid taxes, informal relationship may also lead to the tenant's blackmailing to disclose all information to the Tax Authorities. Tax issues are most topical in ESTONIA as majority of landlords are non-professionals who could not deduct any investment or maintenance cost of the dwelling from the rental income and have to pay (currently) 21 % income tax on the total amount received as rent. This is the major reason, why many private landlords tend to avoid written contracts.

Unfortunately in case of LATVIA, the level of legal certainty is relatively low as the legal provisions of the Law on Residential Tenancy do not always conform to provisions of the Civil Law. As a result it is very difficult to determine the mutual relations and applicability of articles of the Civil Law, when the Law on Residential Tenancy does not regulate a particular issue in part.<sup>303</sup>

ESTONIAN law is too restrictive, i.e. the parties may not agree on terms and conditions that work to the detriment of the tenant, unless specifically provided by law. There are further limitations to the parties' freedom of contract, for example, agreements which require the tenant to pay a contractual penalty upon violation of a contract are void. On the other hand, given package of the regulations does not allow flexibility in the tenancy relationship and, as such, does not fully support the development of the market for residential dwellings. For example, solution that the parties can not agree that the long-term tenant takes care of the routine repairs, is not reasonable.

..... TO BE CONTINUED

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<sup>301</sup> E.g.; standard social lease contract of Tallinn, section 15, standard social lease contract of Tartu, section 7.2.

<sup>302</sup> Articles 6.592 and 6.594 of the CC.

<sup>303</sup> Under Article 1 of the Law on Residential Tenancy the Civil Law and other legal enactments are applicable to the legal relations of rent in so far as the Law on Residential Tenancy does not regulate such relations. Nevertheless, court practise limits application of different legal provision of the Civil Law without well-grounded reasoning, it causes uncertainty because the parties cannot prepare their agreement so that it complies with law. The matter concerns the issue which are not established by the Law on Residential Tenancy in an explicit way. Latvian Report, 175.

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

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### **Intra-team Comparison Report for ENGLAND & WALES, REPUBLIC OF IRELAND, SCOTLAND**

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## **1. The current housing situation**

### **1.1. General Features**

Housing is central to the life of every person. Everyone needs somewhere to live whether the accommodation is owner occupied or rented. This comparative report examines the housing situation in England and Wales, Scotland and the Republic of Ireland. One hundred years ago these countries formed a single political union governed directly from Westminster. This gave rise to much commonality in housing matters however since then there has been a diaspora of political autonomy from Westminster, first to Ireland which separated in 1922 and became increasingly independent, then later to Scotland and Wales through devolution since 1998. This has had far more radical effects than could have been imagined as increased political autonomy from the United Kingdom has been exercised first in Ireland, then Wales and Scotland especially in the housing field.

In describing the development of the housing situation across Great Britain and Ireland five strands can be drawn together. Beginning with the development of public housing powers which can be traced to the response to the mass industrialisation, which occurred in Great Britain during the 18<sup>th</sup> and 19<sup>th</sup> centuries, when the population began to expand at an unprecedented sustained growth.<sup>1</sup> Factors motivating the public intervention were both a desire to improve public health and a paternalistic concern to improve the appalling standards of housing endured by the working classes in the major industrial cities as to overcome the chronic overcrowding.<sup>2</sup> These evolved, first in Great Britain then later in Ireland, into comprehensive powers for modern local authorities including for example powers to close uninhabitable properties, relief of overcrowding and the licensing of Houses in Multiple Occupation.<sup>3</sup> The second strand is the influence of private sector security of tenure contained in the Rent Acts from 1915 to the 1980s. The First World War can be seen as the origin of modern housing law throughout Britain and Ireland. At this time the vast majority of the population lived in rented accommodation. The war effort led to further industrialisation which resulted in severe housing shortages in parts of the United Kingdom. In response to civil unrest the Government introduced a system of rent regulation which capped rents at below market rate and granted tenants strong security of tenure. Details fluctuated over the years as political control changed hands however by the 1970s more people owned than rented. The controls on the rented sector restricted the rent a landlord could charge and this contributed to the reduction in value of property subject to residential tenancies. Arguably, this caused the decline over the years of many properties into slum condition, as landlords were increasingly unable to get a sufficient return on their investment to fund repairs. The third strand is the development of mass public sector provision from the early 20<sup>th</sup> century through to the 1980s. During the early 20<sup>th</sup> century Governments came under increasing pressure to intervene on behalf of those households unable to afford their accommodation. Both Britain and Ireland started with the direct provision of housing by public authorities. The dominance of the public rented sector began to give

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<sup>1</sup> D. Mullins & A. Murie, *Housing Policy in the UK* (New York: Palgrave Macmillan, 2006), 13.

<sup>2</sup> J.F. Kitto, 'One-roomed Homes', a paper given at a meeting of the Church of England Sanitary Association, (Manchester, 1893).

<sup>3</sup> Housing Act 1985, a consolidation of earlier powers, widely amended since. In Ireland these powers were contained in the Housing Acts (1966-2011).

way however after the mid-1970s. This was compounded by the large take up of tenant purchase schemes, in Ireland in 1966 and in Great Britain the late 1980s. These gave tenants of local authorities the opportunity to purchase their home at a discounted rate. Fourthly, modern tenancy law in Great Britain begins, essentially, with the Thatcher Government of the 1980s. Market reforms in the private rented sector led to the introduction early in 1989 of the assured tenancy under which the landlord could charge market rents.<sup>4</sup> The default form of tenure is now the assured shorthold, under which the tenant has a short contractual fixed term of at least six months but the tenant does not enjoy long term security of tenure. In Ireland the system of rent regulation came to an end in 1982 after it was declared unconstitutional by the Supreme Court.<sup>5</sup> While market rents prevailed once again it was not until the introduction of the Residential Tenancies Act 2004 (RTA 2004) that the current syntax of Irish tenancy law was established, based on implied terms, market rates and security based on rolling four year cycles.

The final strand concerns the introduction of local authority tenant purchase schemes and the social provision of affordable housing. The former occurred earlier in Ireland with the passing of the Housing Act 1966 however unlike Great Britain where the tenant purchase scheme was underpinned by the secure tenancy (which carried full residential security of tenure and succession rights) the introduction of the tenant purchase scheme in Ireland was not underpinned by a dedicated tenancy which carried full residential security or succession rights and instead local authorities operated a discretionary power to sell.<sup>6</sup> In Great Britain the secure tenancy was crafted in the 1980s in order to provide tenants with the Right to Buy. In spite of the differences both schemes proved highly popular. In spite of the large scale sale of housing stock local authorities continue to play a key role in the social provision of affordable housing. In this respect allocation arrangements have been formalised and in Britain a right to housing has been conferred on those who were homeless in 1977 with functionally comparable though not justiciable homelessness legislation following in Ireland in 1988.<sup>7</sup> In Britain Government policy has shifted since that time to the provision of affordable housing through the social sector. Funding for new housing was focussed on housing associations and encouragement was given to mass transfers of public sector stock to housing associations. Ireland provides a strong contrast since local authority housing remains the main provider of housing with a public task although the social housing sector has been identified as being of key importance in future provision of social housing supports. Across both Islands the public and social sectors have been affected very substantially by the direct incorporation into English and Irish law of the European Convention on Human Rights,<sup>8</sup> public landlords are directly affected and social landlords more peripherally.<sup>9</sup>

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<sup>4</sup> Housing Act 1988.

<sup>5</sup> *Blake and others v Attorney General* [1982] IR 117.

<sup>6</sup> Kenna, *Housing Law Rights and Policy*, pp. 798, 799.

<sup>7</sup> In the UK this legislation engenders innumerable reported cases each month about issues such as the suitability of the accommodation offered and has proved highly controversial in the UK.

<sup>8</sup> Human Rights Act 1998, European Convention on Human Rights Act 2003 (Ireland).

<sup>9</sup> Incorporation has provoked a tidal wave of litigation disproportionate to the actual changes to the law brought about by human rights arguments. Also see *Donegan & Gallagher v. Dublin City Council* [2012] IESC 18 where a declaration of incompatibility was made in respect of a local authority eviction procedure.

### **1.1.2. Current situation**

In 2011 across Britain and Ireland there were approximately 28.2 million dwellings, of which the vast majority were owner occupied (18.3 million) while the remainder was rented (9.9 million). The majority of rented dwellings were in the private rented sector (4.9 million), followed by the social rented sector (2.7 million) and finally the public rented sector (2.3 million). These trends are largely followed across the jurisdictions of England and Wales, Scotland and the Republic of Ireland with one major exception being that public renting remains dominant in Ireland, far outstripping social renting.<sup>10</sup> In a number of important respects the housing situation is unsatisfactory from a tenant's perspective. In particular, there is a gross undersupply of various forms of dwellings with a public task across Britain and Ireland (see section 4.3.1 below). While concerted efforts have been made to improve housing quality in the rented sectors, most notably in Scotland and England and Wales, there remains significant housing quality concerns (most notably enforcement of repairing obligations) which have not been adequately addressed in both Islands (see section 3.1.1 below).

### **1.1.3. Types of housing tenures**

At this most basic point of housing law there is no longer a commonality across England, Wales, Scotland and Ireland:

In England classification is based on the purpose for which housing is provided. This is a by-product of the reorganisation of the regulation of social providers recommended by the Cave Report, implemented and already largely undone in the recent bonfire of the Quangos.<sup>11</sup> The crux of the new classification scheme appears in sections 68 and 69 of the Housing and Regeneration Act 2008, where three concepts are introduced: public/social housing – low cost accommodation consisting of the following two sub-categories; low cost rental accommodation (accommodation made available to rent below the market rate and to people selected because their needs are not met adequately by the commercial housing market); and low cost home ownership accommodation – consisting of various forms of tenure intermediate between full ownership and rental. The classification imposed in 2008 needs to be superimposed onto the traditional classification by which tenures were classified solely by the character of the landlord. England has four categories: Private landlords (18.5% of total households): these operate in a regime of market rents and grant assured tenancies, almost always in fact assured shortholds which lack long term residential security. Housing associations (when acting as private landlords); a small percentage of housing association stock is let at market rents using assured shortholds. Public landlords (7.6% of total households) – local housing authorities letting publicly owned housing stock; they grant secure tenancies with long term residential security at affordable rents and finally social landlords (9.9% of total households) – these were formerly known as Registered Social Landlords and now as Private Registered Providers of Social

<sup>10</sup> 'Housing Statistics 2013' (London: Department for Communities and Local Government, 2011) Table 104 Dwelling Stock by Tenure (Historical Series), England and Table 106; Central Statistics Office, *Census 2011: Profile 4 The Roof over our Heads - Housing in Ireland* (Dublin: Stationery Office, 2011), Table 4.

<sup>11</sup> Respectively Cave Review of Social Housing Regulation (London: Department for Communities and Local Government, 2007); Housing and Regeneration Act 2008 Part 2; Localism Act 2011 ss 178-179.

Housing; they grant assured tenancies with full residential security but at affordable rents. So in essence the two sectors are characterised by market rents (the private sector) and low cost or affordable rents with a maximum of 80% of the open market rent (public/social housing).

The restructuring of the public/social housing market that took place in 2008 does not apply to Wales,<sup>12</sup> so the framework established in the Housing Act 1996 continues to apply. This creates basic sectoral divisions based on the character of the owner and of landlords. In Scotland, as in Wales, the basic sectoral divisions are based on the character of the owner and of landlords. The rented sector is divided private landlords (14% of total households); these operate in a regime of market rents and grant assured tenancies, almost always in fact short assured tenancies which lack long term residential security. Local authorities, New Towns, Scottish Homes (13% of total households); local housing authorities letting publicly owned housing stock; they grant secure tenancies with long term residential security at affordable rents and finally housing associations/Registered Social Landlords (11% of total households); (when acting as private landlords); a small percentage of housing association stock is let at market rents using short assured tenancies.

This is roughly the same in Ireland where the rented sector is divided into private landlords (19% of total households) which operate in a regime of market rents and grant tenancies which are almost universally governed by the Residential Tenancies Act 2004. After 6 months continuation without a valid notice of termination being served, such tenancies become Part 4 tenancies with security for a further 3 and a half years which will automatically renew at term without further action. Next, there are local authorities (7.8%), which grant local authority tenancies with differential rents linked to the tenant's ability to pay, periodic tenancies are common and security is limited. Finally, there are voluntary and co-operative housing bodies (0.1%). These may grant tenancies governed by the Residential Tenancies Act 2004 or non RTA tenancies, in the case of non RTA tenancies a below market rent is charged and security is limited.

In terms of housing types, these are common across both Britain and Ireland, but the prevalence of certain housing types within the various housing systems varies widely. In 2011 in England and Wales over half of all homes in England were terraced or semi-detached houses, a fifth were detached houses and a tenth were bungalows. The remaining fifth were flats, mainly purpose built low rise flats. This trend is exaggerated in Ireland where about nine tenths of housing units were houses,<sup>13</sup> whether detached, semi-detached or terraced, while a tenth were flats or apartments in a purpose built or converted block.<sup>14</sup> In contrast to England and Wales and, particularly, Ireland, While Scotland's housing situation continues to be characterised by the presence of high levels of flats or apartments (about two fifths) and the low levels of detached housing units (a fifth).<sup>15</sup>

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<sup>12</sup> Housing and Regeneration Act 2008 ss 59-60.

<sup>13</sup> On average in Ireland detached housing contain 6.3 rooms per households, while flats or apartments contain 2.9 rooms per households.

<sup>14</sup> Central Statistics Office, *Census 2011: Profile 4 The Roof over our Heads - Housing in Ireland* (Dublin: Stationery Office, 2011) p. 10.

<sup>15</sup> 2011 Census: *Key Results on Households and Families, and Method of Travel to Work or Study in Scotland - Release 2C* (Edinburgh: Scottish Government, 2013), p. 7.

In England and Wales the profile across the tenures varied considerably: some quarter of owner occupied homes were detached houses, while one tenth of private rented sector dwellings were converted flats. In the local authority sector, about a half of dwellings were purpose built flats. The prevalence of renting in flats or apartments is common to both Ireland and Scotland. In Ireland renting has long been the most common tenure category for both apartments and bedsits. Around three fourths of apartments in 2011 were rented. This far surpasses the rental rate for other types of housing – about a tenth of detached houses and roughly a third of semi-detached and terraced houses were rented in 2011.<sup>16</sup> In Scotland this is also the case, roughly two thirds of private rented dwellings and housing association dwellings were flats, while local authorities own roughly equal numbers of houses and flats.<sup>17</sup>

The age profile varies by tenure type with private rented sector having the largest proportion of pre-First World War stock and local authority stock falling into the post-Second War period up to 1980, and housing associations having by far the greatest proportion of post-1990 stock.<sup>18</sup> This is comparable to the situation in Scotland where almost all properties owned by local authorities were built between 1920 and 1982, while about half of housing association dwellings were built in this period and around 40% are more recent. By contrast, more than half of private rented flats were built before 1919.<sup>19</sup> However, in contrast to Britain, Ireland has a much higher proportion of newer dwellings. Roughly one third of the national housing stock has been constructed since the turn of the 21<sup>st</sup> century and just under half of all stock has been constructed since 1991. As such the high levels of housing construction which took place from the 1950s onwards resulted in Ireland having a high proportion of new housing.<sup>20</sup> The average dwelling size varies across Britain and Ireland. In England the average dwelling had a total usable floor area of 91m<sup>2</sup>. However, this varied by tenure, from an average of 103m<sup>2</sup> in the owner occupied sector to 74m<sup>2</sup> for private rented dwellings and 63m<sup>2</sup> across the social rental sector. On average, those built before 1919 were the largest dwellings, with a mean useable floor area of 102m<sup>2</sup>.<sup>21</sup> In Scotland the average flat has an internal floor area of 84 m<sup>2</sup>.<sup>22</sup> In Ireland the average (useful floor area) size of an Irish dwelling was 104 m<sup>2</sup> in 2003.<sup>23</sup>

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<sup>16</sup> Central Statistics Office, *Census 2011: Profile 4 The Roof over our Heads - Housing in Ireland* (Dublin: Stationery Office, 2011) p. 11.

<sup>17</sup> 'Scottish House Conditions Survey 2012 - Key Findings' (Edinburgh: Scottish Government, 2013), para 29.

<sup>18</sup> 'English Housing Survey: Homes 2011' (London: Department for Communities and Local Government, 2013) para. 1.2 and fig. 1.1.

<sup>19</sup> 'Scottish House Conditions Survey 2012 - Key Findings' (Edinburgh: Scottish Government, 2013), para 29.

<sup>20</sup> Central Statistics Office, *Census 2011: Profile 4 The Roof over our Heads - Housing in Ireland* (Dublin: Stationery Office, 2011) p. 10.

<sup>21</sup> 'English Housing Survey: Homes 2011' (London: Department for Communities and Local Government, 2013) para. 1.2 and fig. 1.1.

<sup>22</sup> 'Energy Use in the Home Measuring and Analysing Domestic Energy Use and Energy Efficiency in Scotland' (Edinburgh: Scottish Government, 2012), para 62.

<sup>23</sup> Ahern, C., et al., State of the Irish housing stock—Modelling the heat losses of Ireland's existing detached rural housing stock & estimating the benefit of thermal.... Energy Policy (2013), p. 2.

#### **1.1.4. Other general aspects of the current housing situation in comparative perspective**

Across Britain and the Republic of Ireland there are established national associations representing providers of private rented accommodation. Landlords in England and Wales are represented by the National Landlords Association, in Scotland by the Scottish Association of Landlords and the Republic of Ireland by the Irish Property Owners Association. The situation is markedly different with regard to tenant representation as there are no national associations in Britain and Ireland to represent the interests of private rental tenants. This is particularly unusual in a European context and sets these Islands apart as having perhaps the least developed tenant representation framework in Western Europe.

Vacancy rates are broadly similar across Great Britain but the picture is radically different in Ireland. Taking Britain first; in 2011 about 3.9 per cent of dwellings in Scotland<sup>24</sup> were vacant compared to 3.1% in England and Wales.<sup>25</sup> This is in sharp contrast to the high vacancy rate in the Republic of Ireland in recent years: In 2011 the vacancy rate, including holiday homes, was recorded as 14.5% of total housing units. If holiday homes are excluded then the vacancy rate dropped to 11.5%.<sup>26</sup> Following the onset of the economic crisis new property taxes, the main one being the Local Property Tax, have been introduced making it more expensive to hold a second property or leave a dwelling vacant.

It is difficult to provide a definitive picture on the presence of informal economies in the British and Irish rental markets. Black market phenomena do not appear to be particularly prevalent but the absence of meaningful statistics do not allow for a more detailed examination of the extent of real market activity. In England and Wales there appear to be two particular problems which might be described as black market phenomena. First, there is a problem of severe overcrowding of low-quality rental properties in defiance of Houses in Multiple Occupation controls, as well as the phenomenon of ‘beds in sheds’; ie turning garages, sheds etc into very basic dwellings.<sup>27</sup> Second, there is unauthorised sub-letting of social sector housing, whereby the tenant charges sub-tenants a significantly higher rent than s/he is paying. New offences have been introduced by the Prevention of Social Housing Fraud Act 2013 as of October 2013, in respect of subletting without consent. In Scotland there have been a number of reports which suggest that various informal economic activities take place in the Scottish rental market. Perhaps the most pressing instance of an “informal economy” is the letting of substandard accommodation and the practice of letting agents requiring unlawful pre-tenancy payments.<sup>28</sup> In Ireland various informal economy activities have

<sup>24</sup> ‘Housing Statistics for Scotland - Key Information and Summary Tables’ (Edinburgh: Stationery Government, 2013), see chart for estimated stock of dwellings by tenure: 1993 to 2011.

<sup>25</sup> ‘English Homes Survey 2013’ (London: Department of Communities and Local Government, 2013), para. 1.12.

<sup>26</sup> Central Statistics Office, *Census 2011: Profile 4 The Roof over our Heads - Housing in Ireland* (Dublin: Stationery Office, 2011), p. 7.

<sup>27</sup> [www.gov.uk/government/news/major-clampdown-launched-on-beds-in-sheds](http://www.gov.uk/government/news/major-clampdown-launched-on-beds-in-sheds). In the nature of things data on the size of the problem are not available.

<sup>28</sup> Imposition of a prohibited premium can have both civil and criminal consequences: Rent (Scotland) Act 1984 Part VIII and the Housing (Scotland) Act 1988 s 27, but amended and considerably strengthened by of the Private Rented Housing (Scotland) Act 2011 s. 32 and the Rent (Scotland) Act 1984 (Premiums) Regulations 2012. See section 6.2 below..

been reported in the rental market, including the payment of “supplementary rent payments” by private tenants in receipt of rent supplement as well as letting of substandard accommodation.<sup>29</sup>

## 1.2 Economic factors in comparison

### 1.2.1. Comparative view of the housing market

Taking a long term view the housing market in England is characterised by steadily rising prices, and this is true to a lesser extent of Wales and Scotland. The development of the housing market in the Republic of Ireland in recent years is characterised by a period of rapidly rising prices followed by a dramatic house price crash in 2007 with prices continuing to fall until about 2013 when prices began to increase once again. Between 1997 and 2007 the average price of a house increased almost three-fold in England, Wales and Scotland<sup>30</sup> and four fold in Ireland.<sup>31</sup> The banking crisis of 2006 and 2007 produced a sharp correction after which prices continued to fall, but in 2013 growth resumed in England, Wales and Scotland, stimulated in part by the Help to Buy scheme. In the Republic of Ireland growth was slower to return and it was not until 2014 that it became clearly apparent that house prices were increasing consistently in certain parts of the country, most notably Dublin. In the late 1990's and early 2000's there was significant economic growth in Great Britain and Ireland. This was a period when there was intense competition between mortgage lenders for revenue and market share, as well as easy credit conditions resulting in subprime lending. This was accompanied by growth in the housing market across both islands, prior to the economic crunch that followed from 2007.<sup>32</sup> The decline in house prices was a response to reduced mortgage availability and stricter lending criteria, a major reason for the low level of housing transactions. The sharp drop in house prices at the onset of the housing crisis in 2007 was accompanied by a sharp drop in market activity. This was particularly exaggerated in Ireland where from 2007 the Irish economy declined sharply and nationally property prices fell by about a half from 2007 to 2012<sup>33</sup> while the supply of new dwellings dropped from 80,000 units a year in 2006 to just over 10,000 units in 2012. However, since 2013 property prices stabilised with certain urban areas, particularly in Dublin, recording

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<sup>29</sup> Threshold, *Annual Report 2012*, (Dublin, Threshold, 2012), p. 22.

<sup>30</sup> There is a huge quantity of data on house prices, including indices provided by the Land Registry, the National Statistics Office, Her Majesty's Revenue and Customs and the Nationwide Building Society. Much of the data is contradictory and very different ‘averages’ are obtained from different methods of sampling. National figures are largely meaningless because of the wide regional variations. General house prices lie outside the scope of this study. For Scotland see ‘Scottish Housing Market Review’ (Edinburgh, Scottish Government, 2012), pp. 1. The former is mix adjusted whereas the latter takes the raw unadjusted data. The mix adjusted figure for the UK was £233,000.

<sup>31</sup> Central Bank of Ireland, *Address by Deputy Governor Stefan Gerlach at the Berlin Finance Lecture, Berlin, 14 January 2013, Ireland: From Crisis to Recovery* (Dublin, Stationery office, 2013), p. 3.

<sup>32</sup> R. Barrell, S. Kirby & R. Riley, ‘The Current Position of UK House Prices’, *National Institute Economic Review*, 189 (2004), 1: 57-60; G. Cameron, J. Muellbauer & A. Murphy, ‘Was There A British House Price Bubble? Evidence from a Regional Panel’ (London: Centre for Economic Policy Research, Discussion Paper 5610, 2006).

<sup>33</sup> Central Bank of Ireland, *Macro-Financial Review 2012* (Dublin, Stationery office, 2012), p. 16. A. Kennedy & K. McQuinn, *Why are Irish house prices still falling* (Dublin, Central Bank of Ireland, 2012), p. 8.

property price and rent increases.<sup>34</sup> In England and Wales, but not Scotland and Ireland, repossessions increased in proportion to the economic downturn reaching its peak in 2009,<sup>35</sup> and many homeowners lost their homes. A spike in repossessions did not appear in Ireland mainly due to inadvertent repeal of certain mortgage laws,<sup>36</sup> reform of the lenders' voluntary codes of practice on arrears management which gave indebted homeowners extended periods of grace. In Great Britain the fall in house prices was mitigated to some extent by government measures to stem the tide of fall in house prices. The Bank of England sought to extend liquidity to lenders<sup>37</sup> and a review of the lenders' voluntary codes of practice on arrears management as part of the efforts of the state to stabilise the market.

There is a gross under supply of housing with a public task across Britain and Ireland. In England and Wales there were around 1.85 million households on local authority waiting lists on 1st April 2012 across the UK<sup>38</sup>, a figure which has risen consistently every year since at least 2001.<sup>39</sup> The numbers on the Scottish housing waiting list also indicate that housing supply does not meet demand. In Ireland both rents and house prices increases in the last year have been attributed to insufficient housing supply.<sup>40</sup> Both indicators have been taken to suggest that the current supply of housing may not be sufficient to meet existing demand.<sup>41</sup> Indeed there have been calls for a threefold increase in the supply of housing to meet the high demand for housing.<sup>42</sup>

### 1.2.2. Comparative view on price and affordability

Across Britain and Ireland outlay on housing was highest in the private renters, followed by owner occupiers and then social renters.<sup>43</sup> There have been sharp increases in average rents across these islands with particularly rapid increases recorded in London. Currently (2014) the average private sector rent in England and Wales is £707 per month, but average rents in the capital were £1417 a month. Rents across England and

<sup>34</sup> Central Statistics Office, *Residential Property Price Index September 2013* (Dublin: Stationery Office, 2013), p. 1. However, property prices may not yet have stabilised in the rest of the country. See Daft.ie, *The Daft.ie House Price Report 2013 in review* (Dublin: Daft.ie, 2013), p. 6. Also see Private Residential Tenancies Board/ESRI, *Rent Index 2013 Q4* (Dublin: Stationery Office, 2014).

<sup>35</sup> C. Randall, *Housing* (Office for National Statistics, 2011), 22; C. Whitehead, *Private Rented Sector in the New Century: A Comparative Approach* (Cambridge: University of Cambridge, 2012), 115-116.

<sup>36</sup> *Start Mortgages & Ors v Gunn & Ors [2011] IEHC 275*. See 'Report of the Expert Group on Repossessions' (Dublin: Department of Justice, 2013), p. 5. The Land and Conveyancing Law Reform Act 2013 was enacted to ensure the continued application of certain repealed provisions.

<sup>37</sup> Bank of England 'Special Liquidity Scheme: Information', [www.bankofengland.co.uk/publications/Pages/news/2008/029.aspx](http://www.bankofengland.co.uk/publications/Pages/news/2008/029.aspx), 22 January 2013.

<sup>38</sup> "Government releases housing statistics for 2011-12: so what's new?", <http://socialhousingwatch.co.uk/government-releases-housing-statistics-for-2011-12-so-whats-new/>, 13 August, 2013.

<sup>39</sup> 'Local Authority Housing Statistics 2010-11' (London: Department for Communities and Local Government, 2013).

<sup>40</sup> Central Statistics Office, 'CSO Residential Property Price Index December 2013' (Dublin: Stationery Office 2014). *The Private Residential Tenancy Board Rent Index 2013*, (Dublin: Stationery office, 2013)

<sup>41</sup> Economic and Social Research Institute, 'Quarterly Economic Commentary – Winter 2013' (Dublin: Stationery Office, 2013, p. 8).

<sup>42</sup> Economic and Social Research Institute research professor John Fitzgerald called for a return to construction of 25,000 houses per year at the Trinity Economic Forum in February 2014.

<sup>43</sup> 'English Housing Survey 2011-12' (London: Homes and Communities Agency, 2013); H. Meyer, 'Cost of Renting Outstrips Inflation in England and Wales', *Guardian*, 21 June 2013. See also 'Review of the Private Rented Sector Volume 1' (Edinburgh, Scottish Government Social Research, 2009).

Wales are rising quicker than the rate of inflation; the average is forecast to rise to £800 a month by the middle of 2015 which would represent a 21% rise on 2010. The Scottish Household Survey (2009)<sup>44</sup> found that the average rent paid by a private renter in Scotland in 2008 was £403 per month.<sup>45</sup> In the past four years rents have increased significantly. Citylet is one of the largest property marketing services in Scotland and provides a quarterly review of the private rental market in Scotland. In the first quarter of 2013, Citylet recorded that the average Scottish rent nationwide was £675.<sup>46</sup> In Ireland after the onset of the economic recession rents nationally fell by about a quarter until early 2011 when rents began to stabilise. From then on rents were relatively flat until late 2013 when rents began to increase again, albeit at a low level. The average monthly rent paid by a private renter nationally in the fourth quarter of 2013 was €772.<sup>47</sup> Rents have been consistently higher in Dublin (€1059 in 2013) than rents in the rest of the country and indeed rents in Dublin have recovered much quicker than rents in the rest of the country.<sup>48</sup> Across Britain and Ireland it would appear that most renters wish to purchase.<sup>49</sup> Since house prices have risen strongly there has been an overwhelming incentive to buy whenever this was possible in order to participate in the capital gain that arises on most houses over time. Those who choose not to, or are unable to, buy find themselves locked out of the housing market permanently. At the height of the property boom in 2007 the Scottish Government commissioned a study on the housing aspirations of Scottish households.<sup>50</sup> The study found that just 10% of respondents would ideally prefer to rent their home and the overwhelming majority said they would prefer to own. Almost all owner-occupiers, four in five private renters and three in five social renters said they would prefer to own their home.<sup>51</sup>

### **1.2.3. Tenancy contracts and investment**

Residential investment seeks both capital appreciation and, rental yields. According to one commercial Buy to Let index, gross yields on a typical rental property in England are 5.3%, but taking into account capital accumulation and void periods total returns rose to 8.9% in November 2013.<sup>52</sup> Potential yields vary regionally. They fluctuate wildly over time especially when capital appreciation or depreciation is taken into account. With the strong house price inflation recorded during the late 1990s and early 2000s, rental dwellings proved to be a highly attractive in this respect. However with the onset of the economic crisis the potential for capital appreciation was severely curtailed as the

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<sup>44</sup> 'Review of the Private Rented Sector Volume 1' (Edinburgh, Scottish Government Social Research, 2009).

<sup>45</sup> *Ibid.*

<sup>46</sup> 'Maximising Yields and Happier Tenants: Working smarter in Scotland's Rental Sector' (Edinburgh, Citilets, 2013), p. 3. (data is mix adjusted).

<sup>47</sup> *The Private Residential Tenancy Board Rent Index 2013*, (Dublin: Stationery office, 2013) p. 12 .

<sup>48</sup> Private Residential Tenancies Board/ESRI, *Rent Index 2013 Q4* (Dublin: Stationery Office, 2014), p. 6.

<sup>49</sup> See below 2.7, pp 48-50.

<sup>50</sup> S. Clegg, A. Coulter, G. Edwards & V. Strachan, 'Housing Aspirations' (Edinburgh, Scottish Government, 2007).

<sup>51</sup> *Ibid.*, para 4.3.

<sup>52</sup> LSL Buy-to-Let Index, 20 December 2013; the average return in gross terms was £14,592, with rental income of £8,243 and a capital gain of £6349. Clearly the picture would be very different if house prices were not rising so sharply. Earlier versions of the index show the changes over time. Another survey by BM Solutions reported in the *Guardian* 26 February 2014 suggests 5.5 throughout 2013. A figure of 2.8% for 2010 is given in C. Whitehead, *Private Rented Sector in the New Century: A Comparative Approach* (Cambridge: University of Cambridge, 2012).

property price and construction booms ended with falls in property prices eroding some of the value gained in the last 10 years.<sup>53</sup> However in recent years house prices have once again begun to increase across these islands with particularly strong growth in England. The liberal regulation of the private rented sector in Britain increases the attraction of the sector as this scheme allows landlords charge market rents and does not provide strong security to the tenant.

#### **1.2.4. Other economic factors**

The role of estate agents is broadly the same across Britain and Ireland though the extent to which they are regulated varies greatly. Different types of agencies operate in the housing market, ranging from those that find tenants for properties or connect tenants to landlords, and manage properties to those involved in sales. Agents whose primary business is connecting landlords to potential tenants are called letting agents. Their services include drawing up tenancy agreements, collecting references etc. The only regulations for rental agents in England may be for those who are members of the Property Ombudsman Scheme or who have registered with the Property Ombudsman Scheme under the Office of Fair Trading Approved Estate Agents Redress Scheme. Firms who are members follow the Property Ombudsman Scheme Code of Practice for Residential Sales. Lack of regulation of lettings agents is a significant problem, particularly in respect of the excessive charges for basic administration.<sup>54</sup> In Scotland regulation of letting agents is largely centred on voluntary codes of practice and rules of conduct. All private landlords operating in Scotland must register themselves, and each of the properties they are renting, with the relevant local authority under the landlord registration scheme. Under this scheme landlords, and any agent appointed to manage the property, must pass a fit and proper person test. The charging of illegal premiums has contributed to the Scottish Government decision to reconsider regulation of letting agents.<sup>55</sup> In Ireland the Property Services Regulatory Authority was set up in April 2012,<sup>56</sup> to regulate, control and supervise auctioneers, estate agents, letting agents and management agents and to enforce standards within the property industry. When evaluating the different systems regulating estate agents it is clear that the system in England falls behind those operating in Scotland and Ireland particularly with regard to registration and dealing with illegal fees.

#### **Effects of the current crisis in comparative perspective**

In Britain and, particularly, Ireland the mortgage market expanded during the early 2000s, as low interest rates in combination with financial innovation by lenders combined to reduce barriers to accessing credit. The proportion of homeowners who own with a loan or mortgage is remarkably similar across both islands. In 2011 just over a half of owner occupiers in England and Wales,<sup>57</sup> Ireland<sup>58</sup> and Scotland<sup>59</sup> held their

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<sup>53</sup> Access to credit has been constrained while the supply of new houses has halved since the onset of the recession. See above section 1.4 above.

<sup>54</sup> W. Wilson & C. Fairbairn, 'Regulation of Private Sector Letting and Managing Agents' (House of Commons, Library Standard Note SN 060000).

<sup>55</sup> 'A Place to Stay, a Place to Call Home - A Strategy for the Private Rented Sector in Scotland' (Edinburgh, Scottish Government, 2013), p. 18.

<sup>56</sup> By order under the Property Services (Regulation) Act 2011.

<sup>57</sup> 'A Century of Home Ownership and Renting in England and Wales' (London: Office for National Statistics, 2013), 22.

property with the aid of a mortgage or loan. Since the onset of the recession there has been a substantial reduction in the availability of credit across both Islands. In England and Wales and Scotland gross lending in 2013 was just half the level recorded in 2007.<sup>60</sup> Since the advent of the financial crisis interest rates have been cut and while this has improved affordability, deposit requirements – especially for first time buyers across both Islands, have become much stricter with the average deposit in Scotland being approximately equivalent to 69% of average annual income for first time buyers. The reduction in credit is particularly dramatic in Ireland where according to the Irish Banking Federation mortgage lending fell from a peak in excess of 200,000 residential loans in 2008 to less than 15,000 in 2011 though one feature is the increasing proportion of first time borrowers. In addition, the number falling into arrears or calling upon the social welfare support schemes for indebted homeowners has increased across both islands however the increase has been particularly dramatic in Ireland.<sup>61</sup>

Private rental properties may also be the subject of a mortgage arrangement when the properties are under the structure of ownership typically described as Buy to Let. Across Britain and Ireland a few landlords are professional landlords owning multiple investment properties. Tenants face difficulties if the landlord defaults on the payment of the loan.<sup>62</sup> Buy to let lending covers about 6% of all UK households, contributing around £30 billion to the economy and making up around 50% of the entire private rented sector. In the UK the Buy to Let market currently provides accommodation for about 2.5 million households, about 12 per cent of the total.<sup>63</sup> Some limited protection is provided in England and Wales by the Mortgage Repossessions (Protection of Tenants etc.) Act 2010. Across Britain buy to let lending continues to increase year-on-year, accounting for 11.4% of gross lending in the second quarter of 2012.<sup>64</sup> The situation in Ireland was quite different, because a dramatic reduction in mortgage lending of all forms has taken place in Ireland since the onset of the economic crises. There is a relatively limited amount of research profiling landlords.<sup>65</sup> However about a third of investors in the residential letting sector were in 2013 at risk of default.<sup>66</sup>

Across Britain the number of mortgage possession claims in County Courts increased from 2003 to a peak in 2008, but has fallen 60 per cent since then to 14,375 in the first

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<sup>58</sup> Central Statistics Office, *Census 2011: Profile 4 The Roof over our Heads - Housing in Ireland* (Dublin: Stationery Office, 2011), 12.

<sup>59</sup> Scottish Household Survey Quarterly Data Trends (Edinburgh: Scottish Government, 2012), 1.

<sup>60</sup> 'Gross mortgage lending table - September 2014' (London: Council of Mortgage Lenders, 2014); 'Scottish Housing Market Review November 2013' (Edinburgh: Scottish Government, 2013), p. 3

<sup>61</sup> Department of Social Protection *Residential Mortgage Arrears and Repossessions Statistics: Q3 2013, p. 5, Annual SWS Statistical Information Report 2012* (Dublin: Stationery Office, 2012), Section G.

<sup>62</sup> M. Ball, 'Buy to Let: The Revolution 10 Years On' (London: Association of Residential Letting Agents, 2006) p. 1.

<sup>63</sup> A. Leyshon & F. Shaun, 'We All Live in a Robbie Fowler House: The Geographies of the Buy to Let Market in the UK.' *The British Journal of Politics & International Relations* 11.3 (2009): 441.

<sup>64</sup> Council of Mortgage Lenders, *Housing Finance at a Glance*, September 2012, 1.

<sup>65</sup> D. Rae & P. Van den Noord., 'Ireland's Housing Boom: What has Driven it and Have Prices Overshot?" (OCED: OECD Publishing, Economics Department Working Papers, 2006) para. 492. 'Mortgage Market Profile - Data Series 2005-2012' (Dublin, IBF/PwC, 2012); J.Kelly and A. Menton, "Residential Mortgages: Borrowing for Investment", *Quarterly Bulletin, CBFSAI*, (2007), No. 2, pp. 129-145.

<sup>66</sup> 'Evidence Review of the Private Rented Sector in Scotland' (Edinburgh: Scottish Government, 2012), para. 2.1.

quarter of 2013.<sup>67</sup> The fall in the number of mortgage possession claims since 2008 coincides with lower interest rates, an approach from lenders in managing consumers in financial difficulties and other interventions from the government, such as the Mortgage Rescue Scheme. Although Ireland has the highest level of arrears and might be expressed to have a comparatively high number of repossession however this is not the case. Instead, many non-performing mortgages have been restructured by private agreement between lender and borrower.<sup>68</sup> This is largely due to combination of legal and policy measures. In the first place the Land and Conveyancing Law Reform Act 2009 played a significant role in reducing the amount of repossession in Ireland. By inadvertently repealing certain legislation the Act made it more difficult for a lender to secure a court order for possession. Further mortgage instruments were introduced including the Mortgage Arrears Resolution Process which imposed standards of behaviour on lenders and borrowers further encumbering the ability of the lender to take possession.

In Scotland the Home Owner and Debtor Protection (Scotland) Act 2010 reformed the law relating to repossession in Scotland. Those at risk of repossession are protected because prior to going to court the lender must comply with certain Pre-action Requirements including engaging with the borrower and maintaining records of actions in this regard. The Scottish Government provides additional supports for homeowners who have mortgage difficulties; the Mortgage Rights (Scotland) Act 2001 provides statutory protections for homeowners who are experiencing difficulty in meeting their mortgage obligation.<sup>69</sup> The debtor may apply to the court for a stay of repossession proceedings of their home in order to repay arrears or to allow them secure alternative accommodation.<sup>70</sup> There are also distinctive Scottish mortgage 'rescue' schemes, in particular the Home Owners' Support Fund which provides support to struggling home owners through the Mortgage to Rent and Mortgage to Shared Equity schemes.<sup>71</sup>

A raft of new housing or housing-related legislation has been introduced in response to the crisis across Britain and Ireland. The Help to Buy scheme across Britain has been focused on reinvigorating the property market but the general drift of the main pieces of legislation has been directed at protecting homeowners struggling to pay their mortgage and the reform of welfare supports. The Personal Insolvency Act 2012 introduced three new debt-resolution mechanisms and has reformed the law relating to bankruptcy.<sup>72</sup> Across both Islands the growth in the numbers living in the private rented sector has been accompanied by a dramatic increase in the number of households accessing welfare supports to meet their accommodation costs. In Ireland the Housing Assistance Payment has reformed income support for private tenants experiencing difficulty paying

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<sup>67</sup> 'Mortgage and Landlord Possession Statistics' (London: Office of National Statistics, 2013).

<sup>68</sup> *Mortgage Arrears and Repossessions Statistics*: Q3 2013, p 8; at end September 2013 there 21,607 BTL mortgage accounts that were categorised as having been 'restructured'.

<sup>69</sup> Further protections are provided under the Home Owner and Debtor Protection (Scotland) Act 2010.

<sup>70</sup> Mortgage Rights (Scotland) Act 2001. This part of the Mortgage Rights (Scotland) Act 2010 has been repealed by the Home Owner and Debtor Protection (Scotland) Act 2010.

<sup>71</sup> 'Evaluation of the National Mortgage to Rent Scheme' (Edinburgh: Scottish Government Social Research, Scottish Government, 2008), pp. 2-3

<sup>72</sup> Referred to as the Keane report see *Inter-Departmental Mortgage Arrears Working Group* (Dublin: Stationery Office, 2011).

rent and allows for tenants in need of long term income support to take on employment while retaining a portion of their income support. Across Britain recent changes have been made to Housing Benefit, with respect to both applicants' eligibility and the maximum amount that can be made. Specific benefits are being replaced by a Universal Credit, which will draw together existing means-tested benefits and will include a housing costs element.<sup>73</sup>

Housing was at the root of the crisis across both islands and it has been at the centre of the various policy attempts to remediate the unprecedented challenges thrown up during the best part of the last ten years. In responding to the crisis States were confronted with multifaceted legal, economic and social challenges affecting all tenure groups, many of which have not been resolved. For instance, the numbers on housing waiting lists or accessing welfare supports to help pay the costs of accommodation indicate there is an ongoing affordability crisis across both Islands. The sustained neglect of the public rented sector and failure to reinvest proceeds raised from the sale of public housing in new stock has resulted in an inadequate supply of housing across Britain and Ireland. Measures aimed at addressing this matter, such as the introduction of hybrid public private leasing arrangements in Ireland, have so far failed to make significant inroads and demand for affordable housing far exceeds supply. There are also substantial challenges in the private rented sector where demand exceeds supply across both Islands. The legal regulatory system in Britain allows upward pressure on rents and a whole generation have to move all of the time or have to move into house sharing arrangements with friends or family. While in the owner occupier sector the steep increases in house prices across England continue to place homeownership out of the reach of whole swathes of the population while in Ireland the numbers in arrears remain at unsustainable levels. There are signs that growth is returning to the housing markets however given the difficulties still present in the national housing systems some of which are outlined above it would be misleading to conclude that these factors signal that the crisis has been overcome.

### **1.3. Urban and social aspects of the housing situation in comparison**

#### **1.3.1. Urban aspects in comparative perspective**

In England and Wales the majority of homes were located in suburban areas (62%) and other urban centres (17%). Only a small proportion of homes were located in city centres (3.4%) and hamlets or isolated rural areas (2.9%).<sup>74</sup> With regard to dwelling type and location this is much as one would expect, detached houses in the suburbs and flats and high rise in inner city areas.<sup>75</sup> Social housing (30%) tends to be more common than private housing (20%) in city centres and other urban centres. This trend is also apparent in Scotland where private renting is currently experiencing a renaissance of sorts. From 2001 to 2012 the private rented sector in Scotland has almost doubled in size, growing from 6% to under 12% during this period. A large part of this growth

<sup>73</sup> Welfare Reform Act 2012 s. 11; see below, 3.6, pp 80-82.

<sup>74</sup> English Housing Survey: Homes 2011 (London: Department of Communities and Local Government, 2013) ch. 1.

<sup>75</sup> English Housing Survey: Homes 2011 (London: Department of Communities and Local Government, 2013) ch. 2.

derives from increases in the size of the private rented sector in large urban areas.<sup>76</sup> In contrast to Scotland and England only about two thirds of the Irish population live in urban areas while one third live in rural areas. Rates of homeownership are higher in rural areas (84%) than urban areas (62%) however with regard to renting the converse is the case with renting in urban areas (37%) almost twice as common as renting in rural areas (17%).

**Gentrification** is the process by which minority groups are forced out of the mainstream housing, usually by cultural and socio-economic forces. Much of the inner parts of the big cities in England and Wales and Scotland, particularly London, Liverpool, Newcastle, Manchester, Glasgow are undergoing gentrification of some sort.<sup>77</sup> Gentrification on its own would not be unlawful, but in the context of administering government policy the circumstance in which gentrification occurs might give basis for judicial interference.<sup>78</sup>

**Ghettoization** is associated with high density council housing, particularly in cities such as London, Glasgow and Birmingham, in that, by definition, those people who qualify for social housing are those in greatest need (and often vulnerable in multiple respects). Accommodation in high-rise blocks of flats is often constructed to poor standards and poorly maintained contributed to the problem. Historically these problems have been particularly acute in Scottish cities and this remains the case in certain areas.<sup>79</sup> Ethnic minorities are represented disproportionately in all rental sectors across both islands. In England 16 per cent of tenants are from minorities, as against 10% of the general population and 8 per cent of owner occupiers.<sup>80</sup> In Ireland the local authority rented sector underwent dramatic changes in the last fifty years. For much of this period the size of the sector decreased consistently due to the introduction of the tenant purchase scheme in 1966. As a result of this scheme the number of higher income households living in local authority housing reduced consistently and local authority housing became increasingly residualised and segregated.<sup>81</sup> Local authority households are among the poorest in Irish society and are disproportionately affected by unemployment, with this sector experiencing higher levels of unemployment.<sup>82</sup>

**Squatting** occurs across both Islands however it is only in Ireland, England and Wales that the legal system allows for a squatter to gain title to the land. The common law departs from civilian systems completely in its approach to adverse possession. It is no

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<sup>76</sup> 'Note on Tenure Change in Glasgow City' (Glasgow: Glasgow City Council, 2012), p. 1.

<sup>77</sup> Butler and Lees, described this as "super-gentrification", different from the traditional gentrification because of the significantly higher income bracket involved in this – 'Super-gentrification in Barnsbury, London: globalization and gentrifying global elites at the neighbourhood level' at <[www.kcl.ac.uk/sspp/departments/geography/people/academic/butler/SupergentrificationinBarnsbury.pdf](http://www.kcl.ac.uk/sspp/departments/geography/people/academic/butler/SupergentrificationinBarnsbury.pdf)>, 2 January 2013.

<sup>78</sup> *Porter v. Magil* [2001] UKHL 67.

<sup>79</sup> 'Scottish Household Survey 2012' (Edinburgh: Scottish Government, 2013), p. 18. For local examples see 'The Impact of Local Antisocial Behaviour Strategies at the Neighbourhood Level' (Edinburgh: Scottish Government, 2007), pp 94.

<sup>80</sup> 'English Housing Survey Headline Report 2012-13' (London: Department for Communities and Local Government, 2014) paras 1.17-1.19.

<sup>81</sup> On the residualisation of local authority housing see: National Economic and Social Council *Housing in Ireland, Background Analysis, Paper 6: The Provisions of Social and Affordable Housing* (Dublin: National Economic and Social Council, 2004), Box 6.3.

<sup>82</sup> *Ibid.*

use here thinking of *usus capio* and the requirement of non-forcible possession in good faith, a process which draws title from the person dispossessed and transfers it, at length, to the possessor. In this respect the common law jurisdictions of England and Ireland stand in contrast to the hybrid common law – civil law jurisdiction of Scotland when it comes to adverse possession. In Scots law, unlike English and Irish law, title of an owner may not be lost by limitation rather an interest in land may be acquired through the legal process of prescription as set out in the Prescription and Limitation (Scotland) Act 1973. In order for a person to acquire an interest in land they must fulfil the three criteria set out in the first section of that Act. That is, the interest at issue must be possessed for 10 years, that possession must be open, peaceable and without judicial interruption and must be founded on and follow the recording or registration of an ex facie valid title to the land in question.<sup>83</sup> For most of the last century the systems governing the acquisition of title to land based on adverse possession were broadly the same in England and Wales and Ireland in that 12 years of adverse possession was required before a claim to the title of registered or unregistered land could be successful however English law underwent a major change when the Land Registration Act 2002 effectively curtailed the acquisition of title through adverse possession when, as is usual, title is registered.<sup>84</sup> The long standing basis of English law that squatting was only a civil trespass has recently been reversed. Squatting in residential buildings was criminalized by the (inelegantly titled) Legal Aid, Sentencing and Punishment of Offenders Act 2012.<sup>85</sup> It would appear that this provision is mainly a policing measure and has not resulted in the abolition of adverse possession.<sup>86</sup> In Ireland trespass generally remains a civil offence however this is not the case with respect to public land since the Housing Act 2002,<sup>87</sup> in amending the Criminal Justice (Public Order) Act, 1994, introduced criminal liability for trespass on public land in certain circumstances.<sup>88</sup> While of general scope this provision restricts unauthorised encampments of members of the Traveller Community on public land and as a result the provision has drawn criticism from a number of sources.<sup>89</sup> It is also submitted that this provision is mainly a policing measure and has not resulted in the abolition of adverse possession.

### 1.3.2. Social aspects

Public opinions on various tenures are predominantly fashioned by the population spread of classes of people in the different tenures. This is often a reflection of the

<sup>83</sup> T. Guthrie *Scottish Property Law* (Edinburgh: Bloomsbury, 2<sup>nd</sup>edn, 2005) chapter 3; D. J. Cusine 'Adverse Possession of Land in Scots and English Law', *International and Comparative Law Quarterly*, (1996), 45(3) pp. 667; F. M. McCarthy (2008) Positive prescription in the human rights era, *Scots Law Times* 15.

<sup>84</sup> Land Registration Act 2002 s. 97; N. Cobb & L. Fox, 'Living Outside the System: The (Im)morality of Urban Squatting after the Land Registration Act 2002', *Legal Studies* 27(2) (2007): 236-260.

<sup>85</sup> Although the Act does not use the word 'squatter', its purpose is betrayed by the title of section 144 'Offence of squatting in a residential building'.

<sup>86</sup> *Best v Chief Land Registry* [2014] EWHC 1370.

<sup>87</sup> Criminal Justice (Public Order) Act 1994 s. 19C, inserted by Housing (Miscellaneous Provisions) (No. 2) Act 2002 s. 24.

<sup>88</sup> Criminal Justice (Public Order) Act, 1994 s. 19C(1)(b).

<sup>89</sup> *Progressing the Provision of Accommodation to Facilitate Nomadism*, (Dublin: Irish Traveller Movement, 2007) p. 4; P. Watt & K. Charles, *Housing Conditions of Roma and Travellers*, (Dublin, European Union Agency for Fundamental Rights , 2009) p. 18.

economic class or social status, as perceived from the great majority of tenure occupiers. Some of these are also researched findings as the National Wellbeing Survey put it - an individual's housing tenure and the level of their overall satisfaction with life are linked.<sup>90</sup> A measure of life satisfaction across the three major tenures from a survey conducted by the Office of National Statistics shows that there are more owners who have high to medium levels of life satisfaction than people on rental. Stigmatization of social estates and their residents, particularly tenants of local authorities, is widespread, one example being during the outbreak of riots in London in August 2011;<sup>91</sup> responses in the media and in Parliament were generally linked to the areas affected by the riots and the social class of occupants of the social properties in the areas.<sup>92</sup> In Scotland a 2007 study found that external perceptions of social housing were largely negative. The sector was viewed as housing of need rather than choice, for benefit claimants and low income families. Furthermore those with previous experience of living in social housing were found to hold the belief that the sector had declined over time, with social and structural changes resulting in greater concentrations of social deprivation in this tenure. In addition, social landlords were viewed as bureaucratic and unhelpful, while paying rent was seen to be a waste, particularly when mortgage rates could be similar or even lower.<sup>93</sup> Private tenants are often those who cannot assess social security because of their fairly stable financial circumstances or ineligibility owing to connection with the country – like immigration status. On the property spectrum they are those in the middle – not wealthy enough to afford a mortgage; and no cogent circumstances meriting social housing. Consequently, decrease in the number of owner occupiers results in increase in the number of private rented households.<sup>94</sup> Most tenants in the private rented sector (61%) would buy if they could, though many expect to have to wait many years to be able to afford to do so. Only 23% of public/social sector tenants expect to buy eventually, many of those presumably anticipating taking advantage of the Right to Buy.<sup>95</sup>

## 2. Housing policies and related policies in comparison

### 2.1. Introduction

No single policy stance informs housing policies across England and Wales, Scotland and Ireland today.<sup>96</sup> However, there is a broad consensus on key components, such as:

<sup>90</sup> A. Self, J. Thomas & C. Randall, 'Measuring National Well-being: Life in the UK, 2012', (London, Office for National Statistics 2012), 50.

<sup>91</sup> Like Manchester, Birmingham and Liverpool.

<sup>92</sup> The broken society narrative emerged from the Prime Minister, Mr David Cameron: certain urban places were represented as problematic, with caution applied in not offsetting the balance of discrimination in any suggestion.

<sup>93</sup> S. Clegg, A. Coulter, G. Edwards & V. Strachan, '*Housing Aspirations*' (Edinburgh: Scottish Government, 2007), para 4.28.

<sup>94</sup> For example, the number of owner occupied households has continued to decrease from the peak of 14.79 million in 2005, to 14.45 million in 2010-11. In contrast, there continued to be a rise during the same period of private rented households, which is now at 3.62 million compared to 2.45 million in 2005. See Annual Report on England's Households, 2010-11, 11 December 2012, [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/6739/2173283.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6739/2173283.pdf).

<sup>95</sup> English Housing Survey Headline Report 2012-13' (London: Department for Communities and Local Government, 2014) paras 1.67-1.69.

<sup>96</sup> N. Barr, *The Economics of the Welfare State*, (California: Stanford University Press, 1993); V. George & P. Wilding, *Welfare and Ideology*, (Hemel Hempstead: Harvester Wheatsheaf, 1994).

accommodation should be made available to the homeless; public/social sector accommodation should be subsidised so as to be available to those unable to afford accommodation provided in the private market; public/social accommodation should be low cost; and housing supports should be paid to those unable to afford accommodation.

The constitutional framework of housing varies from State to State. In the first place the United Kingdom does not have a written constitution in this sense however that is not to say that housing interests have not been protected in law. Likewise although the Irish Constitution does not contain a fundamental right to housing, there are various housing interests protected under the law.<sup>97</sup> In particular various rights exist within Britain and Ireland in terms of the allocation of social housing and the duty to house those threatened with or experiencing homelessness. In practice the right to housing introduced across the UK in 1977 has been extended under the auspices for the Scottish Executive in the post devolution era. In Scotland from the end of 2012<sup>98</sup> all persons assessed as unintentionally homeless are entitled to settled accommodation as a legal right. In Ireland the Housing Act 1966 and the Housing Act 1988 come closest to providing statutory rights to housing. Under the Housing Act 1966 local authorities are under a duty to make inspections and to assess adequacy of supply and condition of housing in their operational area. The Housing Act 1988 did not place an obligation on local authorities or State agencies to provide accommodation and much provision is undertaken by voluntary and charitable bodies.<sup>99</sup> This is in stark contrast to the approach of the UK. Across Great Britain a local authority is under a duty to provide accommodation when an applicant is (a) homeless, (b) not intentionally homeless, and (c) with a priority need for accommodation. The duty is to 'secure that accommodation becomes available for his occupation', first on a temporary basis and then as soon as possible afterwards permanent accommodation.<sup>100</sup> Lesser duties apply to those threatened with homelessness or becoming homeless intentionally, but in all cases a careful enquiry must be carried out into the circumstances of a person presenting themselves as homeless. This legislation is structured in such a way as to create justiciable rights for homeless people since duties are imposed throughout on local authorities, who may require social landlords to cooperate by making accommodation available to a person qualifying as homeless. Review procedures are laid down,<sup>101</sup> but the ultimate decisions remain susceptible to judicial review and to human rights arguments.<sup>102</sup> This legislation engenders innumerable reported cases each month about issues such as the suitability of the accommodation offered.<sup>103</sup>

<sup>97</sup> J.M. Kelly, *The Irish Constitution* (Dublin: Tottel Publishing, 4<sup>th</sup> edn, 2006); G. Hogan, *Origins of the Irish Constitution 1928-41* (Dublin: Royal Irish Academy, 2012); P. Kenna, *Housing Law Rights and Policy*, ch. 8.

<sup>98</sup> Homelessness (Abolition of Priority Need Test) (Scotland) Order 2012.

<sup>99</sup> Kenna, *Housing Law Rights and Policy*, p. 262-264.

<sup>100</sup> Housing Act 1985 s. 65.

<sup>101</sup> Housing Act 1985 s. 64.

<sup>102</sup> It may help readers to observe that a public law challenge asking for judicial review in the name of the Queen (*Regina = R.*) by X against the activity of public body Y was named until about 2000 as *R. v. Y ex parte X* and since then as *R. (X) v. Y*; at about the same time citations neutral of place of publication were introduced based on the year of decision and the court; those important for this report are: UKHL – the Judicial Committee of the House of Lords; UKSC – the Supreme Court which took over from the House of

In addition to domestic legislation both the United Kingdom and Ireland have acceded to a number of international human rights measures with housing rights, notably Article 16 of the European Social Charter 1961, but this is not justiciable in the domestic courts. By contrast the Human Rights Act 1998 (UK) Human Rights Act 2003 (Ireland) incorporated the provisions of the European Convention on Human Rights into domestic law. Actions of all public bodies must be compatible with the European Convention. This does not expressly confer a right to housing, but housing rights can be defended indirectly via the protection of property expressed in Article 1 Protocol 1, the trial rights in Article 6, and the respect for a person's home required by Article 8. This has affected most litigation affecting housing rights.<sup>104</sup> In the local laws of England and Wales, Scotland and Ireland the provisions of human rights laws are applied in measuring the legality of conducts during possession proceedings.<sup>105</sup> Possession proceedings must respect the human rights of those being evicted.

## **2.2. Policies and actors**

### **A. The United Kingdom and Republic of Ireland, devolved authority to Scotland and Wales**

The United Kingdom was made up of England, Wales, Scotland and Ireland from the Act of Union 1800 until the Government of Ireland Act 1922. From the point of political separation onwards Ireland's housing law became increasingly distinct. The United Kingdom and the Republic of Ireland both joined the European Economic Community in 1973. So too did both accede to the European Convention on Human Rights (ECHR), the United Kingdom acceded in 1950 and Ireland acceded in 1953; the provisions of the ECHR were incorporated directly into domestic law by the Human Rights Act 1998 in the UK and the Human Rights Act 2003 in Ireland. Responsibility for effecting Westminster policy has been devolved to Scottish authorities for over one hundred years. But much more recently government powers have been devolved to Wales in 1998.<sup>106</sup> In the context of the current comparison, the vital point is that housing is one of the devolved areas in which the Welsh Assembly and Scottish Parliament has legislative competence, but finance is not devolved.<sup>107</sup> Thus legislative authority in relation to housing in England resides in the Westminster Parliament, in Ireland resides in Dail Eireann, in Scotland resides in the Scottish Parliament and in Wales in the Welsh Assembly.

### **B. Local Government in housing**

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Lords in 2009; EWCA Civ – the Civil Division of the Court of Appeal; EWHC – the High Court; EWUT – the Upper Tribunal.

<sup>103</sup> UK wide legislation dating from Housing (Homeless Persons) Act 1977 was re-enacted as Part 6 of the Housing Act 1996, Part III, ss. 58-78; as amended by the Homelessness Act 2002 and the Localism Act 2011. The law in Wales is beginning to diverge from that in England see Housing (Wales) Bill 2013 Part 2, cl 36-83.

<sup>104</sup> *Donegan & Gallagher v. Dublin City Council* [2012] IESC 18.

<sup>105</sup> *R. (JL) v. Secretary of State for Defence* [2013] EWCA Civ 449.

<sup>106</sup> Government of Wales Act 1998.

<sup>107</sup> R. Deacon, *Devolution in Britain Today* (Manchester University Press, 2006). The Scotland Act 2012 has set in motion the devolution of certain taxation powers from Westminster to the Scottish Parliament.

Across Britain and Ireland local authorities play a crucial role in housing, primarily at the lower tier of district, borough or city councils; in parts of the country with a single tier of local government housing functions reside in these ‘unitary’ authorities.<sup>108</sup> Local authorities have a strategic role as well as a more direct role as landlord when providing housing to tenants. In England and Wales the responsibility of the local authority has increased under the Localism Act which will now allow local authorities to do more in creating wealth and diversify the opportunities it can explore to meet its housing targets.<sup>109</sup>

### C. Regulation of local authority housing

For a public tenant (Local Authority) faced with a tenancy related issue such as carrying out repairs etc. the first port of call is the complaint mechanism of the local authority, failing this the tenant can contact the relevant body with responsibility for regulating public housing. In England and Wales until the single housing Ombudsman provisions are brought into force, council tenants must continue to refer complaints to the Local Government Ombudsman, and tenants of other registered providers to the Housing Ombudsman. In Ireland this function is carried out by the Office of the Ombudsman. In Scotland the Scottish Public Services Ombudsman is the office of last resort, after the Scottish Housing Regulator, for complaints concerning public services in Scotland.

### D. Control of Registered Social Landlords/Registered providers of social housing/the voluntary and co-operative housing sector

Across Britain and Ireland there is considerable disparity in the regulation of non-public social housing. In England regulation of registered providers of social housing is the preserve of the Committee of the Homes and Community Agency.<sup>110</sup> The regulator has powers to set standards for registered providers of housing as to the nature, extent and quality of accommodation, facilities or services provided by them in connection with social housing, and the methods of assisting tenants to exchange tenancies'.<sup>111</sup> Registered providers must comply with specified rules about allocating accommodation, terms of tenancies, etc.<sup>112</sup> The Welsh Ministers regulate housing associations in Wales.<sup>113</sup> In Scotland the Scottish Housing Regulator, established on 1 April 2011 under the Housing (Scotland) Act 2010, is the independent regulator of Registered Social Landlords and local authority housing services in Scotland.<sup>114</sup> The Regulator is directly accountable to the Scottish Executive but is an independent non-ministerial department.<sup>115</sup> The Scottish Ministers formulate and implement housing policy,

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<sup>108</sup> Localism Act 2011.

<sup>109</sup> Localism Act 2011 s. 1. For Ireland local authorities are governed by the Local Government Acts, the most recent of which was the Local Government Act 2001. The Housing Acts govern the housing functions of local authority's in Ireland.

<sup>110</sup> Localism Act 2011 ss.178-179, sch. 17.

<sup>111</sup> Housing and Regeneration Act 2008 ss 193 and 194 as amended by Localism Act 2011 s. 176.

<sup>112</sup> Housing Act 1996 s. 218A.

<sup>113</sup> ‘Regulatory Framework for Housing Association Registered in Wales’, (Welsh Government, 2011).

<sup>114</sup> ‘Framework Agreement between Scottish Ministers and the Scottish Housing Regulator’ (Edinburgh, Scottish Housing Regulator, 2012).

<sup>115</sup> The Regulator replaced a previous agency: ‘Scottish Housing Regulator – About’ (Edinburgh, Scottish Housing Regulator, 2012).

including social housing.<sup>116</sup> Ministers appoint the Regulator and supervise some functions: The Regulator maintains a register of all Registered Social Landlords in Scotland, and assesses and reports on the activities of social landlords in carrying out their housing services, their financial health and standards of governance. In Ireland voluntary and co-operative housing bodies are registered under section 6 of the Housing Act 1992. In 2013 the Voluntary Regulation Code was launched which provides a framework within which statutory regulation of the voluntary or co-operative housing body sector will be developed.

## **E. Regulation of private rentals**

Regulation of private rentals differs across Britain and Ireland. Across Scotland, Wales and Ireland there is a clear trend of developing purpose built regulatory bodies in stark contrast to the approach in England where there is no overarching statutory regulation of private sector letting or managing agents in England. In some respects Ireland could be considered to be leading the charge. The RTA 2004 has substantially reformed the law regulating the relationship of landlord and tenant with respect to private residential tenancies. In particular, the Act established the Private Residential Tenancies Board which was charged with primary responsibility for regulating the residential tenancies sector i.e. registration of landlords, dispute resolution etc. Since devolution regulation of the private rental market in Scotland has been substantially overhauled. These reforms included the institution of a purpose built regulatory body, the Private Rented Housing Panel in 2007. The Panel is responsible for upholding the Repairing Standard, introduced in the Housing (Scotland) Act 2006, which is aimed at improving physical conditions in private rented housing. With regard to rent, the Panel is responsible for assessing rents in order to determine whether the rent rate is reasonably in line with prevailing market forces.<sup>117</sup> The Welsh Assembly have signalled a clear intention to implement heightened regulation of the private rented sector in line with the Scottish approach.<sup>118</sup>

### **2.2.2. Housing policies**

Across Britain and Ireland the greatest focus has been on extending owner-occupation through the various Low Cost Home Ownership schemes. The focus in the social housing sector has been to ensure that it is used optimally, for example through the introduction of the flexible tenancy. At the other end of the homeowners' spectrum, the introduction of the Mortgage Rescue Scheme<sup>119</sup> allows homeowners facing repossession to sell all or part of their property to a housing association. A new mortgage guarantee scheme to help people take the first step onto or to move up the property ladder was rolled out in the spring of 2013.<sup>120</sup> Government efforts to balance

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<sup>116</sup> 'Framework Agreement between Scottish Ministers and the Scottish Housing Regulator' (Edinburgh, Scottish Housing Regulator, 2012).

<sup>117</sup> 'Private Rented Housing Panel – Press Release' (Edinburgh, Scottish Government, 2011).

<sup>118</sup> <http://wales.gov.uk/topics/housing-and-regeneration/legislation/housingbill/specific-elements/private-rented-housing/?lang=en>

<sup>119</sup> Introduced by the Welsh Assembly Government as an emergency measure during the economic downturn. £14.1 million has been spent on the scheme to date and it has been successful in helping to prevent homelessness through repossession. 'Written – Mortgage Rescue Scheme'

<http://www.wales.gov.uk/about/cabinet/cabinetstatements/2010/100610mrs/?lang=en>, 17 January 2013.

<sup>120</sup> 'Mortgage Guarantee Boost for Potential House Buyers and Builders'

demand and supply in the housing market seem to revolve on three areas of policy: the house building industry, financial incentives for private sector development and the supply of affordable/social housing. A distinctive feature of the current building slump is the tightening of credit availability and the terms on which it is made available to both building companies and house purchasers.<sup>121</sup> The New Home Bonus has been devised to provide local authorities with an incentive to permit new building by matching the council tax on each additional unit for a fixed period of six years; a larger bonus is provided for affordable homes. The government's stated intention is to increase supply, but with the abolition of targets.<sup>122</sup> Already there is considerable evidence that the abolition of regional targets has led to reductions in the number of homes planned by local authorities.<sup>123</sup>

After devolution Wales began operating a housing policy distinct from that generated at Westminster, resulting in notable developments and a distinctive approach.<sup>124</sup> The Welsh policy has been channelled to meet housing need through the improvement of access to housing and increase in the supply of affordable housing, seeking to ensure the availability of modern housing.<sup>125</sup> The vision for housing in Wales touches on the various tenures but social housing seems to get the greatest of attention. In a bid to meet the Welsh Housing Quality Standard by local authorities stock transfer to housing associations and co-operatives continues to be promoted by the Assembly.

Scottish national housing policy is directed towards developing "a housing system which provides an affordable home for all."<sup>126</sup> Current Government housing policy does not express a preference for a particular tenure but rather adopts a tenure neutral approach,<sup>127</sup> the key policy being to increase the supply of housing across all tenures. Indeed, the policy takes account of the growing numbers of people whose housing needs are not met by the traditional tenures and certain housing policies are directed towards expanding mid-range housing products, including shared equity and intermediate renting.<sup>128</sup> While there are still major supports available to homeownership the overall housing policy of the Scottish Government is not as generous in its support compared with the support directed to that tenure south of the border. Amongst the policy changes made in Ireland in the wake of the economic crisis perhaps the most

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[www.wales.gov.uk/newsroom/housingandcommunity/2012/121113ms/?lang=en](http://www.wales.gov.uk/newsroom/housingandcommunity/2012/121113ms/?lang=en), 17 January 2013.

<sup>121</sup> M. Ball, *The Housebuilding Industry: Promoting Recovery in Housing Supply*, (London: Communities and Local Government, 2010).

<sup>122</sup> *The Coalition: our programme for Government*, (London: Cabinet Office, May 2010), p. 11.

<sup>123</sup> Research for the National Housing Federation suggests that plans for some 160,000 homes have been dropped and this was expected to rise to 280,000–300,000 by October 2011. Such examples may be the result of uncertainty – a gap in planning has been identified by the Communities and Local Government Committee. NHF (National Housing Federation) 'Government policies killing off 1300 planned new homes every day', *News Release*, 4 October 2010.

<sup>124</sup> Government of Wales Act 2006 sch. 7.

<sup>125</sup> *One Wales: A Progressive Agenda for the Government of Wales*, (Welsh Assembly Government (WAG), June 2007). *The Welsh Housing Quality Standard, Revised Guidance for Social Landlords on Interpretation and Achievement of the Welsh Housing Quality Standard*, (Welsh Assembly Government, July 2008).

<sup>126</sup> 'Homes Fit for the 21st Century - The Scottish Government's Strategy and Action Plan for Housing in the Next Decade: 2011-2020' (Edinburgh: Scottish Government, 2011), p. 2.

<sup>127</sup> *Ibid.*, p. 33.

<sup>128</sup> *ibid.*, p. 7.

notable change has been a shift in favour of tenure neutrality. Firstly, housing policy with regard to owner occupation has been overhauled in recent years with the Government's *Housing Policy Statement* (2011) laying bare the role which previous housing policy which promoted homeownership has had in contributing to the economic crises.<sup>129</sup> The policy document promotes tenure neutrality. A more equitable balance between the tenures had been encouraged by changes to taxation, subsidisation and regulation. Amongst the major policy changes, all affordable housing schemes have been stood down, while tenant purchase has been restrained. In addition, the local property tax has been introduced on owner occupiers.

Secondly, the introduction of a deposit protection scheme has been proposed. Government housing policy and legislation continues to regard the private rented sector as a key means by which to provide housing to those experiencing housing need. Thirdly, Government policy with regard to local authority housing has been reformatting in the Housing (Miscellaneous Provisions) Act 2009 from the traditional provision of housing to the provision of social housing supports. This shift is readily identifiable from the emphasis placed in the 2009 Act on the use of public private leasing arrangements to provide housing support to those in need. With regard to existing local authority housing, Government policy has had to respond to the residualisation of the sector arising from the tenant purchase schemes and the persistent incentivisation of owner occupation. This has led to a broadening of the housing management function of local authorities. Fourthly, Government policy with regard to the voluntary and co-operative housing sector has developed substantially in recent years. In particular the Housing policy statement 2011 places particular emphasis on the role which voluntary and co-operative housing associations may play in meeting tradition social housing need. Indeed, a voluntary regulatory code has been introduced ahead of a proposed statutory code.

In Ireland special housing policies have been developed in response to the housing needs of Irish Traveller community who have faced considerable disadvantage and discrimination since the foundation of the State. The first statutory reference to the Irish Traveller Community was in the Housing Act 1988 and since then housing policy with regard to Irish Travellers has developed significantly, leading in particular to the Housing (Traveller Accommodation) Act 1998. Travellers within the Act are those belonging to the class of persons who traditionally pursue or have pursued a nomadic way of life. The Act required local authorities to carry out a process of consultation, and then to prepare and adopt accommodation programmes to meet the existing and projected accommodation needs of Travellers in their areas. These plans form the basis of the Government response to the housing needs of the Traveller community.

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<sup>129</sup> In detailing the role which housing has played during the economic crises, the Statement sets out that 'over-stimulation of the housing market is accepted as a key causal factor in the scale of the economic downturn': Department of the Environment, *Housing Policy Statement* (2011) (Dublin: Stationery Office, 2011), p. 1.

### 2.3. Urban policies

The United Kingdom and Ireland have systems of town and country planning, which makes no formal differentiation of urban areas or policies for such areas. Population growth in urban areas exceeds that in rural areas and this has resulted in increased pressure on housing. It is reckoned that approximately 3 million new homes are needed by 2030 in the UK to meet current need while approximately 20,000 new houses are needed each year in Scotland and Ireland<sup>130</sup>. Major factors in demand are increased birth rates and greater life expectancy and movement to the cities. There has been a shortfall in the rate of house building and the general supply of housing, exacerbated by the privatization of much of the public housing stock.

Planning policy across the UK and Ireland has also sought to create tenure mix and at the same time boost affordable housing supply through facilitating homeownership. In Ireland the most significant piece of legislation concerning pepper potting and tenure mix is the Planning and Development Act 2000 which, in Part V, provides a scheme designed to encouraging planning of housing in a way that avoids undue social segregation.<sup>131</sup> The planning authority, *An Bord Pleanála*, may impose conditions on the grant of planning permission<sup>132</sup> that the applicant enters into an agreement with the planning authority for development of the land so as to promote social inclusion.<sup>133</sup> A 2012 Government review concluded that Part V 'delivered below its potential and only began to make a real contribution around the time the property market crash commenced.'<sup>134</sup> In 2011 Government stopped all affordable housing schemes. Part of the reason for the low effectiveness of Part V agreements is a result of the removal of the requirement to include a proportion of social housing in housing developers.<sup>135</sup>

Mixed tenure has become a predominant development and regeneration strategy over the past 15 years. In Ireland the incremental Purchase Scheme is an example of a mixed tenure housing policy approach and by its design and operation the scheme encourages a tenure mix.<sup>136</sup> This scheme allows persons who qualify for social housing

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<sup>130</sup> "Projected Population Change and Housing Demand: A County Level Analysis" (Dublin: Economic and Social Research Institute, 2014). 'Evidence Review of the Private Rented Sector in Scotland' (Edinburgh: Communities Analytical Services, Scottish Government, 2012), p. 6

<sup>131</sup> Three key objectives were: to promote more socially integrated communities, to ensure adequate housing supply to meet the demand from all sectors of the market; and to accommodate those unable to purchase a home due to affordability constraints in the face of rising house prices. See Brady Shipman Martin, *Review of Part V of the Planning and Development Act 2000* (Dublin, Housing Agency, 2012), p. ii.

<sup>132</sup> *Ibid*, s. 96(2).

<sup>133</sup> *Ibid*, s. 95(1)(b).

<sup>134</sup> 'Part V delivered 15,114 units in the period 2002-2011 (62.1% affordable and 37.9% social). This total represented just 3.8% of all dwellings excluding one-offs delivered over the period 2002-2011 which was a relatively small contribution. However over the entire period 2002-2011 it delivered below its potential and only began to make a real contribution around the time the property market crash commenced. An estimated 44,654 social housing units were constructed in the period 2002-2011 of which Part V contributed around 13% (5,721 units),' Brady Shipman Martin, *Review of Part V of the Planning and Development Act 2000* p. 26.

<sup>135</sup> Gore-Grimes, 'Change of Plan', *Law Society Gazette*, Jan/Feb 2003, pp. 18-23. The Planning and Development Act (Amendment) 2002 facilitated developers making a compensation payment in lieu of transfers of sites and thereby reduced the promotion of social integration.

<sup>136</sup> See section 1.4 above for an overview of intermediate tenure in Ireland.

to buy designated newly built houses from a local authority or an approved housing body at a discount.<sup>137</sup>

Since devolution the Scottish Government has an active mixed tenure policy.<sup>138</sup> Under the 'Planning Policy on Affordable Housing' local authorities can require developers to ensure that a proportion of new housing developments are 'affordable' and sets a benchmark figure of 25 per cent to apply in most cases.<sup>139</sup> Affordable is defined broadly to include housing build without subsidy such as entry level housing for sale, as long as it is affordable to groups identified in a local housing needs assessment. This mechanism therefore sets out a process both for the subsidy of affordable housing through the market, and also for ensuring that new developments include a mix of affordable and market housing, which may well include a tenure mix. Scottish housing policy on mixed communities has been criticised by McIntyre and McKee who have argued that policies of mixed communities in Scotland have acted to promote home ownership to marginal groups for which home ownership may not be economically viable.<sup>140</sup>

## 2.4. Energy policies

Across Britain and Ireland energy policies form part of the national housing policy and are embedded into various housing regulatory systems. In the first place energy policies are ingrained in the national building control system in Britain and Ireland.<sup>141</sup> This system provides for a scheme of regulation to control matters relating to the construction of buildings, including standards, workmanship, design, etc. Certain technical specifications include harmonised European Standards.<sup>142</sup> Energy policies are embedded into national housing standards. The Building Energy Rating Scheme was established under the Energy Performance of Buildings Directive (in its original form).<sup>143</sup> In the late 2000s, a Building Energy Rating certificate became compulsory for all homes being sold or offered for rent and a seller or landlord is required provide a Building Energy Rating certificate to prospective buyers or tenants when a home is constructed, sold or rented across Britain and Ireland.<sup>144</sup> Across Britain the Standard Assessment Procedure is used to calculate the energy performance and efficiency of a dwelling while in Ireland the Dwelling Energy Assessment Procedure is used. In general a standard heating regime is assumed which allows for a calculation of the amount of fuel required

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<sup>137</sup> Department of the Environment, Incremental Purchase Scheme.

<sup>138</sup> The Scottish Sustainable Communities Initiative was launched in 2008. It focuses on both the environmental and social sustainability of new development

<sup>139</sup> 'Planning Policy Advice Note 74: Affordable Housing' (Edinburgh: Scottish Government, 2005).

<sup>140</sup> See Z. McIntyre, & K. McKee, 'Creating sustainable communities through tenure-mix: The responsibilisation of marginal homeowners in Scotland', *Geojournal* 77(2) (2012), p. 245.

<sup>141</sup> This was established by the Building Control Act 1990. In Britain the relevant Act is the Building Act 1984.

<sup>142</sup> Construction Products Directive, Directive 89/106, as amended by Construction Products Directive, Directive 93/68 of 22 July 1993; these are transposed by European Communities (Construction Products) Regulations 1992, SI No. 198/1992 as amended by SI No. 210/1994.

<sup>143</sup> Directive 2002/91/EC, implemented into Irish law by the European Communities (Energy Performance of Buildings) Regulations 2006 (SI No 666 of 2006) and Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings (recast), implemented into Irish law by the European Union (Energy Performance of Buildings) Regulations 2012 (SI No 243 of 2012).

<sup>144</sup> A Building Energy Rating certificate is only an indication of the energy performance of a house and actual energy usage will depend on how the occupants live in the house.

to heat certain dwellings to this standard. In addition to the Standard Assessment Procedure model and the related Energy Performance Certificates, the National Housing Energy Rating is also used to assess the energy efficiency of housing in Scotland. Typically a house in Scotland, in an average year, will require almost 50% more energy to maintain a given temperature than the same house in the South West of England.<sup>145</sup> Therefore there was a need for a model which accounted for regional variations in climate.

With regard to policy initiatives in Britain and Ireland the Supplier Obligation appears to be the most important instrument to deliver energy and carbon savings in the domestic sector.<sup>146</sup> Here the Government imposes a savings target on energy companies that has to be achieved at the customer end. The energy companies arrange for energy saving measures that carry out the work in homes according to a defined standard and with a certain benchmark for energy and or carbon savings. Alternatively, energy companies may choose to work with the occupants of homes directly.<sup>147</sup> In social housing the attention for energy efficiency among landlords has been stimulated among others by the introduction of the Decent Homes Standard in England and Wales and the Scottish House Quality Standard.<sup>148</sup> In the majority of cases, social landlords may not see, or realise, the benefits of making their housing stock energy efficient due to lack of clear market signals.<sup>149</sup> Better energy management is seen as a key aspect of improved energy efficiency going forward across both Islands.<sup>150</sup> A key aspect of empowering consumers is through the labelling of products, such as white goods, to encourage them to buy products which are more energy efficient.

## 2.5 Subsidization

The UK and Ireland are unusual in European terms in offering large scale demand subsidies in the subsidised rental sector.<sup>151</sup> The Scottish Government and indeed Welsh Government are tightly constrained by the fact that full fiscal authority has not been devolved and so continues to be directed from Westminster.

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<sup>145</sup> 'Domestic Energy Fact File 2008' (London, Department of Energy and Climate Change, 2014), p 21.

<sup>146</sup> Both the 2004 and 2007 Energy Efficiency Action Plans highlight the Supplier Obligation as the principal policy mechanism to deliver energy savings in the domestic sector. In Ireland see the European Union (Energy Efficiency Obligation Scheme) Regulations 2014 (SI No. 131 of 2014).

<sup>147</sup> Businesses and industrial end-users are not covered by the scheme; they are covered by other policy instruments such as the Climate Change Levy and Climate Change Agreements as well as the recently introduced Carbon Reduction Commitment. J. Rosenow, 'Different Paths of Change: Home Energy Efficiency Policy in Britain and Germany', In *European Council for Energy Efficient Economy Summer Study*, 2011: 261-272.

<sup>148</sup> Delivering decent homes is a commitment in the national strategy for neighbourhood renewal and has a key role to play in narrowing the gap between deprived neighbourhoods and the rest of the country. The Decent Homes standard is a minimum standard that triggers action below which no social housing should fall below by 2010 or other renegotiated deadline.

<sup>149</sup> J. Hulme, 'England: Lessons from Delivering Decent Homes and Affordable Warmth', in N. Nieboer, S. Tsenkova, V. Gruis, (eds) *Energy Efficiency in Housing Management: Policies and Practice in Eleven Countries*, (London: Routledge, 2012), 97-115.

<sup>150</sup> This approach is behind the UK Government commitment that 'smart' meters are to be installed in every home by 2020 to encourage better household energy management.

<sup>151</sup> M. Stephens and C. Whitehead 'Rental Housing Policy in England: Post Crisis Adjustment or Long Term Trend?' *Journal of Housing and Built Environment* 2014: (in press), 1.

## Subsidy of public/social housing

In England the system of support for local housing authorities was introduced in 1988 while in Ireland a system of support was introduced in 1966. In Ireland about 42% of local authority income comes from central government, which is divided almost evenly between general-purpose grants from the Local Government Fund and specific grants and subsidies. In England the Housing Revenue Account subsidy is paid each year<sup>152</sup> at a level set by the Secretary of State with a width of discretion judicially described as 'remarkably wide'.<sup>153</sup> Housing Revenue Account subsidy was a grant made by central government to each authority covering the amount each authority needed to spend on its council housing. This determination was based on notional calculations of rental income, housing expenditure and housing debt. Legislation provides for the abolition of Housing Revenue Account subsidy in England<sup>154</sup> and the transfer of competence for Wales to the Welsh Government and the Welsh Assembly.<sup>155</sup> The year 2012 also saw the ending of the housing subsidy regime for council housing in England as part of the government's programme of deficit reduction.<sup>156</sup> Across Britain and Ireland subsidy has been increasingly concentrated on housing associations in order to provide new build social housing. By the mid-1990s they had become the main providers of social housing across Britain. Funding is provided by the Homes and Communities Agency except in London where it is through the Greater London Council and Wales where it is the Welsh Government. Housing subsidy is important in securing the aim of affordability in areas where people with low or modest incomes can afford to live in areas that people with high income may also live, and reaping the benefits of the population mix. In England Wales and Scotland very substantial sums have been invested in the Decent Homes programme and the Scottish Social Housing Charter.<sup>157</sup>

In England and Wales the Grant is to be channelled towards social housing providers in two phases. The first is the Affordable Homes Programme running from 2011 to 2015. This provided £4.5 billion to 80,000 registered providers. It will be followed by the removal of the supply subsidy in 2015. Housing associations will then be expected to provide new housing through market mechanisms, charging 'affordable' rents at up to 80% of market levels. For the future there will be a move to affordable rents, set at up to 80% of market levels. At present average social rents are well below 80% in most parts of the country and the areas where they are in the north this is because private sector rents are very low. So rents for new supply will have to increase very substantially.<sup>158</sup>

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<sup>152</sup> Local Government and Housing Act 1989 s. 79.

<sup>153</sup> *R. v. Secretary of State for the Environment ex p. Greenwich LBC* (1990) 22 HLR 543, 546, Farquharson L.J.

<sup>154</sup> Localism Act 2011 s. 167 (not yet in force/ abolishes requirement to pay Housing Revenue Account subsidy for financial year 2012-2013). Sch. 15 excludes Wales and transfers is a technical measure to ensure that the reform relates to England alone.

<sup>155</sup> Public Bill Committee, 22nd Sitting, (Hansard, House of Commons, March 8, 2011) col. 866.

<sup>156</sup> H. Pawson and S. Wilcox, *UK Housing Review 2013*, (London: Chartered Institute of Housing, 2013).

<sup>157</sup> However, comparable schemes are lacking in Ireland.

<sup>158</sup> M. Stephens and C. Whitehead 'Rental Housing Policy in England: Post Crisis Adjustment or Long Term Trend?' *Journal of Housing and Built Environment* 2014 (in press), 3.

The Scottish Executive has also used various subsidies to promote council house construction e.g. Council House Building Fund.<sup>159</sup> Several subsidies operate through the housing association sector for instance the Housing for New Supply Shared Equity is financed through the Housing Association Grant and is geared towards assisting people on low to moderate incomes who want to own their own homes but are unable to afford the purchase.<sup>160</sup> The shared ownership scheme is a similar scheme and is directed towards assisting people with below average income who aspire to become homeowners.<sup>161</sup> In addition the Housing for Rent scheme is operated by registered social landlords through the Housing Assistance Grant. In Ireland the provision of social housing in Ireland by approved voluntary and co-operative housing bodies is generally funded under two Department of the Environment Community and Local Government funding schemes: the Capital Assistance Scheme (CAS) and the Capital Loan and Subsidy Scheme (CLSS)<sup>162</sup> The scheme is administered by local authorities and provides social rental accommodation for general family type needs and persons with specific categories of need. .

### **Subsidy of the private sector**

Traditionally across Britain and Ireland home ownership was encouraged by various means and to varying extents across the Islands. This is reflected in 2011 by the high rates of owner occupation across England (64%)<sup>163</sup>, Wales (70%)<sup>164</sup> Scotland (65%)<sup>165</sup> and Ireland (70%).<sup>166</sup> Across both Islands the support was expressed through various direct and indirect subsidies, taxation schemes and the operation of various tenant purchase schemes. A major contributor to the high homeownership rate was the tenant purchase schemes extended to local authority tenants in Ireland mainly during the 1960s and in Britain during the 1980s.<sup>167</sup> Across Britain and Ireland home ownership was encouraged by providing income tax relief on mortgage payments, but this had been removed in Britain in the 1980s and in Ireland in 2012. A substantial gap has opened up between Britain and Ireland in the approach to providing subsidies of the private sector. In Ireland all affordable housing schemes have been removed as part of the wider Government reformulation of housing policy towards a more tenure neutral

<sup>159</sup> 'Housing Statistics for Scotland 2012: Key Trends Summary 2011-12' (Edinburgh, Scottish Government, 2012).

<sup>160</sup> 'New Supply Shared Equity Scheme – Information for Buyers' (Edinburgh: Scottish Government, 2012).

<sup>161</sup> 'The Evaluation of Low Cost Initiative for First Time Buyers' (Edinburgh: Scottish Government, 2011).

<sup>162</sup> D. Silke & C. Farrell, 'Study to examine the implications of including the voluntary and co-operative sector under the PRTB registration and dispute resolution services' (Housing and sustainable communities agency: Stationery Office, 2011), p. 4.

<sup>163</sup> 'Dwelling Stock by Tenure: England (Historical Series)' in 'Housing Statistics', (Department for Communities and Local Government , <[www.communities.gov.uk](http://www.communities.gov.uk)>, 2012) Table 104; figures rounded and in millions with figures for 1986 extrapolated; sectors as defined by the Department.

<sup>164</sup> R. Caunt, *Dwelling Stock Estimates for Wales, 2010-11, SDR 25/2012*, (Cardiff: Welsh Government, 2012), 2.

<sup>165</sup> Housing statistics for Scotland 2013: Key Trends Summary (Edinburgh: Scottish Government, 2013) p. 10.

<sup>166</sup> Central Statistics Office, *Census 2011: Profile 4 The Roof over our Heads - Housing in Ireland* (Dublin: Stationery Office, 2011), p. 12.

<sup>167</sup> T. Fahey & B. Maitre, 'Home Ownership and Social Inequality in Ireland', in K. Kurz & H. Blossfeld (eds.), *Homeownership and Social Inequality in Comparative Perspective* (Palo Alto, CA: Stanford University Press, 2004), p.284.

policy in response to the onset of the economic crises. However, in Britain new subsidies have been introduced which promote home ownership. Encouragement to the private sector is now provided through the Help to Buy scheme, by which the government guarantees (part of) mortgage loans provided in the commercial market. Across both Islands the private rental sector has largely been left to fend for itself in terms of the supply of rental housing, but the coalition has provided £1 billion support for a 'Build to Rent' programme.<sup>168</sup> In addition the Scottish Government has developed a number of subsidies which promote access to the rental market including the Grant for Mid-Market Rents and the Rural Empty Properties Grant.<sup>169</sup>

### **Welfare supports for renters**

Welfare supports are available to lower income tenants across Britain (Housing Benefit) and Ireland (Rent Supplement and the recently introduced Housing Assistance Payment). As from October 2013 it is gradually being phased out in favour of a universal credit across Britain. However this is controversial as both the Scottish and Welsh Governments have signalled their opposition to the changes.<sup>170</sup> Across both Islands these schemes are essentially means tested benefits provided by the state and administered by local authorities. In Britain housing benefit, is paid to tenants irrespective of the sector in which they are renting while in Ireland both Rent Supplement and the Housing Assistance Payment are targeted at households living in the private rented sector. Currently two thirds of social renters and a quarter of private renters receive housing benefit, with claims increasing<sup>171</sup> while in Ireland approximately two fifths of private renters are in receipt of rent supplement.<sup>172</sup> Housing benefit expenditure has risen as a result of the sustained policy choice to direct subsidy towards individuals with low incomes at a time when housing costs have increased across all tenures. Demand side subsidies tend to be efficient and progressive, being targeted at an individual and means-tested, and have the additional advantage that they are portable. A household is enabled to move without losing its subsidy, assisting in mobility to secure work, and people who may need care are enabled to move nearer to support networks. In both Britain and Ireland there is a cap<sup>173</sup> on housing benefit. In Britain the under occupancy charge (or to the political opposition the 'Bedroom Tax'), will reduce the amount of Housing Benefit that is paid to those considered to under-occupying their home.<sup>174</sup> Further controls are proposed on EU migrants; they will have to have earned

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<sup>168</sup> M. Stephens and C. Whitehead 'Rental Housing Policy in England: Post Crisis Adjustment or Long Term Trend?' *Journal of Housing and Built Environment* 2014: (in press).

<sup>169</sup> *Ibid.*

<sup>170</sup> 'The Benefit Cap - Assessment of Impact in Scotland' (Edinburgh: Scottish Government, 2013); 'Impact of Planned Benefit Changes on Under-Occupied Disabled Households in Scotland' (Edinburgh: Scottish Government, 2013). For Wales see <http://wales.gov.uk/newsroom/communities/2014/black-hole-universal-credit-should-be-stopped/?lang=en>

<sup>171</sup> 'English Housing Survey Headline Report 2012-13' paras 1.35-144; the gross annual income of a couple claiming the benefit is £12,000.

<sup>172</sup> Department of Social Protection, *Annual SWS Statistical Information Report 2012* (Dublin: Stationery Office, 2012), Section G.

<sup>173</sup> Benefit Cap (Housing Benefit) Regulations 2012. In Ireland the Social Welfare (Consolidated Supplementary Welfare Allowance) (Amendment) (No. 2) (Rent Supplement) Regulations 2007.

<sup>174</sup> 'Benefit changes: Who will be affected?' [www.bbc.co.uk/news/uk-21706978](http://www.bbc.co.uk/news/uk-21706978), 15 April, 2013.

£150 a week for more than three months before they can claim housing benefit and most other benefits.<sup>175</sup>

## 2.6. Taxation

Housing occupies a prominent position in the taxation systems across Britain and Ireland and is a major contributor to national revenue. Housing taxation has a large remit which draws from a range of distinct tax models. The tax system does not directly subsidise any particular tenure but it does create market distortions. In the past there was a more direct subsidy of the owner occupation market by allowing the deduction from taxable income of mortgage interest payments on the principal home; this however was phased out in the late 1990s in Britain and 2010s in Ireland.

Stamp Duty Land Tax (SDLT) is charged on transactions with land in the UK and Ireland. The tax is paid by the purchaser at the following rates on residential property. In Ireland Stamp Duty Tax applies at a rate of 1% on properties with a value up to €1,000,000 while transfers of properties with a value above this threshold are taxed at 2%.<sup>176</sup> In the UK the taxation rate ranges<sup>177</sup> from 0% on properties purchased for less than £125,000, up to 7% on properties worth over £2,000,000.<sup>178</sup> Stamp duty has been used by the government as a tool to stabilise the housing market, including the use of stamp duty holidays and raising the threshold to accommodate first time buyers.

Rental income of individual landlords is chargeable to income tax. This is charged on the net income from a property that is let, so that various expenses incurred in letting the property may be deducted from the rent received.<sup>179</sup> Allowable deductions include management fees, repairs, insurance, ground rent, wear & tear allowance, professional fees, and loan interest. Landlords are required to declare this rental income on a self-assessment tax return. If the landlord is a company it will pay corporation tax instead.<sup>180</sup> Landlords which are companies are required to pay tax on profits in the form of corporation tax.<sup>181</sup> This form of taxation does not apply to owner occupiers; there is no income tax charge on a principal private dwelling or any secondary dwelling.

Value Added Tax is charged at the standard rate - currently 20% in Britain, 23% in Ireland - on all repairs, renovation and maintenance work whatever the status of the building concerned. In Britain the construction of new buildings is charged a zero rate, provided the supply in question is for a social purpose.<sup>182</sup> Landlords are required to pay the full rate of VAT for all goods and services, as owner-occupiers are for repairs, renovations, extensions and professional fees.

Capital Gains Tax is a tax on the profit or gain made upon sale or disposal of an asset. For landlords the sale of a property which has been held for investment is liable for

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<sup>175</sup> *Guardian* 19 February 2014.

<sup>176</sup> *Irish Tax Guide 2015*, part 6.

<sup>177</sup> [www.gov.uk/stamp-duty-land-tax-rates](http://www.gov.uk/stamp-duty-land-tax-rates), 25 January 2013. Different dates apply to non-residential and mixed use property.

<sup>178</sup> Or 15% if the purchaser is a corporate body.

<sup>179</sup> Income is taxable whether derived from a lease or a licence or any other occupation arrangement.

<sup>180</sup> Income Tax Act 2007 part 2 chap. 3; *UK Tax Guide 2013-14*, Part II. *Irish Tax Guide 2015*, part 2.

<sup>181</sup> Corporation Tax Act 2010; *UK Tax Guide 2013-14*, Part IV. *Irish Tax Guide 2015*, part 2.

<sup>182</sup> Value Added Tax Act 1994 sch. 8; *UK Tax Guide 2013-14*, Part V.

Capital Gains Tax at 33%<sup>183</sup> in Ireland, while in the UK the rate payable is between 18% and 28% for individuals depending upon the taxpayer's total taxable income.<sup>184</sup> This tax applies only to the gain in value of the property (i.e. the rise in the property's price). Owner-occupier are not liable for pay Capital Gains Tax when they sell the dwelling forming their principal home. When a landlord dies, the value of his rental properties will be included in the estate on which Inheritance Tax is levied. Rented property will be included at its market value. Inheritance Tax is levied at 40% in Britain and 33% in Ireland.<sup>185</sup> No tax is paid when a spouse dies and leaves their property to their spouse and there are large zero bands.<sup>186</sup>

In Ireland the local property tax is an annual tax charged on the market value of all residential properties in Ireland.<sup>187</sup> The new tax came into effect from 1 July 2013. In practice the owner of a residential property will be liable to pay the tax and this includes the landlord of property which is rented on a normal short term period. Lessees are only liable if they hold long term leases for a term of more than twenty years. Those liable to pay will be required to complete a self-assessment form and return it to the Revenue. This self-assessment form will include a valuation of the property by Revenue. However, this valuation is not conclusive and may be contested.<sup>188</sup> In contrast to Ireland, council tax in Britain which fulfils the same function as the local property tax in Ireland, is chargeable on the occupiers of residential property and will usually be billed to the tenants directly; alternatively the landlord may collect the tax and pay it over to the council. Each year the local council sets the level of council tax for each band. Dwellings are charged on the basis of two adult occupiers, and there is a reduction for a single occupier. Students are ignored, so any property occupied exclusively by students will not be charged. Carers and those cared for are also ignored for six months after being required to live elsewhere. There are some exemptions of which the most important and controversial is for vacant dwellings. Help with council tax bills is available in the form of Council Tax Benefit. The value of occupying a home is not (and has not for many years past) been considered a form of taxable income. Gains made on a person's principal private residence are exempt from capital gains tax charge.

Taxes on housing and rentals can be a significant source of revenue for the government, but also threatened with the illegal acts of tax evasion. In the UK buy-to-let landlords paid £2 billion income tax on their rental income in 2010-11,<sup>189</sup> but private landlords are reported to be evading over half a billion pounds in tax due on their rental income.<sup>190</sup> The route to tax evasion is often from the allowances given to property owners in computing their expenses while working out their profits for tax purposes.

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<sup>183</sup> Taxes Consolidation Act 1997, chapter 3. The rates of Capital Acquisitions Tax and Capital Gains Tax increased to 33% from 30% as from 5 December 2012.

<sup>184</sup> 28% for trustees or personal representatives of someone who has died; corporate landlords will pay corporation tax on chargeable gains.

<sup>185</sup> Inheritance Tax Act 1984; *UK Tax Guide 2013-14*, Part VII.

<sup>186</sup> This includes a civil partner.

<sup>187</sup> See Finance (Local Property Tax) Act 2012, s. 17 for the scheme of valuation to be applied. The rate of taxation in the first year the LPT was introduced was 0.18% of the estimated value of the property.

<sup>188</sup> *Ibid.*

<sup>189</sup> T. Mannan, 'HRC closing in on tax-evading expat landlords', <http://www.yourmoney.com/your-money/news/2283950/hmrc-closing-in-on-taxevading-expat-landlords>, 15 August, 2013.

<sup>190</sup> 'Private landlords evading at least £550 million tax on rental incomes', *The Independent*, 14 November, 2012.

There could be some deliberate misrepresentation of a business's or an individual's financial affairs to the tax authorities to reduce tax liabilities. A landlord can claim expenses for running their rental business and the associated costs of running an office at home because in calculating rental business profits a taxpayer can deduct business expenses so long as they are incurred wholly and exclusively for business purposes. If a buy-to-let property is empty for any period of time, the expenses such as utilities or council tax incurred when the rental property is empty can be claimed as a letting expense.<sup>191</sup> In relation to council tax/local property tax, benefit fraud and manipulation of the various exemptions are means of evading taxes.

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<sup>191</sup> 'Deductions: General Rules' (London: Her Majesty's Revenue and Customs, PIM2005).

## **2. Comparison of tenures without a public task (Regulation in Private Markets – points 3 and 4 have been exchanged as private tenancies work as default solutions in many national systems)**

### **3.1. Evaluative criteria for the landlord**

Statute has overlaid the common law of leases so completely in the field of residential tenancies across both Islands that it is necessary at the outset to differentiate the key types of tenancy before detailing the issue of profitability.<sup>192</sup> In Britain the Housing Act 1988 introduced statutory tenancies which have become the default tenancy across the Island however the approach taken in Ireland is different in that no default statutory tenancy was introduced rather the vast majority of tenancies are governed by the Residential Tenancies Act 2004. Thus in Britain the private rented sector is dominated by the assured shorthold tenancy<sup>193</sup> while in Ireland the private rented sector is dominated by tenancies governed by the Residential Tenancies Act 2004.<sup>194</sup> Britain and Ireland differ greatly with regard to how the tenancy is governed. The assured shorthold tenancy will be governed by contractual rules for its duration while in Ireland a range of statutory rights and duties are implied into every tenancy subject to the Residential Tenancies Act 2004 which cannot be contracted out and these affect fundamental matters such as security of tenure, setting of rent, termination etc.

Across Britain and Ireland the rent is a matter for free market negotiation, but if a welfare support such as housing benefit or rent supplement is relied on by the tenant then housing benefit is used to cover any of the rent payment, there will be limits on the rent level accepted for benefit claims. In Britain the landlord can increase the rent payable under a shorthold most easily by granting a series of short contractual terms, thus reserving the possibility of increasing the rent at each contractual renewal. In Ireland the maximum a landlord can charge is the market rate. This essentially means the rent which a willing tenant not already in occupation would be willing to pay and a willing landlord would accept in respect of the dwelling.<sup>195</sup> In practice a landlord is prohibited from setting the rent higher than an open market level and can only raise the rent rate once a year. A tenant may apply to the Private Residential Tenancy Board for a review of the rent which may result in a reduction or increase in the rent level. In considering a market rent the Private Residential Tenancy Board carry out an assessment of what similarly placed landlords and tenants would agree with regard to the dwelling in question. Thus the system of rent regulation across Britain and Ireland does not prevent the landlord charging a market rate. Across both Islands there is a gross undersupply of housing with a public task and this has resulted in upward pressure on rents, particularly in London and Dublin. As set out above the landlord's rental income is taxable<sup>196</sup> and while the landlord is primarily responsible for carrying out repairs to the dwelling any expense incurred in maintenance or repair work is tax deductible. All in all there remains strong potential for profitability in the private rented sector. According to one commercial

<sup>192</sup> ‘Lease’ and ‘tenancy’ are interchangeable, but ‘tenancy’ is used for shorter arrangements.

<sup>193</sup> Arden and Dymond, *Manual of Housing Law*, 9th edn, para. 1-237 ff; S. Garner & A. Frith, *A Practical Approach to Landlord and Tenant*, 7<sup>th</sup> edn, (Oxford: University Press, 2012), 250ff.

<sup>194</sup> For a discussion of the indicia of a lease/tenancy see section 3.2.1.

<sup>195</sup> Market rent is defined in s. 24 of the RTA 2004.

<sup>196</sup> See section 2.6 on taxation.

Buy to Let index, gross yields on a typical rental property are 5.3%, but taking into account capital accumulation and void periods total returns rose to 8.9% in November 2013.<sup>197</sup> Potential yields vary regionally. They fluctuate wildly over time especially when capital appreciation or depreciation is taken into account. Private landlords will be taxed on any income from rent.<sup>198</sup>

Across Britain and Ireland the primary duty to repair the dwelling will generally lie with the landlord however the tenant must be alert to the fact that he must also undertake certain obligations with regard to maintenance of the property.<sup>199</sup> For instance in Scotland the tenant is also required to do their part. In particular, the tenant is under a common law obligation to keep the property "aired and fired"<sup>200</sup>, this means that the tenant must use the heating system which is provided.<sup>201</sup> However, this must be an efficient system and must not involve undue or excess expenditure on the tenant.<sup>202</sup> In addition across Britain and Ireland the tenant will be liable for any damage caused to the dwelling which is beyond normal wear and tear.

Throughout both Islands legal minimum standards apply to rented dwellings, in both England and Wales and Scotland additional and distinct standards have been introduced in the social and private rented sectors. However, the extent of the repairing obligation and the overarching scheme for regulating housing conditions varies widely across both Islands and indeed across rental sectors giving rise to widely different outcomes. While common law duties to the effect that the house be reasonably fit for human habitation apply in all jurisdictions,<sup>203</sup> by far the most important duties are imposed by statute.

With respect to the basic standard which applies to all rented housing – in England this was the fitness standard<sup>204</sup> which has been overhauled by the Housing Health and Safety Rating System.<sup>205</sup> In Scotland this is the tolerable standard as set out in the Housing (Scotland) Act 1987 (as amended)<sup>206</sup> while in Ireland the Housing (Miscellaneous Provisions) Act 1992 and subsequent regulations set out the housing quality standard which all landlords must meet to ensure that their properties were of a

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<sup>197</sup> LSL Buy-to-Let Index, 20 December 2013; the average return in gross terms was £14,592, with rental income of £8,243 and a capital gain of £6349. Clearly the picture would be very different if house prices were not rising so sharply. Earlier versions of the index show the changes over time. Another survey by BM Solutions reported in the *Guardian* 26 February 2014 suggests 5.5 throughout 2013. A figure of 2.8% for 2010 is given in C. Whitehead, *Private Rented Sector in the New Century: A Comparative Approach* (Cambridge: University of Cambridge, 2012).

<sup>198</sup> See section 2.6 above.

<sup>199</sup> McAllister, *Scottish Law of Leases*, ch. 19. In Ireland certain obligations in relation to repair are placed on the tenant through RTA 2004 s. 16(f).

<sup>200</sup> Boyle v. Waddell 1870 11 M. 223.

<sup>201</sup> Dover District Council v Farrar (1980) 2 Hous LR 32.

<sup>202</sup> McArdle v Glasgow District Council 1989 SCLR 19.

<sup>203</sup> In England and Wales there is no requirement that a property let should be fit for human habitation, unless the letting is furnished.

<sup>204</sup> Housing Act 1985.

<sup>205</sup> Housing Act 2004, s. 7.

<sup>206</sup> Housing (Scotland) Act 1987 s. 86; the Housing (Scotland) Act 2006 s. 11 amends the definition of tolerable standard to require satisfactory thermal insulation.

certain standard.<sup>207</sup> These standards essentially amount to a legal minimum quality threshold below which a rented dwelling must not fall and shows when it may be condemned as unfit for human habitation. Each of these standards contains detailed provisions on various aspects of the condition of the dwelling including structural condition, sanitary facilities, heating facilitates, cooking facilities, water facilities, insulation and energy efficiency, ventilation etc. The landlord is responsible for ensuring that the dwelling meets these standards however where the landlord is failing in this duty any tenant across Britain and Ireland may contact the local authority which is primarily responsible for enforcement of these housing condition standards.<sup>208</sup> Where a tenant feels that the local authority has not adequately responded to a complaint about the housing standard they can lodge a complaint to the Ombudsman.<sup>209</sup> In recent years there have been efforts across both Islands to improve the condition of rented accommodation. In addition to introducing the Housing Health and Safety Rating System in England and Wales, the Decent Homes Standard has been introduced in social housing. A social home is described as decent<sup>210</sup> when it meets the current statutory minimum standard<sup>211</sup> for housing – be in a reasonable state of repair, has reasonably modern facilities and services, and provides a reasonable degree of thermal comfort.<sup>212</sup> Part 1 of the Housing Act 2004 puts in place the framework for the Housing Health and Safety Rating System (HHSRS) by which local authorities have powers to regulate housing conditions. Although local authorities cannot take statutory enforcement action against themselves in respect of their own stock of housing they will be expected to use the HHSRS to assess the condition of their stock and to ensure their housing meets the Decent Homes Standard.<sup>213</sup>

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<sup>207</sup> The Housing Act 1966 s. 114 implied into every contract for letting, a condition that the house was at the commencement of the tenancy ‘in all respects reasonably fit for human habitation’; s114 was repealed by Housing (Miscellaneous Provisions) Act 1992 s. 37. *Siney v. Dublin Corporation* [1980] IR 400 held that s.114 did not apply to housing authorities but that housing authorities were liable in damages for breach of contract based on the implied warranty as to fitness for human habitation. See Housing (Standards for Rented Houses) Regulations 2008 (SI No. 534/2008) as amended. See: M. Jordan, M. ‘The Rented Accommodation Sector in Ireland: Increased Demand amid Regulatory Transition - Housing Standards in Focus’ (2012) 17(3) *Conveyancing and Property Law Journal* 42.

<sup>208</sup> Housing (Miscellaneous Provisions) Act 1992 ss. 18A and 18B, inserted by the Housing (Miscellaneous Provisions) Act 2009 sch.2, part 4. In Scotland repair notices, improvement notices, maintenance notice, closing and demolition orders are available under the Housing (Scotland) Act 1987 Part VI, s. 114. In England and Wales see the Housing Act 2004, part 1 which introduced the framework for the Housing Health and Safety Rating System.

<sup>209</sup> In England it is the Local Government Ombudsman, in Scotland it is the Scottish Public Services Ombudsman and in Ireland it is the Government Ombudsman.

<sup>210</sup> A technical standard for public housing introduced by the government aimed to provide a minimum standard of housing conditions for all those who are housed in the public sector.

<sup>211</sup> Dwellings which fail to meet this criterion are those containing one or more hazards assessed as serious (‘Category 1’) under the Housing Health and Safety Rating System.

<sup>212</sup> Department for Local Government and Communities, *A Decent Home: Definition and Guidance for Implementation, June 2006 – Update*. The definition of what is a decent home has been updated to reflect the Housing Health and Safety Rating System (HHSRS) which replaced the Housing Fitness Standard under section 604 of the Housing Act 1985.

<sup>213</sup> ‘Regulatory Framework for Social Housing in England from April 2012’ (London: Homes and Communities Agency, 2012).

In addition to the tolerable standard in Scotland, housing in the private rented sector must also meet the 'repairing standard'<sup>214</sup> which the landlord must ensure that the dwelling meets the repairing standard at the start of the tenancy and at all times during the tenancy.<sup>215</sup> This standard goes above and beyond the basic tolerable standard in various respects.<sup>216</sup> Once the landlord becomes aware of a defect in the dwelling which requires repair or maintenance work he is under a duty to act within a reasonable time. Essentially this means that the time in which the landlord should carry out the repairs depends on the nature of the defect in question with more material defects requiring prompt attention. When carrying out repairs the landlord will be responsible for any damage caused and he must make good any damage caused while carrying out any work.<sup>217</sup> Where the defect requiring maintenance work is down to the fault of the tenant the landlord will not be under a duty to carry out repairs. Furthermore, the landlord will not be liable for failure to carry out maintenance or repairs where the only reason for that failure was the tenant's refusal to grant access. The landlord is expressly prohibited from contracting out of the repair and maintenance obligations and any lease which purports to shift responsibility onto the tenant is prohibited.<sup>218</sup>

The Private Rented Housing Panel is primarily responsible for enforcement of repair and maintenance obligations<sup>219</sup> in the private rented sector.<sup>220</sup> The tenant may apply to the panel for a determination that the landlord has breached his repairing duty. However, in order to make such an application the tenant must first have notified the landlord of the defect which requires attention and allowed the landlord a reasonable amount of time to carry out the maintenance or repair in question.<sup>221</sup> The committee can order the landlord to carry out certain works to bring the defect into order so that the dwelling meets the repairing standard.<sup>222</sup> Should the landlord fail to carry out the repairs in the manner required then the Committee may impose a rent relief order allowing the tenant to pay less rent while awaiting repair.

The Housing (Scotland) Act 2001 sets out the repairing obligation of landlords in relation to Scottish secure tenancies.<sup>223</sup> In general the statute restates the common law obligation of the landlord to meet the tolerable standard and the extent of the landlord's obligation closely resembles the repairing standard in the private rented sector i.e. duty to act within a reasonable time, duty to give notice, liability for damage caused carrying out repairs, etc. Certain small urgent repairs, so called qualifying repairs, which might affect a tenant's health, safety or security, have to be done quickly.<sup>224</sup> Where the landlord is unable to carry out such repairs within the time limit then the tenant may be

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<sup>214</sup> This is dealt with in detail in Part 2.

<sup>215</sup> Housing (Scotland) Act 2006 s. 14(1).

<sup>216</sup> Housing (Scotland) Act 2006 s. 13(1) (a).

<sup>217</sup> Housing (Scotland) Act 2006 s. 14(2); this follows the Sheriff's decision in *Little v. Glasgow District Council* 1991 1 SHLR 195 at 199.

<sup>218</sup> Housing (Scotland) Act 2006 s.17.

<sup>219</sup> Housing (Scotland) Act 2006 s. 22(5) and sch. 2 para. 8; Private Rented Housing Panel (Applications and Determinations) (Scotland) Regulations 2007. There is a proposal to allow third party applications: Housing (Scotland) Bill 2013 cl. 23-25.

<sup>220</sup> Right of application is not available to a Scottish secure tenancy etc.

<sup>221</sup> Private Rented Housing Panel (Applications and Determination) (Scotland) Regulations 2007.

<sup>222</sup> Housing (Scotland) Act 2006 s 24(2).

<sup>223</sup> Housing (Scotland) Act 2001 s. 27(1).

<sup>224</sup> Housing (Scotland) Act 2001 s. 27(2).

entitled to carry out the repairs and charge them to the landlord.<sup>225</sup> Where the landlord fails to carry out repairs within a reasonable time the tenant may lodge a complaint with the Scottish Public Services Ombudsman. A higher standard must be met before housing meets the Scottish Housing Quality Standard<sup>226</sup> which was introduced in February 2004 as the Scottish Government's principal measure of housing quality in Scotland. It applies in the social sector as an aspiration (though a highly influential one) for the improvement of the stock of local authority and Registered Social Landlords. In order to meet the Scottish Housing Quality Standard, a dwelling should meet five housing criteria, though we can perhaps spare the reader the fifty five separate elements into which these criteria are broken down, some of them further subdivided. The Scottish Housing Regulator is responsible for ensuring that local authorities and registered social landlords adhere to the Scottish Government's Social Housing Charter.

In Ireland while the basic repairing standard applies to all dwellings there are disparities in enforcement options between private and social rented tenants. In the private rented sector a tenant may apply to local authority but may also apply to the Private Residential Tenancies board for dispute resolution by reason of the landlord's failure to meet the standard of repair.<sup>227</sup> A landlord may be liable to reimburse a tenant for expense they incur while carrying out repairs. The tenant is under no statutory obligation to carry out repairs and indeed the landlord is not allowed to impose any repairing obligations on the tenant,<sup>228</sup> but if the landlord has failed to carry out pressing repairs in a reasonable time after notice to do so the tenant may carry out the repairs at their own expense and then seek payment from the landlord to reimburse them for their outlay.<sup>229</sup> These protections are not available to a local authority tenant. Where a local authority tenant is having difficulty having repairs carried out in a reasonable time then he may lodge a complaint with the Government Ombudsman.

Across Britain and Ireland a landlord must provide the services which are reasonably required the tenant, including, as appropriate, the supply of gas, electricity, sewerage and water. Other utilities would include telephone. In most cases the supply contract would be concluded between the utility provider and the tenant directly.<sup>230</sup>

Where registration fees fall due across Britain and Ireland they are the responsibility of the landlord. In Ireland private landlords are obliged to register any tenancy of a dwelling rented by them with the Private Residential Tenancies Board, who have the power to actively pursue landlords who fail to register tenancies.<sup>231</sup> The landlord must register the tenancy within one month of commencement. In order to register the landlord must submit an application along with €90 fee.<sup>232</sup> Although a significant number of tenancies have not been registered, the system is a vast improvement on the previous one. In

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<sup>225</sup> Scottish Secure Tenants (Right to Repair) Regulations 2002 setting out the max amount for any single qualifying repair as well as the period in which it is to be completed.

<sup>226</sup> 'Scottish Housing Quality Standard' (Edinburgh: Scottish Government, 2004).

<sup>227</sup> RTA 2004 s. 78(1)(e).

<sup>228</sup> *Norris v. Rice TR23/DR347/2006*, 25 July 2006.

<sup>229</sup> RTA 2004 s. 12(1)(g).

<sup>230</sup> This is discussed in section 3.2.1 below.

<sup>231</sup> RTA 2004 Part 7.

<sup>232</sup> *Ibid.*, s. 137(1)(b).

Scotland each landlord or agent applying for registration should pay a principal fee of £55 to each local authority in which they apply and, in the case of landlords, a property fee of £11 for each property registered.<sup>233</sup> The register records the landlord and the dwelling, but not the tenant or other occupier; there is no scheme for registering individual tenancy contracts. The obligation to register is triggered where a person unconnected to the landlord can occupy a house as a dwelling – this may be under a tenancy or any other occupation agreement, and includes arrangements covering parts of a building.<sup>234</sup> In order to secure registration the landlord has to pass the test of being a fit and proper person,<sup>235</sup> taking into account: convictions involving fraud, dishonesty, violence or drugs, and also firearms and sexual offences;<sup>236</sup> any record of unlawful discrimination; contraventions of housing or tenant law;<sup>237</sup> failure to observe a Letting Code,<sup>238</sup> and other relevant circumstances. It is important to emphasise that this test is not onerous on the landlord and should not be treated as a complete check on the landlord's previous dealings etc. It is an offence to let out a dwelling without lodging an application for registration which may incur a fine, and it is also possible for the authority to serve a notice which will mean that the tenant or occupier does not have to pay rent while the notice remains in effect.<sup>239</sup> Advertisements of property to let must include the landlord's registration number.<sup>240</sup> Registrations are renewable every three years. With regard to registration fees in England social landlords are regulated by the Homes and Communities Agency but that there is no comparable oversight regulation of the commercial/professional or private landlord sector and there is no requirement to register. This is also true in Wales but new proposals have been brought forward for national mandatory registration and licensing scheme for private sector landlords, anybody wanting to let homes privately will have to sign a register before being allowed to take on tenants.<sup>241</sup> One of the key features of the Housing (Wales) Act 2014 is to introduce of a compulsory registration of private rented sector landlords and letting agents.<sup>242</sup> Across Britain a licence is required for a house in multiple occupation (commonly abbreviated to HMO) that is a property shared by three or more occupiers who are not members of the same family.<sup>243</sup> This applies to a "house" and also any premises where basic amenities are shared. So it would include a flat shared by a group of students or young professionals, or a house subdivided into bed sitting rooms

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<sup>233</sup> Antisocial Behaviour etc. (Scotland) Act 2004, as amended by Housing (Scotland) Act 2006 s 175 and Private Rented Housing (Scotland) Act 2011; McAllister, *Scottish Law of Leases*, para. 218, makes the point in the following para. that the register can be criticised as an example of ineffective bureaucracy.

<sup>234</sup> It would include lodging arrangements where the occupier does not have exclusive use of a separate dwelling.

<sup>235</sup> Antisocial Behaviour etc. (Scotland) Act 2004 s. 84.

<sup>236</sup> The last two were added in 2011. The local authority will rely on a criminal record certificate.

<sup>237</sup> Matters to be considered including records of antisocial behaviour orders and notices and housing related complaints were clarified in 2011.

<sup>238</sup> Antisocial Behaviour etc. (Scotland) Act 2004 s. 92A inserted in 2006, though no such code has yet been issued. Scottish Ministers may issue guidance to local authorities under powers given in 2011.

<sup>239</sup> Antisocial Behaviour etc. (Scotland) Act 2004 s. 94.

<sup>240</sup> Antisocial Behaviour etc. (Scotland) Act 2004 s. 92B, added by Private Rented Housing (Scotland) Act 2011 s. 6.

<sup>241</sup> Announced by Housing Minister Huw Lewis. Wales Online [www.walesonline.co.uk/business-in-wales/business-news/2012/08/22/building-societies-warning-over-landlord-regulation-scheme-91466-31668821/#ixzz2lhUFbfIc](http://www.walesonline.co.uk/business-in-wales/business-news/2012/08/22/building-societies-warning-over-landlord-regulation-scheme-91466-31668821/#ixzz2lhUFbfIc), 22 January 2013.

<sup>242</sup> Cls 1-35.

<sup>243</sup> Housing Act 1985 ss 345-394 as amended..

with shared kitchen, toilet or bathroom.<sup>244</sup> This licence must be obtained before the property is rented out,<sup>245</sup> and renewed every three years and can range into several hundred pounds. The cost of a licence depends on the type of House in Multiple Occupation (HMO) being licensed, and the number of persons, or units, in the property. The council must check that the owner and anyone who manages the property (for example, a letting agent) doesn't have any criminal convictions, for example, for fraud or theft. The council will inspect the property to check on safety and that it is suitable for the proposed number of tenants, and they will also ensure that proper management practice is followed.

### 3.1.2. *Property rights respected de iure and de facto*

There are inherent risks in letting property which may reduce the potential profitability. There is the risk of default with rent payment, of abuse or deterioration of the house by the tenant and the risk of being unable to evict a tenant, even in cases of protracted violations of the contract or default in rent payment. The risk to the landlord may be reduced through requiring a security deposit or by taking out insurances however in cases of default with rent payment or where the tenant damages the property the main remedy sought for the landlord will be to seek termination of the tenancy. Across Britain and Ireland the effect of a notice of termination depends very much on the sectoral allocation of the tenancy, in Britain the key division being between assured shorthold tenancies and tenancies with full security - fully assured tenancies in the social sector and secure tenancies in the public sector or Scottish secure tenancies as the case is in Scotland, while in Ireland the division is between tenancies governed by the Residential Tenancies Act 2004 and local authority tenancies. Across both islands there is also a residual category of tenancies falling outside all security regimes so that contractual principles apply.

### **Termination of a short assured tenancy**

An assured shorthold tenancy will often include a fixed contractual grant for a term of six months or more. The landlord will be able to terminate the tenancy at the end of the fixed term and any contractual regrant. It is necessary to end any periodic continuation by notice to quit or other contractual rights.<sup>246</sup> It is common to give a notice with a saving clause to ensure that a valid date is stated; this device has been accepted by the courts.<sup>247</sup> The landlord must give a statutory notice, which must be of two months duration and expire on or after the term date.<sup>248</sup> At the expiration of the notice the landlord may issue a possession action in the county court and the court must make an

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<sup>244</sup> There are a number of exemptions e.g. for care homes, property occupied by members of the armed forces, prisons, religious communities and co-operative housing associations; other exempted groups may be designated. The rules cannot be avoided by treating a group of six students as an independent religious order: *Thomson v. Aberdeen City Council* 2011 SLT (Sh. Ct) 218.

<sup>245</sup> It is a criminal offence for a landlord to operate an HMO without a licence, and they could face a fine of up to £20,000.

<sup>246</sup> It was previously necessary to specify a date at the end of a period of a tenancy while it was periodic, but this was overruled in *Spencer v. Taylor* [2013] EWCA Civ 1600.

<sup>247</sup> *Hussain v. Bradford Community Housing* [2009] EWCA Civ 763.

<sup>248</sup> The tenancy agreement may require longer than two months. A single document can be used to end a tenancy and to give notice of proceedings: *Aylward v. Fawaz* (1997) 29 HLR 408, CA.

order for possession which ends the tenancy when executed.<sup>249</sup> Because possession is mandatory tenants tend to move once notice has been given.

### **Termination of an assured tenancy**

Termination of a (fully) assured tenancy is quite different because security of tenure accrues when contractual protection ends: a tenant who remains in possession of the house after the lease has been terminated will have a statutory tenancy of the house<sup>250</sup> and he can only be removed if the landlord obtains a county court order based on the statutory grounds. The tenant must be given notice of the proceedings for possession and this notice must state the relevant ground as well as giving any relevant information.<sup>251</sup> The period of notice is either two weeks or two months.<sup>252</sup> Therefore when a landlord is seeking to terminate a contractual tenancy he must serve two notices, a notice to quit which will bring the term of the lease to an end and will prevent a periodic tenancy arising; a second notice will inform the tenant of the landlord's intention to raise proceedings for recovery of possession. Where a sub-tenancy is in operation then termination by the head landlord of the tenancy will cause the sub-tenant to take the place of the head tenant. Where there are substantial (two to three months) rent arrears this can be a mandatory ground for possession meaning the court will grant possession to the landlord upon establishing the ground. Where the condition of the dwelling or common parts of the building has deteriorated because of acts of waste, or any neglect or default of the tenant this is a discretionary ground for possession meaning the court can use its discretion in making an order for possession. All of these misconduct grounds are available once the contractual term has ended and the tenancy is subject to statutory continuation.<sup>253</sup> Some of the grounds may also be used during the contractual period of the lease where the lease provides for this, performing the function of a forfeiture clause.

### **Termination of an assured tenancy for management reasons**

There are a number of grounds for possession where the tenant has not conducted himself improperly, and the ground is available either because the security regime is inherently limited or to facilitate proper management of the property. In many ways the situation is the same as just described. When the (fully) assured tenancy ends a statutory tenancy arises which can only be ended if the landlord obtains a county court order based on the statutory grounds.<sup>254</sup> The tenant must be given notice of the proceedings for possession and this notice must state the relevant ground as well as giving any relevant information.<sup>255</sup> The exact period of notice depends upon the ground being used but ranges from two weeks to two months but the court may dispense with notice in some situations.<sup>256</sup> As set out above some grounds are mandatory and some are discretionary. Where the landlord can establish that any of the grounds for

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<sup>249</sup> Housing Act 1988 s. 5(1).

<sup>250</sup> Housing Act 1988 s. 5.

<sup>251</sup> Housing Act 1988 s. 2; Assured Tenancies and Agricultural Occupancies (Forms) (England) Regulations 1988, as amended by SI 2003/260.

<sup>252</sup> Housing Act 1988 s. 8(4a).

<sup>253</sup> Housing Act 1988 sch. 2 as amended eg by Housing Act 1996 ss 144-152.

<sup>254</sup> Housing Act 1988 s. 5(1).

<sup>255</sup> Housing Act 1988 s. 8; Assured Tenancies and Agricultural Occupancies (Forms) (England) Regulations 1988 as amended by SI 2003/260.

<sup>256</sup> Housing Act 1988 s. 8(4A).

possession from 1 to 8 exists then the court must give back possession to the landlord. These mandatory grounds include the situation where occupancy is required by the landlord or where the landlord wishes to substantially redevelop the dwelling. In the event that the landlord requires the dwelling for the principal residence of the landlord or a ‘spouse’ etc. The landlord should have been occupying the dwelling in question prior to the beginning of the tenancy as his principal home and have given a notice to the tenant that possession might be required on this ground (though there is a discretion to dispense with notice).

### **Termination of tenancies governed by the Residential Tenancies Act 2004**

An RTA tenancy can only be terminated by one party serving a valid notice of termination upon the other in accordance with Part 5 of the Act.<sup>257</sup> The landlord seeking a termination must give a certain period of notice to the other party. The notice period will depend on the duration of the tenancy; the longer the duration of the tenancy, the longer the notice period required. However, in the case where the landlord wishes to terminate the tenancy as a result of anti-social behaviour or behaviour which threatens to damage or does actually damage the fabric of the dwelling then only a seven day notice period is required.<sup>258</sup> Unlike assured shorthold tenancies where a fixed period for notice of termination applies, the notice requirements for termination of a RTA tenancy vary according to the duration of the tenancy and range from a minimum of 28 days to 112 days where the tenancy has been operating for 4 or more years.

Failure to provide the correct notice period will result in an invalid notice of termination and this will cause the tenancy to continue to operate, potentially resulting in the attraction of Part 4 tenancy status. Parties are allowed to deviate from the general notice periods where there has been a breach of obligation on the part of the other party. Where the tenant is in breach due to anti-social behaviour on their part the landlord may only give notice of 7 days. However the landlord must produce sufficient evidence. Anti-social behaviour is defined by statute and it is important to set out that a single incident may constitute ASB. Where the breach relates to rent arrears then special rules regarding rent arrears apply. The landlord has a duty to mitigate the loss from unlawful termination of the tenancy and should make efforts to fill a vacant tenancy.<sup>259</sup>

Where a tenancy which is governed by the RTA 2004 has been in operation for six months and a valid notice of termination has not been served then a Part 4 tenancy will come into operation with an array of legal consequences for both parties. This affects the termination procedure. In particular, a landlord can only bring about a termination of a Part 4 tenancy on one of six grounds and in doing so he must adhere to the particular requirements of any one of those six grounds<sup>260</sup> in addition to complying with the normal procedural requirements set out above.<sup>261</sup>

**Breach of the tenancy:** In the first instance a landlord may terminate a Part 4 tenancy where a tenant has failed to comply with his obligations. The landlord must first afford the tenant the opportunity to right the wrong complained of by notifying the tenant of the

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<sup>257</sup> RTA 2004 ss 57 and 58.

<sup>258</sup> *Ibid.*, s. 67(2).

<sup>259</sup> *Kinney and Anor v O'Doherty* TR 26/DR1039/2008.

<sup>260</sup> RTA 2004 s. 34.

<sup>261</sup> RTA 2004 Part 5.

breach and allowing the tenant reasonable time<sup>262</sup> to correct the failure.<sup>263</sup> Where the breach relied upon relates to rent arrears a more complex termination applies. The landlord must notify the tenant of his breach and afford him a reasonable time to remedy the breach. In addition the landlord must serve the tenant with a 14 day warning letter in relation to their rent arrears.<sup>264</sup> This notice must detail the arrears and give the tenant a reasonable period of time to remedy the breach. If the tenant fails to remedy the breach then the landlord must serve a second notice informing the tenant that the rent is due and giving the tenant a further 14 days to pay. Should the tenant fail again then the landlord may terminate the tenancy by serving a notice of termination with 28 days notice.<sup>265</sup>

Where the dwelling is required in contemplation of sale the landlord may also bring a Part 4 tenancy to an end where he intends to sell the property within three months. When terminating a part 4 tenancy on this ground the landlord must intend to enter an enforceable agreement to transfer the whole of his interest in the dwelling for full consideration within three months.<sup>266</sup> Where the dwelling required for landlords own use the landlord may also bring a part 4 tenancy to an end. However he must provide an additional statement to the tenant stating the identity of the new occupants and where the landlord is not one for the occupants the statement must set out the relationship between the new occupants and the landlord, as well as setting out the expected duration of occupation. In addition, where the dwelling becomes available for letting within 6 months then the landlord is obliged to offer the dwelling to the previous tenants.<sup>267</sup> Where the landlord wishes to terminate a Part 4 tenancy but is unable to rely on one of the 6 permitted grounds he must either serve notice on or after the end of the fourth year or serve notice during the first six months of the tenancy.

Across Britain and Ireland deposits are not usual in the social sector, but they would be general in the private rented sector. A security deposit is usually charged as security against damage to the property or getting into rent arrears. Across Britain government deposit protection schemes have been introduced however such a scheme has not been introduced in Ireland although it has been proposed.<sup>268</sup> Since 2007 in England

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<sup>262</sup> In *Canty v. Private Residential Tenancies Board* [2007] IEHC 243 there was a failure to pay rent, and the landlord gave the errant tenant three days to remedy the issue. The court found that this period was not reasonable and instead substituted a 14 days period. As such the period of time given will depend on the nature of the breach complained of and is by nature a relative condition.

<sup>263</sup> *Barrington-Martin and O'Neill and Anor* TR66/DR695/2007, July 9, 2007.

<sup>264</sup> RTA 2004 s. 67(3).

<sup>265</sup> RTA 2004 s. 67(2).

<sup>266</sup> *O'Gorman v. Slattery* TR36/DR236/2007, 28 March 2007 where a landlord served a notice of termination on the basis of sale however the tenant failed vacate and arrears. In response the landlord changed locks prevent tenant from gaining access. The tenancy tribunal found that changing the locks constituted an unlawful termination of the tenancy and awarded €9,000 compensation for inconvenience. Also see *Boyne v. Hanaway* TR49/DR1262/2008.

<sup>267</sup> *Barrett v. Ward* TR135/DR963/2007, 31 March 2008, landlord failed to offer the dwelling to the previous tenants and was imposed with paying compensation of €3,300 to the tenants.

<sup>268</sup> See Indecon International Economic Consultants, 'Indecon's Assessment of the Feasibility of a Tenancy Deposit Protection Scheme in Ireland' (Dublin: Indecon, 2012). An independent tenant deposit scheme has been proposed in the Residential Tenancies (Amendment)(No. 2) Bill 2012. However, as of March 2014 the scheme has not been introduced.

and 2012 in Scotland<sup>269</sup> an agent who charges a security deposit for an assured shorthold tenancy or short assured tenancy in Scotland must protect it in government-approved schemes<sup>270</sup> and provide the tenant with details of the scheme. Landlord and tenant should agree with the agent the condition of the property and an inventory of furniture and fittings, in order to reduce disagreements at the end of the tenancy. There are two types of scheme, custodial schemes and insurance schemes, and the choice of which scheme to adopt is the landlord's. In each case the landlord must comply with the initial requirements of the scheme within thirty days of receiving the deposit, providing information<sup>271</sup> and handing over the deposit. Failure gives rise in each case to a claim that the tenant receive three times the deposit.<sup>272</sup> In Ireland the landlord or letting agent hold the deposit of the duration of the tenancy and at the end of a tenancy the landlord, or their agent, is under a duty to return the deposit within a reasonable timeframe. The majority of disputes before the Private Residential Tenancies Board concern allegations of illegal retention of the deposit. The extent of the number of claims has led the Government to consider introducing a deposit protection scheme.<sup>273</sup> There are no rights of lien or pledge operating in residential lettings across Britain and Ireland.

No insurance is obligatory across Great Britain. Many households are uninsured, either because they cannot afford the premiums or because insurance is unobtainable because of flooding or other risks. Mortgage lenders invariably require borrowers to insure the building standing as security, and this includes properties bought on a Buy to Let basis. The lender will dictate the risks to be covered, the amount and the identity or character of the insurer. All major structural work falls to a residential landlord so it would be normal for a private sector landlord to repair against the normal risks such as public liability and subsidence. In Ireland a private landlord must take out and maintain a policy of insurance for the structure of the building under the RTA 2004.<sup>274</sup>

Across the private rented sectors of Britain and Ireland it is possible to terminate the tenancy if the house is need for the landlords own use/family use or for another economic purpose such as redevelopment or sale.<sup>275</sup>

In England, Wales, Scotland and Ireland some possession orders will be made outright, the most common example being orders terminating an assured shorthold tenancy/short assured tenancy once the initial contractual period and initial six month shorthold are over. Possession orders made after breaches of tenancies are often, perhaps usually,

<sup>269</sup> Tenancy Deposit Schemes (Scotland) Regulations 2011, reg. 3. Information about this must be included in the Tenant's Information Pack, cl. 4.5.

<sup>270</sup> Housing Act 2004 ss 213-215, sch. 10, as amended by Localism Act 2011 s. 184. Schemes in operation are the Deposit Protection Service, the Tenancy Deposit Scheme and 'mydeposits'.

<sup>271</sup> Housing (Tenancy Deposits) (Prescribed Information) Order 2007. Tenancy Deposit Schemes (Scotland) Regulations 2011, reg. 3. Information about this must be included in the Tenant's Information Pack, cl. 4.5.

<sup>272</sup> *Ayannuga v. Swindells* [2012] EWCA Civ 1789; *Johnson v. Old* [2013] EWCA Civ 415. See *Superstrike v. Rodrigues* [2013] EWCA Civ 669; K Lees, 'More Questions Than Answers', *Conveyancer* 2013: 60.

<sup>273</sup> See Indecon International Economic Consultants, 'Indecon's Assessment of the Feasibility of a Tenancy Deposit Protection Scheme in Ireland' (Dublin: Indecon, 2012). An independent tenant deposit scheme has been proposed in the Residential Tenancies (Amendment)(No. 2) Bill 2012. However, as of March 2014 the scheme has not been introduced.

<sup>274</sup> RTA 2004 s. 12(1)(c).

<sup>275</sup> See section 3.1.2 above.

suspended. It is only in Ireland that alternative dispute resolution has been incorporated into the framework of tenancy law, at least in the private sector, in a meaningful way. The Private Residential Tenancies Board is now the appropriate forum for dealing with disputes in the private rented sector. As well as providing a range of alternative dispute resolution services to parties, there are also conventional dispute resolution services available with parties at liberty to appeal to a tenancy tribunal.<sup>276</sup>

### **3.2. Important evaluative criteria for the tenant**

#### **3.2.1. Affordability**

In the private rented sector across Britain and Ireland the rent is a matter for free market negotiation, but if a welfare support such as housing benefit or rent supplement is relied on by the tenant then housing benefit is used to cover any of the rent payment, there will be limits on the rent level accepted for benefit claims. Thus the initial rent is freely negotiable between landlord and tenant and will generally correspond to prevailing market forces. Across Britain all new private lettings have been either assured or assured shorthold tenancies (short assured tenancies in Scotland).<sup>277</sup> Both operate under a market rent regime, but the effect is rather different in practice. Assured shortholds give limited security of tenure, so in practice if the landlord wishes to increase the rent it is difficult for the tenant to object; eventually he will have to move out if he is not prepared to agree to an increase. Fully assured tenancies are rarely granted by private sector landlords, but if they are open market negotiation of rents applies to the initial rent. During any fixed contractual period, the landlord can put the rent up if the tenant agrees, but otherwise the landlord will have to wait until the fixed term ends before he or she can raise the rent. Where a fixed term assured tenancy is agreed it will be essential for the landlord to address the question of rent review during that fixed term because the statutory method of increase in section 13 only applies to assured periodic tenancies, though this will include the statutory periodic tenancy which arises when the fixed term assured tenancy expires.<sup>278</sup> The landlord must give at least a month's notice of the proposed increase if the rent is paid on a weekly or monthly basis (more if the rent period is longer). In Britain the landlord can increase the rent payable under a shorthold most easily by granting a series of short contractual terms, thus reserving the possibility of increasing the rent at each contractual renewal. In Ireland the maximum a landlord can charge is the market rate. This essentially means the rent which a willing tenant not already in occupation would be willing to pay and a willing landlord would accept in respect of the dwelling.<sup>279</sup> In practice a landlord is prohibited from setting the rent higher than an open market level and can only raise the rent rate once a year.

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<sup>276</sup> RTA 2004 part 6.

<sup>277</sup> *Secretarial and Nominee Co Ltd v. Thomas* [2005] EWCA Civ 1008.

<sup>278</sup> Housing Act 1988 s. 13; Regulatory Reform (Assured Periodic Tenancy) (Rent Increases) Order 2003. The form that can be used either for an assured or an assured shorthold tenancy is a *Landlord's notice proposing a new rent under an Assured Periodic Tenancy of premises situated in England: Assured Tenancies & Agricultural Occupancies (Forms) (Amendment) (England) Regulations 2002*; in Wales SI 2003/307.

<sup>279</sup> Market rent is defined in s. 24 of the RTA 2004.

In Ireland the Residential Tenancies Act 2004 provided that Irish rents in tenancies governed within the Act must not be above a market rate<sup>280</sup> and once the rate was agreed upon, it was open to annual review.<sup>281</sup> Rent review is broadly defined, so the method of reviewing the rent rate is left open to the parties who could decide their own rent review formula so long as the method chosen did not result in a rent which deviated from the market rate. Market rent is defined as the rent which a willing tenant not already in occupation would give and a willing landlord would take for the dwelling having regard to the other terms of the tenancy as well as the letting values of a similarly placed tenancies.<sup>282</sup> The Private Residential Tenancies Board collect rent rate data from all RTA tenancies and this data assists where a dispute arises in the determination of the market rate.<sup>283</sup> A landlord must give 28 days' notice prior to the change in rent taking place.<sup>284</sup> In the event of a dispute concerning a rent review the Board will examine whether a valid notice of a review has been served. When reviewing whether the rent rate confirms to the market rate the Board are disbarred from considering the financial circumstances of either party.<sup>285</sup> In addition to consulting with local values or letting agents, parties may also be required to support such representations with direct oral evidence.<sup>286</sup> Where the landlord fails to follow the correct procedures as set out in Part 3 of the RTA 2004, the rent review will have no effect and the old rent will continue.<sup>287</sup>

Across Britain and Ireland a landlord must provide the services which are reasonably required by the tenant, including, as appropriate, the supply of gas, electricity, sewerage and water. Other utilities would include telephone. In most cases the supply contract would be concluded between the utility provider and the tenant directly. In some cases the landlord might, for example, supply a pre-payment meter for electricity. Waste disposal is provided by the local authority and is paid for through the council tax. Contracts will generally be concluded by the tenant. If, exceptionally, a landlord concludes a contract for a utility the cost may be recovered from the tenant, usually along with the rent. In England notice would be needed to include utilities payments in rent if this had not previously been the case.<sup>288</sup> The tenant must pay for the fuel and water used, usually paying the bill himself. If the landlord pays the fuel or water company's bills, the cost can be included in the rent. Where a tenant does not pay rent the usual course of action for the landlord is to terminate the tenancy and seek possession of the premises. Cutting off the supply of utilities in response to rent arrears may lead to a claim of illegal eviction by the tenant and the landlord may be liable in

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<sup>280</sup> RTA 2004 s. 19(1) "Market rent" is defined by the RTA 2004 s.24.

<sup>281</sup> RTA 2004 s. 20(1), the rent rate is open to review once a year. However a further review may be allowed where there is a substantial change in the nature of the accommodation.

<sup>282</sup> RTA 2004 s. 24 similarly placed refers to the letting values of dwellings of a similar size, type and character to the dwelling and situated in a comparable area to that in which the tenancy in question is situated.

<sup>283</sup> RTA 2004 pt 9.

<sup>284</sup> RTA 2004 s. 22(2).

<sup>285</sup> RTA 2004 s. 120.

<sup>286</sup> *Devlin v. MacDermot-Roe* TR30/DR511/2007, 26 April 2007.

<sup>287</sup> *Canty v Connelly* TR22/DR259/2006, 11 July 2006.

<sup>288</sup> Housing Act 1985 s. 103; *Rochdale Borough Council v. Dixon* [2011] EWCA Civ 1173.

damages to the tenant. In Ireland under the RTA 2004 such action would amount to constructive termination.<sup>289</sup>

As set out above across Britain and Ireland the primary duty to repair the dwelling will generally lie with the landlord however the tenant must be alert to the fact that he must also undertake certain obligations with regard to maintenance of the property. For instance the tenant will be liable for any damage caused to the property which is beyond normal wear and tear.<sup>290</sup>

Across Britain and Ireland where registration fees fall due these are the responsibility of the landlord. This is also the case with respect to taxation in Britain with respect to council tax which the occupier is liable to pay, however the equivalent tax in Ireland, the local property tax, is payable by the owner of the dwelling. These matters have been discussed above.<sup>291</sup> There are rent subsidies available to tenants struggling to pay their rent across Britain and Ireland.<sup>292</sup>

### 3.2.2. Stability

Across Britain and Ireland security in both the private and the social rented sectors attaches only to a tenancy and only where a house is let. Thus a licence will not confer security.<sup>293</sup> This seems to open the possibility that a landlord could evade the security regimes by artificially altering a lease into a licence. This has attracted much more litigation in England than in Scotland or Ireland. In Scotland this could be because the definition of a lease is wider in Scotland<sup>294</sup> while in Ireland differences in the system of rent regulation removed the possibility of such action.<sup>295</sup> The English test is that a tenant must be given exclusive possession of property, and this requires that the tenant is able to exclude the landlord and all others from the property for the duration of the lease.<sup>296</sup> A guest in a hotel lacks exclusive possession because the hotel management has access to the room to service it. A tenant must have exclusive control. In England many unscrupulous landlords sought to exploit this distinction in order to avoid conferring full security on people who were in substance tenants; devices included the provision of minimal breakfasts, reciting the absence of exclusive possession,<sup>297</sup> or

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<sup>289</sup> *Wall v. Cullen* TR17/DR487/DR655/2008, 29 October 2008. Here a landlord caused the electricity supply to be cut off in order to force the tenants to leave, the Private Residential Tenancies Board held this amounted to constructive termination and awarded the tenants €3,000 compensation.

<sup>290</sup> See section 3.1.1 above.

<sup>291</sup> See registration at section 3.1.1 and taxation at section 2.6.

<sup>292</sup> This has already been discussed in section 2.5.

<sup>293</sup> *Street v. Mountford* [1985] AC 809, HL. See McAllister, *Scottish Law of Leases*, para. 2.50 ff. Wylie, *Irish Landlord and Tenant Law*, p. 59.

<sup>294</sup> McAllister notes that Rankine's definition of a lease included 'certain uses' as well as 'the entire control' of lands.

<sup>295</sup> The system of rent regulation in Ireland required the house or part of a house subject to a letting to be let as a separate dwelling. Thus, unlike in England and Wales, exclusive possession was a statutory requirement in Ireland thereby greatly reducing the uncertainty over the nature of various occupancy agreements. See Wylie, *Irish Landlord and Tenant Law*, p. 546-547.

<sup>296</sup> It is perfectly permissible for the landlord to have limited rights of access e.g. to inspect the state of repair.

<sup>297</sup> *Street v. Mountford* [1985] AC 809, HL.

requiring a couple to sign two separate licence agreements.<sup>298</sup> These avoidance devices were invalidated by the rule that the test of exclusive possession was substantive and by allowing the courts to ignore any document that could be labelled as a 'pretence'.<sup>299</sup> It appears that this was always less of an issue in Scotland<sup>300</sup> and Ireland. In Ireland all private tenancies are governed by the RTA 2004 unless excluded. Among the main occupancy arrangement excluded are holiday lets; resident landlord tenancies i.e. where the landlord shares occupation employment tenancies, business tenancies, leases of more than 35 years, shared ownership leases etc.<sup>301</sup>

Across Britain there are a wide range of tenancies that are not assured as well as many licences.<sup>302</sup> These include tenancies in other sectors such as business tenancies, agricultural leases, residential tenancies granted by social landlords and also sharing arrangements/licences (i.e. Premises are not let; where accommodation is not a self-contained dwelling;<sup>303</sup> where the landlord is resident; serviced accommodation; tied accommodation of employees).<sup>304</sup> Occupancy agreements which relate to a dwelling which is not the principle home of the occupant are excluded (i.e. Company lets;<sup>305</sup> second homes; holiday lets and out of season holiday lets; student lets and out of term lets). Many of these will operate as contractual arrangements, either contractual tenancies or licence agreements. If the arrangement does create a tenancy there will be minimum periods for notices to quit but little other regulation. In some but not all cases there is protection against eviction, i.e. the requirement to obtain a court order before evicting the occupier.<sup>306</sup>

Licence agreements remain common in the social housing sector across Britain and Ireland. Often such arrangements are used to house homeless persons in hostels and emergency-short stay accommodation.<sup>307</sup> In such situations the length of stay varies significantly and in some cases may be for as short as a single night. The licensee is not granted exclusive possession of the dwelling and therefore no tenancy arises.

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<sup>298</sup> *Antoniades v. Villers* [1990] 1 AC 417, HL.

<sup>299</sup> *Street v. Mountford* and *Antoniades v. Villers* as above.

<sup>300</sup> In theory it should have been possible for protection to be evaded in Scotland by the use of licences, though the complete lack of case law on this suggests that it was not common, perhaps because of the less developed concept of a licence in Scotland. However, there is anecdotal evidence that attempts to evade protection by means of the notorious "bed and breakfast" lets were widespread north of the border, for which there is also some case evidence – see *Holiday Flat Co v Kuczera* 1978 SLT (Sh Ct) 47 (a successful attempt at evasion) and *Gavin v Lindsay* 1987 SLT (Sh Ct) 12 (an unsuccessful attempt).

<sup>301</sup> RTA 2004 s. 3(2).

<sup>302</sup> There were corresponding exceptions before 1989 from the Rent Act 1977.

<sup>303</sup> Though some accommodation may be shared, see below 6.3, pp 135-138.

<sup>304</sup> This is where accommodation is provided by an employer and it is essential for the employee to live in the property to do his job.

<sup>305</sup> *Eaton Square Properties v. O'Higgins* (2001) 33 HLR 68 CA.

<sup>306</sup> Protection from Eviction Act 1977.

<sup>307</sup> Approximately 2,000 voluntary units are provided within the sector on the basis of license arrangements. See D. Silke & C. Farrell, 'Study to examine the implications of including the voluntary and co-operative sector under the PRTB registration and dispute resolution services' (Housing and sustainable communities agency: Stationery Office, 2011), p. 14.

Across Britain and Ireland it is possible to create a lease orally however where the term of the lease is greater than one year in Scotland<sup>308</sup> and Ireland<sup>309</sup> or greater than three years in England and Wales<sup>310</sup> then it must be in writing. Despite this, all tenancies are in practice granted in writing, not least to ensure that the landlord is able to enforce terms that are clear. In addition across both Islands a tenant must be provided with a rent book which will contain key details concerning the tenancy including rent, etc.<sup>311</sup>

As detailed above in Scotland, Wales and Ireland all private landlords must register every tenancy, though there is no registration scheme in England, while in England and Wales and Scotland landlords letting houses in multiple occupation must have a licence. Where a landlord fails to register a tenancy or get a licence he will face sanctions including fines and rent penalties. In Ireland where a landlord fails to register the tenancy then he will be unable to avail of the dispute resolution services of the Board however his failure to register will in no way inhibit the rights of the tenants under the RTA 2004.<sup>312</sup> In addition, the errant landlord may face prosecution by the Board for failing to register after having been notified and not taking appropriate steps to register the tenancy.<sup>313</sup> An errant landlord may face fines etc.<sup>314</sup>

As set out earlier, deregulation of the private rented sector across Britain and Ireland during the 1980s and the return of market rents and limited security have reduced the extent to which landlords seek to avoid landlord and tenant law by using insecure instruments such as licences. In addition failure to register will lead to robust sanction, particularly in Ireland under the RTA 2004 and in the case of a failure to get a house in multiple occupation licence.

The security of tenants across Britain and Ireland has already been considered already<sup>315</sup> however it is worth reiterating that in general tenants in the private rented sector across Britain and Ireland have limited security and do not have a guarantee to

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<sup>308</sup> Requirements of Writing (Scotland) Act 1995, s. 1(7) (as amended by the Abolition of Feudal Tenure etc (Scotland) Act 2000, s 76(1) and sch 12, para 58). Also under Part 10 of the Land Registration etc (Scotland) Act 2012 (which is not yet in force) documents requiring writing under the 1995 Act can be in electronic form.

<sup>309</sup> Landlord and Tenant Law Amendment (Ireland) Act 1860, .s 4.

<sup>310</sup> Law of Property Act 1925, s. 54(2).

<sup>311</sup> Landlord and Tenant Act 1985 s. 4. Failure gives rise to an offence under s. 7; Housing (Scotland) Act 1988 s. 30(4); Assured Tenancies (Rent Book) (Scotland) Regulations 1988 (notices etc. to be included); Housing (Rent Book) Regulations 1993 (SI No. 146/1993) as amended by Housing (Rent Books) Regulations 1993 (Amendment) Regulations 2004 (SI No. 751/2004) and by Housing (Rent Books) (Amendment) Regulations 2010 (SI No. 357/2010).

<sup>312</sup> *Ibid.*, s. 83(2).

<sup>313</sup> Where a landlord fails to register then he will not have recourse to the dispute resolution services of the Private Residential Tenancies Board, however his inability to register will not restrict the tenant's rights under the RTA 2004. Where the Board is of opinion that a tenancy has not been registered it shall serve a notice under s. 144(1) allowing a landlord a period of time to explain their failure. Failure to register without good reason may lead to prosecution by the Board. It is also in the landlords economic interests to register as under the RTA 2004 s.145(5) registration is necessary for tax deductions under s. 97(2)(e) of the Taxes Consolidation Act 1997.

<sup>314</sup> Housing Act 2004, s. 72. Letting a licensable HMO without a licence is an offence and can result in a fine of up to £20,000

<sup>315</sup> See section 3.1.2.

stay in their dwelling as long as they respect the contract however the extent of their security varies. Tenants in the social rented sector, particularly in Britain, generally enjoy greater security than private tenants however they do not have absolute security of tenure.

Regulation of rent increases has been covered already<sup>316</sup> however it is worth reiterating that market rents apply across the private rented sector in both Britain and Ireland and therefore there is nothing to prevent an increase in rent provided it is in accordance with market forces and abides by the regulatory regime governing the tenancy in question.

Across Britain and Ireland in order to evict a tenant it is necessary first to end any contractual rights and give the necessary notices of intention to recover possession discussed in the preceding section. It is then necessary to secure a court order to evict a residential tenant.<sup>317</sup> Defences should be run when a possession order is sought though the British jurisdiction (England, Wales and Scotland) recognise mandatory grounds. The Human Rights implications of eviction were recently the focus of much attention in Ireland. Originally, section 62 of the Housing Act 1966<sup>318</sup> provided a local authority with an accelerated method of recovering possession of a dwelling. While the provision has been relied on by local authorities for over forty years, its continued use<sup>319</sup> has been called in to question by a recent Supreme Court judgment.<sup>320</sup> Section 62 provided a summary eviction procedure against a tenant overholding despite the service of a notice of termination. The authority could apply to the District Court for the issue of a warrant, and the court was required to issue this if satisfied that a proper demand had been made. In *Donegan and Gallagher* the Supreme Court held that this was incompatible with the tenant's trial rights under the European Convention on Human Rights.<sup>321</sup> However the eviction procedure set out in section 62 is still used by local authorities in cases where the facts are undisputed, unlike the *Donegan* case.

### 3.2.3. Flexibility

In general in Britain residential tenancies usually consist of a fixed term grant followed by a periodic continuation. Termination during the fixed term is considered below, so the topic here is the giving of a notice to quit a tenancy while it is periodic, either originally or by implied continuation. The continuation of assured tenancies<sup>322</sup> and secure

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<sup>316</sup> See section 3.2.1.

<sup>317</sup> The following legislation makes it necessary to seek a court order for possession where the tenant fails to vacate. Rent Act 1984 (Scotland), Protection from Eviction Act 1977 (England and Wales), Prohibition of Forceful Entry and Occupation Act 1971 (Ireland).

<sup>318</sup> Ejectment proceedings were originally developed under the Landlord and Tenant Law Amendment Act Ireland 1860 (Deasy's Act), s. 86.

<sup>319</sup> This provision has provoked much litigation see: *Dublin City Council v. Fennell* [2005] 1 I.R. 604, *Leonard v. Dublin City Council* [2008] IEHC 79; *Donegan v. Dublin City Council* [2008] IEHC 288; *Dublin City Council v. Gallagher* [2008] IEHC 354, O'Neill J.; *Pullen v. Dublin City Council* [2008] IEHC 379, Irvine J.; and *Pullen v. Dublin City Council* (No. 2) [2009] 2 ILRM 484.

<sup>320</sup> *Donegan v. Dublin City Council, Ireland and the Attorney General and Dublin City Council v. Gallagher* [2012] IESC 18

<sup>321</sup> *Ibid.*

<sup>322</sup> Housing Act 1988 s. 5(2); this is subject to any contractual regrant: s. 5(4).

tenancies<sup>323</sup> is rather similar. The periodic tenancy continues between the same parties and on the same terms (ignoring express terms about termination), with the period of the tenancy being determined from how rent was last payable under the tenancy.<sup>324</sup> At this stage it is necessary for the tenant who wishes to leave to terminate the tenancy by giving the landlord a valid notice to quit.<sup>325</sup> The law here is a curious mixture of the old view requiring strict technical accuracy in notices and a more relaxed view allowing effect to a notice which is comprehensible to the other party.<sup>326</sup> Many notices given by tenants are ineffective. The rules are as follows. A notice to quit residential property must be in writing, and of a minimum length of four weeks.<sup>327</sup> A full period of the tenancy is required, so, for example, if the tenancy is quarterly a quarter's notice is required.<sup>328</sup> The latter rule at least requires the notice to expire on either the last day of a period or the next day, the first day of the succeeding period.<sup>329</sup> Service by post is usual. It must be remembered that one joint tenant can serve notice which ends the tenancy for all other joint tenants.<sup>330</sup> However, in Ireland this is not the case with a tenancy governed by the RTA 2004. Rather where there are multiple tenants all tenants must agree to a termination in order for it to be valid.<sup>331</sup>

Across Britain most residential tenancies are initially granted for a fixed term. If so, the tenant cannot terminate the tenancy without the landlord's concurrence during the continuance of the fixed term. This also applies to any contractual regrant. It is possible for a lease to include a break clause enabling a tenant to break a fixed term, but this is unusual unless the term is long; the terms of a break clause often require the tenant to be up to date with rent etc before being entitled to exercise the break.

In Ireland where the tenant wishes to terminate the tenancy they must give the landlord valid notice. Any notice of termination for tenancies of houses let for rent or other valuable consideration, whether by landlord or tenant, must be in writing and must be served not less than 4 weeks before the date on which it is to take effect.<sup>332</sup> Where a tenancy is regulated by the RTA 2004 then the period of required notice will vary according to the duration of the tenancy in the manner set out below. Alternatively where the tenant fails to provide a valid notice of termination then he runs the risk of forfeiting some or all of his deposit. For tenancies which are not regulated by the RTA 2004, the notice period is determined by the nature of the agreement, subject to the statutory minimum of twenty eight days set out above, except in the case of anti-social behaviour

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<sup>323</sup> Housing Act 1985 s. 86.

<sup>324</sup> Rent paid quarterly under an annual tenancy requires a quarterly notice: *Church Commissioners for England v. Meya* [2006] EWCA Civ 821. An express tenancy agreement should state the period, the rent days and the period of notice to quit required.

<sup>325</sup> On rehousing see *Watford Borough Council v. Simpson* (2000) 32 HLR 901, CA.

<sup>326</sup> *Mannai Investments Co. v. Eagle Star Life Assurance Co* [1997] AC 749, HL.

<sup>327</sup> Protection from Eviction Act 1977 s. 5; *Hounslow London Borough Council v. Pilling* [1993] 1 WLR 1242, CA; *Laine v. Cadwallader* (2001) 33 HLR 36, CA.

<sup>328</sup> It is half a year for a yearly tenancy.

<sup>329</sup> Notice last date period only: *McDonald v. Fernandez* [2003] EWCA Civ 1219. See also *Lower Street Properties v. Jones* (1996) 28 HLR 877; *Notting Hill Housing Trust v. Roomus* [2006] EWCA Civ 407.

<sup>330</sup> See above, 6.4, pp. 154-155.

<sup>331</sup> RTA 2004 s. 73.

<sup>332</sup> Housing (Miscellaneous Provisions) Act 1992, s.16.

or where there is a damage or threat of damage to the dwelling.<sup>333</sup> The parties are at liberty to include early termination terms in the tenancy agreement. Where the tenancy agreement contains such a break clause, this may allow termination to occur prior to expiry of the term and depending on the nature of the term this power may be extended to either landlord or tenant or indeed both. In a periodic tenancy the general rule is that the notice period required varies according to the duration of the tenancy and will operate to prevent renewal of the tenancy. Where there is a yearly tenancy then notice of 183 days (one half year) will be required to terminate the tenancy.<sup>334</sup> Where there is a monthly tenancy then one months' notice is required to determine the tenancy.<sup>335</sup> Although many local authority tenancies are weekly tenancies a minimum notice period of twenty eight days applies.

Where the tenant wishes to leave the tenancy upon expiry of the term, he must give notice to the landlord of at least 28 days. In the event that the tenant is seeking to bring about a termination due a landlord breach of obligation, the tenant must first notify the landlord of the failure in writing and give the landlord the opportunity to remedy the failure in a reasonable time. The landlord does not have a right to compensation where an early termination has been brought about in a manner which complies with the notice requirements of the RTA 2004. It is only when the tenant deviates from the required procedure that a landlord may claim compensation. Where the landlord is in breach of tenancy obligations the tenant may give a shorter notice period. As set out above the tenant must afford the landlord the opportunity to remedy a breach however where a landlord fails to remedy the breach then the tenant may give 28 days' notice. The main exception to this general rule is where the landlords breach causes an imminent danger to the tenant due to the landlords breach; in this situation the tenant may give 7 days' notice.

Across Britain and Ireland in order for the creation of a sub tenancy in the private rented or social rented sectors consent from the landlord is an essential requirement. In England and Wales a term against alienation is implied by statute in a secure tenancy, and applies to any assignment, sub-letting or parting with possession without consent;<sup>336</sup> the three exceptions where dealings are permitted are: an exchange to which the landlord consents;<sup>337</sup> an assignment ordered in matrimonial proceedings; and an assignment to a person qualified to succeed on the tenant's death. On the other hand the tenant may take in a lodger in the dwelling-house; this encourages full occupancy of social housing.<sup>338</sup> Consent to subletting should not be withheld unreasonably.<sup>339</sup> A secure tenant will commit an offence if he sublets the property such that the property (or any part) is no longer their only or principal home when he knows that this is contrary to

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<sup>333</sup> RTA 2004 ss. 67, 68.

<sup>334</sup> *Wright v. Tracey* (1874) IR 8 CL 478 at 494.

<sup>335</sup> *Kane v. McCabe* [1952] IR Jur. Rep. 41

<sup>336</sup> Housing Act 1985 s 91. This applies to any periodic tenancy and to a term certain granted since 5 November 1982. The controls continue to apply while the tenancy is not secure because the tenant is not occupying as his principal home: s. 95.

<sup>337</sup> Housing Act 1985 s. 92; consent is not to be withheld unreasonably; permitted grounds are set out in detail in sch. 3.

<sup>338</sup> Housing Act 1985 s. 93.

<sup>339</sup> Housing Act 1985 s. 94.

the express or implied terms of their tenancy. An offence will also be committed if the tenant dishonestly and in breach of an express or implied term of the tenancy sublets or parts with possession of the whole or part of the property and ceases to occupy it as their only or principal home. In the case of the first offence, it will be a defence for the tenant to show that they acted as they did owing to violence or threats of violence towards themselves, or towards a member of their family who was residing with them immediately before he ceased to occupy the property, from a person residing in, or in the locality of, the property.<sup>340</sup> It is also a defence to the first offence to show that the person in occupation is someone who is entitled to apply to the court for an order giving him a right to occupy the dwelling-house, e.g. under an occupation order or a matrimonial order transferring the tenancy,<sup>341</sup> or a transfer for the benefit of a child.<sup>342</sup>

In Scotland if a social tenancy is sublet, then the subtenancy cannot be a Scottish secure tenancy, since the head tenant is not a local authority or registered social landlord, and will be prevented from being a regulated or assured tenancy by virtue of section 32(7) of the Housing (Scotland) Act 2001. If a private sector tenancy is sublet with the landlord's consent, then the sublet will normally qualify as an assured tenancy

So far as a private sector assured tenancy is concerned, a tenant is not permitted to assign the tenancy or sublet or part with possession of the whole or any part of the house without the consent of the landlord.<sup>343</sup>

In the social sector, a tenant holding under a Scottish Secure tenancy is not permitted to assign the tenancy or sublet or part with possession of the whole or any part of the house without the written consent of the landlord.<sup>344</sup> In the case of assignation, the dwelling must have been the purported assignee's principal home in the six months prior to the application for landlord consent to the assignation.<sup>345</sup> Where the landlord is a registered social landlord then the assignee or subtenant must be a member of the association at the time of the transfer. An authorised sub-tenant is a qualifying occupier who is entitled to receive notice of, and defend, an action raised for possession. A Scottish secure tenant is entitled to exchange his home for another property also held subject to a Scottish secure tenancy if he is able to find a suitable match and obtain the consent of both landlords.<sup>346</sup>

In Ireland under the RTA 2004 a tenant may not sublet without the written consent of the landlord.<sup>347</sup> In the event that the landlord consents to the sub-letting then the tenant will become a landlord upon letting a sub-tenancy. As such they will be regulated with all of the obligations set out above which relate to the landlord under the RTA 2004. Subletting of social housing will usually be forbidden.

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<sup>340</sup> Prevention of Social Housing Fraud Act 2013 s.1(3).

<sup>341</sup> Family Law Act 1996 s.53 and sch. 7.

<sup>342</sup> Children Act 1989 sch.1, para.1.

<sup>343</sup> Housing (Scotland) Act 1988 s. 23; this is an implied term of every assured tenancy; McAllister, *Scottish Law of Leases*, para. 17.59.

<sup>344</sup> Housing (Scotland) Act 2001 s. 32 and sch 5, pt 2; Model Scottish Secure Tenancy (2002) cl. 4; McAllister, *Scottish Law of Leases*, para. 18.94 ff.

<sup>345</sup> It is proposed to extend this to twelve months by Housing (Scotland) bill 2013 cl. 13; and allow the landlord to refuse consent where the assignee would not have a reasonable preference in housing allocation. On the current law see *East Lothian Council v. Duffy* 2012 SLT (Sh. Ct) 113.

<sup>346</sup> Housing (Scotland) Act 2001 s.33; McAllister, *Scottish Law of Leases*, para. 18.99ff.

<sup>347</sup> RTA 2004 s 16(k).

## 4. Comparison of tenures with a public task

### 4.1. Generalities

#### Secure Tenancies in England and Wales

A tenant holding under a secure tenancy has a statutory right to stay in the dwelling in excess of the contractual term stated in the lease agreement.<sup>348</sup> When seeking to terminate the tenancy the landlord must give the tenant written notice<sup>349</sup> setting out the ground of termination as well as the date from which the landlord may bring proceedings for recovery of possession. A minimum notice period of four weeks is required and the date set in the notice cannot be earlier than the date on which the tenancy would have been brought to an end by a notice to quit had it not been a secure tenancy.<sup>350</sup> A notice to quit cannot be revoked.<sup>351</sup> The number of notices seeking possession has risen sharply, with 100,000 issued between April and November 2013, the period when restrictions on housing benefit began to bite.<sup>352</sup> Rent arrears and deterioration of the dwelling are both discretionary grounds for recovery of possession so the court must be satisfied that it is reasonable to make the possession Order. Where the landlord requires the dwelling for redevelopment this is a ground for recovery of possession however before making the order the Court must be satisfied that suitable alternative accommodation available.<sup>353</sup>

#### Assured Tenancies in England and Wales

Assured tenancies are common in the social rented sector across England and Wales.<sup>354</sup>

#### Local authority tenancies in Ireland

Termination of tenancies which fall outside of the RTA 2004 is governed by a range of statutes and various principles developed through the common law. In general there were two primary methods for bringing a tenancy to an end; serving a notice to quit or a forfeiture notice or, if it is a fixed term, expiry. In all cases where the tenancy is a residential tenancy then termination is governed by the Housing (Miscellaneous Provision) Act 1992. Prior to the 1992 Act, termination of periodic tenancies was quite straight forward; where the tenancy was weekly/monthly then all that was required was to give one week/month notice to quit in writing.<sup>355</sup> The form of the notice was not strictly proscribed, and so long as it was clear from the notice that the landlord or tenant wishes to terminate the tenancy then that would suffice. The notice should give details of the tenancy, including the term, the identity of the parties, the amount of rent payable and a description of the dwelling.<sup>356</sup> A periodic tenancy may be terminated without giving a

<sup>348</sup> Garner and Frith, *Practical Approach* (7th edn), ch. 18.

<sup>349</sup> Housing Act 1985 s. 83; Secure Tenancies (Notices) Regulations 1987 as amended for England by SI 2004/1627.

<sup>350</sup> Housing Act 1985 s. 83.

<sup>351</sup> *Fareham Borough Council v. Miller* [2013] EWCA Civ 159.

<sup>352</sup> *Independent on Sunday* 15 December 2013 citing *Inside Housing* magazine.

<sup>353</sup> Housing Act 1985 sch. 2, as amended eg by Housing Act 1996 ss 144-152.

<sup>354</sup> This has been discussed in section 3.1.2 above.

<sup>355</sup> *Ibid.*, s.16(1).

<sup>356</sup> *Glory Estates Ltd v. Mooney*, unreported, HC, 13 May 1971, at pp 5-6.

reason. The Housing (Miscellaneous Provision) Act 1992 introduced a minimum notice period of twenty eight days for periodic tenancies.<sup>357</sup> However, this period acts as a basic notice period with parties free to agree to longer notice periods.<sup>358</sup> Where there is a yearly tenancy then notice of 183 days (a half year) is required.<sup>359</sup> Under the 1992 Act notice must be served pre commencement. The Act 1992 has no application to fixed term tenancies of which the term either expires or where it is terminated early then forfeiture is the appropriate procedure.

Local authority tenancies are subject to various specialist statutes as well as the general principles of pre-2004 tenancy law which govern the termination of tenancies. Many local authority tenancies are weekly tenancies. This means that security of tenure for local authority tenants holding under a periodic tenancy is decidedly limited.<sup>360</sup> However in practice local authorities are reluctant to terminate a tenancy and in many cases it is only as a last resort in response to a serious breach, e.g. anti-social behaviour, of the tenancy obligations. Therefore local authority tenants often enjoy practical security for as long as their need is present rather than in accordance with the technical security attaching to their tenancy. As such termination procedures are rarely invoked however when they do arise it is usually at the end of a lengthy dispute concerning a serious breach of the tenancy. However, the local authority<sup>361</sup> is an organ of state and as such is affected by various public law duties and in particular the provisions of the European Convention on Human Rights.<sup>362</sup> This has significant consequences for the parties to the tenancy as evidenced in a range of cases which concerned issues arising after termination of the tenancy.<sup>363</sup>

### **Short secure tenancies**

There are a number of variants of the secure tenancy which lack long term security beyond a short fixed term and where possession is mandatory. In each of these cases there is a review procedure to consider the decision to limit security, and to meet the argument that proportionality must be considered. Examples are Introductory tenancies, Demoted tenancies, Family Intervention tenancies and the new Flexible tenancies. Even here the making of a possession order is not absolutely automatic because it is necessary to make available to the court the opportunity to assess the proportionality of ordering possession, or more accurately, possession should not be ordered if no reasonable person would consider it justified.<sup>364</sup> In *Pinnock* a secure tenant for 30 years was demoted after antisocial behaviour by a family member and it was held that the making of a possession order was proportionate on the facts.

The Short Scottish Secure tenancy was introduced alongside the Scottish Secure Tenancy in order to provide a short term tenancy option to local authorities and Registered Social Landlords. In this sense the Short Scottish secure tenancy shares key

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<sup>357</sup> Housing (Miscellaneous Provisions) Act 1992, s.16(1).

<sup>358</sup> *Ibid.*, s.16(3).

<sup>359</sup> *Wright v. Tracey* (1874) IR 8 CL 478, *Kane v. McCabe* [1952] Ir. Jur. Rep. 41.

<sup>360</sup> Housing (Miscellaneous Provisions) Act 1992, s. 16(1).

<sup>361</sup> Operating a section of the housing system which is meant to be guided more by a social than by commercial criteria.

<sup>362</sup> As implemented by the European Convention on Human Rights Act 2003.

<sup>363</sup> *Donegan v. Dublin City Council and Dublin City Council v. Gallagher* [2012] IESC 18.

<sup>364</sup> *Manchester City Council v. Pinnock* [2010] UKSC 45.

features with the short assured tenancy, in particular the Short Scottish secure tenancy is for a fixed term, at the end of which the landlord has an absolute right to terminate the tenancy without the tenant having the right to extended security of tenure, the right to buy or the succession rights which are available with an ordinary Scottish secure tenancy

## 4.2. Evaluative criteria for public/social/private subsidized landlords

- Funding by state or other bodies

Subsidisation of public/social/private landlords already been discussed.<sup>365</sup>

Statute has overlaid the common law of leases so completely in the field of residential tenancies that it is necessary to differentiate the key types of tenancy across Britain and Ireland.<sup>366</sup> In Britain private rentals are either fully assured tenancies or assured shorthold tenancies (short assured tenancies in Scotland) while in Ireland all tenancies are governed by the Residential Tenancies Act 2004 unless excluded. With regard to social renting, in England and Wales local authority tenants will have secure tenancies while social tenants holding from non-public landlords, referred to in Wales as registered social landlords and referred to in England as registered providers of social housing, will generally have assured tenancies. In Ireland local authority tenants will have local authority tenancies while other social tenants will have a contractual tenancy or a tenancy governed by the Residential Tenancies Act 2004. The distinction is incredibly important as each tenancy will attract different rights and duties which will govern material matters of the occupancy arrangement such as rent, security etc.

## 4.3. Evaluative criteria for the tenant

### 4.3.1. Access

There is a gross undersupply of various forms of dwellings with a public task across Britain and Ireland. Across Britain in 2011 there were 1.84 million households on local authority waiting lists..<sup>367</sup> In Ireland the National Assessment 2011 revealed almost 100,000 households waiting for social housing support. Of this figure, two thirds were not able to meet the cost of their existing accommodation. Demand for social housing cannot be met by existing social housing stock and the result is that housing waiting lists have grown rapidly. In 2011 almost a quarter of all those assessed as being in need of housing were on housing waiting lists for more than four years while almost sixty per cent of all those assessed as being in housing need had been on waiting lists for over two years.<sup>368</sup>

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<sup>365</sup> See section 2.5.

<sup>366</sup> ‘Lease’ and ‘tenancy’ are interchangeable, but ‘tenancy’ is used for shorter arrangements.

<sup>367</sup> ‘Local Authority Housing Statistics 2010-11’ (London: Department for Communities and Local Government, 2013).

<sup>368</sup> Department of the Environment, *Housing Needs Assessment 2011* (Dublin: Stationery Office, 2011), p. 1.

Across Britain and Ireland public/social housing must be allocated in accordance with an allocation policy. Local authorities and registered providers of social housing are the main providers of housing with a public task in England and Wales, Scotland and Ireland. Rents in accommodation provided by these landlords should be affordable.<sup>369</sup> Social housing is allocated in accordance with an allocation scheme determined by each provider.<sup>370</sup> It must take into account its homelessness strategy, its tenancy strategy and, where appropriate, the London housing strategy.<sup>371</sup> Every social provider must have rules covering transfers and exchanges (which are not allocations<sup>372</sup>) as well as initial allocations, and the whole scheme must be published.<sup>373</sup> The legislation covering England has been changed by the Localism Act 2011<sup>374</sup> and that covering Wales is contained in the original Housing Act 1996;<sup>375</sup> however the two regimes are currently the same. No such change has been introduced in Ireland or Scotland. Providers are required to allocate in accordance with their allocation scheme,<sup>376</sup> but if a housing officer grants tenancies to people who are not at the top of the list the tenancies remain valid.<sup>377</sup>

Most applications are now made to a common register which includes the property of the local authority and registered providers operating in the locality.<sup>378</sup> In England and Wales and Scotland because housing allocations can affect voting patterns and to avoid any possibility of Gerrymandering, councillors are required to recuse themselves from participation in allocation decisions affecting accommodation situated within their electoral area.<sup>379</sup> However there is no such provision in Ireland.<sup>380</sup>

Across both Islands the prospective tenant must take the initiative by making a formal application for accommodation to a social landlord. However, the next step in the process differs greatly across all jurisdictions. In Scotland provided the applicant must be over the age of 16, but provided that is so anyone can apply for social housing and will be added to the housing waiting list. This is in contrast to England and Wales, where

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<sup>369</sup> The tenant will pay a lower rent and is not required to pay a deposit.

<sup>370</sup> In Ireland section 60 of the Housing Act 1966, codified the allocation procedure for State housing. See Housing (Miscellaneous Provisions) Act 2009, s. 22. The Social Housing Assessment Regulations 2011 (S.I. No. 84 of 2011). For Scotland see Housing (Scotland) Act 1987 s. 21. Public consultation would be required before rules were adopted under the Housing (Scotland) Bill 2013 cl. 4.

<sup>371</sup> Housing Act 1996 s. 166A inserted by Localism Act 2011 s. 147.

<sup>372</sup> *R. v. Lambeth London Borough Council ex parte Pattinson* (1996) 28 HLR 214; *R v. Islington London Borough Council ex parte B* (1998) 30 HLR 706. In Ireland this is required by the Housing (Miscellaneous Provisions) Act 2009, s. 22.

<sup>373</sup> Housing Act 1996 ss 167-168. In Ireland the scheme must be available to the public see Housing (Miscellaneous Provisions) Act 2009, s. 22.

<sup>374</sup> Housing Act 1996 s. 166A, inserted by Localism Act 2011 s. 147. The tenancy strategy states the kinds of tenancies granted and the circumstances in which each kind will be granted, as well as the lengths of any term certain.

<sup>375</sup> Housing Act 1996 s. 167, as amended textually by the Localism Act 2011. The duplication will enable the Welsh legislation to be changed in future, though there are no proposals to do so in the Housing (Wales) Bill 2013.

<sup>376</sup> *Sahardid v. Camden London Borough Council* [2004] EWCA Civ 1485.

<sup>377</sup> *Birmingham City Council v. Qasim* [2009] EWCA Civ 1080. In Ireland this is enshrined in statute by Housing (Miscellaneous Provisions) Act 2009, s. 22(7).

<sup>378</sup> Housing Act 1996 s. 170. For Scotland see Housing (Scotland) Act 2001 s. 9.

<sup>379</sup> Allocation of Housing (Procedure) Regulations 1997, reg. 3. For Scotland see Housing (Scotland) Act 1987 s. 20(3), (4).

<sup>380</sup> Kenna, *Housing Law Rights and Policy*, pp744-745.

the applicant must be over the age of 16 and eligible to apply for an allocation of social housing, and Ireland where the applicant must be over the age of 18, eligible to apply for social housing supports and must be in need of social housing support. As one would expect the added requirements lead to closer examination of the claim in question.

In England upon submitting an application for housing from a registered provider, the applicant will be added to a housing waiting list.<sup>381</sup> In Ireland different requirements apply. Upon receipt of the application the housing authority will assess whether the applicant is eligible for social housing and in need of social housing. This means that the applicant will have to satisfy an income test<sup>382</sup> and will have to show that they do not have suitable alternative accommodation. A household will be regarded as having suitable alternative accommodation where a member of the household has property that the household could reasonably be expected to live in. Once both criteria have been satisfied the applicant will be added to the housing waiting list.<sup>383</sup>

Across Britain and Ireland these lists vary in length greatly from area to area however they generally include people who are homeless, people with special housing needs as well as people seeking a transfer to another social sector property.<sup>384</sup> Where the applicant has special needs the council may be able to match that person with suitable accommodation in supported or sheltered accommodation.<sup>385</sup> An applicant must be qualified and may either be in a priority group or without special priority or disqualified.

Across Britain and Ireland preference is given to certain priority groups in allocation.<sup>386</sup> These include homeless persons;<sup>387</sup> persons occupying overcrowded or insanitary houses; people needing to move on medical or welfare grounds; or people who will suffer hardship if they are unable to move.<sup>388</sup> Consideration can be given to: financial resources available to meet housing costs; behaviour of the applicant and household affecting his suitability as a tenant;<sup>389</sup> and, in England and Wales but not in Ireland, any local connection.

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<sup>381</sup> Allocation of Housing (Procedure) Regulations 1997, reg. 7 requires the following; the applicant's name, the number of people in his household; the no who are under 10, expecting or aged 60+, the address and the date of entry on the register.

<sup>382</sup> There are three maximum income thresholds that apply in different areas.

<sup>383</sup> The allocation of local authority housing is subject to equality legislation prohibiting discrimination on 9 grounds see Equal Status Act 2000 s. 6, Equality Act 2004 s. 49, these grounds are nationality, gender, family size, family status, marital status, disability, age or membership of the Traveller community.

<sup>384</sup> Allocation controls do not apply to tenants transferring nor to the upgrading of flexible tenancies: Housing Act 1996 s. 159(4A) ff, inserted by Localism Act 2011 s. 145. In Ireland, households seeking a transfer are free to come to a private arrangement with another household willing to transfer.

<sup>385</sup> For instance where the applicant is elderly or infirm, has mental health issues, has a disability, has learning difficulties, is a young person who needs support living independently, is a refugee or asylum seeker, is an ex-offender, or has an alcohol or drug related problem.

<sup>386</sup> Housing Act 1996 s. 159. Housing (Miscellaneous Provisions) Act 2009, s. 22 (Ireland).

<sup>387</sup> *R v. Westminster City Council ex parte Ali* (1997) 29 HLR 580; *R(Mei Ling Lin) v. Barnet London Borough Council* [2007] EWCA Civ 132.

<sup>388</sup> Extra preference should be given to those with life-threatening illnesses; those in accommodation so overcrowded as to be a risk to health, and to those escaping domestic violence. On the last see Allocation of Housing (England) (Amendment) (Family Intervention Tenancies) Regulations 2008.

<sup>389</sup> Housing Act 1996 s. 167 (allocation in Wales) allows for the removal of preference for serious unacceptable behaviour; this is not in s. 166 (allocation in England) but English authorities can take behaviour, good or poor, into account in taking allocation decisions.

Across Britain and Ireland applicants outside priority groups may well have to wait a long time to be housed. If an applicant does not a priority need for housing allocation, the above provisions indicate the wide range of factors that might be considered relevant, including period of residence in the locality, age, income, ownership or property, any record of defaults, and so on. A majority of waiting lists are processed on a points system which is geared towards prioritising certain groups over others according to housing need, however in some regions housing is allocated by a choice based system.<sup>390</sup> With regard to the former, when awarding points during the allocation process, providers will generally have regard to the amount of time spent on the waiting list, whether the applicant has been in tied accommodation i.e. in military service etc. In addition the process will have regard to any medical needs,<sup>391</sup> social needs,<sup>392</sup> social work,<sup>393</sup> harassment,<sup>394</sup> under occupation of present accommodation, shared living space, mobile homes, when allocating points.<sup>395</sup>

### **Eligibility for public/social housing**

In order to qualify for public/social housing the applicant must have a legal right to remain in the State on a long term basis. The key concept across Britain and Ireland is a ‘person from abroad’, that is person who is not a British or Irish citizen and who will normally be subject to immigration control. Categories of people from abroad eligible to apply for social housing include:

- (1) Foreign nationals with a right of abode in the UK persons;
- (2) Nationals of EEA member states with a right to reside in the UK under EC rules based on their economic status; this includes:
  - a. nationals of ‘old’ EU states who have a right to reside if they are workers, job seekers, the self-employed or students, as well as family members<sup>396</sup> and carers;<sup>397</sup> the right to seek housing can be terminated if the right to reside ends (because the EEA national ceases permanently<sup>398</sup> to be a worker etc.);
  - b. nationals of EEA states with a right to reside in the UK under EC rules based on their economic status; this includes the three EEA states of Iceland, Liechtenstein and Norway and in practice also (under mutual treaty arrangements) Switzerland;

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<sup>390</sup> See the Scottish Report for a detailed discussion of choice based letting.

<sup>391</sup> Such as a disability.

<sup>392</sup> For instance looking after an elderly relative.

<sup>393</sup> Where the applicant has care needs.

<sup>394</sup> This would include domestic violence.

<sup>395</sup> Conversely an applicant guilty of antisocial behaviour etc should be required to wait for a qualifying period before becoming entitled to housing.

<sup>396</sup> EC Directive 2004/38/EC implemented by Immigration (European Economic Area) Regulations 2006, SI 2006/1003; *Harrow London Borough Council v. Ibrahim* [2008] EWCA Civ 386 (Somali married to Dane who died).

<sup>397</sup> Allocation of Housing and Homelessness (England) (Amendment) Regulations 2012; this meets the decision in C-34/09 *Gerardo Ruiz Zambrano v. Office National de l'Emploi* [2011] ECR I-1177, ECJ; an example of a Zambrano carer is *Pryce v. Southwark London Borough Council* [2012] EWCA Civ 1572.

<sup>398</sup> *R v. Westminster City Council ex parte Castelli* (1996) 28 HLR 616, CA; *Barnet London Borough Council v Ismail* [2006] EWCA Civ 383; *R (Mohamed) v. Harrow London Borough Council* [2005] EWHC 3194. Contrast a temporary cessation: *Samin v. Westminster City Council* [2012] EWCA Civ 1468 (a surprising result on the facts?).

- c. EEA nationals from states which acceded to the EU in 2004 now equated to 'old EU states';<sup>399</sup>
  - d. EEA nationals from Bulgaria, Romania and Croatia who are workers registered under the Worker Registration scheme;<sup>400</sup>
- (3) People subject to immigration control but in a class allowed assistance with housing:
- a. A person granted refugee status;
  - b. A person granted exceptional and unconditional leave to remain (usually on humanitarian grounds or by way of discretionary leave);<sup>401</sup>
  - c. A person with current unconditional leave to remain with habitual residence in the Common Travel Area (of the United Kingdom, the Channel Islands, the Isle of Man and the Republic of Ireland);<sup>402</sup>
  - d. A person deported by law to the UK or Ireland.

People from abroad who are not eligible for housing are those subject to immigration control and not in any exceptional group: (a) Asylum seekers; (b) EEA nationals who do not have an economic right of residence;<sup>403</sup> (c) EEA jobseekers if not habitually resident in the Common Travel Area;<sup>404</sup> (d) EEA nationals for the first three months if not habitually resident in the Common Travel Area; (e) Those admitted on the condition that they will be self-funding.

### **Eligibility for public/social housing – Wales**

Currently the rules are enshrined in legislation<sup>405</sup> as amplified in regulations made separately for Wales in 2006.<sup>406</sup> These rules are the same as for eligibility for homelessness assistance in England except that Wales allows help to any person lawfully resident in the UK who is a national of a state which has ratified the European Convention on Social or Medical Assistance or the European Social Charter; this includes all EEA nationals.

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<sup>399</sup> Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2013. Except that ex workers only have the right to remain if they have worked for 12 months in the UK: *Putans v. Tower Hamlets London Borough Council* [2006] EWHC 1634 (Ch).

<sup>400</sup> Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2013. The rules in Scotland here differ from those in England. There are moves to tighten controls further, though to date the threatened influx of Bulgarians has not appeared.

<sup>401</sup> Normally a condition will be imposed that no recourse will be had to public funds.

<sup>402</sup> Again leave would generally be conditional on being self-funding.

<sup>403</sup> *Lekpo-Bozua v. Hackney London Borough Council* [2010] EWCA Civ 909 (French girl living with her aunt for 9 years; her presence was tolerated but she was not lawfully resident).

<sup>404</sup> *R(Conde) v. Lambeth London Borough Council* [2005] EWHC 62.

<sup>405</sup> Housing Act 1996 s. 160A.

<sup>406</sup> Homelessness (Wales) Regulations 2006; Allocation of Housing and Homelessness (Eligibility) (Wales) Regulations 2006; in future see Housing (Wales) Bill 2013 cl. 47, sch. 2.

#### 4.3.2. Affordability

In England tenants of private registered providers of social housing are generally<sup>407</sup> assured tenants who can, in theory, be charged a market rent. Such landlords are, however, subject to the Home and Communities Agency 'rent influencing regime' set out in the Rents Standards Guidance. The rent regime is governed by 'target rents' which are below market rent whilst allowing the provider to meet their obligations to their tenants, maintain their stock and continue to function as financially viable organisations. Differences are recognised for certain kinds of social housing, such as supported housing and affordable rent. Affordable rents were introduced as a part of the Affordable Homes Programme 2011-15 and enables providers to charge higher rents, at levels up to 80% of the market rent, but only for new properties delivered by arrangement with the Agency.<sup>408</sup>

With regard to local authority tenancies, the terms of a secure tenancy may be varied by notice. A preliminary notice must be served by the landlord on the tenant specifying the proposed variation and its effect. If the authority decides to continue with the proposal after considering any comments from tenants, they do so by serving a notice of variation.<sup>409</sup>

In Scotland as in England, Wales and Ireland, local authority rents and Registered Social Landlords rents are lower than the market rate however unlike those jurisdictions where there are different tenancies operating in the social sector, in Scotland there is one main tenancy for all social rentals – the Scottish Secure tenancy. With regard to rent increases, local authorities have discretion over the amount of rent to charge to their tenants and there are no external limitations on what landlords can charge tenants. Under a Scottish secure tenancy<sup>410</sup> the local authority or RSL has the right to increase the rent, but that body must give the tenant at least four weeks' notice before doing so.<sup>411</sup> In addition, they must consult with the tenant in a meaningful way, which takes into account the views of the tenant, before increasing the rent.<sup>412</sup>

Local authorities provide the majority of housing with a public task in Ireland. Local authority housing is excluded from the operation of the RTA 2004 and as such the legal framework governing rent rates in the private rented sector do not apply. Rather rent levels in local authority housing are set according to a statutory framework comprising a range of primary, secondary pieces of legislation as well as various administrative guidelines, decisions and directions. Under the Housing Act 1966<sup>413</sup> each housing authority is empowered to set and charge rents for dwellings which it lets as part of its social housing function and there is no nationally uniform authority housing rent scheme.<sup>414</sup> Each housing authority is required to make a rent scheme which sets out

<sup>407</sup> Rent Act fair rents apply to (secure) tenancies first granted by housing associations before 15 January 1989: Rent Act 1977 Pt 6.

<sup>408</sup> See above 4.3, pp 97-99.

<sup>409</sup> Housing Act 1985 s. 103; *Kilby v. Basildon District Council* [2007] EWCA Civ 479; *Peabody Trust Governors v. Reeve* [2008] EWHC 1432 (Ch).

<sup>410</sup> Some older housing association tenancies still have the right to have a fair rent registered.

<sup>411</sup> Housing (Scotland) Act 2001 s. 25.

<sup>412</sup> Housing (Scotland) Act 2001 s. 25(4).

<sup>413</sup> As amended.

<sup>414</sup> Housing Act 1966 s. 58 subss (3A) and (3B) were inserted by Housing (Miscellaneous Provisions) Act 2002 s 14; this will be replaced by the Housing (Miscellaneous Provisions) Act 2009 s 31.

how it will set rents.<sup>415</sup> This design of this rent scheme may be influenced by Ministerial Regulations and review and once completed the scheme must be made available for public inspection.<sup>416</sup> Local authority rents are set on a differential basis and are related to the household's ability to pay, so where the household's income is low then the rent will be low and should the household's income increase then the rent will increases proportionally. Where a household falls into arrears on their rent in local authority housing the authority has the power charge interest on overdue payments.<sup>417</sup> As such the tenant is legally obliged to inform the authority where their income charges. The authority is also empowered to offset any monies it owes to a household against interest due from that household.<sup>418</sup> The local authority may also have a minimum and/or maximum rent, which may depend on the size of the dwelling in question. Additionally, there is usually a hardship clause which gives local authorities discretion to reduce the rent if there are particular reasons to do so. Deposits are not usual in the social rented sectors across Britain and Ireland. Regulation of expenses,<sup>419</sup> repairs,<sup>420</sup> and the availability of rent subsidies<sup>421</sup> have been discussed already.

#### 4.3.3. Stability

The position of the tenant under the tenancy has been discussed above.<sup>422</sup>

In the social sector rights of pre-emption vary from jurisdiction to jurisdiction. In England and Wales secure tenants have a generous Right to Buy and housing association tenants have a less generous Right to Acquire their home. In Scotland this is also the case however the right to buy for all social tenants will be abolished in 2016.<sup>423</sup> In Ireland local authority tenants have a generous right to purchase their home. The basic problem with the right to buy is that it sold off precious social housing asset without adequate provision for building more housing stock. This problem is now, at least in England according, to be solved by allowing landlords to retain the receipts from sales of social housing and to devote them to providing 30% of the cost of replacements.<sup>424</sup>

#### Right to Buy

Tenants in the social rented sector across Britain may have the right to purchase their dwelling at a discounted price, under a scheme dating from the Thatcher Government of the 1980s,<sup>425</sup> and, at present, being revived in England.<sup>426</sup> The Right to Buy applies in

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<sup>415</sup> Housing Act 2009 s. 31(5).

<sup>416</sup> Housing Act 2009 s. 31(9).

<sup>417</sup> Housing Act 2009 s. 33; Housing (Miscellaneous Provisions) Act 2009 (Commencement Order) 2010 (SI No. 253/2010) set the rate at 6%.

<sup>418</sup> Housing Act 2009 s. 33(4).

<sup>419</sup> See section 3.2.1.

<sup>420</sup> See section 3.2.1.

<sup>421</sup> See section 2.5.

<sup>422</sup> See section 4.1.

<sup>423</sup> Housing (Scotland) Act 2014, s.1.

<sup>424</sup> 'Reinvigorating Right to Buy and One for One Replacement' (London: Communities and Local Government, March 2012).

<sup>425</sup> Housing Act 1980 Part IV, re-enacted as Housing Act 1985 Part V. Ironically it had been proposed in the Labour manifesto for the 1959 General Election, which they lost. Mrs Thatcher was much influenced by Horace Cutler, chair of Housing at the Greater London Council.

<sup>426</sup> 'Reinvigorating Right to Buy and One for One Replacement' (London: Communities and Local Government, March 2012).

the public sector and there is an equivalent but more restrictive Right to Acquire in the social sector.<sup>427</sup>

### **(1) Tenants qualified to buy**

In principle the Right to Buy attaches to any secure tenant (that is a tenant of a public landowner),<sup>428</sup> and this includes flexible tenancies; the detail of the right depends upon when the tenancy was first granted, with longer standing local authority tenants being treated most favourably. Joint tenants must agree between themselves. The Right to Buy is subject to a residential qualification period of and throughout this continuous period the house should have been their primary dwelling; it will not be available to Lottery winners who move out to live elsewhere.<sup>429</sup> The period depends upon when the applicant first became a public sector tenant: Before 18 January 2005 – two years;<sup>430</sup> and on or after 18 January 2005 - five years.<sup>431</sup> A tenant may lose his Right to Buy by ceasing to occupy the dwelling as his principal residence, by becoming bankrupt, by committing breaches of the tenancy agreement resulting in the making of a possession order,<sup>432</sup> or as a result of antisocial behaviour.<sup>433</sup> These cases require a proper balancing of the competing claims.<sup>434</sup>

### **(2) Restrictions and exclusions**

There are a number of exclusions from the Right to Buy of which only a sketch can be attempted:<sup>435</sup> accommodation specially adapted eg for the elderly;<sup>436</sup> property occupied under a contract of employment,<sup>437</sup> a home in the curtilage of a non-residential building;<sup>438</sup> and property due for demolition.<sup>439</sup>

### **(3) Price and discount**

The price paid for exercising the Right to Buy is the market value less the discount.<sup>440</sup> The prices can be determined by the District Valuer<sup>441</sup> as at the date that the Right to

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<sup>427</sup> There are detailed provisions delineating the borderline Housing Act 1985 sch. 5 paras 1-3.

<sup>428</sup> Housing Act 1985 s. 80.

<sup>429</sup> *Islington London Borough Council v. Demetriou* [2001] 2 CLYB [4216].

<sup>430</sup> Housing Act 1985 s. 119.

<sup>431</sup> Housing Act 1985 s. 119 as amended by Housing Act 2004 s. 180.

<sup>432</sup> Housing Act 1984 ss 121, 121A, 121B,, as amended; *Islington London Borough Council v. Honeygan-Green* [2007] EWCA Civ 363 (discharge of the possession order revives the right to buy); *Knowsley Housing Trust v. White* [2007] EWCA Civ 404.

<sup>433</sup> Housing Act 1985 s.121A inserted by Housing Act 2004 ss 191-194.

<sup>434</sup> *Basildon District Council v. Wahlen* [2006] EWCA Civ 326.

<sup>435</sup> Housing Act 1985 s. 120, sch. 5.

<sup>436</sup> Housing Act 1985 sch. 5 paras 7, 9, 10, 11, as amended by Housing Act 2004 s. 181.

<sup>437</sup> Housing Act 1985 sch. 5 para. 5; *Godsmark v. Greenwich London Borough Council* [2004] EWHC 1286 (Ch); *Copping v. Surrey County Council* [2005] EWCA Civ 1604; *Wragg v. Surrey County Council* [2008] EWCA Civ 19.

<sup>438</sup> Housing Act 1985 sch. 5 para. 5.

<sup>439</sup> Housing Act 1985 sch. 5 paras. 12A, 13, 14; Housing and Regeneration Act 2008 s. 305.

<sup>440</sup> Housing Act 1985 s. 126.

<sup>441</sup> Housing Act 1985 ss 127-128B; Residential Property Tribunal (Right to Buy Determinations) (Procedure) (England) Regulations 2005; Housing and Regeneration Act 2008 s. 306.

Buy is established.<sup>442</sup> Levels of discount depend upon the date of the initial grant, and whether the home is a house or a flat. The discount cannot take the sale price below the floor cost, ie below the historic debt outstanding on the property.<sup>443</sup> There is also an absolute cash limit, set low by the Labour administration in 1998 (especially in London) and varying regionally,<sup>444</sup> but now set much higher by the Coalition at £75,000 (or £100,000 in London) in an attempt to 'reinvigorate' the Right to Buy.<sup>445</sup>

#### (4) Procedure

The Housing Act 1985 has a mandatory procedure with powers for ministers to override recalcitrant local authorities.<sup>446</sup> Public landlords must provide information to their tenants about the Right to Buy.<sup>447</sup> The tenant must take the initiative by putting in an application to buy.<sup>448</sup> He may choose to do so jointly with up to three family members occupying with him; such an arrangement can be beneficial if the tenant does not meet lending criteria, but a child of the tenant living in the home has a good income.<sup>449</sup> A sale may be voidable if the application contains fraudulent misrepresentations.<sup>450</sup> Within four weeks of the tenant's application the landlord must either accept or refuse the application; if it accepts an offer to sell must be issued within a further two months stating the market value, the discount and the price.<sup>451</sup> If the landlord delays the remedy is a declaration of rights rather than damages.<sup>452</sup> The tenant has twelve weeks to accept the terms proposed.<sup>453</sup> The landlord can serve a notice requiring the tenant to complete.<sup>454</sup> A house will be sold freehold or a flat leasehold,<sup>455</sup> in the latter case subject to a service charge.<sup>456</sup> Until the contract is concluded the tenant may lose his Right to Buy by dying or receiving a notice to quit for misconduct. There are detailed provisions about the effect of a demolition notice.<sup>457</sup> Disputes can be resolved by a county court.<sup>458</sup>

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<sup>442</sup> *Copping v. Surrey County Council* [2005] EWCA Civ 1604.

<sup>443</sup> Housing Act 1985 s. 131; Housing (Right to Buy) Limit on Discount) (England) Order 2013.

<sup>444</sup> SI 1998/2997, re-enacted as Housing (Right to Acquire) (Discount) Order 2002. .

<sup>445</sup> Housing (Right to Buy) Limit on Discount) (England) Order 2012 art. 3 (England) and 2013 Order (London); 'Reinvigorating the Right to Buy'. Previously the cap was £16,000 in London and varied between £22,000 and £38,000 in the English regions.

<sup>446</sup> Housing Act 1985 ss 122E-125E, 132-142A, 164-170.

<sup>447</sup> Housing Act 1985 ss 121A, 121B; Housing (Right to Buy) (Information to Secure Tenants) (England) Order 2005; in Wales SI. 2005/2681.

<sup>448</sup> Housing Act 1985 s. 122; Housing (Right to Buy) (Prescribed Forms) (Amendment) (England) Regulations 2007.

<sup>449</sup> The added purchasers must have a 12 month residential qualification.

<sup>450</sup> *Haringey London Borough Council v. Hines* [2010] EWCA Civ 1111.

<sup>451</sup> Housing Act 1985 s. 124-125; these time limits are extended where the landlord changed during the five year qualification period and/or where the property is leasehold. In the latter case the landlord must also estimate the service charge that will be payable.

<sup>452</sup> However, rent payments can be credited against the premium: *Hanoman v. Southwark London Borough Council* [2009] UKHL 29.

<sup>453</sup> Housing Act 1985 s. 125D.

<sup>454</sup> Housing Act 1985 s. 125E; *R (Burrell) v. Lambeth London Borough Council* [2006] EWHC 394. It is also possible to find that an application has been abandoned through inactivity: *Martin v. Medina Housing Association* [2006] EWCA Civ 367.

<sup>455</sup> Housing Act 1985 s. 138, sch. 6.

<sup>456</sup> Indexation follows the Housing (Right to Buy) (Service Charges) (England) Order 1986 as frequently amended.

<sup>457</sup> Housing Act 1985 ss 138A-138C.

## **(5) Repayment of discount**

Discount has to be repaid<sup>459</sup> if the property is resold<sup>460</sup> within five years, on a sliding scale decreasing the amount repayable by one fifth each year.<sup>461</sup> In many cases the sale includes a right of first refusal for the landlord if the property is sold onwards within ten years;<sup>462</sup> this applied in national parks etc.,<sup>463</sup> and in designated rural areas, of which there are many, where demand for social housing exceeds supply.

## **(6) Purchase by housing association tenants - the Right to Acquire**

Some housing association tenants have the Right to Acquire their home<sup>464</sup> under a modified version of Part V of the Housing Act 1985.<sup>465</sup> There are some significant changes, notably that the landlord can choose an alternative dwelling to sell.<sup>466</sup> The scheme is limited to property built with public subsidy or bought by housing associations since 1 April 1997. The discount is less generous<sup>467</sup> When housing stock is transferred from the public sector to a housing association (formerly a Registered Social Landlord, now a private registered provider), the tenant enjoys a Preserved Right to Buy.<sup>468</sup>

## **(7) Wales**

The maximum discount in Wales remains at £16,000 (as against £75,000 in English regions). There is a power for a local authority to apply to the Welsh Minister for a suspension of the Right to Buy and the Right to Acquire in pressured areas, where demand for social housing substantially exceeds supply and exercise of the rights is likely to increase the imbalance.<sup>469</sup>

## **(8) Scotland**

In Scotland the right to buy operated as above but will be abolished in 2016<sup>470</sup> and this has created a spike in tenants exercising their right to buy.

## **(9) Ireland**

There are two schemes whereby tenants in social rented sector have statutory pre-emption rights. Firstly, the Incremental Purchase Scheme, which is the successor to the

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<sup>458</sup> Housing Act 1985 s. 181.

<sup>459</sup> Technically the authority has a discretion: Housing Act 1985 s. 155A.

<sup>460</sup> This does not include a transfer on death or to family members, nor to a compulsory purchase.

<sup>461</sup> Housing Act 1985 s. 155 as amended by Housing Act 2004 s. 195. By s. 155C the value of home improvements is ignored.

<sup>462</sup> Housing Act 1985 ss 156, 156A; at a price determined by ss 158-163; these are amendments by Housing Act 2004 s. 197 ff.

<sup>463</sup> Housing Act 1985 s. 157.

<sup>464</sup> Housing Act 1996 ss. 16-17.

<sup>465</sup> Housing (Right to Acquire) Regulations 1997 sch. 2.

<sup>466</sup> Housing Act 1996 s 124A, inserted by Housing (Right to Acquire) Regulations 1997.

<sup>467</sup> Housing (Right to Acquire) (Discount) Order 2001.

<sup>468</sup> Housing Act 1985 ss. 171A-171D; Housing (Preservation of the Right to Buy) Regulations 1993, amended by SI 1999/1213.

<sup>469</sup> Housing (Wales) Measure 2011.

<sup>470</sup> Housing (Scotland) Act 2014, s.1.

1995 Tenant Purchase Scheme, allows for a discount scheme based on household income that enables the State to share in the profits from resale during the twenty to thirty year period for which the house is subject to an incremental purchase charge. The scheme will make it possible for households in receipt of or eligible for social housing support to purchase designated new local authority and approved housing body houses.<sup>471</sup> Secondly, in 2012 the Tenant Purchase of Apartments Scheme came into effect in Ireland. This scheme allows for an apartment complex to be eligible for designation for tenant purchase under section 51 of the Housing (Miscellaneous Provisions) Act 2009. At least 65% of tenants must support designation of the complex. Where that quota is reached then apartments can be sold. Once sales begin, the housing authority will transfer ownership of the entire complex to an apartment owners' management company which will immediately lease all the apartments back to the authority for continued letting to tenants, who will then have the option of buying them from the authority at discounted rates depending upon the applicants income.

#### *4.3.4. Flexibility*

The possibility of unilateral termination by the tenant<sup>472</sup> and the possibility of non-abusive subletting<sup>473</sup> have already been discussed.

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<sup>471</sup>Department of the Environment, Incremental Purchase Scheme.

<sup>472</sup> See section 3.2.3.

<sup>473</sup> See section 3.2.3.

## **5. Conclusion**

The comparative nature of this research effort has allowed for the selection of a number of elements which stand out in the midst of the various housing systems across Britain and Ireland. These elements touch upon a wide range of topics, from fundamental matters of tenurial definition through to reforms of tenancy law. In the first place, the 2008 reclassification of tenure in England is at odds with the tenurial structure which is more or less common to Wales, Scotland and Ireland. There are considerable difficulties with the new classification. If a homeless person is offered temporary accommodation by a private landlord acting at the request of the local authority, it is a private rental, but it might switch categories if the rent was reduced significantly. Housing provision relies on a complex connection between the role of the state and the private sector in various areas such as joint partnerships, land ownership and control, subsidies for developers, among others. The relationship between public housing backed by the state, and private housing tends to be one of mutual dependence, not least because private tenants may receive housing benefit which pays a part of the rent of a tenant in the private sector with a low income. It remains to be seen how this reclassification develops in practice.

As the private rented sector continues to grow across Great Britain and Ireland, the method of regulating that sector will be subject to new and greater pressures. In this environment the early identification of best practice is imperative. In the last decade the variety in approach to regulation of the private rented sector across these Islands has grown rapidly. Since 2004 Irish private tenancy law has forged a radically different path to English and Scottish tenancy law. By instituting a system of regulation based on implied rights and duties, the Irish system, while adhering to market rents, stands in stark contrast to the British model which remains underpinned by the notion of freedom of contract. The change may not have produced fundamentally different results in practice were it not for the introduction of the Private Residential Tenancies Board, which effectively regulates the private rented sector. When set against traditional court based dispute resolution process the alternative dispute resolution functions of the Board appear highly effective in terms of speed and cost efficiency and across both Islands this function could be identified as best practice. It is hardly surprising that the Scottish and Welsh Governments have moved towards a more specialist regulatory approach to the private rented sector akin to the Private Residential Tenancies Board. One drawback of the 2004 reforms in Ireland was the failure to provide for regulating deposits. Indeed, for many years disputes concerning deposits took up the majority of the Boards time. In contrast highly effective deposit schemes have been operating in the private rented sector of England and Scotland since 2007 and 2012 respectively. These schemes, which involve an independent body holding the deposit for the duration of the tenancy and requiring that landlord and tenant agree to the quality of the dwelling and furnishings prior to transferring the deposit, greatly reduce the potential for disputes. This scheme forms the basis for the current Irish Government proposal to reform deposit protection.

The advances made in regulation of the private rented sector stand in contrast to regulation of local authority tenancies in Ireland. For instance although terminations are rare, the effective security of the tenants in legal terms is illusory as the security of many tenants is limited to just 28 days. Across these Islands the security of Irish local authority

tenants stands in stark contrast to the extensive security enjoyed by public and social tenants in England, Wales and Scotland under secure tenancies. These countries are also leading the charge to improve the condition of rented housing. In recent years there have been extensive efforts to improve the quality of rented accommodation across Britain and Ireland. However, reforms in England and, in particular, Scotland could be considered as representing best practice in a number of respects. In Scotland the introduction of the Scottish Housing Quality Charter alongside a purposely focused regulatory body, the Scottish Housing Regulator, represents a major advance in terms of improving the quality of social rented housing. Results from the Scottish House Condition Survey indicate that this twofold approach centred on aspirational but detailed standards with dedicated regulatory oversight has dramatically improved the quality of housing in the social rented sector. While the increase in housing quality is to be welcomed it must be reiterated that across Britain and Ireland the sustained neglect of the public rented sector and failure to reinvest proceeds raised from the sale of public housing in new stock has resulted in an inadequate supply of housing across Britain and Ireland. Measure aimed at addressing this matter, such the introduction of hybrid public private leasing arrangements in Ireland, while highly novel have so far failed to make significant inroads and demand for affordable housing far exceeds supply.

With regard to provision of housing with a public task the British approach, which created a justiciable right to housing, stands out in a European context.<sup>474</sup> In the UK review procedures are laid down,<sup>475</sup> but the ultimate decisions remain susceptible to judicial review and to human rights arguments. This legislation engenders innumerable reported cases each month about issues such as the suitability of the accommodation offered. This has proved highly controversial in the UK and the right to housing, which is far stronger than comparable provisions in European countries such as France or Germany, has been characterised as being comparatively overly generous and therefore there have been calls to curtail the right to housing in order to bring it in line with other European countries.

One final element which is common across England, Wales, Scotland and Ireland but which marks these Islands out as particularly unusual in a European context is the general absence of national tenant associations. This is in stark contrast to strong representation available to providers of private rented accommodation. The lack of representation is a major blight on the ability of tenants to have their needs represented in the development of housing law and policy concerning the rented sector.

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<sup>474</sup> Housing Act 1985 s. 64.

<sup>475</sup> Housing Act 1985 s. 64.



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

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### Intra-team Comparison Report for

### CROATIA, SERBIA, SLOVENIA

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## **1. The current housing situation**

### **1.1. General Features**

#### **1.1.1. Historical evolution of the national housing situation and housing policy**

Housing system and policy in Slovenia, Serbia and Croatia have their roots in the beginning of twentieth century. During the socialist era the development of the principal types of housing tenures was similar as in other former Yugoslav republics. The collective rights were set as major priority, while individual rights were neglected to a certain extent. The notion of "social ownership"<sup>1</sup> was developed and housing property was transferred into "the housing right".<sup>2</sup> A category of "solidarity apartments" for low-income citizens existed. In general, the real property regime was marked by two tenure systems: (i) private ownership and (ii) social ownership. In the 1960s and 1970s, the housing rights were prevailing in urban areas, while rural areas remained privately owned.

When comparing Slovenia to other socialist republics one can note that there was an early formation of market actors. Supply was represented by building (state) enterprises, while demand was represented by other state enterprises and individuals. Enterprises were mainly buying the dwellings in order to allocate them to their employees based on the housing rights. There had been no institutionalized economic activity of gathering and renting during this period, but it was rather a part of collective consumption.<sup>3</sup>

After the process of dissolution of the former Yugoslavia in the early 1990s and after the independence of countries, the process of shifting the responsibility for housing issues from state to local authorities or to individuals began. The most important part of the housing reform was the sale of public housing with the housing rights. As a result of privatization and restitution of denationalized housing stock Slovenians, Croats and Serbs have become a nation of extremely high proportion of homeownership (with an extremely low share of households living in rented dwellings).

In Slovenia and Croatia housing building boom happened in the previous decade (around 2004-2007/2008) and has stopped because of the economic crises. In Serbia, however, the effect of the economic crisis on the housing sector was not as pervasive as in other two countries, since the general economic circumstances in Serbia were not promising even before the crisis.<sup>4</sup>

The Yugoslav war caused a number of housing problems in Croatia and Serbia (e.g. demolition of housing units). There was a mass influx of refugees and IDPs to both countries. They had been placed in poor housing conditions, for example

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<sup>1</sup> A "social ownership" was a specific kind of ownership right and a special legal institute in Yugoslavia. It was a dominant and basic type of ownership.

<sup>2</sup> "The housing right" was a specific tenure type in Yugoslavia. Comparing to civil law, the housing right holder could be described as "a beneficiary of rights, which go beyond those of a protected tenant but which do not include all those of a private owner."

<sup>3</sup> T. Petrović, National Report for Slovenia, p. 8.

<sup>4</sup> T. Petrović, National Report for Serbia, p. 4.

in collective centres or in illegal settlements lacking basic facilities. In Serbia, the living conditions of refugees gradually improved during the period 1996-2004 due to the construction of individual houses and multi-apartment buildings for refugees. However, some refugees (approximately 2,500 people) still reside in collective centres, in poor quality temporary housing or in illegal settlements lacking basic facilities.<sup>5</sup>

In Croatia the renovation of housing units and accommodations of the victims of war began in 1997 and lasted until 2006.<sup>6</sup> In addition to the demolished housing units, the non-acknowledgement of the former housing right impeded the return of Serb refugees to Croatia. For the most part, the restitution of the ownership of homes, land and other real estate to their legal owners was accomplished by 2005.

Slovenia, as opposed to the other two countries (Serbia and Croatia), did not have such a massive influx of individuals from the other republics of former Yugoslavia. While migrants from other EU countries have not influenced the housing situation, the working migrants from non-EU countries (particularly from ex-Yugoslav countries), who live in terrible conditions (in overcrowded single homes, unsuitable individual houses or sub-rented rooms), still present an important housing problem in Slovenia. With this regard the Rules on Setting Minimal Standards for Accommodation of Aliens, Who are Employed or Work in the Republic of Slovenia<sup>7</sup> was enacted in 2011. The act defines the duties of employers and organizations, which employ the workers.<sup>8</sup>

### **1.1.2. Current situation**

As it is common in other post-socialistic countries, there is an extremely high preference of home-ownership over renting in all of three countries being compared. This is confirmed by the data in Table 1. The relationship between owner-occupied dwellings and rented dwellings is comparable among the three countries.

**Table 1. Number of dwellings and ownership<sup>9</sup>**

	<b>Number of dwellings/households</b>	<b>Owner-occupied dwellings</b>	<b>Rented dwellings</b>
<b>Slovenia</b>	849,825	77%	9%
<b>Croatia</b>	2,246,910	89,4%	5,6%
<b>Serbia</b>	3,243,587	87,5%	6,7%

The quality of housing in Slovenia can be evaluated as more well-developed amongst the newer members of EU and less well-developed than the older

<sup>5</sup> National Report for Serbia, p. 10.

<sup>6</sup> A. Jakopič/M. Žnidarec, National Report for Croatia, p. 21.

<sup>7</sup> Pravilnik o določitvi minimalnih standardov za nastavitev tujcev, ki so zaposleni ali delajo v Republiki Sloveniji, Official Gazette, No. 71/2011.

<sup>8</sup> National Report for Slovenia, p. 12.

<sup>9</sup> Based on the data from National Reports for countries under review. All numbers are from the year 2011.

ones.<sup>10</sup> Likewise, the standard of living in Croatia has been growing steadily in the second half of the twentieth century. Equipment of housing units in Croatia is also relatively satisfactory and has noted positive trends in the past decade.<sup>11</sup> On the contrary, the quality of dwellings in Serbia is very low compared to supply and quality of housing units in Slovenia and Croatia.

### 1.1.3. Types of housing tenures

In Slovenia, Croatia and Serbia, a condominium is defined as the ownership of a single unit in a building and co-ownership of common areas. However, this is a real property right, which is not an intermediate form of tenure.<sup>12</sup>

Company law schemes are not present in Slovenia and Serbia.<sup>13</sup> In Croatia, on the other hand, the tenure in the new Rent-to buy scheme (so called POS programme) can be classified as an intermediate form of tenancy. In these cases the tenants are the future potential buyers of the apartments they rent.<sup>14</sup>

As far as cooperatives are concerned, Slovenian legislation is familiar with the institute of cooperative<sup>15</sup> and Serbia also has several housing cooperatives. However, they all differ from the traditional meaning of the housing cooperatives.<sup>16</sup>

There is a distinction between rental tenures with and without a public task in all three countries under review. However, small differences in rental tenure types among countries exist. The comprehensive comparison between the three countries based on the share in the housing stock is impossible, since not all data on the shares is available.

In Slovenia, there are 70% of dwellings with non-profitable rent<sup>17</sup> and 3% of special purpose rental apartments. The two have a public task. The other two, which are employment based apartments (7%) and dwellings with market rents (20%), do not have a public task.<sup>18</sup>

In Croatia only private market rental housing as the rental tenure does not have a public task. Other categories, i.e. protected tenants rentals, social housing, public rental tenures and POS Programme Rent-to buy scheme, all have a public task.<sup>19</sup>

2.9% of households rented their dwelling in the private rental sector, 1.8% of households lived in housing with protected rent and 0.9% rented a part of a flat in

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<sup>10</sup> National Report for Slovenia, p. 19.

<sup>11</sup> National Report for Croatia, p. 41.

<sup>12</sup> National Report for Slovenia, p. 17, National Report for Serbia, p. 20, National Report for Croatia 37.

<sup>13</sup> National Report for Slovenia, p. 17 and National Report for Serbia, p. 20.

<sup>14</sup> National Report for Croatia 37.

<sup>15</sup> For more on the topic see National Report for Slovenia, p. 17.

<sup>16</sup> National Report for Serbia, p. 20.

<sup>17</sup> The Slovenian 2003 Housing Act (Stanovanjski zakon (SZ-1), Official Gazette of RS, No. 69/03 and later amendments) does not distinguish between social and non-profitable dwellings. For both categories there is only one rent, non-profitable one.

<sup>18</sup> National Report for Slovenia, p. 18.

<sup>19</sup> National Report for Croatia, p. 35.

2011. Official data on the share of public rental housing in Croatia are not available.<sup>20</sup>

Finally, in Serbia dwellings owned by the state and other state organs and institutions (municipalities, ministries, etc.) have public task. These encompass less than 2% of the entire housing stock in Serbia. Rentals without public task are market or private rentals. Employment based apartments, as the rental tenure without public task, are also present in Serbia, but they encompass only minuscule proportion of the public rental tenures.<sup>21</sup>

In Slovenia and Croatia the quality of housing is relatively satisfactory, even though the quality of newly built housing units is often questionable. In Serbia, on the other hand, the quality of dwellings in general is very low compared to supply and quality of housing units in Slovenia and Croatia.

The majority of dwellings in Slovenia possesses three rooms and is followed by houses with two rooms. An average usable area of a dwelling is 27,4 m<sup>2</sup>. Central heating is found in 80%, whereas bathrooms are found in 93% of homes in Slovenia.<sup>22</sup> Likewise, in Croatia three-bedroom housing units prevail (34,4%), followed by houses with two rooms (27,5%). The average size of inhabited apartment is 80.94m<sup>2</sup>. Merely 2,11% of housing units have neither toilet nor bathroom and 1,56% of housing units in Croatia have no bathroom.<sup>23</sup>

Serbian housing stock consists mostly of two-room dwellings. The average area of the dwelling is 72,3 m<sup>2</sup>, the communal infrastructure is imperfect, piped water and sewer are not provided in some parts of Serbia, whereas gas supply and central heating are also underdeveloped. More than one half of dwellings (around 54%) still use hard fuels as a source of heating. Quality of dwelling is especially low in the rural areas of Serbia, where 40% of rural housing lacks flush toilet or shower.<sup>24</sup>

Most of the dwellings are privately owned. This applies to all three countries being compared. In Slovenia as much as 90% of all dwellings are privately owned (mostly by natural persons), while public sector (municipal and other non-profit housing organizations) owns only 6% of all housing units.<sup>25</sup> Secondly, 97.3% of the total number of permanently occupied housing units in Croatia is in the ownership of natural persons, while legal persons own 2.7%.<sup>26</sup> Also data from Serbia shows that the largest proportion of dwellings is owned by private persons (natural and legal) – around 98.3% according to data from the 2011. Smaller proportion of dwellings in Serbia is state / publicly owned – 1.7%.<sup>27</sup>

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<sup>20</sup> National Report for Croatia, p. 35.

<sup>21</sup> National Report for Serbia, p. 21.

<sup>22</sup> National Report for Slovenia, p. 20-23.

<sup>23</sup> National Report for Croatia, p. 38-41.

<sup>24</sup> National Report for Serbia, p. 22-25.

<sup>25</sup> National Report for Slovenia, p. 25.

<sup>26</sup> National Report for Croatia, p. 45.

<sup>27</sup> National Report for Serbia, p. 25.

#### **1.1.4. Other general aspects of the current housing situation in comparative perspective**

Associations of tenants operate in Slovenia, Croatia as well as in Serbia. There are several such associations in Serbia and Croatia, while in Slovenia only one group operates on behalf of the tenants. In general, associations act as lobby groups and mainly protect the rights of tenants by offering legal help and information about their rights. However, their actual role in the political and social sphere is insignificant.

In Slovenia and Croatia there is also an interest group working on behalf of the owners of property or landlords (see Table 2 below), whereas there is no data on the existence of such or similar group in Serbia.

**Table 2. Active Lobby Groups**

	<b>Slovenia</b>	<b>Croatia</b>	<b>Serbia</b>
<b>Associations of tenants</b>	<ul style="list-style-type: none"> <li>• Association of Tenants of Slovenia</li> </ul>	<ul style="list-style-type: none"> <li>• Alliance of Tenants' Associations of Croatia</li> <li>• Croatian Association of Tenants</li> <li>• Associations of Tenants – Co-owners of Apartment Buildings</li> <li>• Association Franc</li> </ul>	<ul style="list-style-type: none"> <li>• Association for the Protection of Rights and needs of Tenants in Serbia</li> <li>• Association of Users of Apartments in Private Ownership</li> </ul>
<b>Associations of owners</b>	<ul style="list-style-type: none"> <li>• Association of Owners of Real Properties in Slovenia</li> </ul>	<ul style="list-style-type: none"> <li>• Croatian Association of Owners of Property Confiscated During the Fascist and Communist Regimes</li> </ul>	

All three countries under review are facing the problem of vacant dwellings. In Slovenia there is approximately 100,000 vacant dwellings,<sup>28</sup> which are not (yet) available on the housing market. The number is even higher in Croatia - 416,343 or 21,8% in total (some are temporarily vacant, others are abandoned)<sup>29</sup> and in Serbia – 587,715 or 18%.<sup>30</sup>

<sup>28</sup> National Report for Slovenia, p. 27.

<sup>29</sup> National Report for Croatia, p. 46.

<sup>30</sup> National Report for Serbia, p. 26.

Furthermore, in all three countries the majority of the rental sector is executed through the unofficial (black) market, with very little officially registered contracts. Landlords do not opt to register the contract in order to avoid paying the tax. This can lead to disadvantages especially for the tenant (e.g. in Croatia tenants without the contract are not eligible for housing allowance).<sup>31</sup>

There are no other important black market or otherwise irregular phenomena and practices on the housing market in Slovenia.<sup>32</sup> However, this does not apply to Serbia and Croatia. The housing market in Croatian's larger cities is controlled by speculative interests of different stakeholders. Fighting for extra profit, developers misuse their position and use bribe to get permits with higher density. In additional, illegal construction of family houses, without building permits, on the edges of cities is also a problem.<sup>33</sup> Similarly, Serbia is also facing with illegal construction as a major problem in the housing sector.<sup>34</sup>

## 1.2. Economic factors in comparison

### 1.2.1. Comparative view of the housing market

In Slovenia, the rental price for the market as well as purpose and employment based apartments is determined freely on the market.<sup>35</sup> The rent for the non-profit apartments, on the other hand, is determined with a special methodology.<sup>36</sup> The base is calculated according to administratively determined value of the dwelling. Newer and more modern apartments have more value points, meaning also higher rent price.<sup>37</sup>

Similarly to Slovenia, in Croatia free housing market also exists, where the level of freely determined rent is left for contractual parties to determine.<sup>38</sup> On the other hand, the amount of protected rent (which is a form of social housing) is determined on the basis of conditions and measures set by government.<sup>39</sup>

In Serbia, all housing prices are usually determined freely on the market, since the rental-housing sector in Serbia is under-regulated.<sup>40</sup>

Since the crisis, there has been a larger supply of dwellings in all three countries under review, leading to a decrease in the prices of rentals. Even though the construction sector has been gravely affected due to economic crisis, there is a surplus of unsold apartments, especially in Slovenia and Croatia. In addition, in Slovenia the number of smaller households (i.e. households of one or three members) has been raising due to the ageing population. Therefore, more

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<sup>31</sup> National Report for Croatia, p. 47.

<sup>32</sup> National Report for Slovenia, p. 27.

<sup>33</sup> National Report for Croatia, p. 47.

<sup>34</sup> National Report for Serbia, p. 27.

<sup>35</sup> Pursuant to Article 115(2) of Slovenian 2003 Housing Act.

<sup>36</sup> Pursuant to Article 117 of Slovenian 2003 Housing Act.

<sup>37</sup> National Report for Slovenia, p. 32.

<sup>38</sup> National Report for Croatia, p. 49.

<sup>39</sup> In accordance to Article 7 of Croatian Lease of Flats Act (Zakon o Najmu Stanova, Official Gazette of RC, No. 91/96 and later amendments).

<sup>40</sup> National Report for Serbia, p. 32.

purpose apartments are going to be needed in the future, as well as smaller regular apartments.<sup>41</sup>

The demand for a rental dwelling is greater in bigger municipalities and towns, as well as in their inner parts (this applies to all three countries), due to better possibilities for employment, schooling and road networks. So far, one could say that none of the countries under this review has presented an efficient program in terms of demand and supply.

### **1.2.2. Comparative view on price and affordability**

The average cost of market rent in Slovenia is approximately 550 EUR per month for a two-room dwelling, while the rent-income ratio is 0.28 or 28%.<sup>42</sup> The average amount of rent in private sector in Croatia for an apartment from 20-40m<sup>2</sup> amounts to 289 EUR per month, for an apartment from 40-60m<sup>2</sup> to 410 EUR, for an apartment from 60-80m<sup>2</sup> to 499 EUR per month and for an apartment from 80-100m<sup>2</sup> to 633 EUR per month.<sup>43</sup> The calculation of rent-income ratio for the apartment of size up to 60m<sup>2</sup> in Croatia (Novi Jelkovec) shows that rent-income ratio for private renting in Croatia is 0.26% or 26%.<sup>44</sup> For Serbia there is no official information on the market rents. However, a study done for UN-Habitat indicates that rent-income ratio in Serbia exceeds 0.50 or 50%.<sup>45</sup>

According to these data the average rent for the apartments in Croatia is lower compared to the average rent for the apartments in Slovenia. Furthermore, the highest rent-income ratio is in Serbia and the lowest in Croatia.

There is an extremely high preference of home ownership over renting in Slovenia, Croatia and Serbia. Citizens of countries being compared are traditionally more inclined towards home ownership than to living as tenants in rental housing. Even though there is a relatively weak affordability of ownership of homes in Slovenia<sup>46</sup> and Croatia and a massive affordability problem exists also in Serbia,<sup>47</sup> renting is usually still just a temporary solution. Many households would rather opt for mortgage loan instead of a rent. But since the conditions for obtaining a housing loan are not very favourable (this apply to all three countries), renting is a temporary alternative to home ownership (and not the other way around).

### **1.2.3. Tenancy contracts and investment**

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<sup>41</sup> National Report for Slovenia, p. 32.

<sup>42</sup> According to the data from 2013. See National Report for Slovenia, p. 34.

<sup>43</sup> According to the data from the research for city of Zagreb in August 2012. See National Report for Croatia, p. 51.

<sup>44</sup> National Report for Croatia, p. 51.

<sup>45</sup> National Report for Serbia, p. 32.

<sup>46</sup> National Report for Slovenia, p. 35.

<sup>47</sup> National Report for Serbia, p. 33.

Return on investments for a rental dwelling is unattractive for landlords-investors in all three countries under review. Prevailing opinion in Croatia and Serbia is that this kind of investment is simply not profitable for investors.<sup>48</sup> The main reason in Croatia is too low and too slow return on investments. For the same reason (the rent usually does not cover the basic costs of the construction) investors in Slovenia are not interested in building rental apartments.<sup>49</sup>

#### **1.2.4. Other economic factors**

Purchasing, selling or renting a dwelling with a help of an estate agent is not a common practice in any of the countries being compared. In Slovenia, many individuals decide to use services only when they themselves are not able to sell the dwelling or find the adequate one.<sup>50</sup> In Croatia the percentage of renting relationships concluded through real-estate agencies is small<sup>51</sup> and the services of estate agents are used mainly by foreigners, especially foreign companies.<sup>52</sup> Real estate agencies in Serbia enjoy very low reputation, probably because the sector is under-regulated, while the usually low financial status of potential renters and bad reputation of the real estate agents prevents them to engage such services. Only a small percentage (10%) of the agencies advertises in local newspapers, more than half of the agencies (77%) do not have their own web page. The agents are generally poorly educated. In addition, there have been numerous scams in the past. For all of those reasons individuals in Serbia are reluctant to hire an agency in search of the housing. Many of them are not prepared to pay the commission, since the services of the agencies do not guarantee for the higher protection.<sup>53</sup>

Fees of real estate agents for selling are comparable in all three countries. The value of the agent's commission in Slovenia is usually between 2% and 4% of the contractual price (maximum value of the agent's commission set by law is 4% of the selling price),<sup>54</sup> in Croatia agencies in practice usually take 2% of the buyer and 2% of the seller (maximum value of the agent's commission set by law is 6% of the selling price),<sup>55</sup> while in Serbia in case if a brokerage contract is concluded only a buyer must pay additional 3% of the selling price for the agency fee (in general the services of the agency are without charge).<sup>56</sup> There are no data on commission fees in case of renting.

The commissions are comparable with other countries, so they may be characterised as fair and just. However, since prices of real estates in Slovenia

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<sup>48</sup> National Report for Croatia, p. 56 and National Report for Serbia, p. 33.

<sup>49</sup> National Report for Slovenia, p. 36.

<sup>50</sup> National Report for Slovenia, p. 37.

<sup>51</sup> According to the Croatian survey on renting only 7% of the tenants came across the information on the property they are renting over the real estate agency and only 14% of landlords found the tenants through the real estate agency.

<sup>52</sup> National Report for Croatia, p. 61.

<sup>53</sup> National Report for Serbia, p. 35.

<sup>54</sup> National Report for Slovenia, p. 37.

<sup>55</sup> National Report for Croatia, p. 61.

<sup>56</sup> National Report for Serbia, p. 35.

are relatively high compared to other countries, the commission can be regarded as rather high. Likewise, the commission in Serbia could be regarded as unfair, since the work of the real estate agencies is of a very poor quality.

### **1.2.5. Effects of the current crisis in comparative perspective**

The crisis in Slovenia, Croatia and Serbia is mostly seen in the construction sector and has affected demand and supply of dwellings, especially due to the decreased possibilities of obtaining banking loans. This applies especially to Slovenia and Croatia, while in Serbia the economic crisis weakened the construction sector only to a certain extent. But the effects of the crisis on the housing sector (rental sector) directly were not as pervasive as in Slovenia and Croatia. This is because the general economic circumstances in Serbia were not promising even before the crisis.<sup>57</sup> The mortgage defaults in Serbia have also increased, but the situation is not as alarming when compared to other two countries.

In Croatia, the housing market started to decline in 2008 due to the economic recession, when the credit crunch appeared. The growth of the housing loans began to stagnate from the start of the year 2008. One of the reasons for the stagnation is a weak demand for loans due to unfavourable economic conditions (banks have raised lending rates and tightened other lending terms).<sup>58</sup> The non-payment of mortgage credit has also become a problem. Due to such mortgage default the number of real-estates that have been put to auction (mainly because of the non-payment of mortgage credit) have increased by 110% from September 2009 until September 2012.<sup>59</sup>

A similar credit crunch appeared in Slovenia. Firstly, banks were not willing to give loans for new property investments<sup>60</sup> and the number of approved housing loans dropped. According to the National Bank of Slovenia's data from 2012, the scale of new housing loans has dropped for the first time since the crisis started, while the number of construction permissions has been dropping four years in a row.<sup>61</sup> The trend of the decreased construction of new dwellings as well as decreased demand for housing loans continues<sup>62</sup>. Moreover, the stock of planned newly constructed unsold apartments in Slovenia was around 4000 at the beginning of 2011.<sup>63</sup> Considering the fact that there were around 6000 built dwellings all together in the period 2009-2010, the number (4000 newly built apartments after 2009) is enormous. As far as repossessiones are concerned, the

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<sup>57</sup> In Slovenia and Croatia housing building boom happened in the previous decade (around 2004-2007/2008), while in Serbia this was not the case.

<sup>58</sup> National Report for Croatia, p. 61-62.

<sup>59</sup> National Report for Croatia, p. 62.

<sup>60</sup> Therefore, there are a lot of projects, which need to be finished or selling of which was stopped.

<sup>61</sup> National Report for Slovenia, p. 39.

<sup>62</sup> Reasons for this are the following: (i) there is no new capital available, (ii) almost all larger domestic construction business have failed, (iii) there is no interest from foreign investors, (iv) potential new investments are hamstrung due to the credit crunch of banks. See National Report for Slovenia, p. 39.

<sup>63</sup> National Report for Slovenia, p. 39.

actual number of reposessions is not publicly known in Slovenia. The impact on the rental sector has been insignificant so far. However, increased number of reposessions is expected in the future.<sup>64</sup>

There are about 934,000 dwellings under mortgage in Serbia. Many individuals are no longer able to cover the costs of instalments.<sup>65</sup> Also, there is a lower demand for the housing loans, since the crisis has affected the labour market and many individuals are unemployed.<sup>66</sup> There is no precise data on the number of repossessed dwellings in Serbia. In general, there is not much repossession from individuals.<sup>67</sup>

After the crisis a larger supply of dwellings (especially rental apartments) led to a decrease in the house prices. This effect of the decreased house prices appeared in all three countries under review to a certain extent,<sup>68</sup> which is indicated by the following data. In Slovenia, the market rent prices of dwellings have decreased by around 30%-40% since 2008.<sup>69</sup> In Serbia, the rents have decreased for 50% on average.<sup>70</sup> Hence, rentals in Serbia have never been more affordable.<sup>71</sup> Finally, in Croatia according to estimation from 2008, only in the capital city Zagreb there was 6000 to 7000 unsold housing units on the housing market, which illustrate housing market crisis and pressure for price decrease.<sup>72</sup> In the period from 2008 to 2010, the average selling price of newly built apartments has therefore decreased for 9.29%, while the prices of all housing units (old, new, apartments and houses) have decreased for 20%.<sup>73</sup> Surplus of unsold apartments and consequently the decrease in the prices of housing units has led to the decrease also in the level of rents in the private renting sector.<sup>74</sup> This makes renting more affordable.

In response to the crisis the governments of all three countries have already adopted different housing-related legislation.<sup>75</sup> In addition, certain measures, especially regarding the tax system are expected to be taken in the near future (this applies mostly to Slovenia and Croatia), while some of the newly enacted laws have already proved to be inefficient.

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<sup>64</sup> National Report for Slovenia, p. 41.

<sup>65</sup> National Report for Serbia, p. 29.

<sup>66</sup> National Report for Serbia, p. 36.

<sup>67</sup> There are around 4000 dwellings that are to be repossessed (according to article from 2012). These amount to around 1.6% of all individuals having a mortgage. National Report for Serbia, p. 36.

<sup>68</sup> Again, one should bear in mind that the decrease in the house prices in Slovenia and Croatia happened due to the economic crisis, while the effect of the crisis in Serbia on the housing sector was not as pervasive.

<sup>69</sup> National Report for Slovenia, p. 31.

<sup>70</sup> National Report for Serbia, p. 29.

<sup>71</sup> As far as the ownership market in Serbia is concerned, the purchase prices have also decreased. A luxurious apartment, which cost approximately 100,000 EUR in 2008, can now be purchased for 70,000 EUR.

<sup>72</sup> National Report for Croatia, p. 19. There was 10,000 unsold housing units, finished or in construction, worth about 5.2 billion HRK (around 700 million EUR) on the real estate market in 2011.

<sup>73</sup> National Report for Croatia, p. 54.

<sup>74</sup> There is no official data on the decrease of the renting prices in Croatia, only the data analysed and published by different real-estate agencies. See National Report for Croatia, p. 54.

<sup>75</sup> For a fully described new house-related legislation see National Report for Slovenia, p. 42, National Report for Croatia, p. 63 and National Report for Serbia, p. 37.

For example, the Croatian government's answer to unsold housing units was the enactment of the Promotion of the Sale of Housing Units Act in 2010.<sup>76</sup> However, its use did not produce expected results. Instead of the planned 1000 housing units, in reality only 68 were sold.<sup>77</sup> Due to its inefficiency, the government derogated this law in 2011 by passing the Subsidies and State Guarantees for Housing Loans Act.<sup>78</sup> The act introduced two measures.<sup>79</sup> The first measure consists of state paying half of the monthly instalment during the first four years of housing loan repayment. The second measure consists of state's obligation to pay interest on overdue instalments, starting from the first instalment repayable after onset of the reasons for inability of repayment to the termination of this reason, but no longer than one year after the start of the inability to repay the loan.<sup>80</sup> In the period from 2011-2012, a total number of 2253 subsidies were given, worth around 43 million HRK. One should bear in mind that the amount spent in one year should be ensured for the following three years, since the subsidy applies to the period of four years from the first year of loan repayment.<sup>81</sup> Data on the number of realized guarantees are not available.

The current crisis in Croatia has introduced innovations in the POS programme<sup>82</sup> as well. In the city of Varaždin, the non-profit organization conducting this program has started to rent the unsold apartment within the public rental program.<sup>83</sup> A new Rent-to buy scheme in the POS programme has also been launched. The new POS programme had a big success among the citizens so far, since all the offered apartments have been already taken.<sup>84</sup>

One of the statutes enacted in response to the crisis in Slovenia was the Act on the Natural Persons Guarantee Scheme of the Republic of Slovenia.<sup>85</sup> The act has enabled individuals to obtain state guaranteed loans.<sup>86</sup> The state obliged itself to provide for 300 million EUR of guarantees for those settling their houses issue for the first time. Such guarantees of the state were available until the end of 2010.<sup>87</sup>

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<sup>76</sup> Zakon o poticanju prodaje stanova, Official Gazette of RC, No. 38/10. Under the provisions of Promotion of the Sale of Housing Units Act a buyer could in the process of purchase of a new house obtain a government loan in the amount of 100-300 EUR per square meter. This subsidy was designed only for the newly built houses of the licensed contractors, who were also the investors.

<sup>77</sup> National Report for Croatia, p. 19.

<sup>78</sup> Zakon o subvencioniranju i državnom jamstvu stambenih kredita, Official Gazette of RC, No. 31/11.

<sup>79</sup> Two measures of the Subsidies and State Guarantees for Housing Loans Act are: (i) subsidies for housing loans from commercial banks and (ii) state guarantees for the repayment of interests on housing loans from commercial banks in case a person loses means for the repayment due to the loss of employment.

<sup>80</sup> National Report for Croatia, p. 32.

<sup>81</sup> National Report for Croatia, p. 33.

<sup>82</sup> Also called Publicly Subsidised Residential Construction Program.

<sup>83</sup> National Report for Croatia, p. 17.

<sup>84</sup> National Report for Croatia, p. 17.

<sup>85</sup> Zakon o jamstveni shemi Republike Slovenije za fizične osebe, Official Gazette of RS, No. 59/2009.

<sup>86</sup> According to the provisions of Act on the Natural Persons Guarantee Scheme of the Republic of Slovenia temporarily unemployed persons and young families can obtain loans ranging from 5,000 to 100,000 EUR for maximum twenty-five years instalment period. The loans are to be safeguarded with mortgage or land debt on an immovable property.

<sup>87</sup> National Report for Slovenia, p. 42.

In order to enable more lenient conditions of housing loaning, the government of Serbia also adopted new legislation. Regulation on Measures of Support to Construction Industry through Long-Term Housing Loans in 2012<sup>88</sup> first reduced the citizens' participation in housing loans from 10% to 5%, but the Regulation adopted for 2013<sup>89</sup> increased the participation again to 10%. According to the new Regulation, 10% of the loan is covered from the budgetary means, in form of a subsidy. The remaining 80% is given by the commercial bank, in form of a loan, with the National Corporation for Securing Housing Loans securing the loan. The user of the loan must first repay the instalments to the bank, in the period of no more than twenty-five years. Afterwards, the subsidy is to be repaid, within following five years without any interests. The interest rate for commercial banks' loans is maximum of 4.5% plus six-month EURIBOR.<sup>90</sup>

It seems that Serbia, where the economic circumstances were not promising even before the crisis, was the least affected by the crisis in terms of the housing sector. Slovenia and Croatia, on the other hand, did not overcome the crisis yet. It remains to be seen, which of the two countries will take proper or better measures to overcome the crisis. So far it looks like Croatia tried out more varied measures. Some of them were inefficient (i.e. Promotion of the Sale of Housing Units Act), while the others were successful (i.e. POS programme and Rent-to-buy Scheme).

### **1.3. Urban and social aspects of the housing situation in comparison**

#### **1.3.1. Urban aspects in comparative perspective**

The distribution of housing types in the city scale vs. the region scale is the same in the three countries being compared. Rented units are mainly situated in the centres of bigger municipalities (e.g. Ljubljana, Maribor, Zagreb, Split, Rijeka, Osijek, Belgrade, Niš, Novi Sad), whereas owner occupied dwellings are mainly located in the suburbs and smaller municipalities.<sup>91</sup> There are several reasons for this. One is certainly the fact that the prices of dwellings are lower in the suburbs and smaller towns.<sup>92</sup> Secondly, there is a larger influx of students in university centres and towns hosting faculties and high schools. Consequently there is a larger demand for room and apartment rentals in town centres of these municipalities, since students usually do not possess a car or are reluctant to cover the costs of driving long distances from residence to the schooling area.

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<sup>88</sup> Uredba o mjerama podrške građevinskoj industriji kroz dugoročno stambeno kreditiranje u 2012. godini, Official Gazette of RS, No. 4/2012 and 77/2012.

<sup>89</sup> Uredba o mjerama podrške građevinskoj industriji kroz dugoročno stambeno kreditiranje u 2013. godini, Official Gazette of RS, No. 124/2012.

<sup>90</sup> National Report for Serbia, p. 37.

<sup>91</sup> National Report for Slovenia, p. 46, National Report for Croatia, p. 58, National Report for Serbia, p. 38.

<sup>92</sup> For example, a squared meter of a house in Ljubljana in the last quarter of 2011 was 2420 EUR, while in Kranj, which is relatively near Ljubljana, but has fewer inhabitants, it was 1804 EUR; a purchase price for a squared meter of a dwelling in Belgrade varies from 800 to 2000 EUR, while in Zrenjanin, which is relatively near Belgrade, but has fewer inhabitants, it is ranging from 450 to 900 EUR.

The demand for rental housing is also higher in bigger cities due to the bigger possibilities for employment.

In Slovenia, Croatia, as well as in Serbia the process of social segregation of population can be observed. This process has appeared as a consequence of the general social transformation in the transitional period and can be seen mostly in urban areas with multi-apartment buildings. However, the degree of social degradation in Slovenia is in general less obvious than in some other transitional countries (like Serbia and Croatia). The degraded areas in Slovenia are not as pronounced as they are for example in Serbia. In the degraded areas in Serbia crime rates are higher. Concentrations of marginal social groups and underprivileged are lowering the housing prices and making such parts less favourable.<sup>93</sup>

As far as gentrification is concerned, it is rather difficult to define parts of urban areas in Slovenia as being gentrified, even though they exhibit some typical signs of gentrification,<sup>94</sup> while in Serbia gentrification is not even present.<sup>95</sup> Croatia, on the other hand, is showing signs of gentrification, especially in bigger cities, since the beginning of 1990s.<sup>96</sup> However, compared to the gentrification processes in Western Europe and USA, the Croatian gentrification reflects some particularities.<sup>97</sup>

Genuine ghettos are not present in Slovenia. Some social groups (i.e. Roma population and immigrants from former Yugoslav republics) that are unable to obtain legal housing are indeed segregated on specific locations and are forced to construct shacks, illegal houses or other forms of dwellings, but such settlements do not correspond to the widely accepted definition of a ghetto.<sup>98</sup> The situation in Serbia is different. In Serbia, many of Roma population live in poor housing conditions due to the lack of financial means and many of them are without any documents and ineligible for social assistance.<sup>99</sup>

A phenomenon of squatting is not very common in Slovenia.<sup>100</sup> Nevertheless, it is worth mentioning that even if an individual is to unlawfully seize a dwelling, he is not able to prescript either the dwelling or the land, since the individual is not in a good faith regarding the ownership (he is aware that the dwelling was not handed over from the owner).<sup>101</sup> The good faith is necessary for obtaining the ownership right. Since squatters are aware of the fact that they are occupying property that is not theirs, they do not fulfil the legal conditions for prescription.

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<sup>93</sup> National Report for Slovenia, p. 48.

<sup>94</sup> For instance, some older residential districts with good accessibility and favourable living conditions are attractive for the population with higher incomes. This is particularly the case in some parts of Ljubljana. See National Report for Slovenia, p. 49.

<sup>95</sup> National Report for Serbia, p. 39.

<sup>96</sup> National Report for Croatia, p. 66.

<sup>97</sup> For more on the topic see National Report for Croatia, p. 67.

<sup>98</sup> According to notion of 'ghetto' forcibility of settlement in the segregated area is condition sine qua non. In Slovenia it is questionable whether the inhabitants are forced to live in these settlements or decide to inhabit them willingly. See National Report for Slovenia, p. 50.

<sup>99</sup> National Report for Serbia, p. 39.

<sup>100</sup> National Report for Slovenia, p. 50.

<sup>101</sup> According to Article 43 of Slovenian Code of Property.

Serbia and Croatia (particularly city of Zagreb), on the other hand, are more familiar with the phenomenon of squatting. In Zagreb, squatting is as an expression of alternative lifestyle, while in Serbia usually refers to Roma population occupying vacant factory warehouses or old houses.<sup>102</sup> Moreover, there are examples of squatting in Serbian's suburban areas, where citizens occupy a part of a land and build a shack or similar dwelling and use it as a second home.<sup>103</sup> The owner of the dwelling has a legal claim against the intruders.<sup>104</sup> This applies to Serbia, as well as to Croatia, where squatting as an act of autonomous disturbance of possession is prohibited.<sup>105</sup> The legal procedure initiated by such lawsuit is considered urgent (this applies to Serbia and Croatia).<sup>106</sup>

### 1.3.2. Social aspects

Slovenians, Croats and Serbs traditionally prefer home ownership to living in rental housing. In Croatia, for example, living in a rented dwelling is often seen as inferior, while home ownership implies financial success. This is why renting in general is regarded as temporary solution in Croatia.<sup>107</sup> The same fact applies to Slovenia, where ownership is preferable to rental to a great extent. Many of Slovenians see owning a home as the most valuable asset. They see homeownership as a secure investment after retirement. This is strongly preferred to renting a dwelling.<sup>108</sup> Renters, on the other hand, are often stigmatized and seen as "poor persons" in Slovenia.<sup>109</sup> That ownership of dwellings offers a higher standard of living is also a dominant public opinion in Serbia, where all types of renting are considered as inferior to ownership.<sup>110</sup>

One of the problems in all three countries under review, apart from the rental sector being neglected to a certain extent, is the maintenance and managing of the multi-apartment buildings. The maintenance costs are often not included in the feasibility test when planning the investment into home purchase, as this is the case in Croatia.<sup>111</sup> This attitude is due to the housing situation in the past, when the largest part of the rental housing stock was socially owned (i.e. by the state). After the privatization, the former holders of housing rights purchased the dwellings and became the owners of individual apartments, as well as co-owners of the common areas in the building. However, for many of them it was difficult to grasp what an owner of a housing unit in a multiunit building means. They did not invest in the renewals and maintenance. Furthermore, the purchased apartments

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<sup>102</sup> Squatting in Serbia has not developed into a social movement, but it is rather an individual phenomenon.

<sup>103</sup> For example, such dwellings are present in forest of Miljkovica.

<sup>104</sup> National Report for Serbia, p. 42.

<sup>105</sup> According to Article 20-27 of Croatian Ownership and other Proprietary Rights Act (Zakon o vlasništvu i drugim stvarnim pravima, Official Gazette of RC, No. 91/96 and later amendments).

<sup>106</sup> National Report for Serbia, p. 42 and National Report for Croatia, p. 68.

<sup>107</sup> National Report for Croatia, p. 69.

<sup>108</sup> As much as 96% of elderly in Slovenia are homeowners, whereas in non-profit rentals there is a mere 1%. See National Report for Slovenia, p. 52.

<sup>109</sup> National Report for Slovenia, p. 51.

<sup>110</sup> National Report for Serbia, p. 42.

<sup>111</sup> National Report for Croatia, p. 69.

were in some cases larger than the real needs of the households (this is the case mostly in Slovenia).<sup>112</sup> These owners are now relatively old, living in oversized apartments. Larger areas of units are linked to higher costs of residing, which are usually above income standards of the older owners. In addition, many of the owners residing in the housing unit still consider the state as the owner of the common parts of the buildings. A reason for the described situation in Serbia is legal instability in this sector,<sup>113</sup> because of which many multi-apartment buildings are neglected and ruined these days.

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<sup>112</sup> National Report for Slovenia, p. 52.

<sup>113</sup> For more on this topic see National Report for Serbia, p. 42-43.

## **2. Housing policies and related policies in comparison**

### **2.1. Introduction**

In Slovenia, only a few official documents regarding the social and housing policy were enacted so far or are at least under preparation.<sup>114</sup> Unfortunately they were more or less inadequate for various reasons. Likewise, the Slovenian tax policy in regard to housing and tenancy law is inadequate. The major critic is directed towards the support of homeownership instead of promoting rental sector. Apart from the inadequacy of official documents, the ongoing crisis has brought further implications for the housing policy and welfare. Due to the harsh austerity measures by the Slovenian government, many rights and benefits regarding housing have been restricted or cancelled.<sup>115</sup>

Unlike in Slovenia, housing policy in Croatia has been neglected, forgotten and reduced to dealing with individual housing issues of particular groups of population. Today housing strategy in Croatia does not exist and there is no national programme of social rental housing. It is fragmented to the point that it cannot be considered a policy, and is mainly left to local governments.<sup>116</sup>

In Serbia, situation is similar to Croatia, since Serbia does not have an official, comprehensive national housing policy. Only recently the National Housing Agency has been established, but it is still too early for an assessment of its work. As far as taxation policy is concerned, it is important to stress that it has a negative effect on the rental sector (same as in Slovenia but for different reasons). There is a 20% tax rate imposed on the value of the monthly rent, in the form of the income tax. Since the inspection is derisory, many Serbian landlords decide to evade payments, supporting the black market in the rental sector.<sup>117</sup>

The right to housing in Serbia is not enacted in the Constitution or in any of the relevant statutes.<sup>118</sup> Although Slovenian Constitution has no provision on the fundamental right to housing,<sup>119</sup> the Slovenian state is obliged to create possibilities for the citizens to obtain a suitable housing, i.e. to provide for appropriate conditions for the citizens regarding housing (Article 78 of the Constitution). Finally, the Constitution of the Republic of Croatia does not explicitly mention the responsibility of the state to help its citizens in meeting their housing needs.<sup>120</sup> At the same time, the Croatian Constitution does provide for quite some provisions in accordance with which it can be said, that such a legal obligation of Croatian state does in fact exist.<sup>121</sup>

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<sup>114</sup> Slovenian official documents regarding the social and housing policy: National Housing Programme (NHP), The National Housing Savings Scheme (NHSS), The National Program of Social Security for 2011-2020.

<sup>115</sup> National Report for Slovenia, p. 53-58.

<sup>116</sup> National Report for Croatia, p. 71.

<sup>117</sup> National Report for Serbia, p. 44-47.

<sup>118</sup> National Report for Serbia, p. 48.

<sup>119</sup> National Report for Slovenia, p. 53.

<sup>120</sup> National Report for Croatia, p. 72.

<sup>121</sup> Constitutional provisions of proving the above are detailed in National Report for Croatia, p. 72.

## **2.2. Policies and actors**

### **2.2.1. Governmental actors**

In Slovenia, housing policy is responsibility of both national and local government, while meso-level of government in Slovenia has not been introduced yet.<sup>122</sup> In Serbia and Croatia, on the other hand, all levels of government are involved in the housing policy: national, regional and local.<sup>123</sup>

### **2.2.2. Housing policies**

In Slovenia, the main objective of national housing policy is the general concern for the housing situation in the state.<sup>124</sup> Currently and unfortunately, there is no active or effective housing policy in Slovenia. Also, no special housing policies targeted at certain groups of the population are present in Slovenia.<sup>125</sup>

In Croatia, there is no general housing policy, which would aim at meeting the needs of entire population. Instead, the particular housing programmes are aimed at meeting the housing needs of particular groups of population. For example, the social rental housing is aimed at meeting the needs of most vulnerable groups of society. Secondly, there is a housing program for refugees and returnees as well as housing program for war veterans. In addition, there is a notable program aimed at housing accommodation of the elderly and disabled population. Besides these, particular programs the Action Plan for the Decade of Roma Inclusion 2005-2015 was introduced. One of the measures of this plan is the legalization of Roma settlements and the improvement of their housing conditions.<sup>126</sup>

In all three countries, housing policies in general prefer and promote homeownership over renting. The rental sector in Slovenia and Croatia is under-regulated and neglected to a certain extent, while in Serbia the situation is even worse.

## **2.3. Urban policies**

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<sup>122</sup> National Report for Slovenia, p. 59.

<sup>123</sup> National Report for Serbia, p. 48, National Report for Croatia, p. 73.

<sup>124</sup> National Report for Slovenia, p. 60.

<sup>125</sup> National Report for Slovenia, p. 61.

<sup>126</sup> National Report for Croatia, p. 74-76.

Furthermore, there is no control of the quality of privately rented housing in Slovenia, Croatia or in Serbia.<sup>127</sup> The quality is determined and governed only by free market mechanism. In practice, this results in devastating living conditions of tenants in market rental sector.

Since in Slovenia genuine ghettoization is not an issue and the phenomenon of gentrification is not widely spread, there are no corresponding measures to avoid it.<sup>128</sup> Similarly in Serbia and Croatia at this time there are no special measures to prevent these two phenomena, even though in Croatia (especially in Zagreb and Split) the trends in urban development are showing the increase of ghettoization and gentrification.<sup>129</sup>

## 2.4. Energy policies

In Slovenia, the primary legal document regarding the energy policy is the Energy Act.<sup>130</sup> According to the Energy Act, Slovenian Parliament will enact the National Energy Program (NEP),<sup>131</sup> prepared by the Government.<sup>132</sup> In addition, pursuant to Article 68b of Energy Act, the owners of buildings are obliged to show their potential buyers or tenants energy performance certificate of the building before concluding a sale contract or a lease. For this reason the Energy Act has a direct influence on the housing policy and tenancy relations. Other measures include financial incentives - tax reliefs for energy-friendly building and dwellings.<sup>133</sup> Furthermore, on the local level each municipality or several municipalities jointly are obliged to plan the energy consumption and the energy supply scheme in the development documents at least every ten years.<sup>134</sup>

The two capital Croatian acts that were enacted in the framework of the energy efficiency (Physical Planning and Construction Act<sup>135</sup> and Energy Efficiency in Final Consumption Act<sup>136</sup>) set minimum requirements in construction and renovation of residential units in order to achieve energy efficiency. Furthermore, the owners of the residential units must obtain an energy performance certificate – energy certificate. From 1 of January 2016, the rental apartments will have to have a valid energy performance certificate available for the tenant before

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<sup>127</sup> National Report for Slovenia, p. 62, National Report for Serbia, p. 54 and National Report for Croatia, p. 77.

<sup>128</sup> National Report for Slovenia, p. 61-62.

<sup>129</sup> National Report for Serbia, p. 53 and National Report for Croatia, p. 76.

<sup>130</sup> Energetski zakon, (EZ-1), Official Gazette of RS, No. 79/1999 and later amendments.

<sup>131</sup> In Slovenian: "Nacionalni energetski program".

<sup>132</sup> Slovenian National Energy Program (NEP) is yet to be passed. At the moment there is only a draft version, which is in the process of coordination among ministers and public. The main goal of the NEP until the year 2020 is that entire stock of newly-build and renovated buildings are energy friendly.

<sup>133</sup> National Report for Slovenia, p. 64.

<sup>134</sup> This document is called »local energetic concept«.

<sup>135</sup> Zakon o prostornom uređenju i gradnj, Official Gazette of RC, No. 76/07 and later amendments.

<sup>136</sup> Zakon o učinkovitom korištenju energije u neposrednoj potrošnji, Official Gazette of RC, No. 152/08 and later amendments.

entering into a lease agreement. This regulation will therefore have a direct impact on rental housing.<sup>137</sup>

Although there are certain endeavours on the national level in Serbia to address energy efficiency of buildings, there is no general energy policy. The adopted documents are non-binding, which in general results in no significant change in the energy or housing policies of Serbia. The only new measure, which offers insight into the energetic efficiency of the dwelling, is "energy passport".<sup>138</sup> It is obligatory for all the newly built dwellings as from 2013. It is mandatory also for the older dwellings, which are intended for sale, renting or reconstruction.<sup>139</sup>

As the result of the implementation of *acquis communautaire*,<sup>140</sup> Croatia and Slovenia have a more active national energy policy in the field of housing. Serbia, on the other hand, does not have a national energy policy, nor do local self-government units deal with the issue accordingly.

## 2.5. Subsidization

The Slovenian and Croatian systems of subsidization are different but they are based on the same ideas. Serbia, on the other hand, stands out, because the system of subsidization is very underdeveloped.

The only type of housing subsidy available in Serbia is approval of housing loans from commercial banks to citizens.<sup>141</sup> The subsidy has been subject to certain criticism, since the scale of subsidies for housing loans have only been supporting homeownership and some households, who are actually able to solve their housing issue on their own. Other housing subsidies are not available in Serbia.<sup>142</sup>

In Croatia and Slovenia, where all types of housing are subsidized (owner-occupied and rental housing), system of subsidization is much more effective. The largest part of subsidies in Slovenia is intended for rental sector (both market and non-profit). Some are available for tenants,<sup>143</sup> whereas others are intended for landlords.<sup>144</sup> The eligibility for the subsidy depends on the income census of the claimant and number of individuals living in households. The assignment of the subsidy is in the discretion of the public administration and is paid directly to tenant or to landlord. Various groups of people (students, janitor's, elderly,

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<sup>137</sup> National Report for Croatia, p. 77.

<sup>138</sup> The initial energetic passports indicate only the heating consumption of the dwelling and not the other consumptions.

<sup>139</sup> National Report for Serbia, p. 54-56.

<sup>140</sup> Especially due to implementation of the Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings.

<sup>141</sup> The subsidy was introduced in September 2009 with the Program on Subsidies of Loans for Newly-constructed Dwellings. For more on the topic see National Report for Serbia, p. 56.

<sup>142</sup> National Report for Serbia, p. 56.

<sup>143</sup> Tenant's oriented subsidies are regulated in the Exercise of Rights to public Funds Act (Zakon o uveljavljanju pravic iz javnih sredstev (ZUPJS), Official Gazette of RS, No. 62/2010 and its later amendment).

<sup>144</sup> Such as subsidy for dwellings that have social purpose.

invalids etc.) are entitled to subsidies as tenants. Subsidies during tenancy mostly assist the less well-off households with housing costs.<sup>145</sup>

Other subsidies available in Slovenia include those for renewal and restoration of dwellings and for green houses. Slovenian Eco Fund offers nonreturnable grants for the intended renewal and reconstruction of dwellings, which contribute to more eco-friendly and green houses.<sup>146</sup>

A system of subsidization in Croatia is predominantly well-developed and more or less effective (compared to other two countries under review). All types of housing in Croatia are subsidized, owner-occupied, private rental housing, public rental housing and social housing, i.e. housing with protected rent by different types of subsidies. Within the POS programme<sup>147</sup> subsidies for construction or reconstruction are available. Furthermore, within the programme of governmental subsidies and guarantees for housing loans the state subsidizes repayment or guarantees for the repayment of housing loan granted by commercial banks and within the housing savings programme the state gives an incentive on the savings. Rents and housing costs of private rental housing, social housing with protected rent and owner occupied housing, on the other hand, are subsidized by the local and regional authorities within the housing allowance system.<sup>148</sup>

Subsidization within the POS Programme works in the form of lower-than market interest rate for investment loans. Within the programme of governmental subsidies and guarantees for housing loan the subsidy is awarded as direct payment to the commercial bank that granted the housing loan or as guarantee to pay interest on overdue instalments. Within the housing savings programme the state gives an incentive on the amount paid to the savings during the year in the maximum amount of 750 HRK (around 100 EUR).<sup>149</sup> Finally, within the housing allowance system subsidies can be granted in an amount of money that is directly paid to the beneficiary (home owner) or the local authorities pay the costs directly to the providers of services.<sup>150</sup>

## 2.6. Taxation

Homeownership is taxed in all three countries under review, while renting is taxed mostly in Slovenia and Croatia and not so much in Serbia. However, taxes are imposed only on landlords, since Slovenian and Croatian tenants do not pay any taxes on their rental tenancies.<sup>151</sup> In Serbia tenants in rental tenancies must pay the Property Tax, but only if the rental contract is concluded for more than one year or for indefinite period.<sup>152</sup> In practice tenants in Serbia do not pay any taxes

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<sup>145</sup> National Report for Slovenia, p. 67-70.

<sup>146</sup> National Report for Slovenia, p. 69.

<sup>147</sup> More on the POS Programme see p. 14 of this report.

<sup>148</sup> National Report for Croatia, p. 80.

<sup>149</sup> National Report for Croatia, p. 81.

<sup>150</sup> National Report for Croatia, p. 82.

<sup>151</sup> National Report for Slovenia, p. 71 and National Report for Croatia, p. 87.

<sup>152</sup> National Report for Serbia, p. 59.

on their rental tenancies, since there are no contracts for market rentals concluded for period longer than one year or for indefinite period.<sup>153</sup>

In Slovenia and Croatia the value of occupying a house is considered as a taxable income. Ownership in both countries is taxed with the Value Added Tax Act, while in Serbia such act is not enacted. The profit derived from the sale of a residential home is taxed only in Slovenia. Natural persons, who become owners of dwellings in Slovenia after 1 January 2002, must pay the Tax on Capital Income upon sale of their dwellings.<sup>154</sup>

All three tax systems contain several subsidies given in the form of tax reliefs and credits. For example, in Croatia and Serbia the amount of rent for private landlords is reduced by 30% (in Croatia) or 20% (in Serbia) on the name of expenses.<sup>155</sup> Up to mid-2010 the tenants in Croatia were also able to deduct rent from taxable income, but after that time tax deduction was derogated.<sup>156</sup> Furthermore, in Slovenia and Serbia homeowners are also being treated favourably via tax system.<sup>157</sup>

The tax subsidies have negative effect on rental markets in all three countries under comparison. Since there is a tax relief for the owner occupying his dwelling, many do not register rental contract, but rather register themselves as having residence on the address of the dwelling.

Tax evasion is a major problem in Serbia<sup>158</sup> and also a rather topical issue in Slovenia, where the Inspection Office is not too restrictive with the inspections of landlord. Therefore many rental contracts are not registered. Accordingly, the rental market in Slovenia is affected in the sense that renters and landlords are without legal protection in the case of a problem.<sup>159</sup> For Serbia, there is no information on tax evasion to affect the rental market.

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<sup>153</sup> Rather chain contracts are concluded, if any.

<sup>154</sup> National Report for Slovenia, p. 71.

<sup>155</sup> National Report for Croatia, p. 87 and National Report for Serbia, p. 60.

<sup>156</sup> National Report for Croatia, p. 87.

<sup>157</sup> National Report for Slovenia, p. 71-73 and National Report for Serbia, p. 59-60.

<sup>158</sup> National Report for Serbia, p. 61.

<sup>159</sup> National Report for Slovenia, p. 73.

### **3. Comparison of tenures without a public task**

#### **3.1. Evaluative criteria for the landlord**

##### **3.1.1 Profitability**

In all three countries under review rent regulation does not impede a reasonable profit of the landlord, since freely contracted market rents are not subject to any legal (or other) control as long as the profit from renting is reasonable and the rent or contract is not usurious. Usurious rents, however, are regulated by the current legislation in countries being compared.<sup>160</sup>

Slovenian, Croatian and Serbian landlords being natural persons are obliged to pay income taxes from rent. In Serbia, the tax base is equal to the amount of rent minus 20% on the account of standardized costs.<sup>161</sup> Legal persons, whose primary activity is renting apartments, are not subject to the income tax, but to profit tax in accordance with the Tax on Profit of Legal Persons Act.<sup>162</sup>

In Croatia, private landlords are taxed according to the Income Tax Act.<sup>163</sup> Taxpayer is the landlord – natural person when renting is conducted as an additional activity. The taxable basis is the amount of rent reduced by 30% on the account of the expenses. The tax rate is 12%.<sup>164</sup> In addition, the so-called self-employed landlords (i.e. landlords, who gain more than 85.000 HRK from rents in the period of one year) must pay the special income tax – income from independent personal activities.<sup>165</sup> Commercial landlords (i.e. natural and legal persons when renting is conducted as business activity aimed at gaining profit) are subjected to the payment of Corporate Income Tax regulated by the Profit Tax Law.<sup>166</sup>

In Slovenia, taxation of landlords being natural persons is governed by the Income Tax Act<sup>167</sup> and the Tax Procedure Act.<sup>168</sup> The tax base is income in the form of rent minus the normalized cost of 10% of the rent. However, Slovenian government already drafted a new Real Property Tax Act,<sup>169</sup> which would also

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<sup>160</sup> In Slovenia, pursuant to Article 119 of the 2003 Housing Act any rent, which is 50% or more percent higher than the average market rent in the municipality for equal or similar category of dwellings (taking into account also the location and equipment of the dwelling), deems as usurious. Likewise in Serbia, the tenancy contract, which would impose a very high or a very low rent for a dwelling, would according to Article 141 of the 1978 Obligation Relations Act be deemed as usurious. Finally, in Croatia, the rent according to provisions of Lease of Flats Act may not exceed 120% of the average contractually agreed rent in the same village or county for a comparable apartment.

<sup>161</sup> Article 68 of the Citizens' Income Tax Act.

<sup>162</sup> Zakon o porezu na dobit pravih lica, Official Gazette of RS, No. 25/2001 and later amendments.

<sup>163</sup> Zakon o porezu na dohodak, Official Gazette of RC, No. 177/04 and later amendments.

<sup>164</sup> National Report for Croatia, p. 86.

<sup>165</sup> The tax is calculated as if the renting is conducted as an independent personal activity and the income is determined on the basis of business books as the difference between business revenues and expenditures. The tax rate is 12%, 25% and 40% depending on the level of tax base.

<sup>166</sup> Zakon o porezu na dobit, Official Gazette of RC, No. 177/04 and later amendments.

<sup>167</sup> Zakon o dohodnini (ZDoh-2), Official Gazette of RS, No. 13/11 and later amendments.

<sup>168</sup> Zakon o davčnom postopku (ZDavP-2), Official Gazette of RS, No. 13/11 and later amendments.

<sup>169</sup> Zakon o davku na nepremičnine, Official Gazette of RS, No. 101/13.

cover the taxation of rents. But the Slovenian Constitutional Court unanimously annulled the real estate tax act after finding key parts of the law, including the way property has been valued for the purpose of levying the tax, unconstitutional.<sup>170</sup>

The idea regarding the costs of repairs, for which the landlord is responsible, is the same in the three laws under review. The primary concern of the landlord is to maintain the normal use of the dwelling and the building. In practice this means that landlords are obliged to conduct repairs not deriving from the tenants' normal use of the dwelling, but from the dwelling itself (such as changes of windows). Costs of small repairs and costs of regular use of the rented dwelling (such as repair of a broken chair that got broken during the tenancy), on the other hand, are borne by the tenants. However, taking into account principle of freedom of contract, the question of who is responsible for repairs can be also agreed upon differently between the parties. Hence, it is even possible that all repair works are charged from the tenant or from the landlord.

Costs of utilities are mainly in the domain of the tenant and not landlord, unless agreed otherwise in the contract. However, landlords in Slovenia must also secure payment into the reserve fund (in case of a multi-apartment building),<sup>171</sup> similar as landlords in Croatia must cover fee for mandatory maintenance.<sup>172</sup>

### **3.1.2. Property rights respected de iure and de facto**

In case of failure by the tenant to pay the rent the landlord is protected by law. Not paying the rent within the deadline set by the tenancy contract may result in termination of the contract. However, the landlord is obliged to warn the tenant about the breach of the contract first. If the tenant does not pay the rent even after (s)he was required to, the landlord may terminate the contract.

This regulation is common to all three laws. However, deadlines for the payment after receiving the notice from landlord differ to some extent. In Serbia and Slovenia, the tenant is obliged to pay the rent in fifteen days after receiving the notice. In Slovenia, additional deadline for rent payment may be also longer but not shorter. In Croatia, the landlord may terminate the contract, if the tenant fails to pay the rent within thirty days from receiving the notice.

Moreover, landlord is entitled to terminate the tenancy contract also in case of abuse or deterioration of the dwelling by the tenant. Such protection of landlord is guaranteed in all three laws.

If, upon the termination of a tenancy contract and expiration of termination period the apartment is not vacated and returned to the owner, the landlord is legally

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<sup>170</sup> Constitutional Court decision no. U-I-313/13 dated 21 March 2014.

<sup>171</sup> Reserve fund are compulsory monthly payments by condominium owners. The fund is intended for possible maintenance work on the building and cannot be used for other purposes. The manager of the building is in charge of the fund. He must open a special banking account only for storage of these payments.

<sup>172</sup> The fee of mandatory maintenance is a fee paid to a common »housing budget« of every dwelling owned by more than one owner. It is intended to be used for repairs and maintenance of the building itself and of the common spaces.

entitled to demand eviction of the tenant. In Slovenia and Croatia these disputes are handled by the court with a priority.<sup>173</sup>

In Serbia, landlord may request the eviction from the municipal authority, competent for housing matters.<sup>174</sup> The reason for putting in charge the municipal authority and not courts lies in the assumption that the municipal authority would settle the situation more promptly than courts. However, the municipal authority limits its administrative procedure exclusively to the indisputable facts of the case, when it is clear that the occupation of the dwelling is illegal. If the authority assesses that there is a dispute regarding the legality of the occupation, it refers the parties to the litigation in front of the competent court.<sup>175</sup> The eviction procedures, in front of the municipal organs, are also deemed as prioritized.

Deposit is the main form of landlord's security in all three countries under review. The legal concept is the same in Slovenia, Croatia and Serbia. Deposit is mainly a guarantee to cover potential claims of the landlord after termination of the contract on the account of possible damages.

The deposit is not legally regulated in any of the three countries. In practice, the usual value of deposit in Slovenia is between one to three monthly rents,<sup>176</sup> in Croatia between one to two monthly rents,<sup>177</sup> while in Serbia the amount of deposit is usually one (sometimes two) monthly rent(s).<sup>178</sup> However, deposits can be also higher, since it is usual for market tenancy contracts that the parties agree on the deposit.

The parties may agree that the deposit is returned after the termination of the contract or that it be offset with one or more last rents. There are no special provisions regulating the storage of the deposit. Interest rates are not anticipated. Landlord is allowed to use the deposit to restore the dwelling to the condition, in which it was before the tenant started his residence.<sup>179</sup>

In Serbia, other types of security are also legal (e.g. liens, guarantors etc.), but in practice only deposit is used.<sup>180</sup> In Slovenia, while the landlord does not have a statutory lien on the tenant's (movable) property, the landlord and the tenant may establish a contractual lien.<sup>181</sup> In Croatia, on the other hand, a statutory lien on the tenant's assets is provided for the unpaid rent as well as the damages claims. The landlord has the right to retain the movable property until the tenant pays the due rent or damages. In accordance with rules on retention right, landlord may sell the tenant's assets only if (s)he informed the tenant of such an intent.<sup>182</sup>

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<sup>173</sup> National Report for Slovenia, p. 164 and National Report for Croatia, p. 169.

<sup>174</sup> The request is filed with the municipal authority in the municipality, in which the dwelling is located. This is usually the Housing Department of the municipal authority.

<sup>175</sup> National Report for Serbia, p. 138.

<sup>176</sup> National Report for Slovenia, p. 131.

<sup>177</sup> National Report for Croatia, p. 144.

<sup>178</sup> National Report for Serbia, p. 109.

<sup>179</sup> National Report for Slovenia, p. 130-131, National Report for Croatia, p. 144-145, National Report for Serbia, p. 108-109.

<sup>180</sup> National Report for Serbia, p. 108.

<sup>181</sup> Provisions of the 2002 Law of Property Code (Stavarnopravni zakonik (SPZ), Official Gazette of RS, No. 87/02 and later amendment) apply.

<sup>182</sup> Article 75 of Civil Obligations Law (Zakon o obveznim odnosima, Official Gazette of RC, No. 35/05 and later amendments).

The possibility to terminate tenancy contract if house is needed for own use or close relatives is given under Croatian law, according to which a six months move-out period for the tenant applies,<sup>183</sup> as well as under Slovenian law.<sup>184</sup> In such case Slovenian landlord is obliged to provide other suitable apartment for the tenant and to pay for moving costs.

As already mentioned eviction procedure in Slovenia and Croatia is in the jurisdiction of the court, while in Serbia a municipal authority competent for housing matters is competent. The possibility of alternative dispute resolution is available as well, but no special procedures are developed precisely for these procedures (this applies mostly to Slovenia and Serbia).

The disputes are handled with priority in all three legal systems. However, in Croatia the legal procedures for termination and eviction take almost a year at the first instance and few years to be finally resolved.<sup>185</sup> For Slovenia and Serbia no official data are available in respect to the average length of procedure.

According to Article 93(2) of the 2003 Housing Act, the rent payment in Slovenia may be replaced by performance in kind according to the agreement between the parties. This Article regulates the situation when the landlord does not provide the normal use of the dwelling. In such case, the tenant has a right to propose to the Housing Inspection to issue an order, setting the deadline for the provision of proper conditions for use. If the landlord fails to execute the order within the set deadline, the tenant shall provide the needed repairs himself. The costs of the execution, alongside the interests, can be offset with active debts of the tenant to the landlord on the account of the rent.<sup>186</sup>

In Serbia, such practice is extremely rare but not impossible, although none of the statutes contains a provision which would enforce the performance in kind.<sup>187</sup>

### **3.2. Important evaluative criteria for the tenant**

#### **3.2.1. Affordability**

The affordability of the tenant depends on different elements, such as initial rent, deposit, expenses, responsibility on repairs etc. Initial rent is of course the most important among them and therefore it needs to be the evaluated first.

The rent for market rentals in Slovenia, Serbia and Croatia is determined freely on the market, depending solely on the supply and demand. Its value is usually the result of the negotiation between landlord and future tenant, according to the location, size and equipment of the dwelling. No maximum amount of a freely

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<sup>183</sup> National Report for Croatia, p. 161.

<sup>184</sup> Article 106 of 2003 Housing Act.

<sup>185</sup> National Report for Croatia, p. 175.

<sup>186</sup> Article 93(2) of the 2003 Housing Act.

<sup>187</sup> National Report for Serbia, p. 105.

contracted rent is set, since rents for market rentals are not subject to any control in any of the three laws.<sup>188</sup>

In Slovenia and Serbia there is also no regulation of clauses on rent increase. Hence, a possible rent increase is left solely to the discretion of the parties. In Croatia, on the other hand, changes of rent in the open-ended tenancy contract are not allowed before the expiration of one year.<sup>189</sup> After the first year any party may propose the change of the rent in writing. The new rent amount is than maximized to 120% of the average contractual rent paid in the similar apartment in the area. If the new proposed rent exceeds the legally set amount, the tenant has the right to ask the Court to determine the rent in a 30 days period.<sup>190</sup> As far as automatic increase clauses or index-oriented increase clauses are concerned, all three law systems are unfamiliar with both of them.<sup>191</sup>

The next element influencing the affordability of the tenant is the regulation of deposit. At the moment of the conclusion of the tenancy contract the tenant usually pays the deposit. This type of guarantee to cover potential claims of the landlord after termination of the contract on the account of possible damages made by the tenant is common in all three countries under review.

As the deposits are predominantly agreed upon in private rentals, where written contracts can be a rare practice, it is advisable for the tenant to ask for the signed receipt. If a written contract is concluded, the amount of the deposit is usually determined in the contract.

The deposit is not regulated by Law in any of the three countries. In practice the usual value of deposit in Slovenia is between one to three monthly rents,<sup>192</sup> in Croatia between one to two monthly rents,<sup>193</sup> while in Serbia the amount of deposit is usually one (sometimes two) monthly rent(s).<sup>194</sup> However, deposits can be also higher upon agreement between the parties.

The parties have also the possibility to agree upon the rules of use of the deposit as well as on its interest rates. In practice, however, such provisions are rare. When the tenant is normally using the apartment, the landlord is obliged to return the deposit upon the cessation of the contract. Usually this will take place after the landlord checks that the apartment is in proper state and the keys to the apartment are returned. If the apartment is not in a proper state upon return, the deposit may be used for repairs. In practice, deposit is frequently used instead of payment of the last (one or two) rents.

One of the essential provisions of the tenancy agreement is who will pay the apartment utilities. Unless agreed otherwise, the utilities such as water, electricity, garbage removal, gas supply etc. are paid by the tenant. The running costs are usually not included in the rent price and are paid separately (on top of the rent).

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<sup>188</sup> National Report for Slovenia, p. 117, National Report for Croatia, p. 139 and National Report for Serbia, p. 101.

<sup>189</sup> Pursuant to Article 10 of the Lease of Flats Act.

<sup>190</sup> National Report for Croatia, p. 141.

<sup>191</sup> National Report for Slovenia, p. 126, National Report for Croatia, p. 141 and National Report for Serbia, p. 106.

<sup>192</sup> National Report for Slovenia, p. 131.

<sup>193</sup> National Report for Croatia, p. 144.

<sup>194</sup> National Report for Serbia, p. 109.

However, the parties may agree that the tenant is obliged to pay a lump-sum, covering both rent price and running costs. In this case, the tenant has no other costs, unless otherwise agreed.

Increase of prices of utilities normally has to be borne by the tenant. Usually it does not influence rents, since the tenant is paying the costs separately based on the invoice. Only in case of fixed rent clause (lump-sum) the increase of prices is borne by the landlord. It is important to note that in such case the rent does not increase automatically. The landlord is entitled to higher amount, but only if the increase is significant and (s)he manages to negotiate with the tenant a higher amount of rent. Consequently, this type of rent (lump-sum) is rare in practice.

The described arrangement regarding the expenses is applicable in all of the three countries. No significant differences among the countries under review were noticed.

Costs of repairs are mainly in the domain of the landlord and not tenant, unless agreed otherwise in the tenancy contract. This applies to Slovenia, Croatia as well as Serbia. The tenant will usually be responsible only for the costs of small repairs and costs of regular use of the rented dwelling, such as repair of a broken chair that got broken during the tenancy, repair of a broken glass window or change of broken siphons, wires and fuse etc.

According to all three legal systems, major repairs (such as changes of old windows) not derived from the tenants' normal use of the dwelling, but from the dwelling itself are the landlord's responsibility. However, taking into account principle of freedom of contract, the question of who is responsible for repairs may be also regulated otherwise. Hence, it is even possible that all repair works are paid by either party.

Tenants in Slovenia and Croatia do not pay taxes, since taxes are imposed only on landlords.<sup>195</sup> In Serbia tenants in rental tenancies must pay the Property Tax, but only if the rental contract is concluded for the period longer than one year or for indefinite period.<sup>196</sup> In practice this means that also tenants in Serbia do not pay any taxes on their rental tenancies, since there are no contracts for market rentals concluded for period longer than one year or for indefinite period.<sup>197</sup>

Finally, tenants in Slovenia and Croatia are entitled to subsidies, which during tenancy mostly assist the less well-off households with housing costs. As a proof of their status tenants must have a valid tenancy contract. This represents a problem especially in Croatia, where landlords are reluctant to conclude written tenancy contracts. Thus, tenants in Croatia rarely exercise their right to subsidy.<sup>198</sup>

In Slovenia, on the other hand, where a various groups of people (students, janitor's, elderly, invalids etc.) are entitled to subsidies as tenants, the subsidization of students, who reside in market rented dwellings, is quite common. In order to receive the subsidy, the student must fulfil certain conditions.<sup>199</sup> The subvention is

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<sup>195</sup> National Report for Slovenia, p. 71 and National Report for Croatia, p. 87.

<sup>196</sup> National Report for Serbia, p. 59.

<sup>197</sup> Rather chain contracts are concluded, if any.

<sup>198</sup> National Report for Croatia, p. 82.

<sup>199</sup> The student must fulfil following conditions: (i) Slovenian citizenship, (ii) status of student (regular or irregular) that is not employed, (iii) average gross income of the individuals in the household must not

awarded for the period of ten months, i.e. for the duration of the schooling semester, and it is paid out directly to the landlord.<sup>200</sup> Additionally, subsidy of market rent can be awarded also to tenants, who fall into the income census for subsidies in non-profit apartments and have applied for obtaining the non-profit apartment in the municipality of their residence, but failed to obtain it. The subsidy is paid out to the tenant, while (s)he pays full value of the rent to the landlord.<sup>201</sup> On the contrary, subsidization of tenants in Serbia is not even available. Hence, it is reasonable to argue that the position of tenants in Serbia is the least beneficial when comparing the possibilities to obtain a subsidy to tenants in the three legal systems.

### 3.2.2. Stability

Tenancy contract has to be made in writing. This legal requirement, which should bring some stability to the position of the tenant, is common to all three laws. The effect of the lack of a written agreement is, however, not always the same.

According to Slovenian law, the absence of a written contract results in a null and void contract.<sup>202</sup> Similarly, oral contracts in Serbia do not have a legal effect,<sup>203</sup> since the written form is a condition for the existence of the contract and not merely a proof of it.<sup>204</sup> Pursuant to Croatian legislation tenancy contracts are valid if concluded in writing.<sup>205</sup> However, according to case-law, the "rule of consolidation"<sup>206</sup> may apply. Therefore, if the contract has been fulfilled in its whole or in its important part, it is validly concluded regardless of its (written or oral) form. The rule of consolidation only applies when both parties have fulfilled their obligations. Fulfilment of contractual obligations by one party only will therefore not suffice.<sup>207</sup>

Slovenian and Croatian law are also familiar with the landlord's duty to register a tenancy contract, while in Serbian legislation no such obligation exists.<sup>208</sup> However, none of the first two systems is effective in case of the omitted registration. Provisions of the Croatian law do not have a desired impact in practice,<sup>209</sup> although a fine is imposed in case of omitting the obligation of

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exceed 150% of average gross salary per individual in Slovenia, (iv) has permanent residence more than twenty-five kilometres away from the institution and (v) has not been excluded from the residence hall.

<sup>200</sup> National Report for Slovenia, p. 69.

<sup>201</sup> National Report for Slovenia, p. 68.

<sup>202</sup> J. Šinkovec and B. Tratar, Komentar stanovanjskega zakona (2003), p. 102.

<sup>203</sup> S.R. Vuković, Komentar Zakona o stanovanju (sa Sudskim Praksom, Obrascima i Registrom Pojmova) (2004), p. 41.

<sup>204</sup> National Report for Serbia, p. 86.

<sup>205</sup> Article 4 of Lease of Flats Act.

<sup>206</sup> Article 249 of Civil Obligations Law.

<sup>207</sup> Gorenc and others: Komentar Zakona o obveznim odnosima (2005), p. 883.

<sup>208</sup> According to the 2011 Residence and Domicile of the Citizens Act the landlords are obliged only to allow their tenants to register temporary and permanent residence.

<sup>209</sup> Article 26 of Lease of Flats Act provides the obligation to register a tenancy contract, which can be registered with the Local authority unit as well as the nearest Tax office. The contract has to be registered by the owner of the dwelling within eight days after the tenancy contract was signed. In practice many tenants are registered as "family members", since the payment of taxes in such cases is not determined.

registration. As far as Slovenia is concerned, there was no special duty or requirement to register a tenancy contract prior to 1 July 2013. As of this date every new rental contract, as well as any change of the parties or the rent price, must be registered with the Geodetic Office of RS by the fifteenth of the following month. Due to the relatively new practice in Slovenian regime the possible effects of omitted registration will be seen in the future.

Among the incentives for the landlord to conclude an unofficial “black market” contract giving less stability to the tenant are the tax subsidies. They have major negative effect on rental markets in all three countries under comparison. Since there is a tax relief for the owner occupying his dwelling, many do not register rental contract, but rather register themselves as having residence on the address of the dwelling. Accordingly, the rental market is affected in the sense that renters and landlords are without legal protection in the case of a dispute.<sup>210</sup>

In Slovenia, Croatia and Serbia open-ended contracts for market rentals are not very common, although market rentals may be concluded for either limited period or as open-ended. In case of open-ended tenancies, tenants in Slovenia and Croatia are given adequate protection against unilateral termination by the landlord.

According to Slovenian legislation the landlord is able to terminate the contract if the so-called culpable reasons for termination exist<sup>211</sup> or for other reasons, as long as they are clearly governed by the rental contract.<sup>212</sup> In addition, even in such cases the tenant may prove before the court that the reason was incurred due to circumstances beyond his control or that he was unable to resolve them without fault at his part in due time.<sup>213</sup> Similarly, pursuant to Croatian legislation the landlord is able to terminate the tenancy contract for culpable reasons determined by law, i.e. if the tenant breaches some of his contractual or legal obligations.<sup>214</sup> The position of the Serbian tenant is, however, not as protected as in other two countries. In general, the landlord in Serbia does not need to state any reason for terminating open-ended market tenancy contract.<sup>215</sup>

As already indicated, market tenancy contracts are usually concluded as limited in time in practice.<sup>216</sup> In Slovenia and Croatia landlords are not given the chance to circumvent the protection of the tenant guaranteed in case of open-ended leases by concluding the fixed term lease. The above-described regulation regarding the possible unilateral termination by landlord also applies for cases of fixed term leases.

The protection or/and stability of the tenant in case of limited in time tenancy contract is also ensured in Serbia. Pursuant to Serbian regulation the premature

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<sup>210</sup> National Report for Slovenia, p. 73.

<sup>211</sup> According to Article 103 of the 2003 Housing Act there are twelve culpable reasons for termination.

<sup>212</sup> Article 105 of the 2003 Housing Act.

<sup>213</sup> Vlahek, 'Odpoved stanovanske najemne pogodbe', Podjetje in Delo, no. 7 (2006), p. 1235-1236.

<sup>214</sup> Article 19 of the Lease of Flats Act.

<sup>215</sup> National Report for Serbia, p. 132.

<sup>216</sup> National Report for Slovenia, p. 116, National Report for Croatia, p. 137 and National Report for Serbia, p. 100.

termination of the limited in time contracts by the landlord is allowed only due to certain special reasons that are contained in 1978 Obligation Relations Act.<sup>217</sup>

In Slovenia, the prolongation of the contract is left to the explicit demand of the tenant. The tenant, who wishes to prolong the duration of the tenancy, is obliged to ask for the permission of the landlord within thirty days before the termination of the contract.<sup>218</sup> Otherwise the tenant is obliged to vacate the premises within the period determined in the contract. This is different in Croatia and Serbia, where it is possible to tacitly renew a tenancy contract.

In Croatia a tenancy contract for definite period may be tacitly renewed for the same duration if none of the parties gives notice in writing to the other party to enter into a fixed-term contract for a further period, 30 days prior the expiry of the contract.

According to Serbian legislation a tacit renewal of tenancy contract may apply if the tenant continues to use the dwelling after the termination of the agreed period, while the landlord does not object. In such case it is considered that the new open-ended contract was concluded under the same conditions as the previous contract.<sup>219</sup>

In case of a market rental the tenant and landlord are free to agree upon the duration of the contract. In practice most of the tenancy contracts in Slovenia, Croatia and Serbia are concluded for a limited time period (rather than open-ended contracts). In such case the contractual term of definite time period is regarded as essential.

For tenants in private rental market no general protection or social defences are available in the eviction procedure. This applies to all three countries under review. However, tenants in Slovenia, who are (in theory) protected from being unjustifiably evicted by the landlord, may be considered as only exception to the general rule.<sup>220</sup>

### **3.2.3. Flexibility**

Non-abusive subletting is allowed in all three systems, although there are some differences in the regulation (especially when comparing Serbia to Slovenia).

The landlord's approval of subletting is always required. However, according to Serbian legislation, the landlord is entitled to refuse the subletting only for justified reasons.<sup>221</sup> These reasons could refer to the leased asset in question, the personal characteristics of the sub-tenant or some other.<sup>222</sup> The Slovenian Code of Obligations (hereinafter also: CO) includes the same provision, according to

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<sup>217</sup> See Arts 582, 584 and 588 of the 1978 Obligation Relations Act .

<sup>218</sup> National Report for Slovenia, p. 116.

<sup>219</sup> Article 596 of the 1978 Obligation Relations Act.

<sup>220</sup> Pursuant to Article 106 of the 2003 Housing Act, if the landlord terminates the contract from a reason other than culpable reason from Article 103 or reasons contained in the tenancy contract, (s)he is obliged to provide another adequate dwelling for the tenant. Nevertheless, the tenant's rental position must not deteriorate.

<sup>221</sup> Article 587 of the 1987 Obligation Relations Act.

<sup>222</sup> Article 586(2) of the 1987 Obligation Relations Act.

which the landlord may oppose the sublease only on justified grounds.<sup>223</sup> In addition, subletting in Slovenia is also a subject to 2003 Housing Act, which is in relation to previously mentioned CO lex specialis. It is important to note that this act does not require justified grounds as a condition for refusing the subletting.<sup>224</sup>

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<sup>223</sup> Article 606 CO.

<sup>224</sup> National Report for Slovenia, p. 115.

## **4. Comparison of tenures with a public task**

### **4.1. Generalities**

Rental tenures with public task exist in all three countries under review. However, there are some differences among them.

In Slovenia the majority of rented housing represents dwellings with non-profitable rent, i.e. 70% of all rented units. These dwellings are awarded by municipality, state, public housing fund or other non-profit housing organization. They are intended for individuals with very low incomes, limited property and poor housing conditions.<sup>225</sup> Secondly, there are special purpose rental apartments designed to sooth the needs of elderly citizens, who are no longer able to supply themselves or to care for themselves. Nevertheless, they are capable of living a relatively autonomous life with rare help of the professional stuff. The apartments are constructed to serve the functional needs of elderly (for instance the dwelling do not have doorsteps, have wider halls, larger bathrooms, adjusted equipment etc.). The largest investor in these apartments is the Real Estate Fund of Pension and Invalidity Institution (hereinafter: Fund), whose owner is the Institution for Pension and Invalidity Security of Republic of Slovenia. The Fund is the owner of 170 apartments in nine municipalities across Slovenia, which represents 3% of all rented units.<sup>226</sup>

In Croatia there are three types of tenures with a public task. Social housing, which is intended for households of low income, is renting with protected rent. In most cases these housing units are owned by local authorities (cities) and the smaller part is in private ownership. Secondly, a latest program of public rental housing is an innovation in the housing program of two cities, Zagreb and Varaždin. This program has been proven as effective. Although the freely determined rent is prescribed by the by-laws regulating this program, it is classified under regular types in the rental sector with a public task. This is mainly for the purpose of this program, which aims are younger families with more children and without proper housing. In addition, the indirect goal of this program is to decrease the level of rent of the market rental housing. Next to these two groups, a special form of housing with public task was formed in Croatia. This is the so-called protected tenants' renting for former housing right holders.<sup>227</sup>

Non-profit rentals in Serbia also have a public task, although their share is rather modest. They encompass less than 2% of the entire housing stock in Serbia. These dwellings are awarded by local self-governed units or non-profit housing agencies, if such agency is established in the particular municipality. The situation has improved since the execution of the 2009 program Social Housing in the Supportive Environment, which introduced a new model of social housing. The main object of the project is to offer an adequate housing for socially underprivileged persons, as well as IDPs and refugees. Hence, a chosen

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<sup>225</sup> National Report for Slovenia, p. 78-80.

<sup>226</sup> National Report for Slovenia, p. 81-82.

<sup>227</sup> National Report for Croatia, p. 94-97.

individual is regarded as a host, whose responsibility is to help others in the building.<sup>228</sup>

From the above it is apparent that regulatory types of rental with public task are intended for different groups of people in each country. Social cases (individuals and/or households with lower income) are taken care of in all three countries to a certain extent. Slovenia has additional provisions for the elderly, while Croatian system is targeted also in protecting younger families in need. In Serbia system of tenures with a public task seems, however, the least effective among the three. Nevertheless, Serbians are looking for improvements.

#### **4.2. Evaluative criteria for public/social/private subsidized landlords**

Subsidization of landlords in tenures with a public task is underdeveloped in all three countries under review. In Serbia, such subsidies are not even available, while in Slovenia and Croatia landlords are merely encouraged to rent public/social/non-profit dwellings. In Croatia the subsidy for local authorities and other legal persons when acting as buyers of housing units for the purpose of social and public rental housing is prescribed. Similarly, landlords in Slovenia are entitled to subsidy for dwellings that have social purpose.

#### **4.3. Evaluative criteria for the tenant**

##### **4.3.1. Access**

In general, there is the lack of adequate supply in all three countries under review.

Non-profit and social housing in Serbia has been neglected since the dissolution of former Yugoslavia. Some improvements have been seen recently, with around 1.500 dwellings built in 2010 in various cities across Serbia. However, this is far from satisfactory supply due to emerging economic state in the country.<sup>229</sup>

The supply of dwellings with a public task is also insufficient in Slovenia. Taking into account the ageing population more purpose apartments are going to be needed in the future. Apart from that there is also a large demand for non-profit rentals, which has been somewhat reduced by introducing subventions for market rents in 2009. In spite of this, according to municipal data, there are around 8.300 households in need of non-profit dwellings.<sup>230</sup>

The number of households in need for social housing in Croatia increased in recent years according to the research that was made. This indicates that the problem of lack of adequate supply of dwellings with a public task is also present in Croatia.

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<sup>228</sup> National Report for Serbia, p. 67.

<sup>229</sup> National Report for Serbia, p. 30.

<sup>230</sup> National Report for Slovenia, p. 29.

The selection procedure of awarding non-profit apartments in Slovenia is based on a public notice, which is published in the media stating all necessary documentation that is to be submitted by the applicants.<sup>231</sup> For this reason alone it can be argued that the selection procedure is fair. In addition, incomplete applications may be completed in additional time limit. The right to appeal against the decision of the committee, which is entitled for forming the lists of eligible applicants, is also guaranteed.

General conditions of eligibility are: (i) Slovenian or EU citizenship, (ii) permanent residence in the municipality or the territory on which the landlord is operating, (iii) that the applicant and his family members have not already rented a non-profit apartment for indefinite period of time or(co)own a dwelling, (iv) that the applicant and his family members do not own a property in the value of 40% of an adequate dwelling and (v) the value of determined income census of the household. Every notice sets out particular target group, which is more prone to obtain an apartment. The fulfilment of conditions is assessed with points, whereas landlords are able to determine additional conditions. However, landlord must be careful to set conditions in a manner that the apartments are available for all social groups. Landlords have a right to request from the tenants to submit evidence on eligibility for non-profit rental every five years. If the tenant is no longer eligible, the contact can be change to market rental contract.<sup>232</sup> If the social circumstances of the tenant deteriorate again in the future, he has a right to request a non-profit rent again.<sup>233</sup>

The residents of special purpose rental housing in Slovenia can be elderly, who are psychophysically capable of autonomous life, but require some assistance with everyday work. Additionally, eligible are individuals, whose present residence is inadequate in some manner (too far from the urban area, inadequately equipped regarding their invalidity), then partners of eligible residents and individuals younger than sixty-five years, who fulfil other conditions.<sup>234</sup>

The application is available on special form. The selection procedure is in the jurisdiction of the special committee,<sup>235</sup> which is responsible to elect rightful claimants. The non-elected applicants have a right to appeal to the Fund.<sup>236</sup> Apart from the fulfilment of general conditions of eligibility, the applicants must have enough finance to cover the expenses of the rent and other costs. This provision can be characterized as relatively unfair, since it eliminates those, who might be most in need of assistance from the selection procedure.

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<sup>231</sup> Selection procedure of non-profit apartments in Slovenia is in the jurisdiction of special committees established by landlords. The committees are entitled for forming the lists of eligible applicants.

<sup>232</sup> National Report for Slovenia, p. 78-79.

<sup>233</sup> Article 90 of the 2003 Housing Act.

<sup>234</sup> The advantage is given to the Slovenian elderly (although Slovenian citizenship is not required), who need assistance from a professional, rather than to those, who reside in inadequate dwellings or arrears, and to those, who have a permanent residence in the municipal, in which the rented dwelling is located. In addition, the advantage is given to the individuals without relatives, who would be able to take care of them.

<sup>235</sup> The special committee is formed on behalf of the Fund and legal person, who is responsible for the care in the dwelling.

<sup>236</sup> Deadline for the appeal is eight days from the notice.

In Croatia protected rent is paid by various groups of people, why this program should be quite effective. Firstly, the protected tenants, i.e. former holders of the housing rights, are entitled to it.<sup>237</sup> They acquired *ex lege* a status of a tenant with the right to conclude open-ended tenancy contract with protected rent.<sup>238</sup> Secondly, tenants eligible for social housing program, war veterans, victims of war, refugees and returnees are all entitled to protected rent.

On the basis of the individual applications for tender of social housing a priority list is drawn up. The rank of the applicant on the priority list depends of the evaluation of the prescribed criteria. They are prescribed on the local level, usually in by-laws and decisions, so its town has its own criteria.<sup>239</sup> For this reason the fairness of the selection procedure may be questionable, although in practice these criteria are very similar and mostly refer to different social conditions of the applicant.

Regarding the public rental housing, both cities (Zagreb and Varaždin) conducted tenders for the allocation of public rental housing. The priority list was drawn up on the basis of the individual applications. The selection procedure and eligible criteria as prescribed by the by-laws were applicable.<sup>240</sup> The important part of selection of the appropriate applicant held also tenants' social and health status apart from the basic criteria based on their housing situation and income level. The tenancy contracts were conducted for the period of five years with the possibility of prolongation.<sup>241</sup>

The general conditions of eligibility for non-profit rentals in Serbia are given to individuals based on their housing situation, income level, health conditions, invalidity, number of household members and property situation. The priority is given to more vulnerable groups, such as youth, families with children, elderly over sixty-five years, single parents, invalids, IDPs and refugees, Roma and others.<sup>242</sup>

#### **4.3.2. Affordability**

A short overview of regulation of the initial rent in the three laws is required, before the comparison regarding its effectiveness can be made.

In Croatia, the level of protected rent is determined on the basis of conditions and measures set by the government,<sup>243</sup> but at the same time it cannot be lower than

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<sup>237</sup> More precisely this refers to: (i) tenants former holders of the housing rights on the former public (socially owned) housing or nationalized housing who did not exercise their right to buy dwellings they were living in, (ii) tenants former holders of the housing rights on the private housing who were not entitled by the law to buy housing they were living in and (iii) tenants former holders of the housing rights on the confiscated housing which were resulted to their previous owners.

<sup>238</sup> For this group of tenants Arts 30-50 of the Lease of Flats Act apply.

<sup>239</sup> National Report for Croatia, p. 95.

<sup>240</sup> Decision on renting of Public Rental Housing.

<sup>241</sup> National Report for Croatia, p. 99.

<sup>242</sup> National Report for Slovenia, p. 67.

<sup>243</sup> This controlled rent is paid by different groups of people, such as persons in social or public houses (social cases, war veterans) and former housing right holders.

the amount necessary to cover the costs of the maintenance of the building, as determined by a special regulation.<sup>244</sup> If the level of maintenance of the building is higher than the level of protected rent, protected tenant is obliged to pay the protected rent in the amount of the maintenance costs.<sup>245</sup>

In Slovenia, the rent for non-profit apartments is determined in accordance with a special methodology.<sup>246</sup> The basis is calculated according to administratively determined value of the dwelling. Newer and more modern apartments have more value points, therefore also higher rent price.<sup>247</sup> The rental prices of purpose apartments, on the other hand, are to be determined freely on the market.

The rent of social housing in Serbia is based on social and other criteria, such as area of the dwelling, quality of the dwelling and the building, in which the dwelling is situated. It does not include actual costs. The manner of calculations is set in Directions on the Manner of Determining the Rent.<sup>248</sup>

Based on the above it can be argued, that rental prices of dwellings with a public task are generally controlled in a certain manner, i.e. they are regulated with a specific methodology or based on certain criteria. This makes them more affordable compared to the private market rentals. Hence, the aim of achieving housing affordability, which is one of the aspects of the tenure with the public task, is reached. However, since people in need of these dwellings usually have lower income, the rental prices are merely more affordable.

Furthermore, tenants are protected by the legal regulation of rent increase. The increase of non-profit rents in Slovenia, the increase of protected rents in Croatia<sup>249</sup> and the increase of non-profit rents in Serbia<sup>250</sup> are all controlled by the law. In Slovenia, for example, if a landlord of a non-profit unit wants to increase the rent, the government must first amend the relevant Decree,<sup>251</sup> setting different value of elements of non-profit rent. The rent in non-profit rentals in Serbia is determined every six months by the government, which means the landlord cannot unilaterally increase the rent. In cases of protected and public rentals in Croatia, the rent is automatically increased when the relevant legal documents are changed.<sup>252</sup>

The next element influencing the affordability of the tenant is the regulation of deposit. Slovenia has the most unified and precise regulation of deposit for non-profit rentals among the countries under comparison. According to its legislation,<sup>253</sup> the landlord and the tenant must determine the mutual obligations regarding the deposit in tenancy contract. Contractual terms must define the payment, reimbursement and revaluation of the deposit. In certain cases the

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<sup>244</sup> Pursuant to Article 7(3) of the Lease of Flats Act.

<sup>245</sup> National Report for Croatia, p. 50.

<sup>246</sup> Article 117 of the 2003 Housing Act.

<sup>247</sup> National Report for Slovenia, p. 32.

<sup>248</sup> National Report for Serbia, p. 124.

<sup>249</sup> National Report for Croatia, p. 140.

<sup>250</sup> National Report for Serbia, p. 123.

<sup>251</sup> The Decree on the Methodology of Determination of Rents for Non-profit Housing and the Criteria and Procedure for the Implementation of Subsidised Rents.

<sup>252</sup> The Government of Decree or local Rules on the amount of protected or public rent.

<sup>253</sup> Article 13 of the Rules on Renting the Non-Profit Apartments (Pravilnik o dodeljevanju neprofitnih stanovanj v najem, Official Gazette of RS, No. 14/04 and later amendments).

landlord may approve the payment of the deposit in instalments. The level of the deposit for non-profit rentals is also regulated. Its value is limited with the level of maximum three monthly rent prices.<sup>254</sup>

In Croatia, the regulation of deposit for social and public tenants selected by tender procedure is also regulated, but only to a certain extent.<sup>255</sup> Therefore, the level of deposit is not regulated the same in all parts of the Croatia. For example, according to tender for public housing in Zagreb, 2 monthly rents have to be paid at the conclusion of a tenancy contract, while in case of tenders for social and public housing in City of Vinkovci no deposit is required.<sup>256</sup>

In Serbia, there are no relevant provisions on the amount of the deposit for the non-profit rentals.<sup>257</sup>

#### **4.3.3. Stability**

In order to ensure a proper stability for the tenant, contracts for non-profit rentals in Slovenia are always concluded for the indefinite period of time.<sup>258</sup> Same applies to protected tenants (former housing rights holders) in Croatia. The lease concluded between the landlord and the protected tenant is open-ended (until the death of the tenant), while tenders for social and public tenancy contract provide for different solutions depends on the municipal regulation.<sup>259</sup> Serbian tenants of non-profit rentals do not have such a protection as, for example, Slovenians tenants of non-profit rentals or protected tenants (former housing rights holders) in Croatia. According to Serbian legislation, if the tenancy contact does not determine the period for which it is concluded, the period is deemed as open-ended.<sup>260</sup> This means that tenancy contracts may be concluded for either limited period or for indefinite.

Tenants of tenures with a public task, however, do not have any an option to buy the dwelling. No such pre-emption right is provided in any of the three laws.

#### **4.3.4. Flexibility**

Non-abusive subletting is allowed in all three systems, although there is some differences in the regulation (especially when comparing Serbia to Slovenia) that need to be pointed out.

The landlord's approval of subletting the apartment is always required. However, according to Serbian legislation, the landlord is entitled to refuse the subletting only from the justified reasons.<sup>261</sup> These reasons could refer to the leased asset

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<sup>254</sup> Article 13(2) of the Rules on Renting the Non-Profit Apartments.

<sup>255</sup> National Report for Croatia, p. 144.

<sup>256</sup> Likewise in Zadar and Rijaka no deposit is required in case of tender of social housing.

<sup>257</sup> National Report for Serbia, p. 108.

<sup>258</sup> Article 90(1) of the 2003 Housing Act.

<sup>259</sup> National Report for Croatia, p. 138.

<sup>260</sup> Article 7(3) of the 1992 Housing Act.

<sup>261</sup> Article 587 of the 1987 Obligation Relations Act.

in question, the personal characteristics of the sub-tenant or some other.<sup>262</sup> The Slovenian Code of Obligations includes the same provision, according to which the landlord may oppose the sublease only on justified grounds.<sup>263</sup> In addition, subletting in Slovenia is also a subject to 2003 Housing Act. It is important to note that this act does not require justified grounds as a condition for refusing the subletting.<sup>264</sup>

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<sup>262</sup> Article 586(2) of the 1987 Obligation Relations Act.

<sup>263</sup> Article 606 CO.

<sup>264</sup> National Report for Slovenia, p. 115.

## 5. Conclusion

It may be generally noticed that Serbian tenancy law, as well as housing system in general, is underdeveloped compared to Slovenia and Croatia. Serbian legislation is obsolete and governmental control of rental sector is insufficient. There is also a lack of affordable housing. In Slovenia and Croatia, on the other hand, the situation in rental sector is more promising, although not without weaknesses. Slovenia and Croatia enacted more or less appropriate legislation, but tenancy law in both countries still does not function efficiently in practice.

Although the three tenancy law systems are quite different, they are faced with similar problems due to the same socialistic history. One of their crucial characteristics is an extremely high preference of home-ownership over renting. Tenancy as a tenure type is not preferred by the inhabitants and the rentals are seen as a measure of last resort. In addition, the long-term tenancy agreements in private market are so rare in practice that they are almost non-existent. In such circumstances both parties are unaware of their rights and obligations. To make tenancy more attractive, both legislative and financial reforms should be adopted. For example, in order to acquaint the citizens with their rights, a greater role should be given to associations of landlords and tenants.

Furthermore, from the legal perspective a lack of rental standards (especially in the market rental sector) is a problem. None of the valid statutes in Slovenia, Croatia or Serbia governs the (minimum) quality of rental dwellings. As a result, there is a prevalent opinion that rental dwellings are usually of lower quality, which adds to the stigmatization of renting in general. The truth is that some rented apartments are indeed inadequately furnished and maintain (especially those rented to less well-off individuals and migrants). Another reason is inefficient inspection authority in Slovenia and Croatia or even non-existing inspection authority or similar body controlling housing standards in Serbia.

A lack of written tenancy contracts in the market rental sector is a further problem. Written tenancy contracts are not only important as a proof of a tenancy relation, but also serve to inform the parties about their rights and obligations. As a result of the lack of written agreements the parties remain without legal protection in case of a dispute. This is especially disadvantageous for the tenant as the weaker party, who is in need of efficient legal protection. The most likely reason for not concluding a written tenancy agreement is the avoidance of taxes on renting by the landlords. As noted in section 2.6. (Taxation) of this report, the taxation policies of all the three countries under comparison have negative effect on the rental sector, however, for different reasons.

As far as housing with a public task is concerned, there is a lack of adequate supply in all three countries under review. Non-profit and social housing in Serbia has been neglected and is far from satisfactory. Similarly, the supply of dwellings with a public task in Slovenia and Croatia is insufficient. An increased supply could be encouraged by proper subsidies. Unfortunately, currently subsidization of landlords of tenures with a public task is underdeveloped in all three countries under review.

Finally, the most topical issue regarding tenancy at this moment (at least in Slovenia and Croatia) is not legal. It is rather the economic challenge of looking for possible

countermeasures for the consequences of economic crisis.<sup>265</sup> Among the effects of the economic crisis, the most pressing problem is a surplus of unsold apartments and deterioration of newly built apartments in Slovenia and Croatia. Countries have reacted differently to this problem.

In Croatia, the innovations in the POS programme and Rent-to buy Scheme have already been proven as very successful measures.<sup>266</sup> Meanwhile in Slovenia a different transitory solution for the banking crisis has been adopted. A bad bank (BAMC),<sup>267</sup> which has become the owner of many unsold apartments - either as a mortgagee or as a direct buyer - has been founded. Its aim is to return as much money as possible to the state budget. BAMC will start to sell the first apartments in the beginning of the year 2015, either selling them directly or applying a rent-to buy scheme. It is expected that after the entry of the BAMC in the real estate market the prices of other housing supply will decrease. Thus BAMC will surely have a decisive influence on the housing stock and housing conditions in Slovenia in the future.

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<sup>265</sup> For more on the crises see section 1.2.5. Effects of the current crisis in comparative perspective.

<sup>266</sup> For more on the POS Programme see p. 14 of this report.

<sup>267</sup> "Družba za upravljanje terjatev (DUTB)" is not a permanent and real bank, but a temporary financial solution for the economic crisis. Bad loans and credits have been transferred from the state owned banks to BAMC.

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

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### Intra-team Comparison Report for **MALTA, PORTUGAL, SPAIN**

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# **ZERP Tenancy Law Project**

## **INTRA-TEAM COMPARISON ON SPAIN, PORTUGAL AND MALTA**

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### **1. The current housing situation**

#### **1.1 General Features**

The defining elements of the prevalent housing policies in all three countries stemmed from the common element of a conflict or a drastic political change, that, in the case of Spain and Malta had additionally spelt the devastation of much of the existing housing stock. During different stages in their history, the three countries were in fact faced with a significant housing shortage that had either been provoked by war or by mass migratory displacements.<sup>2</sup>

The substantial housing demand with which the States were suddenly faced could not be met either by their frail economies or by local private investors, and the key lay in enabling households to invest into the building of their own homes. Home ownership proved to be particularly effective, since with the gradual growth of the economies, homes also came to signify important means of wealth. Eventually, through accessible credit terms, particularly for middle-class families but not only, home ownership needed no longer be facilitated by the State and it became the natural aspiration of each household.

In the meantime, whilst home ownership was going from strength to strength, rent became progressively unattractive, both for property owners who could not envisage any margin of profit within the rigorous control mechanisms put in place as well as for potential tenants themselves who with such generous credit terms saw mortgage instalments descend to levels of rent. The strict rental regimes applied by the three countries, in fact, engendered the decline of the respective rental markets and it was only when recent events prompted new conditions in the mortgage market and rendered access to ownership more difficult, particularly in Portugal and Spain, that countries turned their attention back onto lease as a true alternative tenure option.

Due to the said difficulties, however, the first obstacle faced by the three countries was to invigorate the supply side of the market and to restore the conditions that would make it attractive in the eyes of willing landlords or

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<sup>1</sup> This work is undertaken in the context of the TENLAW EU Commission project (<http://www.tenlaw.uni-bremen.de>) and are mainly based on the TENLAW project national reports of Spain (E. Molina, *Spanish Report on Residential Leases*, Project 'Tenancy Law and Housing Policy in Multi-level Europe' (TENLAW), EU 7th Framework Programme, <http://www.tenlaw.uni-bremen.de> (2014)), Portugal (M.O. Garcia, D. Correia & N. Santos, *Portuguese Report on Residential Leases*, Project 'Tenancy Law and Housing Policy in Multi-level Europe' (TENLAW), EU 7th Framework Programme, <http://www.tenlaw.uni-bremen.de> (2014)) and Malta (K. Xerri, *Maltese Report on Residential Leases*, Project 'Tenancy Law and Housing Policy in Multi-level Europe' (TENLAW), EU 7th Framework Programme, <http://www.tenlaw.uni-bremen.de> (2014)).

<sup>2</sup> The three-year long Spanish Civil war erupted in 1936 whilst colonial Malta was besieged during the Second World War. In Portugal, the pacific 1974 Revolution caused sudden influxes of migration towards the coastal areas and provoked the return of numerous Portuguese emigrants from the former African colonies.

property owners. In doing so, Spain (2013), Portugal (2012) as well as Malta (1995) reverted back to liberal pro-landlord models, which left tenants with less guarantees. Ironically, this has only served, so far, to strengthen the favourable popular perception in favour of home ownership.

### **1.1.1 Historical evolution of the national housing situation and housing policy**

Home ownership has been facilitated through heavily sustained subsidisation. The means through which this was achieved include tax incentives,<sup>3</sup> interest subsidies, allocation of land at subsidies prices and reduction of stamp duty. The respective governments also undertook to build several public housing units, although large part of this stock was subsequently sold to its occupants. The policies remained largely unchanged, in Portugal and Spain, until 2007 when coinciding with the real estate and economic crisis, market access for new acquirers started being hindered by the high unemployment rates, the tightening of mortgage conditions and the impossibility of selling one's own property. It was at this stage that certain households could only be guaranteed housing access through tenancies.<sup>4</sup> In Malta, the mortgage market remains relatively stronger due to the milder impact of the crisis on the local economy; unarguably the crisis has brought beneficial effects such as the halting of the soaring property prices and the cuing in of a low interest rate regime that enabled the home loan market to expand.

The result of the promotion of home ownership over the years was the gradual mutation of the rental tenure into an inferior or secondary option. The market had additionally deteriorated due to the rigid rent regimes that had only allowed landlords very low profitability. The supply of dwellings was therefore hampered by legislation that both froze the rental income as well as forced the extension of tenancy contracts.<sup>5</sup> Moreover, legislative oscillations from one position to another led to the simultaneous co-existence of various regimes.

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<sup>3</sup> In Spain the defining policies started being shaped in the late fifties when, following the 1959 Stabilisation Plan when government approved a tax deduction of 15% for the purchase of dwellings; the elevation of housing to a social right in the Spanish constitution subsequently paved the way for further subsidies. In Portugal the State maintained its efforts through the promotion of interest subsidies and tax incentives, which rendered access to loans possible for the wide majority of households [*Contributos para o Plano Estratégico De Habitação 2008/2013, Relatório 1*]. In Malta the notion of home ownership can be said to have really taken root after the country's independence in 1964 although policies had already been introduced in the previous years; the most popular schemes saw government dividing its land into plots that were granted to prospective home owners [A. Camilleri, *Building Trends and Policies 1943-1981*, Dissertation submitted to the Department of Architecture and Civil Engineering, University of Malta, 1982, 99].

<sup>4</sup> M. Pareja-Eastaway y T. Sánchez-Martínez, 'El Mercado de vivienda en España: La necesidad de nuevas propuestas' at *El acceso a la vivienda en un contexto de crisis*, ed. S. Nasarre Aznar (Madrid: Edisofer, 2010), 40.

<sup>5</sup> In the three countries, laws that were enacted in circumstances of emergency were left to apply beyond their justified purpose. In Spain the law was established in the 1920s, however, it remained in operation with the entry into force of the Urban Leases Act of 1964 (LAU 1964, *Ley de Arrendamientos Urbanos*, Decreto 4104/1964). The stock was then liberalised in 1985 (Royal Decree Law 2/1985) but a strong element of precariousness for tenants led the enactment of a third regime in 1994 [Ley 29/1994]. In Portugal and Malta the first controls were also introduced in the aftermath of the First World War; the markets were eventually liberalised before new protective measures were made to apply. Recent legislative acts have now freed the market of any control and additionally sought to gradually phase out the old regimes (Laws no. 6/2006 of 27 February and 31/2012, 14 August in Portugal and Acts XXXI of 1995 and X of 2009 in Malta).

The current figures reveal a very strong home ownership rate as against a very low share of rental tenures although the latter started showing renewed signs of growth very recently due to the said post-crisis restriction of credit facilities in Portugal and Spain, and, arguably, due to the increased influx of foreigners to Malta.<sup>6</sup> Tables 1, 2 and 3 show the evolution of the respective housing markets in Spain, Portugal and Malta during the past decades.<sup>7</sup> In addition to the above-mentioned institutional and fiscal incentives, the demand for ownership was additionally spurred by the declining interest rates and the wide expectation for the appreciation of real estate values.<sup>8</sup>

**Table 1. Evolution of the percentage of tenure in Spain<sup>9</sup>**

%	1950	1960	1970	1981	1991	2000	2006	2008	2010
<b>Ownership</b>	46.9	50.6	63.4	73.1	78.1	82.8	83.4	83.2	83.0
<b>Tenancy</b>	51.4	42.5	30.0	20.8	15	10.5	10.0	10.9	11.4

**Table 2. Evolution of the percentage of tenure in Portugal<sup>10</sup>**

Year	2001	2011
<b>Ownership</b>	75,71%	73,24%
<b>Rented</b>	20,85%	19,91%

**Table 3. Trends of Owner Occupied and Rented dwellings in Malta out of entire housing stock<sup>11</sup>**

Year	1948	1957	1967	1985	1995	2005	2011
<b>Owner occupied</b>	23.1%	26.1%	32%	53.9%	68%	75.2%	76.5%
<b>Rented<sup>12</sup></b>	76.9%	73.9%	68%	46.1%	23%	20.7%	19.9%

<sup>6</sup> In Spain the share of rented dwellings grew from 10% in 2006 to 11.4 in 2010. From 2001 to 2011 Portugal witnessed a similar growth in its rented housing stock, albeit at a slower rate than the growth of the totality of the Portuguese housing stock and in Malta the number of rented dwellings also increased from 29,360 in 2005 to 30,345 in 2011 (Novaconomics Club, *Housing Market: indicators to assess the adjustment program*, 4; NSO, *Census on Population and Housing 2005*, xiv; NSO, *Census on Population and Housing 2011*; 219)

<sup>7</sup> Portugal displays similarly high home ownership rates of 73%, as against a much inferior share of 20% rented dwellings.

<sup>8</sup> E. Molina Roig, *TENLAW: Tenancy Law and Housing Policy in Multi-level Europe, National Report for Spain* (provisional draft), 2014, 6].

<sup>9</sup> Figures based on the data of the *Instituto Nacional de Estadística* (INE): for figures since 2006 provisional data provided by the *Encuesta sobre Condiciones de Vida* (ECV) of the INE.

<sup>10</sup> There is no previous data available on line. There is no annual data, but only from 2001 to 2011 {Censos 2011, National Institute of Statistics (INE):

<http://www.google.pt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=12&ved=0CFMQFjAL&url=http%3A%2F%2Fobservatorio-lisboa.eapn.pt%2Fdownload.php%3Ffile%3D319&ei=gd9VVPeWLizaryygOAL&usg=AFQjCNHrlLmQHYbdnMhDkZD2oALIWV1t0w&bvm=bv.78677474,d.d2s> }

<sup>11</sup> Figures based on: A. Camilleri, *Malta: A Plea for Bi-partisan Consensus*, paper presented to the Housing Affordability Conference, Malta, 1999; data relating to 2005 retrieved from: NSO, *Census on Population and Housing 2005*, xiv; data relating to 2011 retrieved from NSO, *Census on Population and Housing 2011*, 246.

<sup>12</sup> Figures for rented properties include public dwellings being rented out by government.

No. of occupied dwellings	69,965	70,950	74,069	101,509	119,479	139,178	152,770
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### *The effect of migration*

Except for the last years, the migrating trends in the three countries appear to largely converge. This divergence is owed to the distinct economic performances of the Iberian Peninsula and the Mediterranean island. During the fifties, in fact, the three countries registered strong outward trends before they eventually became a destination for migrants following the growth of their economies. The crisis, however, returned to invert the influx of Spanish and Portuguese migrants, although conversely, Malta's continued economic growth led to an increase in its immigration figures. The latter were further affected by the consistent arrival of migrants by boat since 2002 and the recent influx of qualified employees in specific booming sectors. In all three countries, the most frequent choice amongst foreign nationals seems to be the rental tenure.<sup>13</sup>

State policies in the three countries, up until very recently, clearly favoured the acquisition of dwellings on the part of households. Tax incentives as well as housing subsidies, amongst which those targeted at interest rates, all served to render ownership as the dominant tenure in each of the three countries. Public funding by the State in housing credit has, however, decreased drastically in Spain and Portugal where a restricted monetary policy imposed by the European Central Bank also brought about a substantial increase in interest rates.

These conditions prompted the States to turn their attention back onto the rental tenure since it became the only accessible alternative for a number of households. The legislative framework was unable of attracting participation by landlords and this urged the enactment of certain liberal amendments that, in turn, reduced much of the stability that was necessary for tenants.

Nevertheless, the rental tenure is showing signs of growth in the three countries although the share remains considerably inferior to that of home ownership.

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<sup>13</sup> According to data from the Spanish National Statistics Institute (INE) in 2012 as many as 12.1% of the population was composed of immigrants; more than two-thirds of migrants from developing countries currently rent their homes; besides the lack of resources to buy their dwelling their choice is also motivated by the uncertainty that surrounded their future employment. (*Avance de la explotación estadística del Padrón* 1 January 2012; J. Leal & A. Alguacil, 'Vivienda e inmigración: las condiciones y el comportamiento residencial de los inmigrantes en España' en *Anuario de Inmigración en España*, ed. J. Oliver, J. Arango & E. Aja, (Barcelona: CIDOB, 2012), 131-134). The immigrant population in Portugal, estimated to be around 3.7%, is reported to face the same difficulties in relation to access to loans due to the temporary nature of their employment (*Serviço de Estrangeiros e Fronteiras*; J. Malheiros e L. Fonseca, *Acceso a habitação e problemas residenciais dos imigrantes em Portugal*, Observatório da Imigração, 30 (2011), 95). The proportion of migrants in Malta was that of 4.9% (NSO, *Census on Population and Housing 2011*, 111). The peak of Sub-Saharan immigration was reached in 2008 with 2,775 arrivals (NSO, *Demographic Review 2010*, 89). The island has also been attracting EU nationals not only due to the jobs created by the growing tourism sector but also due to the booming i-gaming and financial services industries (R. Portanier, "We turned 10, & still looking ahead!", *Remote Gaming Update 2013*, Lotteries & Gaming Authority Malta, 7; Malta Financial Services Authority (MFSA), *Economic & Market Overview*, July 2013, 11).

### 1.1.2 Current situation

The latest statistics reveal that in the three countries there are only two prevalent forms of tenure with home ownership being the dominant one in each country. Despite this, the amount of rented dwellings has been on the rise in each of the three; in Portugal and Spain this was partly due to the credit restrictions imposed by the effects of the crisis and partly to the rise of unemployment. In Malta it appears that tenancy has increased mostly due to a sustained influx of immigrants.<sup>14</sup>

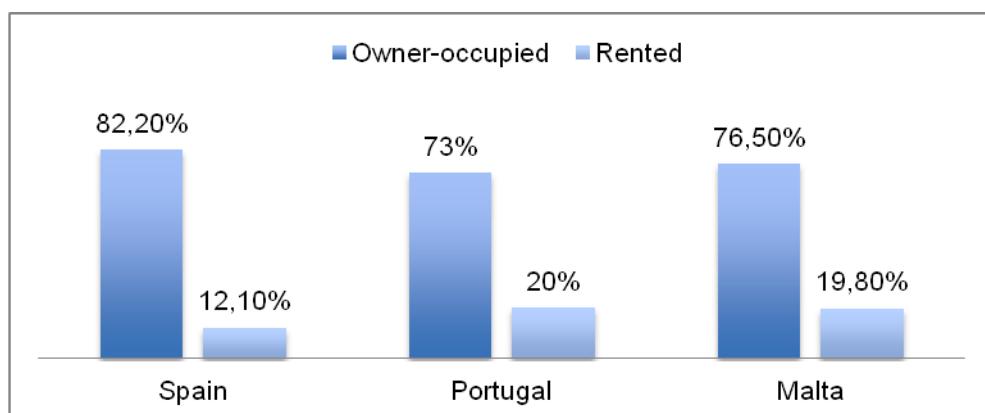
The number of potentially rented dwellings *per se* does not seem to be a problem due to the vast oversupply that is present in all the three countries; all three have, however, been putting significant efforts in incentivising landlords to put their vacant dwellings on the rental market, thereby activating them and increasing the available stock for prospective tenants.

Home ownership is dominant in the three countries although the rental tenure has recently shown encouraging signs of growth. Supply of dwellings is not as much a problem although recent efforts have sought to activate as many vacant units as possible.

### 1.1.3 Types of housing tenures

The situation can be best summarised in the figure below. In Spain owner-occupied dwellings amount to 82.2% of the housing market whilst in Portugal and Malta these account for 73% and 76.5% respectively. Rental tenures display decisively inferior rates.

**Figure 3 Owner-occupied v. rented dwellings in Spain, Portugal and Malta**



#### *Intermediate tenures*

To an extent the recent crisis evidenced the ineffectiveness of the home ownership-tenancy dualism and the need to look at alternative forms of tenure in search for new solutions. During the years, administrations were led to use

<sup>14</sup> The number of non-Maltese went up from 12,112 in 2005 to 20,289 in 2011; the increase was mostly owed to the working age group (20 to 60 years) that grew by 180% (NSO, *Census on Population and Housing 2005*, 89; NSO, *Census on Population and Housing 2011*, 117).

already exiting formulas in the their legal systems in order to provide more accessibility, flexibility and stability to households. This gave rise to alternative tenures such as hire-purchase, right to build and housing cooperatives in both Portugal and Spain. In Malta, the prevalent intermediate tenure is emphytheusis<sup>15</sup> with 16.4% of the total housing stock owning their property with ground rent.<sup>16</sup> Another form of intermediate tenure in Malta is shared ownership, which enables households who cannot afford the full price of a property to buy a share of the equity instead; three such schemes were issued by the Housing Authority between 2006 and 2009.<sup>17</sup> The introduction of shared ownership and leasehold is currently (end-2014) being discussed in the Catalan Parliament.<sup>18</sup>

### *The rented sector*

The rental sector is not only composed of the private rental tenancies but also of rental with a public task, or social rented housing. Although the latter is present in all three countries, it only represents very small proportions of the total housing stock. Social housing, in fact, composes a minimal 2% of the Spanish housing market whilst the private tenancies below market price only total up to 0.8%.<sup>19</sup> The figures displayed by Portugal and Malta are closer since whilst the social dwellings represent 4% and 5.2% of the respective housing stocks,<sup>20</sup> there are an additional 11.5% and 9.2% private rented dwellings which are either open-ended or rented for the lifetime of the tenant and/or a below-market rent (i.e. subject to rent control).

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<sup>15</sup> Emphyteusis involves the transfer of ownership for a specified time, or in perpetuity, against the payment of a yearly ground rent.

<sup>16</sup> Since emphytheusis constitutes the transfer of ownership, albeit an inferior form of ownership, households who own properties with ground rent are still considered to be homeowners. Although this institute plays a minor role in most European jurisdictions, in Malta this institute has maintained its strength due to its utilisation by government in favour of the facilitation of home ownership; it was in fact the method through which land was perpetually granted to households so that they could build their houses upon it (N. Tabone, *The Disintegration of the Institute of Emphyteusis from 1970 to Date*, Dissertation submitted to the Faculty of Laws, University of Malta, 2009, 10-17).

<sup>17</sup> By the end of 2009 as many as 1045 households had been allocated into premises through the shared ownership/shared equity schemes [Hon John Dalli (Minister for Social Policy) in respect to Hon. Roderick Galdes, Legislature XI, Sitting no. 150, 26 October 2009, PQ no. 11604; Hon. John Dalli (Minister for Social Policy) in response to Hon. Jean Pierre Farrugia, Legislature XI, Sitting no. 42, 14 October 2008, PQ no. 2719].

<sup>18</sup> For more regarding intermediate tenures, see the articles by S. Nasarre Aznar, 'La insuficiencia de la normativa actual sobre acceso a la vivienda', at *El acceso a la vivienda en un contexto de crisis* (Madrid: Edisofer, 2010), 120-172; S. Nasarre Aznar & G. Ferrandiz, 'Métodos alternativos de acceso a la vivienda en Derecho privado' en *Revista Iuris, Actualidad y Práctica del Derecho* 158 (2011); J. Ball, 'Fragmentando la propiedad para la asequibilidad: La shared ownership o "nuevas" tendencias en Inglaterra y Francia', 173-224; and P. Kenna, 'Modernizando las tenencias en alquiler en Irlanda', 411-454, both at *El acceso a la vivienda en un contexto de crisis*, ed. S. Nasarre Aznar (Madrid: Edisofer, 2010); H. Simón Moreno, "La vivienda como derecho humano. Especial referencia a la accesibilidad y asequibilidad de la vivienda en España", *Revista Práctica de Derecho CEFLegal*, forthcoming 2015.

<sup>19</sup> These are mainly managed either by public administrations or non-profit entities.

<sup>20</sup> In Portugal social housing is run by the State, self-governing institutions, NGOs, local authorities and housing co-operatives. In Malta it is the sole responsibility of the central government.

### *Housing quality*

None of the three countries seems to have little difficulties relating to quality.<sup>21</sup> The strong majority of dwelling stocks are in a good state of repair, although owner occupied dwellings are likely to be found in a better state.<sup>22</sup>

### *Owners of rented dwellings*

In each of the three countries the majority of the rented units are owned by private individuals, however the various housing providers vary. In Spain we find dwellings owned by: i) regional and local public administrations, ii) non-profit entities that manage houses without a public task such as asset-holding companies, Real Estate Investment Funds, Real Estate Investment Companies and SOCIMI (only since 2013)<sup>23</sup> and iii) non-profit entities that are dedicated to social aims such as housing cooperatives and NGOs. The Portuguese system is very similar with both profit and non-profit organizations having an important role in the housing dynamics and social support establishments. The Maltese social rental market is, on the other hand, in the complete hands of the central government and there is no delegation to the local authorities. Also, NGOs do not usually provide permanent housing and they serve as a temporary shelter until they are housed by the government.

### *Active lobby groups*

Strong and relevant national lobby groups in favour of tenants are conspicuously absent in the three countries. Tenancy associations, in fact, seem to be present only in the Portuguese capital, Lisbon. This seems to allow wider space to other interlocutors whose leanings lie towards property owners.<sup>24</sup> Construction and

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<sup>21</sup> In Spain the average size of single-family dwellings has increased by 38m<sup>2</sup> since 1998 although the average size of dwellings built in blocks has been declining slightly (J. Leal Maldonado, 'La formación de la demanda de vivienda en la España actual' en *La política de vivienda en los albores del Siglo XXI*, ed. P. Morón Béquer (Murcia: Colección de libros formación inmobiliaria UAM, 2005), 58). Space seems not to be a problem in Malta either since with an average of 2.5 rooms per person living in occupied dwellings, it registered the second highest figure out of the EU Member States (Eurostat, *Housing Statistics of the European Union*, 2010).

<sup>22</sup> Whilst 82% of rented dwellings in Spain being located in blocks were reported to be in a good condition, up to that 89% of owner occupied ones were declared to be in the same state. Similarly, in Malta only 61% of the rented dwellings were held to be in a good state of repair, compared to the 78.5% of the ones that were owner occupied (NSO, *Census on Population and housing 2011*, 2014, 335). Figures relating to Portugal seem equally positive with 71% of the total number of dwellings not being in need of any repairs (INE, *Evolução do Parque Habitacional em Portugal 2001-2011*, 26).

<sup>23</sup> In short for *Sociedad Cotizada Anónima de Inversión en el Mercado Inmobiliario* (*Limited Real Estate Investment Company*), a sort of real estate investment trust (REIT).

<sup>24</sup> The lobby groups in Spain include the Spanish Mortgage Association, the Spanish Confederation of Savings Banks (*Confederación Española de Cajas de Ahorros*) and the Consumers and Users Organization (*Organización de Consumidores y Usuarios*). Other potentially influential entities include the Spanish Banking Association (*Asociación Española de Banca*), the National Building Confederation (CNC, *Confederación Nacional de la Construcción*), Grupo 14 (Group 14) and *Confederación de Cámaras de la Propiedad Urbana y Asociaciones de Propietarios Urbanos* (Urban Property Chambers Confederation and Urban Owners Associations). Similar Maltese entities include the These entities include the Malta Developers Association, Federation of Building and Civil Engineering Contractors. Developers are clearly biased toward the

Estate Agents Associations, however, do not seem to be as strong in Portugal, particularly in respect to the two organisations that are most active in defending the respective points of view in respect of housing policies: the Association of Landlords of Lisbon (ALP) and the Association of Tenants of Lisbon (AIL).

### *Vacant dwellings*

The high vacancy rates are certainly another common element amongst the three countries. Over the years, dwellings came to represent rapidly-appreciating assets and the absence of any planning controls generated a spectacular oversupply of dwellings which exceeds by significant proportions the housing needs in each of the three countries. According to provisional data, the Spanish vacancy rate is currently that of 13.7% whilst in Portugal it was similarly that of 12.6%.<sup>25</sup> Maltese figures, on the other hand, point to a decisively higher rate of 31.75%.<sup>26</sup>

The figures appear more preoccupying if one takes into consideration that the sale of these dwellings is mainly directed to the middle and upper middle income category segments and this mismatch between supply and demand leads to a considerable malfunction in the real estate market.<sup>27</sup> These figures create further apprehension if account is taken of future conservation problems that would be generated by the absence of rehabilitation and reuse of these dwellings.<sup>28</sup> In relation to this matter in Malta the government has tried to combine the problem of vacant dwellings with that of the need for social housing.<sup>29</sup> In Portugal, the government was definitely severer with fiscal measures introduced in 2013 that have rendered owners of vacant dwellings liable to an additional 50% of estate tax.

### *Black market phenomena*

There is hardly any official data on tax evasion in Portugal and Malta. In Spain, however, the number of undeclared tenancies reached the figure of 55.83% of the total rented stock in 2008.<sup>30</sup> The increased tax and contributory burden is

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landowning category since their interest is the attractiveness of the rental market for whoever treats it as a property investment whilst the absence of tenants' association in Malta can be explained by the overly protective approach assumed by government over the course of the years. Representation in this area has so far been restricted to spontaneous initiatives on the part of foreign tenants in respect of specific matters.

<sup>25</sup> INE, 2011 Census.

<sup>26</sup> NSO, *Census on Population and Housing 2011*, 2014, xxiv. It must also be said, however, that 19.5% are dwellings that have a secondary or seasonal use and the true figure of dwellings that were found to be completely vacant was that of 12.25%.

<sup>27</sup> As set out by M. Pareja-Eastaway & T. Sánchez-Martínez, 'El Mercado de vivienda en España', 42-43.

<sup>28</sup> As set out by J.M. Neredo Pérez, 'Perspectivas de la vivienda' *Revista de Economía ICE* 815 (2004), 153.

<sup>29</sup> A particular scheme (*Skema Kiri*) had aimed specifically to incentivise property owners to free up their vacant property for beneficiaries of Social Housing, who would in turn have their rent subsidised by the Housing Authority. Up until October of 2013 the Authority had signed 310 agreements for property owners and 262 with its beneficiaries [Hon Marie Louise Coleiro Preca (Minister for the Family and Social Solidarity) in response to Hon. Clyde Puli, Legislature XII, Sitting no. 65, 22 October 2013, PQ no. 80]. This scheme has not been renewed by the incumbent administration.

<sup>30</sup> This Report has been elaborated by the Technicians Sindicato of the Ministry of Economy (GESTHA, Sindicato de Técnicos del Ministerio de Economía y Hacienda) from the INE data and the declaration of IRPF from 2008. It has additionally been found

thought to have increased the black market in Portugal whilst in Malta very recent measures, namely a significant reduction in the final withholding tax payable in respect of rental income, has been aimed specifically at inviting landlords to come clean.<sup>31</sup>

Lax enforcement weighs down very heavily on effective tenant protection. This is evident in Spain where owners refuse to declare their tenancies in order to circumvent the forced three-year (until 2013 it was a five-year) duration of the lease contract; therefore leaving tenants without any rightful protection. The TROIKA has additionally recommended Portugal to present a report on this matter although this has not been concluded yet. According to the press reports there are about 400,000 illegal rental agreements.<sup>32</sup> In Malta, fiscal evasion prompts landlords not to validate formal requests for government assistance by qualifying tenants and neither allow them to transfer utility bills on their name; in this way landlords hinder tenants' access to public subsidies and discounted utility rates.<sup>33</sup>

Intermediate tenures utilised by the three countries include hire-purchase, right to build, housing cooperatives and shared ownership. In Malta an important segment of households owns property on perpetual emphytheusis, whilst Catalonia is considering the introduction of shared and temporary (leasehold) ownerships.

The three countries display relative low social housing figures, although Portugal and Malta display elevated shares of below-market rates within their private rental market. Both government and private non-profit entities participate in social market and social housing also delegated to a local level. This does not happen in Malta it is solely taken care of by a central authority.

There is a very weak representation of tenants, since associations are not present on a national level. The three countries also display very high vacancy rates although there is a preoccupying mismatch between kind of supply and the demand of certain households. Moreover, a strong black market share appears to be present in the three countries, which in most cases debilitates the protection that the law seeks to grant tenants.

## 1.2 Economic factors in comparison

### 1.2.1 Comparative view of the housing market

As we have seen the three rental markets have been largely liberalised and rents are not subject to any regulatory mechanism.<sup>34</sup> Social housing is run according to the respective national criteria and is detached from market values.

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out that 65.8% of the rented dwellings whose tenancies are not declared are concentrated in the Autonomous Communities of Madrid, Andalusia and Catalonia.

<sup>31</sup> Income Tax Act (Cap. 123), Article 31D. The final withholding tax has been set at 15%; the previously applicable rate was in the majority of cases that of 35%.

<sup>32</sup> <http://www.arrendanahora.com/noticia/financas-vao-aumentar-inspecoes-para-detectar-arrendamentos-ilegais> (visited 2-2-2015).

<sup>33</sup> K. Xerri, *Maltese Tenancy Law: Tenants' perspectives and the prospects for revision*, unpublished M.A. (Laws) dissertation, Faculty of Laws, University of Malta, 2014, 129.

<sup>34</sup> It must be noted that in Spain a rented dwelling requires a certificate of habitability.

A high volume of new housing supply is on sale, however, there is a potential demand that is not satisfied, particularly amongst the younger category. This emerges from the high percentages registered in relation to people between 18 and 35 years who still live with their parents: 65% in Spain,<sup>35</sup> 58% in Portugal and 65% in Malta.<sup>36</sup> In Spain, this mismatch may be said to be aggravated by the almost non-existent volume of public housing that barely reaches the level of 2%. In 2011, the vacant dwellings in Portugal were more than double the dwellings that were necessary to respond to the housing necessities, whilst in Malta the number of completely vacant dwellings results to be even 13 times superior to the social housing demand.<sup>37</sup>

The three countries have recently pointed decisively towards liberalisation policies in their respective rental markets. Despite the high vacancy rates, with supply clearly exceeding demand in terms of numbers, there still appear to be affordability problems from young people aged between 18 and 35.

### 1.2.2 Comparative view on price and affordability

Affordability appears to be problematic in Spain and Portugal, particularly for certain categories; the situation seems less acute in Malta. The average rent in Spain was that of €590 for an 80m<sup>2</sup> dwelling in October 2013 with, however, potentially higher prices in larger cities such as Madrid or Barcelona (where rents are estimated to reach the average of €778)<sup>38</sup>. The average annual income for family units was, on the other hand, that of €24,609. This data projects an average effort of 28.75% of a household's yearly income towards the payment of rent. The figure would nonetheless increase to 53.6% if the household depended on one income earner<sup>39</sup> and if the latter earned the minimum wage the income-rent relationship would even rise to a disconcertingly high 91.98%.<sup>40</sup>

In both Portugal and Malta it is very difficult to draw a precise average due to the consistent share of below-market rents that are present in the market. The average monthly rent value calculated by the 2011 survey was at €250, however, the Survey into Households' Financial Situation estimated an average of €428 with figures rising to €757 for properties found in the metropolitan area of Lisbon.<sup>41</sup> These figures do not compare well with Portuguese average monthly net income of €805 per person registered during the last quarter of

<sup>35</sup> As set out by M. Aramburu Otazu, *La resignificación de la tenencia de la vivienda en Cataluña*, Barcelona: Secretaria d'Habitatge i Millora Urbana de la Generalitat de Catalunya, 2010, 14.

<sup>36</sup> "51 million young EU adults lived with their parent(s) in 2008" – Issue number 50/2010. The situation in Malta might perhaps be alleviated by the continuous incentives given to first-time buyers. For instance a one-time exemption has been given to all first-time property buyers between 5 November 2013 and 31 December 2014 on the initial €150,000 of value of their acquired properties [Legal Notice 393 of 2013].

<sup>37</sup> The number of applicants on the waiting list on the 24 June 2014 was that of 3,163 [Hon. Michael Farrugia, PQ 9947]; whilst the number of completely vacant dwellings registered in 2011 was of 41,232 [NSO, *Census 2011*].

<sup>38</sup> Informe sobre el precio de la vivienda a octubre de 2013. Available in [www.fotocasa.es/indice-alquiler-inmobiliario\\_fotocasa.aspx](http://www.fotocasa.es/indice-alquiler-inmobiliario_fotocasa.aspx) (visited 11 December 2013).

<sup>39</sup> The average net monthly salary of a Spanish worker is that of €1,100.

<sup>40</sup> The national minimum wage in 2012 was that of €641.4.

<sup>41</sup> INE, *Inquérito às Despesas das Famílias 2010-2011*, 63.

2012; the results are worse when the average rents are contrasted with the minimum monthly guaranteed wage of €505<sup>42</sup>

In Malta the private rented household that rent their units at market value are only estimated to compose 27% of the total rented dwellings. The median annual rent registered by the 2011 survey was that of €3,537<sup>43</sup> which projects affordable figures even for households which depend on the minimum wage set at a monthly €717.95 in 2014.<sup>44</sup>

#### *Attraction to home ownership*

Due to the scarce advantages that the rental tenure offers to households, the attraction to home ownership remains particularly strong in each of the three countries. This stems mainly from the acquisition of the dwelling's exchange value<sup>45</sup> besides that of its value in use.<sup>46</sup> Therefore, whilst the price of mortgage instalments and rental payments remain equivalent to each other, the choice between the two forms of tenure would appear logical and automatic. Spanish households seem justified in opting for ownership if it is taken into consideration that a lease would represent up to 42%<sup>47</sup> of the tenant's income and a mortgage loan only up to 38.6%<sup>48</sup>.

The same can be said for Portugal where the monthly cost of rents in new contracts and the estimated mortgage payments are significantly close. In November of 2012, the average value of a monthly instalment for a small apartment was that of €276 whilst the reference set by rental agreements signed in the previous three months indicated the average figure of €361.<sup>49</sup> Following the liberalisation of the rental market, rents did go down in Malta although the post-crisis low interest era has kept ownership well within affordable levels.<sup>50</sup>

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<sup>42</sup> INE, *Inquérito ao Emprego*.

<sup>43</sup> The lowest payable rent at the time of the 2011 survey was that of €185, as of 2013 the minimum payable rent in respect of pre-1995 leases has risen to €197.32.

<sup>44</sup> Department of Employment and Industrial Relations <https://dier.gov.mt/en/Employment-Conditions/Wages/Pages/National-Minimum-Wage.aspx> (visited 2-2-2015).

<sup>45</sup> Exchange value refers to the importance of the dwelling as an economic revaluated asset.

<sup>46</sup> The value in use is the utility provided by the dwelling to satisfy the need for housing. This has also been set out by A. Jiménez Clar, 'Algunas observaciones sobre el mercado de la vivienda y en especial sobre el uso residencial de los bienes inmuebles: ¿Es necesario una tercera vía?' in *El acceso a la vivienda en un contexto de crisis*, ed. S. Nasarre Aznar (Madrid: Edisofer, 2010), 110-111.

<sup>47</sup> As far as young people are concerned.

Source: <[www.idealista.com/news/archivo/2010/01/04/0127889-ayuda-210-euros-j-venes-reduce-mitad-esfuerzo-emanciparse](http://www.idealista.com/news/archivo/2010/01/04/0127889-ayuda-210-euros-j-venes-reduce-mitad-esfuerzo-emanciparse)>, 4 January 2010 (visited 2-2-2015).

<sup>48</sup> Source: <[www.fotocasa.es/el-esfuerzo-salarial-para-comprar-una-vivienda-en-espana-es-aun-del-368-segun-deloitte\\_8289.aspx](http://www.fotocasa.es/el-esfuerzo-salarial-para-comprar-una-vivienda-en-espana-es-aun-del-368-segun-deloitte_8289.aspx)>, 8 April 2011 (visited 2-2-2015).

<sup>49</sup> INE, *Taxas de Jura Implícitas no Crédito à Habitação* (Lisboa, November 2012).

<sup>50</sup> Renting property therefore seems to have started offering an alternative to ownership in terms of affordability, although the advent of the crisis halted the steady rise of property prices and introduced a low mortgage interest rate era, thereby reducing the difference between rental and ownership. It was estimated that currently renting a three-bedroom apartment would be equivalent to 75% of the necessary costs of its mortgage payments (in 1997 it would have been equivalent to a 100%) [D. Camilleri, "Housing Affordability in Malta", *International Journal for Housing Market Analysis*, 2011:4(1), 51].

There appear to be problems of affordability for minimum wage earners in both Spain and Portugal, although less so in Malta. In the three cases, the levels of mortgage instalments remain within those of rent.

### **1.2.3 Tenancy contracts and investment**

Despite the gradual process of liberalisation, the three countries display significantly low returns for landlords. In both Spain and Malta tenancy yields hardly exceed the 3% threshold meaning that rental investments are just as profitable as any common long-term deposit or government bond issue. The latter, however, neither involve any works of structural maintenance nor the risks of encountering any defaulting tenants. This part is discussed further in part 3.1 (*Evaluative criteria for the landlord*).

The return for landlords is hardly attractive when compared to other forms of investment.

### **1.2.4 Other economic factors**

#### *Estate Agents*

In Portugal the sector of estate agents has been regulated since 2004<sup>51</sup>, however, in both Spain and Malta there are no rules, at least a national level, regarding such professionals. In fact, whilst in Portugal the activity of agents is supervised by the Real Estate and Construction Institute, in neither of the other two countries do they require a title or any affiliation with a professional body. The only exception is Catalonia where agents should be compulsorily registered in the real estate agents' Register and undergo special training.<sup>52</sup>

The absence of regulation had led to certain abuses particularly during the respective construction booms. This has in turn tarnished the reputation of the sector and subsequently prompted certain remedial measures. In Malta, for instance, the Federation of Agents is expected to present a paper to government regarding the regulation of the sector<sup>53</sup> due to the recognition that agents are the first port of contact for many potential clients.

Regulation of the sector is only present in Portugal, trends in favour of qualifications and ethical guidelines have emerged in both Spain and Malta.

### **1.2.5 Effects of the current crisis in comparative perspective**

The crisis had two distinct effects on Portugal and Spain on the one hand, and Malta on the other. Whilst in the former it resulted in a sharp reduction of credit, in the latter it boosted the mortgage market by rendering both property prices as well as household loans more affordable. The difference lies in the fact that the Maltese core domestic Banks maintained a traditional business model and

<sup>51</sup> Decree-Law no. 211/2004, 20 August 2004.

<sup>52</sup> Regulated in the Decreto 12/2010, de 2 de febrero, por el que se regulan los requisitos para ejercer la actividad de agente inmobiliario (DOGC 09/02/2010 núm. 5563).

<sup>53</sup> C. Grech, "Regulating the property sector", *The Sunday Times (Malta)*, 31 August 2014. Retrieved online on: <http://www.timesofmalta.com/articles/view/20140831/business-news/Regulating-the-property-sector.533863> (visited 2-2-2015).

remained largely funded by resident deposits.<sup>54</sup> The banking sector thus kept solid even during the years of the crisis and both deposit and loan growth remain safely above the euro average.<sup>55</sup>

The post-crisis situation affected the Spanish and Portuguese housing markets quite negatively with the number and volume of mortgages being granted dropping significantly over the last years. Stringent credit restrictions have, in fact, been imposed by the financial institutions and whilst between 1992 and 2006 grants increased from €43,471 billion to €519,224 billion, the volume of mortgage loans started decreasing considerably until 2011 saw a negative figure (-0.6%) for the first time. In Portugal, the rate dropped from +8% in November of 2008 to -3.5% in the same month of 2012.<sup>56</sup>

Since 2007 banks have, in fact, been applying strict criteria to approve loans for home acquisition. This change has led to an increase in higher risk loan spread and to more demanding requirements on the other contractual conditions, namely in the loan-to-value ratio and in the requested securities. Moreover, demand for home ownership itself dwindled due to the increased tax burden, the high level of unemployment, decrease in family's income and the increase in non-housing related consumption expenditure.<sup>57</sup>

These financial difficulties, resulting in a drop in sales, seem to have in turn affected the tenancy market favourably,<sup>58</sup> not only in terms of demand but also in terms of supply, since being faced with the almost impossibility of selling their dwellings, owners decided to put them up for rent. The crisis has also affected figures of mortgage foreclosures in both countries: as many as 38,961 and 39,051 repossessions took place in Spain in 2013 and 2012 respectively (a total of about 150,000 mortgage foreclosures on first residences in the period 2010-2013). The proportion of doubtful loans in relation to residential mortgages was of c. 6% in 2014, whilst in Portugal c. 8% of mortgagees were reported to be in arrears at the end of 2013, according to the *Banco de Portugal*. It has additionally been estimated that, in Spain, about 135,000 tenants were evicted within the four-year period of 2010 and 2013 mainly because of default.

In Malta the crisis had a generally positive effect on housing since it increased affordability. The global credit crunch benefited particularly first-time homeowners since mortgage rates were lowered simultaneously with the decline in property values.<sup>59</sup> This was confirmed by the financial results of one of the country's two main banks that in 2012 registered an increase of €119.5 million in loans and advances over the previous year, which was attributed to

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<sup>54</sup> International Monetary Fund (IMF), *Malta: 2013 Article IV Consultation*, IMF Country Report No. 13/203, July 2013, 7. The IMF also underlined Malta's "remarkable macroeconomic resilience" in the face of the crisis, particularly when compared with its euro area peers [*Ibid.* IMF, 4].

<sup>55</sup> *Ibid.* IMF, 39. It is important to note, in addition, that the drop in prices was not that steep as to cause dangerous losses in household wealth from property; the decline was estimated to be at around 8%.

<sup>56</sup> *Statistical Bulletin*, 1, (Lisboa, BdP, 2013), 36.

<sup>57</sup> *Relatório Dinâmica do Mercado*, 34.

<sup>58</sup> In Catalonia the number of tenancy contracts signed has increased: in 2005 52,941 contracts were signed, 127,813 in 2011 and 32,993 in the first quarter of 2012. Consequently, since 2005 there has been an increase of over 45% in the number of tenancy contracts (Generalitat de Catalunya, 'Informe continuo sobre el sector de la vivienda en Cataluña', (Barcelona: 2012)).

<sup>59</sup> *Ibid.* D. Camilleri.

the increasing demand for mortgages on the part of first-time buyers.<sup>60</sup>

Crisis affected Portugal and Spain negatively but Malta positively. Reduced availability of credit in the former restricted the criteria for the approval of loans for home acquisition. This affected the tenancy market favourably due to the increased demand but also due to a new wave of supply by owners who could not find any prospective acquirers for their vacant dwellings. However, the number of evicted tenants in Spain is very similar to the number of evicted mortgagors (taking into account first residences).

### *Response to the crisis*

Portugal and Spain have responded to the difficulties that have been created within the housing context with both temporary as well as permanent and more long-sighted measures. Specific policies aimed to protect particular classes of people against ill-effects of the economic downturn. Due to the said credit restriction that rendered access to the mortgage market increasingly demanding, the crisis also prompted changes in the respective rental regimes.

In the immediate wake of the economic slowdown, Portugal and Spain sought to give added protection to the most vulnerable categories. Spain suspended evictions in relation to susceptible individuals until the 16 November of 2014<sup>61</sup> (this period was extended until 15-5-2015 by art. 1 Act 1/2013) and raised the threshold for the non-seizable assets owned by the debtor.<sup>62</sup> A common response came in the form of providing for the quasi-forced restructuring of debt in certain cases.<sup>63</sup> It must, however, be kept in mind that these latter advantages are limited to a specific segment of debtors.

New amendments have also aimed to stimulate the private rental market by

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<sup>60</sup> J. Ripard, "BoV's record profits: €110.7m in pre-tax profits", *The Times (Malta)*, 27 October 2012.

<sup>61</sup> These include large families, single-parent families with children under three, unemployed persons and households with disabled members (Royal Decree Law 27/2012, 15 November; Resolution of 29 November 2012)

<sup>62</sup> The threshold was increased from €641.40 to €962.1 (i.e. a 50% increase) and the value by which mortgaged property could be assigned to the financial institution in the absence of a bidder was raised from 50% to 60% (Royal Decree Law 8/2011).

<sup>63</sup> Law 1/2013, 14 May. This law lays down several measures, among which the limiting of the default interest in residential mortgage loans to three times the legal interest; the prohibition of capitalization on these interests; the strengthening of the extrajudicial sale of the mortgaged property; the possibility for the Notary to suspend the mortgage procedure if the parties would have claimed the unfairness of the mortgage terms before the competent court and the possibility on the part of the judge to assess the existence or not of any such unfair contract terms, either *ex officio* or at the request of any of the parties. Spain also responded with the setting up of a voluntary 'Code of Good Banking Practices' (Regulated by the Royal Decree Law 6/2012) that urged banks to offer debtors in special need a four-year period of grace, the extension of the loan timeframe, the release of 25% of the outstanding debt, the limiting of the interest rate and to ultimately opt for the remedy of *datio in solutum*.

In Portugal a similar kind of temporary protection was given, until 31 December 2015, to all households who could not keep up with their mortgages due to unemployment or severe reduction of their income; such cases were given the right to ask banks for a reduction or a suspension of their mortgage payments in line with their financial possibilities (Law no. 58/2012, 9 November 2012). This regime is aimed at families in which at least one of the borrowers is unemployed or else would have lost 35% or more of his/her gross annual income).

protecting the landlord's interests. In 2013, Spain reduced the compulsory minimum duration of the contract, gave the lessor the possibility of increasing the rent unlimitedly and allowed him to waive the right of pre-emption. Similarly, in Portugal new legislation was enacted in order to empower landlords to terminate the contract and to evict the tenant in the case that the latter fell into arrears.<sup>64</sup> It should, nevertheless, be questioned whether such measures will achieve their intended purpose since such amendments have only rendered newly-contracted leases increasingly unstable and uncertain.

Needless to say in Malta no remedial action was necessary at a legislative level since the crisis did not impact the country as hard as it did its European counterparts. It might be said, however, that the 2010 rent reform was exceptionally timely due to the fact that it sought to expand supply at a time when property prices were becoming hardly affordable, particularly for the younger participants in the housing market.

Means of action on the part of Spain and Portugal came in the means of suspension of evictions and special allowance for the restructuring of debt in respect of particularly susceptible households. New measures also aimed to stimulate the supply of private rented dwellings by amending the law in favour of the landlord's interests.

### **1.3. Urban and social aspects of the housing situation in comparison**

#### **1.3.1 Urban aspects in comparative perspective**

In general, tenancies seem to be more common in the city centres. This is owed to either the low price and deteriorated conditions of dwellings<sup>65</sup> or else, as appears to be the case in Malta, to the automatic renewal of the protected leases which incentivises tenants to remain within the same dwelling.<sup>66</sup>

There is also evidence of the creation of ghettos in areas of low cost rentals (particularly owed to the clustering of low-income immigrants residing in degenerated areas<sup>67</sup>) and accumulated public dwellings.<sup>68</sup> These areas commonly suffer from multiple interlinked problems of high unemployment, levels of crime and poor access to quality services.

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<sup>64</sup> A special body, the *Balcão Nacional do Arrendamento*, regulates the special procedure for eviction with the main idea behind it being to expedite out-of-court eviction procedures (Decree Law no. 1/2013, 7 January).

<sup>65</sup> J. Oliver Alonso, 'Informe sobre el sector inmobiliario residencial en España', Barcelona: CatalunyaCaixa y Departamento de Economía Aplicada de la UAB, 2012, 96.

<sup>66</sup> A share of dwellings in Malta has been transferred *causa mortis* from one generation to the next even since the pre-war or immediate post-war period. The 2005 Census had found out that as many as 4,159 leases (27% of the total number of leases signed with private landlords at the time) had been contracted prior to 1955 [Ministry for Social Policy, *The Need for Reform*, 25].

<sup>67</sup> J. Leal & A. Alguacil, 'Vivienda e inmigración', 129.

<sup>68</sup> J. Ponce Solé, *Poder local y guetos urbanos* (Madrid: Estudios Carles Pi i Sunyer, 2002), 97. In Portugal these are called "bairros sociais" [*Contributos para o Plano Estratégico De Habitação 2008/2013, Relatório 1*, 159]. In Malta poverty clusters are either concentrated in social housing, rented estates or in urban sprawl where housing rent is available and affordable [F. Galea Debono, "Poverty runs deep in Qawra, Hamrun: Poverty areas breed crime", *The Times (Malta)*, 19 March 2012].

Processes of gentrification also seem to be occurring within each of the countries. In Spain it has occurred within the centres of large cities such as Madrid and Barcelona, more specifically within the Lavapiés and Raval neighbourhoods respectively.<sup>69</sup> The pattern recurring pattern involves public urban renewal projects that are then complimented as well as exploited by the private sector initiatives.<sup>70</sup> In Portugal, this has for instance occurred in Lisbon after the works undertaken to host the World Exposition in 1998, whilst in Malta this appears to be the case in the old cities within the Southern Harbour.<sup>71</sup>

In addition to these phenomena one may also underline the increased incidence of squatting in Spain as a consequences of the numerous housing evictions that left many families homeless. Unauthorised occupation of dwellings has, in fact, increased by 50% over the past year<sup>72</sup> although the civil legislation grants the "new" possessor certain protection (e.g through usucapio). Neither Portugal nor Malta seem to have registered any relevant increases although squatting is considered as a criminal offence in all of the three countries.<sup>73</sup>

Ghettos are present in the three countries and they have a link with both immigration and clusters of social housing. Gentrification has also taken place following public projects of urban renewal. Only Spain has, however, registered significant increases in cases of squatting during the recent years.

### 1.3.2 Social aspects

A very solid home ownership culture is clearly evident. Ownership has come to represent stability, autonomy, confidence, peace of mind and privacy along with other psychosocial factors such as self-esteem, personal fulfilment or pride.<sup>74</sup> This projects the image of lease as an inferior form of tenure or at most that of a temporary strategy prior to accumulating enough wealth to be able to access home ownership; in Spain, up to 76% of tenants would prefer to be owners if they had the opportunity (2011). Moreover, prior to the crisis (although even in this case it was marginal), instances when the price of land or of buildings fell are unknown in Maltese economic history, and due to their high costs, residential dwellings are associated with wealth, power and prestige.<sup>75</sup> This works to the detriment of rent which is often associated with the less affluent

<sup>69</sup> M.A. Sargant, *Gentificación e inmigración en los centros históricos: El caso del barrio del Raval en Barcelona*, Revista Electrónica de Geografía y Ciencias Sociales de la Universidad de Barcelona nº 94 (66), 2001.

<sup>70</sup> S. Martínez Rigor, *El retorn al centre de la ciutat. La reestructuració del Raval entre la renovació i la gentrificació*. (Barcelona: Universitat de Barcelona, 2001).

<sup>71</sup> Therefore besides having the largest percentages of rented housing, the Southern Harbour also holds the highest concentration of vacant dwellings due to the people who move out in search of better quality accommodation. These two factors make this area particularly susceptible to the phenomenon of gentrification.<sup>71</sup>

<sup>72</sup> Fiscalía General del Estado, 'Memoria de la Fiscalía General del Estado 2012' [www.fiscal.es](http://www.fiscal.es), 18 January 2013.

<sup>73</sup> Spanish Criminal Code, Article 245; Portuguese Criminal Code, Article 215; Maltese Criminal Code, Articles 330 and 338(w). This might light to an antinomy when combined with adverse possession (usucapio).

<sup>74</sup> M. Aramburu Otazu, *La resignificación de la tenencia de la vivienda en Cataluña*, 16.

<sup>75</sup> P. V. Mifsud, *An Evaluation of Housing Patterns and Policies in Malta*, Dissertation submitted to the Department of Environmental Social Sciences, Keele University, 1997.

classes. Even the local Housing Authority itself declares the promotion of homeownership as one of its primary objectives.<sup>76</sup>

Over the years home ownership came to be associated with affluence and stability whilst rental became progressively imbued with negative connotations.

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<sup>76</sup> Housing Authority, accessed from: <<http://www.housingauthority.com.mt/EN/content/115>>

## **2. Housing policies and related policies in comparison**

### **2.1. Introduction**

Spain and Portugal bear important similarities in relation to their constitution since both were established as social States and, therefore, as welfare States with the approval of their democratic constitutions (Portugal in 1976 and Spain in 1978).

According to the Spanish constitution, the State is directly responsible for running social policies needed to improve people's living conditions and to promote equal opportunities for citizens. The execution of all these benefits involves using a large amount of economic resources, to which citizens must contribute with their taxes. Thus, public authorities' beneficial actions are limited by the available public resources and by the interpretation of the Welfare State at any given economic and political moment.<sup>77</sup> However, housing policies in Spain have been mostly oriented towards enhancing the economic value of housing rather than its social value and it remains below the European average in social spending on housing<sup>78</sup>.

The Portuguese situation is very similar to the Spanish one. Housing policies depend on the economic scenario in that they are connected to general welfare policy, as well as to the tax system. For a few decades the dominant housing policy stimulated homeownership, namely by easy access to bank credit with low level of interest and fiscal deductions. As an effect of the financial crisis, the current policy is completely different. The State stopped giving subsidies to keep bank loans with low levels of interest and stopped the fiscal benefits related to homeownership.

In Malta, the Government is the largest employer<sup>79</sup> and Social Security represents a large portion of Government expenditure. Housing subsidies represent a significant part of that expenditure and includes subsidies on the interest paid on loans obtained to purchase housing units and subsidies on rent<sup>80</sup>.

Spain and Portugal are both based on constitutional principles of Welfare State and, therefore, responsible for implementing social policies needed to improve people's living conditions and to promote equal opportunities for citizens. However, the implementation of these tasks depends on the available public resources.

<sup>77</sup> As set out by J. Jaria i Manzano, 'El derecho a una vivienda digna en el contexto social', at *El acceso a la vivienda en un contexto de crisis*, ed. S. Nasarre Aznar, Madrid: Edisofer, 2010.

74-75.

<sup>78</sup> S. Borgia Sorrosal & A. Delgado Gil, 'Evolución de las políticas de vivienda en España. Comparativa con la UE-15' *Instituto de Estudios Fiscales*, 33 (2009): 35-36.

<sup>79</sup> G. Pirotta, *A New Creation or an Image and Likeness? The Maltese Experience of Establishing Local Government in a Centralized Micro-State*, *Public Organisation Review* (2001) 1.

<sup>80</sup> NSO, *Social Protection: Malta and the EU 2011* (Data 2006-2010), 2012: The numbers confirm this since in 2010, expenditure on Social Protection as a percentage of the GDP was 19.8%. Out of this amount €10,001,388 were spent on Housing of which €93,774 on Housing Subsidies and €9,907,614 on Housing Authority Subsidies (similar subsidies on the interest this time on loans obtained to purchase housing units from the Authority and to build on land leased from the authority). The Housing Authority also subsidises the cost of housing units, plots and ground rents. These two categories of subsidies account for 0.01 and 0.81% of the total Social Protection expenditure respectively.

In recent times, housing policies have been changing in Spain and Portugal because of the economic crisis, which affected significantly the housing sector in both countries. Taxation and subsidization policies are matters, which depict well this lack of stability as they have been changing according to the financial situation.

Malta has, on the other hand, presented a more stable situation in as far as housing policies is concerned since it was not strongly affected by the financial crisis. In addition, the Government is the largest employer in Malta and this is another effective method through which the State ensures the general well-being of citizens.

**Housing rights** are only enshrined in the Spanish and Portuguese constitutions. In Spain, article 47 CE establishes the right to decent and adequate housing which is located in Chapter III of Title I regulating the Guiding Principles of social and economic policy. This means that, unlike various international law instruments, it is not contained amongst the individual fundamental rights and it is neither directly enforceable before Ordinary Courts<sup>81</sup> nor before the Constitutional Court.<sup>82</sup> The Spanish Constitution highlights the importance given by the constitutional regulation to the implementing legislation as an essential instrument to materialize the right to housing, being subject to specific obtainment by the citizen.<sup>83</sup>

In Portugal, the right to housing is enshrined in article 65 of the Portuguese Constitution<sup>84</sup> as a social right; it is found amongst economic, social and cultural rights that are protected as fundamental rights but are afforded lower protection than personal rights, freedoms and guarantees (which are also established as fundamental rights)<sup>85</sup>. Consequently, they are not immediately enforceable and their fulfilment depends on the availability of favourable social and economical conditions. Moreover, economic, social and cultural rights are not generically enforceable, as they are addressed to public authorities, binding them to the realisation of the existing constitutional programme on economic and social matters<sup>86</sup>.

Malta does not have a constitutional right to housing, although positive figures testify to the State's active involvement in ensuring adequate housing for the generality of the citizens. Nevertheless Malta has bound itself to respect international legal instruments guaranteeing housing rights, among which there

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<sup>81</sup> Judgement of the Supreme Court (STS, *Sentencia del Tribunal Supremo*) 31 January 1984 (RJ 1984/495) and 19 April 2000 (RJ 2000/2963).

<sup>82</sup> In this sense, ATC 20 July 1983 (RTC 1983/359) and ATS 4 July 2006 (JUR 2006/190875).

<sup>83</sup> J. Muñoz Castillo, *Constitución y vivienda* (Madrid: Centro de Estudios Políticos y Constitucionales, 2003), 18-20.

<sup>84</sup> Vd. <http://www.tribunalconstitucional.pt/tc/en/crpen.html> (visited 2-2-2015).

<sup>85</sup> J. Miranda, *Manual de Direito Constitucional*, Lisboa, 2008; V. de Andrade, *Os Direitos Fundamentais na Constituição Portuguesa de 1976*, Coimbra 2006; J.J. Gomes Canotilho, *Direito Constitucional e Teoria da Constituição*, Coimbra 2003.

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[http://www.tribunalconstitucional.pt/tc/content/files/relatorios/relatorio\\_004\\_confwashington.pdf](http://www.tribunalconstitucional.pt/tc/content/files/relatorios/relatorio_004_confwashington.pdf) (visited 2-2-2015).

are the Charter of Fundamental Rights of the European Union<sup>87</sup> and the European Social Charter.<sup>88</sup>

Spain and Portugal have the right to housing enshrined in their constitutions respectively art. 47 Spanish Constitution and art. 65 Portuguese Constitution. However, these rights are not immediately enforceable and their fulfilment depends on the availability of favourable social and economical conditions. They are addressed to public authorities, binding them to the realisation of the existing constitutional programme on economic and social matters. Contrary to these two countries, Malta does not have a constitutional right to housing.

## 2.2. Policies and actors

### 2.2.1. Governmental actors

The three countries present different models of government involvement in the sector. In Spain three types of actors are involved: national, regional and local. Housing and its legal development are based on the mandate of article 47 CE, which is addressed to public authorities, including the Administration of the State (art. 149.1.1 CE), the administration of the 17 Autonomous Communities and the cities of Ceuta and Melilla, which have the exclusive competence on housing (art. 148.13 CE),<sup>89</sup> and the Local Administration. Within the Local Administration, City Councils have the competence on housing according to articles 25.2 and 28 of Act 7/1985.<sup>90</sup> According to data provided by the INE, Spain had 8,114 municipalities in January 2010, which may perform actions on housing. In addition, there are also the 41 Provincial Councils and another additional 41 County Councils (*Consells Comarcals*) in Catalonia, which may be responsible for the pooled management of the smallest municipalities through agreements with the Autonomous Communities and City Councils.

In Portugal, housing policies are drafted by Parliament and Government and carried out at national<sup>91</sup>, regional (in the case of the two autonomic regions of the islands Azores and Madeira) and municipal level. According to article 165 of the Portuguese Constitution, unless it also authorises the Government to do so, the Parliament has exclusive competence to legislate on the general regime governing urban leases. As far as implementing social housing is concerned, the main role is played by municipalities.

In Malta, housing is a purely national matter and the body responsible for developing and implementing housing policy is the Housing Authority which was established in 1976<sup>92</sup>. No regional or local level is involved either in the designing of the policies or in the allocation of property to applicants.

<sup>87</sup> Article 34 on 'Social security and social assistance' recognizes the right to social and housing assistance as a necessary tool in ensuring a decent existence for those who lack sufficient resources.

<sup>88</sup> The revised European Social Charter was ratified by Malta on the 27 July 2005 although Malta has not accepted article 31 which lays down expressly that "[e]veryone has a right to housing".

<sup>89</sup> Judgement of the Constitutional Court (STC, *Sentencia del Tribunal Constitucional*) 4 November 1982, FJ. 2 (RTC 64/1982) establishes that art. 53.3 CE comprises both national and regional legislation.

<sup>90</sup> Ley 7/1985, de 2 de abril, reguladora de las bases de régimen local (BOE 03/04/1985 núm. 80) (LBRL).

<sup>91</sup> <http://www.portaldahabitacao.pt/pt/ihru/> (visited 2-2-2015).

<sup>92</sup> Act XV of 1976.

Regarding levels of government involved in formulating and implementing housing policies, there are significant differences among the three countries. Whilst in Spain three types of actors are involved: national, regional and local, in Portugal they are two types: national and local. Only the islands of Azores and Madeira have regional housing policies.

On the other hand, whilst in Spain the main role is shared by the autonomous communities (regional and municipal level), in Portugal that role is played by the municipalities (local level).

Conversely, in Malta housing is a purely national matter and the body responsible for developing and implementing housing policies is the Housing Authority.

As housing policies are partly carried out by different actors in the three countries, it is not possible to compare the particular level of effectiveness of those actors although regard can be had to their global performance. In Spain, the State has a minor role in respect to housing matters and the operations of local entities depend on the budget available according to the existing population and the housing needs that are identified each particular area. The Autonomous Communities are the ones that have a more active role, as they have exclusive competence in the matter. However, in Spain, public authorities have not been very effective in performing and managing public policies if we take into consideration the number of empty dwellings (13.7%), the fact that social housing is very residual (barely 2% of the total housing stock), the inefficacy of the dichotomy homeownership-tenancy and Spain's poverty rate of 21.1%. All these factors are cumulatively accentuating overcrowding situations that lead in many cases to substandard housing, particularly for groups at risk of social exclusion, such as low-income individuals, single-parent families, elderly over 65 years old or victims of gender-based violence. In 2012 there were 23,000 homeless persons in Spain (0.05 of the population).

In Portugal, there is no official data to compare the effectiveness of the different actors, as they play different roles, but, in general, municipalities (local level) are very effective in carrying out social housing policies although in 2014 were still approximately 5,000 homeless people in Portugal (or 0.05 of the population).<sup>93</sup>

Maltese housing policy has so far been effective particularly if one takes into considered the low rates of homelessness. Until the end of 2013, there were 277 registered cases of homelessness (0.18% of the total number of households).<sup>94</sup>

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<sup>93</sup> <http://www4.seg-social.pt/publicacoes?bundleId=322036> (visited 2-2-2015).

<sup>94</sup> The registered cases would consist of households rather than necessarily single individuals. If, however, an estimate was carried out according to the average household size of 2.9 persons as found out by Eurostat, this would yield a similar figure of 0.19%. Homeless people in Malta may seek temporary shelter in one of the various NGOs set up for the different categories. Under the Maltese law both leading an idle and vagrant life as well as importuning any person in any public place to beg alms are considered as contraventions against the public order (Criminal Code, Article 338(w) and (x)). A 'vagabond' is defined by jurisprudence as any person who wanders about without a fixed residence, and who additionally neither exercises any profession due to idleness nor has any assets in order to subsist [*Isp. Gabarretta v. Caruana*], decided by the Criminal Court on the 5 February 1895]. It is, moreover, known that Malta's strong family structure acts as the greatest control to the rate of homelessness. The total number of households calculated by the 2011 Census of Population and Housing was that of 153,100.

Concerning effectiveness of housing policies, it would *prima facie* appear that Malta's housing policies, which are implemented by a national authority, are more effective than Spain and Portugal where the same role is shared between regional and local authorities. Such a conclusion would, however, overlook the small dimension of the island compared with the other two countries.

### 2.2.2. Housing policies

The financial crisis has affected the Spanish and Portuguese national policies drastically and it has led them to redirect their housing policies towards the stimulation of rental markets rather than homeownership. In Spain, the objectives of the new State Plan 2013-2016 are directed towards the fulfilment of two main functions: the promotion of tenancy as a form of housing tenure and the encouragement of rehabilitation, regeneration and urban renewal. The main targets established in its preamble, are:

- a) The adaptation of governmental aid to the current social needs and to the scarcity of resources available, concentrating them on the said two issues
- b) The strengthening of inter-administrative cooperation and coordination, as well as the encouragement of shared responsibility in both financing and management.
- c) The improvement of the quality of building construction and, in particular, its energy efficiency, universal accessibility and proper conservation.
- d) The contribution to real estate sector reactivation

The current housing policies aim to protect the most vulnerable groups since the programmes and subsidies laid down in the quoted State Plan only give protection to those categories whose income is below three times the IPREM (below €1,600/month per household for 2014).

Similar commitments were undertaken by Portugal that signed a Memorandum of Understanding with the European Commission, the ECB and the IMF in 2011. Point 6 of this document stated the objectives of improving households' access to housing, the quality of housing, the better use of the current housing stock and the reduction of household incentives that contribute to the building up of debt<sup>95</sup>. As the stock of construction is considered to be sufficient in facing the needs of the population, nowadays housing policies are perceived mainly as solutions for specific social groups. The main concerns are urban regeneration, the empowerment of the private market in facilitating access to low cost housing and the adjustment of the profit from the existing housing stock. The provision of affordable housing, carried out mainly by municipalities, is only for those households in need.

In Malta, besides the housing of low-income persons and vulnerable groups, the main thrust of the housing authority remains manifestly in the promotion of home ownership. The authority is active as well in subsidizing the adaptation and repair of dwellings, stimulating the rental market and the use of vacant housing stock and increasing the accessibility of residential premises. In acknowledging that certain individuals and households need more than just a roof it also provides sheltered housing for target groups and encourages collaboration between private and non-governmental enterprises in accessing cheaper land for housing. The Housing Authority keeps a waiting list of applicants who are interested either to buy or rent government owned dwellings, or private dwellings which are made available through the various schemes<sup>96</sup>.

<sup>95</sup> [http://www.portugal.gov.pt/media/371369/mou\\_20110517.pdf](http://www.portugal.gov.pt/media/371369/mou_20110517.pdf) (visited 2-2-2015).

<sup>96</sup> To qualify for a Government unit, an applicant should not possess assets, including property, exceeding €28,000 and should not have an annual gross income exceeding

In recent times, due to the financial crisis, Spanish and Portuguese national policies have changed in order to stimulate rental markets instead of homeownership. In addition, both countries aim to promote houses rehabilitation and urban areas regeneration. This latter objective is shared by Malta although its main focus remains in the promotion of ownership.

It therefore emerges that due to financial constraints Spain and Portugal are changing their policies in favour of the stimulation of the rental markets, Malta maintained its focus on the promotion of homeownership. In fact, Spanish housing policies gave preference to homeownership until the Housing State Plan of 2009-2012 wherein the stated aim was that of giving equal protection to both forms of land tenures (tenancy-homeownership). Conversely, both tenancy and rehabilitation are the ones promoted exclusively in the Housing State Plan 2013-2016. In Portugal the national policy has similarly aimed to stimulate the rental market instead of access to home ownership as a way to reduce families' indebtedness to bank loans.

In Malta, on the other hand, the Housing Authority itself continues to state that one of its objectives is the promotion of home ownership. Despite the recent amendments to the rent laws, the reform still treated private leases as an 'alternative' form of tenure for who could not afford home ownership.<sup>97</sup>

Malta keeps promoting homeownership as the main way of accessing a dwelling. Spain and Portugal have, since the eruption of the financial crises, altered their policy in favour of rented housing.

Neither of the three countries have drafted any particular housing policies targeted at migrants or minorities like Roma. However, groups like disabled and elderly people are, in certain way, subject to particular attention. In Spain, article 50 CE lays down the public authorities' duty to address the elderly population's specific problems as regards housing, culture and leisure. Moreover, a contextual approach to the Constitution reveals that it also gives specific protection to both young (art. 48 CE) and disabled people (art. 49 CE)<sup>98</sup>. Some statutes of Autonomous Communities also establish this right for specific groups. For example, the right to decent and adequate housing for persons who do not have sufficient resources is present in Catalonia. However, this general clause leaves a wide margin of interpretation, and it will be the legislation implementing the clause which shall determine at any given time the social groups that are considered worthy of protection due to their socio-economic situation<sup>99</sup>.

In Portugal, apart from social housing policies (targeted at those with the lowest income), the new urban lease legislation (from 2012) comprises an exclusive temporary regime for old contracts (made before 1990) that protects poor tenants from paying a market rent for five more years. Moreover, elderly

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€8,200 in the case of single persons and €10,500, plus an additional €700 per child, in the case of married couples and single or separated parents.

<sup>97</sup> Ministry for Social Policy, *The Need for Reform: Sustainability, Justice and Protection*, 30.

<sup>98</sup> G. Ruiz-Rico Ruiz, *El derecho Constitucional a la vivienda Un enfoque sustantivo y competencial*, Madrid: Ministerio de Vivienda, 2008, 30-32.

<sup>99</sup> As set out by G. Ruiz-Rico Ruiz, 'La vivienda como derecho social y material competencial en los nuevos estatutos de autonomía', at Dret a l'habitatge i servei públic d'allotjament català, Barcelona: Departament d'Interior, Relacions Institucionals i Participació, Institut d'Estudis Autonòmics de la Generalitat de Catalunya, 2009, 56-58.

tenants (over 65) have a particular protection against termination of the contract by landlords. On the other hand, young low-income tenants (between 18 and 30) have access to three-year subsidies. It must also be said, however, that although the Portuguese constitution states that elderly people should be assured housing conditions in order to keep their autonomy and avoid social marginalization, current national policies, conditioned by restricted public resources, remain far from achieving this constitutional goal.

In Malta, there have been housing policies targeted at the elderly but none have been addressed towards migrants. A particular NGO had once embarked on a pilot project, which aimed at helping migrants to settle from the open centres into the housing market, however, the project was reported to have been met with resistance by local landlords<sup>100</sup>.

In the three countries there are no special housing policies targeted at migrants or minorities like Roma to improve their housing situation. There is no positive discrimination. They have right to access social housing like the other people. However, the three countries have special housing measures targeted at elderly and disabled individuals.

- Overall: Which national (or subnational) housing policies rank best in terms of formulation and implementation? (comparative)

As Malta was not strongly affected by the financial crises and has not suffered any significant increase in the cases of homelessness, it can be said that its housing policies, due to their stability, can achieve better results than the ones in Spain and Portugal. The latter are still adjusting their housing policies to the consequences of the financial crisis and the phase is premature for the attempt of any conclusion.

### 2.3. Urban policies

The three countries are trying, in different ways, to develop new instruments to reduce ghettoization in social housing. In Spain, housing policy has traditionally tended to homogenize residential areas, bringing together in some urban areas those in need of housing, thereby favouring the creation of ghettos. Although there are rules that seek to counteract these effects, allowing a property-rental mix on the same property, in practice the sale of these properties become more problematic. Some Autonomous Communities such as Catalonia, on the basis of their housing competence, set up inspection programs in order to control, eradicate and prevent overcrowding, substandard housing and permanent vacancies.

In Portugal, the majority of beneficiaries of social housing are brought together in single identifiable segments, which gradually convert into ghettos due to the inherent social stigmatization. Although there are no national policies aimed at preventing ghettoization or gentrification, in recent times, some municipalities, such as Lisbon, are developing local policies to enable the smoother integration of people living in social housing<sup>101</sup>.

<sup>100</sup> Fondazzjoni Suret il-Bniedem, *Housing Asylum Seekers*, 2010, 37-38.

<sup>101</sup> <http://www.gebalis.pt/site/> (visited 2-2-2015).

In Malta, recent measures have also attempted to allocate social housing beneficiaries amongst tenants who rent from private landlords. The Housing Authority has recently been active in introducing new social housing concepts which foster a greater sense of community in order to favour the integration of more vulnerable families.<sup>102</sup>

Malta has adopted successful measures in eliminating stigmatization towards beneficiaries of social housing, particularly by integrating them amongst who tenants rent privately. Spain is also developing legal instruments to counteract the creation of ghettos and in Portugal, there are no national policies in this matter although some municipalities are trying to develop new instruments to integrate better the beneficiaries of social housing.

The three countries have, in general, rules to control the quality of the houses rented privately. In Spain, requirements of habitability, health and hygiene, sustainability, comfort, spatial dimension, durability, security, energy saving, quality, economic aspects, etc., are regulated in Act 38/1999<sup>103</sup> and in Royal Decree 314/2006<sup>104</sup>, which establish the basic quality requirements of both buildings and their facilities to allow them to be functional, safe and habitable<sup>105</sup>. Quality conditions are controlled through the compulsory municipal licence of first occupation and through a subsequent public certificate, which must be renewed periodically.<sup>106</sup>

In Portugal, the quality of private rented housing is controlled by the municipalities, that are vested with the responsibility of assessing whether the dwellings fulfil the minimal habitable conditions<sup>107</sup>. The certificate must, in turn, be presented by the landlords prior to the signing of the agreement. Their failure to do so would signify the illegality of the agreement and the tenant would consequently be able to terminate the contract at any time<sup>108</sup>.

In Malta, properties must conform with the parameters established by the Environmental Development Planning Act<sup>109</sup> in relation to the regulation of sizes of dwellings<sup>110</sup> and the limitations for the various kinds of properties.<sup>111</sup> They

<sup>102</sup> ‘Families get housing help’, *The Times (Malta)*, 16 March 2012.

<sup>103</sup> Ley 38/1999, de 5 de noviembre, de Ordenación de la Edificación (BOE 06/11/1999 núm. 266).

<sup>104</sup> Real Decreto 314/2006, de 17 de marzo, por el que se aprueba el Código Técnico de la Edificación (BOE 28/03/2006 núm. 74).

<sup>105</sup> As set out by F. López Ramón, ‘Sobre el derecho subjetivo a la vivienda’, in *Construyendo el derecho a la vivienda*, Madrid: Marcial Pons, 2010, 21.

<sup>106</sup> Either the municipal licence or the licence of primary occupation may be regulated by the local council but in any case they are compulsory.

<sup>107</sup> Municipalities do not have to approve rental housing, unless it is a house to rent for tourists (according to the Decree-Law n. 128/2014, 29 august). Municipalities certificate the conditions of dwellings irrespectively if they are aimed to be used directly by their owners or rented. Therefore, it is not possible to establish a connection between this control and the black market control.

<sup>108</sup> Decree-Law n.160/2006, amended by Decree-Law n.266-C/2012.

<sup>109</sup> Chapter 504 of the Laws of Malta.

<sup>110</sup> “Development Control Policy and Design Guidance 2007” Part 3 entitled “Site Coverage, Dwelling Type, Plot Size, Dwelling Size (Sections 3.1 to 3.8).

<sup>111</sup> The regulations for ‘Detached and Semi-Detached Dwellings’ include: permissible development, minimum site area, maximum site coverage, maximum number of habitable floors, garages and areas of soft landscaping. The limitations for ‘Flatted Dwellings’ including ‘Maisondettes’ in Areas Zoned for ‘Semi-Detached or Detached Villas’ are contained in Section 3.5.

should also be in line with sanitary laws regulating the construction of new dwellings contained in Article 97 of the Code of Police Laws<sup>112</sup> and the "Technical Guidance Document F - Conservation of Fuel, Energy and Natural Resources".<sup>113</sup> From the results of the latest Census, the state of repair of rented dwellings seems to be reassuringly good.

In the three countries there are legal instruments aimed at controlling the quality of private rented housing or at least housing in general such as the case of Malta. If the minimal quality conditions are not fulfilled, a dwelling would not obtain a public certification. Currently, without this certification, a dwelling cannot be rented legally in either Portugal or Spain.

## 2.4. Energy policies

The three countries have adopted national legislation in line with the European Directives on energy efficiency. Consequently, in the three countries an energy performance certificate is required upon the sale or lease of a property. In Spain, Royal Decree Law 13/2012<sup>114</sup>, which transposed the European regulation on energy sector, establishes a regulatory authority in this sector, the National Commission of Energy and defines the framework of vulnerable consumer, entitling him to benefit from discounts on electricity consumption (a so-called "social bonus"). Furthermore, the use in buildings of energy coming from renewable sources has been promoted in order to limit greenhouse gas emissions, as well as to promote energy efficiency and to reduce pollution<sup>115</sup>. Projects to improve blocks energy saving are subsidized such as for installation of solar panels to produce domestic hot water and to increase thermal insulation. Eligible blocks shall have at least 20 dwellings with a residential purpose<sup>116</sup>, present serious structural or other kind of damages or be aimed entirely at renting for at least 10 years.

In line with the European Directives, Portugal has adopted legal instruments to promote the improvement of the energy performance of buildings, taking into account indoor climate requirements and cost-effectiveness<sup>117</sup>. National rules on this subject were initially compulsory only for new buildings, but were extended to all existing buildings on the first of December 2013.

Besides the "Energy Efficiency Directive" Malta has also transposed several other EU legislations most of all those promoting the improvement of the energy performance of buildings<sup>118</sup> the choice of more energy efficient

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<sup>112</sup> Chapter 10 of the Laws of Malta.

<sup>113</sup> Published through Legal Notice 238 of 2006.

<sup>114</sup> RDL 13/2012, de 30 March 2012 (BOE 31/03/2012, no. 78).

<sup>115</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJEU 5.6.2009 N° L 140/16), transposed by RDL 13/2012.

<sup>116</sup> It is required that the 70% of the edificability is destined to residential purposes.

<sup>117</sup> Directive no. 2002/91/CE of the European Parliament and of the Council on the energy performance of buildings was transposed to Portuguese law by Decree-Law no. 78/2006, Decree-Law no. 79/2006 and Decree-Law no. 80/2006, all of 4 April 2006. Directive n. 2013/31/EU was transposed to Portuguese Law by Decree-Law n. 118/13 of 20 August 2013.

<sup>118</sup> Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings (OJEU 18.06.2010 N° L153/13)].

products<sup>119</sup> and the use of energy from renewable sources.<sup>120</sup> Energy subsidies are also available to the most economically vulnerable consumers (Energy Benefit).

The three countries have adopted national legislation in line with the European Directives on energy efficiency. Consequently, when buildings are sold or rented out, an energy performance certificate should be made available by the owner to the prospective buyer or tenant.

## 2.5. Subsidization

The three countries have different systems of housing subsidies both for property owners as well as tenants. Due to the financial crises, Spain and Portugal have stopped subsidizing homeownership although Malta has continued to subsidise interest on loans for the purchase of a first residence as well as enabling tenants to become owners of their homes. In recent times, Spain and Portugal have focused their subsidization policies mainly on housing rehabilitation.

In Spain, property owners, who want to rent their properties (according to the State Plan 2013-2016) may request subsidies for rehabilitation of dwellings, qualified as housing with a public task for tenancy purposes, for a period of fifty years. Moreover, public or private entities, that are awarded projects of regeneration or urban renewal, may apply for aid in the carrying out works of building rehabilitation, urbanization and redevelopment of public spaces. The maximum amount of subsidisation cannot exceed 30% of the total budget.

In 2007 Portugal was loaned out €200 billion by the European Bank of Investment in order to rebuilt and renovate old buildings until 2016. This low-interest credit can only be accessed by public entities such as municipalities and the renovated or reconstructed buildings must eventually be rented at affordable prices.

The Maltese Housing Authority subsidises both tenants and owners in the rehabilitation of their first homes. Moreover, specific schemes are directed at enabling tenants to become the owners of their rented premises (one such scheme is the *Sir Sid Darek – Become the Owner of your Home*) and specific assistance is also reserved to persons with disability. Until recently, a scheme offered fiscal incentives to owners who made their property available to government for social housing allocation.<sup>121</sup>

Rent subsidies are also available in the three countries. In Spain, tenants may apply for a rental aid provided that the dwelling is used as a primary and permanent residence, the family unit's income does not exceed three times the IMPREM (below €1,600 in 2014) and the rent is inferior to 600€ per month. The subsidy is generally granted for a year (although payable monthly) and there exist possibilities for renewal.

The Portuguese government additionally subsidizes young tenants between 18 and 30 as well as young low-income couples up to 32 years of age. These subsidies cannot last for more than 3 years. The allocation criteria include the use of the dwelling as a sole and primary residence and a monthly income

<sup>119</sup> Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products (OJEU 18.6.2010 N° L 153/1)].

<sup>120</sup> *Ibid.* Directive 2009/28/EC.

<sup>121</sup> 'Skema Kiri' or *Rent Scheme*. Property owners would enter into a ten-year lease agreement with the authority against a full market rent; government would in turn subsidise the amount paid by the actual beneficiaries. This scheme was made available twice although it was not re-proposed by the incumbent administration.

inferior to four times the minimum wage. Some municipalities, such as Lisbon<sup>122</sup> also give temporary rent subsidies to poor tenants, according to their municipal budgets.

In Malta the amount of subsidy depends on the size of the household as well as its cumulative income. The highest grant is that of €1,000 in the case of families with children whose gross annual income does not exceed the total of €14,394.<sup>123</sup> The subsidy is revised every two years following date of application.

The three countries have different systems of subsidization. Whilst, in general, Spain and Portugal do not allocate funds for homeownership, Malta keeps subsidizing interest on home loans and enabling tenants to acquire their homes. In Spain, public or private entities, which develop projects of urban renewal or housing rehabilitation for tenancy purposes, are entitled to ask for subsidisation whilst in Portugal only public entities (normally municipal entities) are entitled to state assistance.

The three countries offer subsidisation on rents although Portugal restricts its aid to the category of young low-income tenants.

The Spanish and Portuguese subsidization systems are not seen as sufficient in meeting the needs of all tenants with low income. In Spain (according to the Housing State Plan 2013-2016), aids are intended to support groups whose income is below 3 times IPREM (about €1,600 for 2014) and preference is given to certain groups: disabled, people over 65, women victims of gender violence or single-parent households. Positive discrimination policies are adopted in their favor when they have limited financial resources, in order to grant them preferential status either in access to social housing or the perception of public aids for rent payments<sup>124</sup>.

In Malta, the system of subsidisation has been recently questioned by a study that has found out that social beneficiaries who rent property from private landlords stand to face an annual shortfall of around €5,000.<sup>125</sup> Moreover, a significant problem in this respect is constituted by the difficulties that certain rightful beneficiaries might have in accessing this subsidy. The main barrier is represented by the requirement of presenting a copy of the written contract, however, due to their reticence to declare their rental income in front of the authorities, certain landlords might refuse to enter into such a writing thereby depriving tenants of such necessary funds.<sup>126</sup>

Although subsidisation is available in the three countries, in all three there seem to be problems relating to its effectiveness.

<sup>122</sup> <http://habitacao.cm-lisboa.pt/index.htm?no=151000101225> (visited 2-2-2015).

<sup>123</sup> Housing Authority, *Conditions for Rent Subsidisation Scheme on Privately Owned Dwellings*, Article 13(v). Single people who lived in care, were fostered for a period of time, left the Cordin Correctional Facility or who have successfully completed a rehabilitation or therapeutic programme could benefit from the subsidy amounting to a maximum of €1,600 per annum until the age of 28.

<sup>124</sup> See more in section 2.c in the second part of questionnaire, 'Restrictions on choice of tenant - antidiscrimination issues', *supra*.

<sup>125</sup> K. Sansone, "Tenants on benefits most likely to be poor - report", *The Times* (Malta), 15 October 2013. Retrieved online from:

<http://www.timesofmalta.com/articles/view/20141015/local/Tenants-on-benefits-most-likely-to-be-poor-report.539761> (visited 2-2-2015).

<sup>126</sup> *Ibid.* Xerri, *Maltese Tenancy Law*, 133.

## 2.6. Taxation

In Portugal and Malta, tenants do not have to pay any tax on their rental tenancies. Conversely, in Spain, tenants are required to pay tax when concluding a tenancy contract since it is considered a property transfer<sup>127</sup>. The landlord would be jointly and severally liable if he receives the first rent without having requested proof of the tax payment from the lessee<sup>128</sup>. The tax base shall be the total payable amount during the term of the contract, and the tax liability is generally determined in accordance with the rules of each Autonomous Community.<sup>129</sup>

In Portugal and Malta tenants do not have to pay any tax on their rental tenancies. Conversely, in Spain tenants have to pay tax when concluding a tenancy agreement, as it is considered a property transfer.

In neither of the three countries is the value of **occupying** a house considered as a taxable income in itself, although in Spain, a second dwelling is regarded as imputed income and therefore subject to taxation. In Portugal, homeowners pay estate tax, annually, for owning a property and if the house is vacant they would be subject to a higher rate than if it is used by its owner or rented out to a tenant.

In the three countries, purchasers of a dwelling pay tax at the time of its **acquisition**. In Spain, a purchaser generally pays 4% on the price of acquisition. In Malta, acquirers of their sole ordinary residence benefit from a reduced rate of 3.5% on the first €150,000 of the value of the dwelling and 5% for the remaining amount.<sup>130</sup> A progressive percentage between 1% and 8% is, on the other hand, applicable in Portugal although purchasers of immovables worth less than 92,000€ benefit from an exemption. Profits derived from the **sale of immovables** are similarly taxed in the three countries.

The value of occupying a house is not considered as a taxable income in either Spain, Portugal nor in Malta. The acquisition of a dwelling is subject to taxation although there are differences in respect to the applicable rates. Profits derived from sale are also taxed.

Unlike Malta, in Spain and Portugal tenants can deduct rents from their tax. In Spain, tax deductions can be up to 9,000€ a year, if the tenant's annual income does not exceed 24,000€ although this benefit might disappear in 2015. In Portugal tenants can deduct up to 295€ from their annual taxable income although this benefit will be reduced in the forthcoming years.

Also in Portugal, landlords of old rental agreements (i.e concluded before 1990) have a fiscal benefit up to 500€ a year when they renovate rented dwellings and in Spain, owners of dwellings acquired before 1 January 2013 may benefit from a tax deduction on their primary housing investment of up to 9000€ a year. Portuguese homeowners who took out a homeloan before

<sup>127</sup> According to art. 7.1.b) LITPAJD. When the taxpayer is a company or a professional, their activity is subject to VAT, according to art. 7.5 LITPAJD.

<sup>128</sup> Arts. 9 RDL 1/1993 and 37 RD 828/1995.

<sup>129</sup> The state fee scale is regulated by art. 12 LITPAJD.

<sup>130</sup> Duty on Documents and Transfers Act (Chapter 364 of the Laws of Malta), Exemption from Payment of Duty on Documents and Transfers Order (Subsidiary Legislation 364.01), Duty on Documents and Transfers Rules (Subsidiary Legislation 364.04).

January 2011 can deduct up to an annual 574€ although this fiscal benefit will disappear in 2016. In Malta, besides the favourable rate of 3.5% on the first €150,000 of the value of the sole ordinary residence, first-time buyers were also afforded a one-off exemption on the said amount between the period of November 2013 and December of 2014.<sup>131</sup>

Tenants can deduct rents from their tax in Spain and Portugal although in the latter case it is only a very small amount. In Portugal, landlords of old contracts have a fiscal benefit when they renovate rented dwellings.

Tax burdens for landlords have been sought to be alleviated in both Malta and Portugal. In Malta they may avail themselves of a newly-introduced 15% final withholding rate (rather than the usually applicable 35%) although this measure was admittedly introduced in order to encourage landowners to come clean on their rental income. Portugal reduced the landlords' estate tax and limited the taxable rate on rental income to 28%. It is too early to see the consequences of this new tax system although an increased in the number of advertised premises is already visible.

Spain aimed to encourage property owners to rent out their dwellings by granting them special tax benefits and allowing tenants to deduct 10% of the rent in their tax payment. As a result of these measures a certain number of "submerged" tenancies have already started to surface.

In Malta and Portugal, the law has been changed in order to alleviate tax burdens for landlords. In Portugal, the new tax system has already visibly increased the numbers of advertised rental dwellings. In Spain certain fiscal benefits have led to the surfacing of numerous hidden rental agreements.

Tax evasion is a visible problem in all of the three countries. In Spain it was reported that more than 50% of tenancies in 2008 were undeclared and that this generated a yearly loss of an estimated €473 million. Malta and Portugal do not have official data although it is similarly seen as a considerable problem.<sup>132</sup>

Tax evasion is a visible problem in the three countries. In Spain more than 50% of the tenancies were undeclared in 2008.

As regards the tenure-bias of the tax system it appears that in Malta rates are still made to favour homeowners, particularly first-time buyers. This may also be said in relation to Portugal although tax deductions for homeowners will no longer be available in 2016. In Spain, nowadays, homeowners and tenants have equivalent tax deduction from their annual tax payment.

In Portugal and Malta the tax system continues to promote homeownership although in Portugal this is expected to change. In Spain there are equivalent tax deductions.

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<sup>131</sup> Legal Notice 393 of 2013.

<sup>132</sup> As said above, Malta has attempted to limit the losses owed to tax evasion by lowering the rates applicable to rental income.

Spanish and Portuguese rental markets are showing signs of growth although it is not yet possible to reach the conclusion that it was a direct result of the new tax systems. In certain way, this seems to be the mere effect of the financial crisis (restriction of credit, high unemployment rate) which rendered the conditions for access to homeownership much more demanding. Malta has been affected much more mildly by the crisis and the system keeps largely favouring homeownership.

### 3. Comparison of tenures without a public task

#### 3.1. Evaluative criteria for the landlord

##### 3.1.1 Profitability

The **profitability** of the rent is one of the key factors for investors who are willing to invest money in the private residential sector. If we look at Spain, it seems that tenancy law is not so attractive if one takes into consideration that tenancy produces an annual net yield of 3% for trading companies entitled to tax rebate, 3.01% for SOCIMI (Spanish REITs), 2.9% for tenancies for young people between 18 to 30 years old, and 2.6% for the remaining tenancies.<sup>133</sup> The annual profitability that tenancy offers in Spain is similar to the one provided by a long-term deposit, which may yield 2.6% when it is contracted with a bank, 2.3% with a savings bank or even 3% through online banking.<sup>134</sup>

The net return for Maltese landowners was similarly estimated at a low 3%.<sup>135</sup> In both countries renting out property was hardly more profitable than other ordinary investments. In Malta, a 15-year bond issue yields around 4% per annum. In the Maltese case, however, one also has to keep in mind the appreciation of property prices; the latter was particularly strong during the pre-crisis era although it appears to have slowed down.<sup>136</sup>

In this respect, Portugal has introduced a new advantageous fiscal regime for landlord-investors in order to incentivise rental investments.<sup>137</sup> Rental agencies are thus seeking investors to acquire properties intended to be put up for rent and certain agencies have been even advertising returns ranging between 5.09% and 12.53%.

The following conclusions may be drawn from the comparison of Spain, Portugal and Malta in relation to topics dealing with profitability:

<sup>133</sup> J. Oliver Alonso, 'Informe sobre el sector inmobiliario residencial en España', 99 - 103, includes an estimate of the annual return regarding new rental housing, according to the average capital invested, which is estimated according to the average value of the home purchase at 1,983 €/m<sup>2</sup>, as this study is concerned with the prices of big cities or provincial capitals such as Madrid and Barcelona, among others. The average rent is set at € 624, and takes into account the notary and registration expenses (1% of the dwelling value that is distributed over the period of 15 years of investment), 0.4% per annum of the value of the dwelling for repairs, insurance (1.4%), community expenses (8.7%), rental management (4%), IBI and other taxes (4.9%).

<sup>134</sup> 'Informe trimestral sobre la rentabilidad de los depósitos bancarios', (iAhorro, 2012) [www.iahorro.com/ahorro/gestiona\\_tus\\_finanzas/informe-trimestral-la-banca-online-ofrece-mas-rentabilidad-al-ahorro-y-cobra-menos-intereses-en-sus-hipotecas.html](http://www.iahorro.com/ahorro/gestiona_tus_finanzas/informe-trimestral-la-banca-online-ofrece-mas-rentabilidad-al-ahorro-y-cobra-menos-intereses-en-sus-hipotecas.html), 18 January 2013 (visited 2-2-2015).

<sup>135</sup> *Ibid.* D. Camilleri, 34.

<sup>136</sup> *Ibid.* D. Camilleri, 34. The author also estimates the landlord's capital return on the value of the property; which was previously said to be at 7.5% p.a. but appears to have now fallen to 3.25% p.a. following the slowdown in the construction industry.

<sup>137</sup> The tax rate for all rental income was set at 28%.

1. In all three countries **the landlord must pay for the most relevant repairs that are needed by the dwelling**. In Spain the law exonerates the landlord from the obligation of maintenance in only three cases: if the damage is attributable to the tenant or to those who live with him (art. 1563 and 1564 CC and art. 21.1 LAU 1994); if the dwelling is destroyed for reasons not attributable to the landlord, in which case the tenancy is extinguished (art. 28 LAU 1994); and if the repairs are of a minor nature and they arise from the ordinary use of the dwelling, which shall be borne by the tenant (art. 21.4 LAU 1994).<sup>138</sup> Malta follows these rules as well to greater or lesser extent.

2. The **cost of utilities and other charges and expenses** are, according to the standard practice in Portugal and Malta paid by the tenant. In Spain the same result may be reached through special agreement on the contract (including the expenses within the condominium ones, like in Portugal).

3. Finally, in regard to the **agreement concerning the initial rent and its revision**, in Spain, Portugal and Malta the parties are **free to establish** the initial amount of the rent at the time that the tenancy contract is concluded although there are some particularities regarding its **increase**. Portugal and Malta allow the parties to agree on future rent increases and landlord are not bound by any kind of control other to those dictated by the market (however, in Portugal the inflation rate is of application unless otherwise agreed on the tenancy contract). The absence of rent control was perceived as necessary by the Maltese legislator since in the absence of relevant profit landlords could never be expected to put their dwellings back on the market. In a similar manner, in Spain the parties can freely agree on the terms over which the rent can be increased, although in the absence of such an agreement the parties will be bound by the Consumer Price Index (IPC).

In the three countries 1) landlords must pay for the most relevant repairs of the rented property, 2) utilities and other charges and expenses are usually borne by tenants and 3) the agreement on the rent and on the rent increase is freely determined by the parties. In neither of the three countries does property letting seem to be particularly profitable for the landlord.

### *3.1.2. Property rights respected de iure et de facto*

In relation to the **risk of default with rent payment**, in both the Spanish and the Maltese legal systems default on the part of the tenant, albeit only in respect of one monthly payment, shall be a sufficient reason for the landlord to terminate the contract. Both legal systems have introduced amendments in recent times in order to speed up the eviction process. In Malta the 2009 amendments also introduced a new procedure in order to expedite cases of evictions (judgment could even be given on the first hearing should the respondent fail to either appear at the sitting or prove a valid defence in his favour). Conversely, in Portugal the landlord has to wait for three months prior to putting an end to the tenancy contract.

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<sup>138</sup> Small repairs are current expenditures that are not indispensable in order for the home to continue to meet its condition of habitability or its purpose of serving the agreed use. They are also called minor works because they do not affect the structure or alter the configuration, so they do not need permission from the lessor. For example, the repair of taps or blinds, toilet cisterns (SAP of Lleida 23 April 1999, AC 1999\4415 FJ. 2), maintenance of the boiler and domestic appliances, which includes cleaning of filters, replacement of parts or other elements (SAP of Madrid 26 December 2009, JUR 2011\159830 FJ. 2).

It is noteworthy to add that in Spain public measures have been introduced to encourage the supply of dwellings for tenancy purposes, such as the "avalloguer" of the Catalan Government that guarantees the landlord's income up till the default of six monthly payments.<sup>139</sup> Other examples are social housing programmes, which offer guarantees in rental income collection, the state of the housing and legal defence. With the Act 4/2013, a register of final decisions on unpaid rents ("register of defaulters") has been created (art. 3 Act 4/2013) and is currently under development.

Another risk for landlords is the **abuse or deterioration of the property at the hands of the tenant**. In Spain, the tenant is obliged to use the thing according to the standard of due diligence (that of a good man of the family) and to return the property as he received it from the landlord, although he is not liable for the deterioration of the thing due to its ordinary use or where there would be no fault on his part. In addition, there exists a *iuris tantum* presumption of culpability on the part of the tenant, who shall prove that the deterioration occurred through no fault of his own.<sup>140</sup> Similarly in Malta it is the tenant's responsibility to prove that they occurred through accident or through a force beyond his control.<sup>141</sup>

As a general rule, **violation of the lease contract** by the tenant is a cause for his **eviction** in Spain, Malta<sup>142</sup> and Portugal; exceptions are only made in specific circumstances where the tenant would still deserve protection.

Thus, in Spain article 704.1 LEC provides that an occupier of his sole residence may ask for a one-month extension of the contract on the grounds of need. However, there are some cases in which case law<sup>143</sup> has suspended the eviction proceeding for a longer period if it is proven that there are minors living in the dwelling and that they would be at risk of becoming homeless. The measure can be based on the higher interest of children set out in Organic Law 1/1996, of 15<sup>th</sup> January, concerning the protection of minors.<sup>144</sup>

In Portugal, the tenant can also apply to court if, based on social needs,

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<sup>139</sup> Approved by Decreto 54/2008, de 11 de marzo, por el que se establece un régimen de coberturas de cobro de las rentas arrendaticias de los contratos de alquiler de viviendas (DOGC 13/03/2008 núm. 5090).

<sup>140</sup>Therefore, he only answers for any abnormal use of the housing, (SAP of Zaragoza 30 July 2008, FJ. 2, JUR 2008\175818). Such as, for example, the repair of a heater when there has been a proper maintenance by the owner (SAP of Valencia 15 February 2003, JUR 2003\141413). It is necessary to check for dirt, abnormal scratches on the walls, because he will be liable for cleaning when the degree of dirtiness implies his not having performed regular cleaning (SAP of Zaragoza 26 November 2010, FJ. 2, AC 2010\2367 FJ. 2), predictable and avoidable fire (STS 12 February 2001, FJ. 3, RJ 2001\850). In addition, there is an *iuris tantum* presumption that the dwelling was received by the tenant in good condition, unless there is mention of the state of the property before renting it (art. 1562 CC). The presentation of an invoice for painting and filler work in the hall is not sufficient evidence for damage to be charged to the tenant - it is considered work to get the house into condition for its next rental, which is borne the lessor (SAP of Zaragoza 26 November 2010, FJ. 2, AC 2010\2367).

<sup>141</sup> The responsibility of the tenant extends to the acts of his dependants and even subtenants who have not been acknowledged by the landlord.

<sup>142</sup> Kan. Lorenzo Micallef et v. Carmelo Zahra, decided by the Court of Appeal on the 10 March 1952.

<sup>143</sup> For example, in SJPI of Madrid on 6th March 2013 (CENDOJ 28079420392013200001), the judge decides to suspend the eviction of a mother with three minor children agreed in an eviction procedure for non-payment, not for a month but until the completion of the school year, which means a four-month period in this case.

<sup>144</sup> BOE 17/01/1996 N° 15.

he or she would need to extend the period within which to vacate the dwelling. (e.g. pregnancy, health problems, etc.). In such cases the court would not be able to delay the abandonment of the premises for more than 5 months.

In Malta, the Court has on various occasions manifested a certain caution in terminating tenancy contracts, particularly in cases of residential dwellings, since a decision against the tenant might potentially lead to homelessness. It is a well-established principle in Maltese jurisprudence, for instance, that any doubt on the interpretation of a clause has to go in favour of the tenant<sup>145</sup> but courts decided that financial difficulties of tenants would not exempt him from payment.<sup>146</sup>

An ulterior protection for landlords is the **deposit**, which is usually used to pay the rent in case of default, keep the property in good conditions and pay utility bills. Nevertheless, there are some relevant differences among the three countries. In Spain the amount for the deposit is the equivalent of one month's rent according to law and has to be delivered to the Public administration. In Portugal the landlord is entitled to ask for up to 3 months rent at the beginning of the contract (treated as rent anticipation), while there is no legal provision about the way the landlord has to manage the deposit. In Malta the Civil Code is silent on any sums of money requested as a security payment prior to entering a rented premises. Apart from the deposit, the Spanish and Portuguese legislation do not provide for any **legal liens nor pledges** on tenant's belongings although can be agreed by the parties in Spain. The Maltese Civil Code, on the other hand, grants a special privilege to the lessor over particular movable property of the lessee.<sup>147</sup> The law in fact states that the debt due to the lessor for the rent of an immovable entitles the landlord to a privilege over the value of all things that serve to furnish the dwelling. **Personal guarantors** can also be agreed under each of the respective laws. **Insurance policies** are more and more common in order to cover the costs that may be incurred by the landlord in the management of the tenancy contract in Spain. This, however, does not appear to be the case in either Malta or in Portugal.

In Spain the landlord may **terminate the tenancy contract before the agreed term** by giving notice to the tenant two months in advance. The same cannot be said for either Portugal or Malta. In Portugal a landlord only has this right in open-ended contracts (in which case the applicable period would be that of two years before the end of the contract). Moreover, the landlord would not have the right to terminate the contract if the tenant would either be over the age of 65 or severely disable and the rental agreement would have been entered into before 28 June 2006.

Whereas in Spain, in order to decongest their amount of work, **alternative dispute resolution mechanisms** (ADR) are being promoted, such as the conciliation, mediation and arbitration systems, in Portugal and Malta they do not play a relevant role. In Portugal, the landlord will have to access the National Office for Tenant's Eviction (BNA) to achieve the vacancy of the property, which is an administrative body established in order to complete the eviction procedure within a period of three months. If the tenant has a legal

<sup>145</sup> Giuseppe Chetcuti Bonavita v. Joseph W. Naudi, decided by the Court of Appeal on the 22 October 1956; Frank Camilleri v. Wing Commander Philip Morgan, decided by the Court of Appeal on the 28 January 1949; more recently in George Camenzuli v. Emanuel Fenech, decided by the RRB on the 28 June 2012.

<sup>146</sup> Francesco Sciberras v. Ignatius Peter Busuttil, decided by the First Hall (Civil Court) on the 17 March 2005.

<sup>147</sup> Civil Code, Article 2009(e).

reason for not vacating the dwelling, he has to go to court to contest the claim (when it is not regarding as a tenant's eviction, other landlord and tenant conflicts can be dealt with in a Court of Peace). In Malta, the process was certainly expedited by the setting up of the new procedure allowing the Rent Regulation Board (RRB), a special judicial body, to decide cases summarily wherever the allegedly defaulting tenant failed to contest the application or satisfy the RRB that he had a valid *prima facie* defence.

Therefore, rather than promoting ADR mechanisms, Portugal and Malta have tried to expedite eviction process through new administrative or judicial procedures.

Spain and Malta have been particularly active in improving the position of landlords in case of rent default. Thus, one defaulted payment is enough to terminate the contract. Three months of arrears are, on the other hand, necessary Portugal. In addition, measures to ensure the payment of rent or to avoid "professional defaulting tenants" are being introduced in Spain. Recent reforms in Spain and Malta were meant to expedite eviction proceedings whilst Spain has also been promoting ADR methods. In Portugal, landlords can achieve a quick eviction (within three months) through an administrative body called the National Office for Tenant's Eviction (BNA).

A similar trend can be identified in case of the property deterioration: in Spain and Malta it is presumed *iuris tantum* that it is the tenant who is responsible for the deterioration.

As a general rule, violation of the lease contract by the tenant is usually a cause for his eviction in the three countries, and only vulnerable cases (such as people suffering from health problems or minors) are afforded additional protection in Spain and Portugal. In any case, the period within which they would be allowed to remain within the premises would be limited to a few months. On the contrary, in the three countries the landlord can terminate the contract in advance if he needed the property for himself or for any of his close relatives, simply by giving a few months notice in advance (six in Portugal – with important limitations – three in Spain and one in Malta – although in the latter this must have been expressly agreed in the contract).

In relation to the deposit, there is no limit in its amount in Malta, while it is limited to an equivalent of three months and one month rent in Portugal and Spain respectively. In Spain it should be delivered to the Public Administration, while in Portugal it is treated as advance rent in Portugal (although the parties can agree to consider it as deposit). Maltese law is silent on this matter. Apart from the deposit, no liens nor pledges on tenant's belongings in favour to the landlord exist Spain and Portugal although in Malta the Civil Code grants a special privilege to the lessor over particular movable property of the lessee. Existence of personal guarantors can be agreed by the parties in the three countries and whilst increasingly common in Spain, insurance policies are still not the norm in either Portugal or Malta.

### 3.1.3. Construction and rehabilitation capabilities

Whereas there is no special regime of mortgage credit for landlords who want to renovate or rehabilitate a rented dwelling in either of the three countries, there exist public subsidies for rehabilitation of rented buildings/houses in each of them.

However, only Spain has recently started to lay down the so-called "rehabilitation for rent" (art. 17.5 LAU 1994). This measure allows the parties to agree that the tenant could substitute the rent for a rehabilitation plan (by

undertaking to do the works himself or else by hiring professionals). In Portugal and Malta the rent can only be paid in money.

### 3.2. Important evaluative criteria for the tenant

#### 3.2.1. Affordability

Since there exist no limits for the establishment of the initial rent or any subsequent increases in any of the three jurisdictions, tenants may face unexpected increases during the contract. A good balance is, however, reached in relation to repairs since structural ones are usually borne by landlords while day-to-day reparation costs and utilities are the responsibility of the tenants. Contributions towards the expenses of the condominium are also agreed upon by the parties although in Spain and Portugal they are often transferred onto the tenant. In Spain, tenants have to additionally pay transfer taxes (due to the mere conclusion of the lease contract) which since 2013 should be formalised through a notarial deed and subsequently registered in the Land Registry if tenants wanted to ensure protection in the case of the sale of the property by the landlord to a third party. This obviously adds the notarial and registration fees to the costs. Similar taxes as well as notarial and registration fees exist in Portugal, although for urban leases enjoy a reduction of 25%. The three States also foresee aid for the most vulnerable tenants.

Structural repairs apart, tenants usually bear all the other costs for minor reparations, utility expenses, fees and taxes that have to be added on top of the amount of rent. This might affect the market access by categories of vulnerable people although state aids are available in each of the three jurisdictions.

#### 3.2.2. Stability

The tenants' right under a contract of lease is deemed as a **personal** one and although the right of first refusal may exist under certain circumstances, it may be exercised under certain conditions that may undermine its effectiveness. In addition to this, as a general rule, there are no social defences available at law against evictions. Therefore, even in the case of individuals held vulnerable, the Court would not be able to prolong their occupation beyond the stipulated period<sup>148</sup> although a judge may exceptionally prolong the occupation for a further the period of one month in Spain and five months in Portugal.

In Spain lease contracts do not need to be put down in **writing** although any of the parties can compel the other to do so. In fact, even, informal situations by which someone is entitled to live within another's premises in exchange of any form of consideration (eg. oral agreements to stay in exchange of an amount of money similar to a rent) have been reconsidered as a proper lease by the Supreme Court. In Portugal and Malta, tenancy contracts must be in writing against the pain of nullity (although in Malta this legal provision has not yet been confirmed by jurisprudence). An unwritten agreement would therefore leave the tenant with little protection even in the case where he would prove both the payment of rents as well as his proper conduct (in Portugal he might raise the claim of abuse of law by the landlord).

<sup>148</sup> This was the case in Awtorità tad-Djar v. Anita Doris Savona (decided by the RRB on the 28 June 2012), which involved an unemployed beneficiary of the Housing Authority whose child had fallen ill. As a result of the medical costs she could not keep up with the rent and despite understanding that this was a genuine case the Board could do nothing but grant the applicant's demands for the payment of rent. In affirming his impotence, the judge did, however, urge compassion from the Authority in the execution of the judgment.

While **registration** of the lease contract is not possible in Malta (no register is available although it is foreseen by the legislation) both Portugal and Spain provide the possibility of registration. In Spain the drafting of a notarial deed and the subsequent registration of the contract are necessary in most cases for the tenant's right to remain in occupation of the property in the case of the sale of the premises by the landlord (art. 13.1 LAU).

In relation to **black market incentives** it seems that, despite the benefits that are available, taxation plays an important role in Spanish and Maltese legal systems. Since 2013, it has become less convenient for Portuguese landlords to conclude unofficial contracts since he would preclude the possibility of availing himself of the fast eviction procedure conducted by the BNA. Faster eviction processes in Spain (since 2012) might help to reduce the ca. 55% of black market leases that existed in 2008. However, a factor that contributes to the black market in Spain is the tenants' right to remain within the premises for a minimum period of three months.

In this regard, neither legal system do not foresees **open-ended** leases, which means that a specific term has to be agreed on the tenancy contract, although as already mentioned, tenants in Spain have the right to remain within the premises for three years (it used to be five years prior to Act 4/2013). In Portugal and Malta, however, old open-ended contracts are still in force although both countries have foreseen mechanisms that will eventually phase out these leases.

Under the new Spanish law since Act 4/2013, the parties can exclude the **right of first refusal**. In Portugal the tenant may acquire it only once the first three years would have elapsed. The right of pre-emption is not contemplated by Maltese tenancy law. The three jurisdictions therefore seem to hindering the tenant's stability, thus favouring the free marketability of the property.

**Massive rent increase** seems to be also permitted under each of the respective laws.

Malta and Portugal demand a written agreement for the validity of the tenancy agreement. This helps the tenant to prove its legal status, although it is still unclear to which extent does the contravention of this rule affect the stability of well-behaving tenants. Conversely, in Spain oral agreements are valid.

In addition, whereas in Portugal tenancy contracts are not affected by the sale of the property, including judicial sale, in Spain the registration of tenancy contract written in a notarial deed is necessary for the tenant's right to remain in occupation of the premises. Although there is no duty to register a contract, a tenant would in each case have the right to remain within the dwelling until the expiration of the agreed term.

There are incentives and disincentives to black market in each jurisdiction. Portuguese landlords cannot use the quick eviction procedure unless the contract is declared. Spanish landlord are, on the other hand, disincentivised by the minimum compulsory duration of the contract. Open-ended leases only exist in relation to the old regimes in Portugal and Malta although mechanisms have been put in place to extinguish them. The right of first refusal has been limited in Spain and Portugal whilst it is not contemplated under Maltese tenancy legislation. In the three jurisdictions massive rent increases are possible, thereby exposing the tenant to relative instability.

### 3.2.3. *Flexibility*

In both Spain and Portugal the tenant is entitled to withdraw from the tenancy contract; whilst in the former a lapse of a minimum period of six months

is necessary, in the latter the contract should have at least lasted for a period equivalent to one third of its agreed duration. In both cases the tenant must give notice of his intention to the landlord in advance and the parties may agree that in such an event the tenant should compensate the landlord.

In Malta the tenant may not terminate the agreement singlehandedly unless he is entitled to do so by the contract.

#### 4. Comparison of tenures with a public task

##### 4.1. Generalities

In Spain and Portugal rented social housing is usually either managed by the public administrations themselves (or through the creation of Agencies, public companies and municipal companies depending on them) or by NGOs that would have been transferred dwellings by the authorities. In Spain public dwellings could even be rented out by the public developers that would have built them. In Malta, rental social housing is represented solely by Government-owned dwellings, except for certain NGOs that provide temporary shelter.

Two common trends can be identified in the countries under study. The first one is the small share of social housing: less than 2% in Spain<sup>149</sup>, 3% in Portugal and 5.2% in Malta. This is quite relevant particularly when one takes into account that, for instance, 21% of the Spanish population is living below the poverty threshold and their demands can hardly be fulfilled.

The second one is the enactment of housing plans aiming at encouraging social housing for those groups who are most in need. These programmes include, for example, rotation housing (art. 14 Spanish Housing Plan 2013-2016), the Catalan Emergency Plan (which aims to rent 3,264 vacant dwellings) and the “Social inclusion housing and accommodations” Programme (which aims to transfer rented social housing to local entities for their use in situations of social emergency). In this sense, a type of tenure with a public task in Portugal is the so-called “Social Rental Market”. This system was not created by a Decree-law, but in a partnership between banks and municipalities or other administrative entities in response to the crisis. Its aim is to rent foreclosed dwellings (repossessed by banks) at affordable prices (on average 30% lower than a market rent) to those who are not vulnerable enough to access social housing but who, at the same time, cannot pay a market rent. The mild impact of the crisis in Malta has not prompted any new legislation in this respect.

Spain, Portugal and Malta have a small share of rented social housing and it is usually managed by the public administration (or public entities created by them) and NGOs. This seems to be insufficient in countries that were hit by the crisis (Portugal and Spain) which have followed to adopt new initiatives in response to the general economical difficulties.

##### 4.2. Evaluative criteria for public/social/private subsidized landlords

According to the Spanish Housing Plan 2013-2016: a) aid may be received if dwellings under construction or undergoing rehabilitation are qualified as housing with a public task for tenancy purposes for a period of fifty years<sup>150</sup> (administrations or public entities, non-profit entities and private companies with which the corresponding public administration constitutes a right to build for a period of 30 years may obtain such aid<sup>151</sup>) and; b) public or private entities that

<sup>149</sup> Eurostat, ‘Housing Statistics in the European Union. Income and Living Conditions’, (2010).

<sup>150</sup> Article 14.

<sup>151</sup> Article 15.

are awarded projects of regeneration or urban renewal may apply for aid to carry out works of building rehabilitation, reconstruction, urbanization and redevelopment of public spaces.<sup>152</sup>

As has been already mentioned, social housing in Portugal is provided by public entities, either national or municipal (there is no social housing provided by private entities) and in Malta the funding is similarly provided entirely by the State.

In Spain there are aids directed at private landlords who develop housing social rented housing, while in Portugal and Malta it is solely promoted by the public sector.

#### 4.3. Evaluative criteria for the tenant

##### 4.3.1. Access

There are increasing problems in meeting the social housing demand in the three countries. In Spain, 2% of social housing seems not to be enough, especially for the needs that arose as a consequence of the crisis; many evicted families are helped economically or even hosted by their older relatives. In Portugal, particularly in the bigger cities, the supply of dwellings is not sufficient, and there are applicants who have been waiting for a public dwelling for several years. Lastly, in Malta difficulties relating to budget as well as land planning could not sustain the pace at which it was erecting blocks of social housing and figures suggest that the demand for social housing is once again on the rise. Furthermore, in all of them the selection system seems to be, in general, objective and transparent because both objective and subjective requirements must be met, although in practice the process might give rise to clientelism.

While selection systems in the awarding of social housing seem to be objective, the number of available social dwellings does not seem to be sufficient in meeting the demand.

##### 4.3.2. Affordability

In Spain, Portugal and Malta the **initial rent and its revision** is controlled in the case of social rented housing. Thus, in Spain the rent shall be adapted to the prices established by each Autonomous Community, or in default, by the State that will rely on the criteria of the legal regime of housing protection, the area where housing is located and the square metres of the dwelling.<sup>153</sup> The revision may be done annually according to the percentage changes of the CPI.<sup>154</sup> In Portugal the initial amount of the rent and the possibilities of rent increase normally depend on the financial capacity of the household.

However, in Malta beneficiaries are subject to a biannual revision of their rent. Every two years, therefore, tenants living in governmental units would be asked to submit evidence of their income in order to have their rates reassessed according to the prices fixed by the public authority. This is a system that it is neither foreseen in Spain nor in Portugal.

<sup>152</sup> Articles 24 and 28.

<sup>153</sup> Article 5.6 of the Spanish Housing Plan 2013-2016 and second and fifth of the First Additional Provision LAU 1994.

<sup>154</sup> Third paragraph of the First Additional Provision LAU 1994.

The regulation of the **deposit** is divergent. In Spain some public bodies (state administration, autonomous communities, local administration), acting as tenants, are exempted from providing a deposit when the rent is to be paid by their own budget<sup>155</sup> however, when the administration acts as a landlord and signs a tenancy contract according to LAU, tenants must provide a deposit in the same terms as if it were a private rented property.<sup>156</sup> In Portugal the general private law rules are regularly applicable although in Malta Social housing beneficiaries are not expected to put down any deposit on their dwellings.

General rules apply for **repairs** of social tenements in Spain. However, in the case of publicly-owned rented properties, the limits until which rents can be increased due to repairs can be altered in relation to those foreseen in article of the 19 LAU for private-rented properties (eg. maximum 20% of rent increase). In Malta, the social housing beneficiary would be responsible for the maintenance of the dwelling that he or she would be renting from government.

In relation to **rent subsidies** for vulnerable tenants, only Spain mentions some differences, with general rules applicable to the private rented sector. Usually, tenants of social housing can benefit from the same subsidies as regular ones (eg. in Catalonia, an economic aid exists in case of default of the rent in case the tenant is unemployed for a long-term). But in addition to this, each Autonomous Community or municipality can provide specific aids for tenants of public-owned properties and other social tenants.

While some aspects of the regulation for social sector tenants are different from that of private tenants (initial rent and rent revision, deposit and rent subsidies) others are the same in the three of them (utilities and responsibility for repairs).

Thus, in Spain, Portugal and Malta the initial rent and its revision is, to some extent, controlled in the case of social rented housing. Only Portuguese, and usually Spanish beneficiaries, that are requested to provide a deposit. Social housing beneficiaries would, however, in all cases be responsible towards the payment of their own utility bills and any ordinary repairs. As concerns rent subsidies for vulnerable tenants, only Spain mentions some differences with general rules applicable to the private rented sector.

#### 4.3.3. Stability

Broadly speaking, the position of tenants within social housing is quite stable in the three legal systems and they have more stability than tenants of private rented dwellings. This is mostly due to the following elements:

- Provided the tenant pays the rent punctually and does not breach the contract, he has the right to stay as long as he needs the dwelling either for a definite (thanks to the long protection period of the tenancy contract, Spain) or indefinite period of time (Portugal).
- Tenants are encouraged to acquire the their dwellings (Malta) or entitled to do this under certain circumstances (in Spain this is usually done in cases of hire-purchase agreements whilst in Portugal this possibility is

<sup>155</sup> Article 145 of Act 13/1996, de 30 de diciembre, *de Medidas Fiscales, Administrativas y del Orden Social* (BOE 31 12 1996 núm. 315) already granted this exemption to State, Regional and Local Administrations, autonomous bodies and law entities, public and dependent ones. Thus, the Fourth Additional Provision of Act 39/2010 also grants it to the Mutual Funds for Accidents at Work and Occupational Illness associated to the Social Security, as well as their Centres and Joint Entities.

<sup>156</sup> LAU, Article 36.

offered three years after the conclusion of the contract). In Portugal, municipalities are equally entitled to sell the dwellings directly to the tenants.

Tenants in social rental dwellings enjoy a relatively greater degree of stability than private rental tenants.

#### 4.3.4. Flexibility

In tenures with a public task, the tenant is usually entitled to terminate the tenancy in advance without any penalty. As regards the subletting, it depends on specific rules of municipalities in Spain and, generally speaking, it is not allowed either in Portugal or in Malta.

### 5. Conclusion

Spain, Portugal and Malta present more similarities than differences as far as housing law is concerned with the former two countries sharing more legal features between themselves than with Malta since the recent financial crises has imposed on them similar economic changes.

In Spain, the legislative amendments on housing have reflected the problems discussed by the public authorities and international bodies (OECD and IMF). In this regard, the main concern has been that of finding a more flexible scheme that could foster the rental sector through the protection of the landlords' interests. Measures such as the reduction of the forced extension term, the possibility for the landlord to freely increase the rent through an update of the agreement, the possibility of giving up the right to pre-emption or the expedition of eviction processes will, however, hardly allow the reform to reach its intended purpose since neither do they provide stability and certainty to the tenant nor do they facilitate access to decent and adequate housing. The main public concern about the tenants is, in fact, the promotion of their stability and the improvement of affordability.

The impact of the crisis similarly required Portugal to carry out substantial reforms in its rent legislation (the amendments came into force in 2013). In an attempt to reduce households' indebtedness government attempted to slow down the homeownership trend in favour of the stimulation of the rental tenure. The reinvigoration of the latter was therefore attempted through the introduction of a more liberal regime that was meant to both increase investor confidence as well as activate the significantly high percentage of vacant dwellings. The direction taken by the Portugal is therefore identical to the one followed by Spain with new legislative changes, such as the elimination of mandatory pro-tenant rules, which shift the system towards an increased freedom of contract. The new law has simultaneously aimed to extinguish old contracts (characterised by low rents) throughout a period of 5 years, entitling landlords to raise the rents and transforming the old open-ended contracts into short-term contracts. In addition, the new law gives landlords a better fiscal treatment by reducing the rates payable on their rental income.

The process happening in Malta largely reflects that of the other two jurisdictions although legislative changes have not been prompted by economic vicissitudes. The main thrust behind the most recent amendments was that of gradually bringing a decisively pro-tenant system to an end. The rigour of the latter regime had both engendered the stagnation of the market as well as

instilled a certain feeling of mistrust towards government amongst the majority of local landowners. In attempting to regenerate the rental market government therefore introduced a particularly liberal policy which deprived tenants of any sort of guarantees in relation to their tenure.

One can therefore immediately trace similar patterns in the three respective systems wherein strong pro-landlord legislation has been dictated by the need to reinvigorate the stagnant rental sectors. The latter had been paralysed by the very same legislation that allowed excessive protection in the form of disproportionate rents and mandatory prolonged terms. This had resulted in a considerable market distortion which ended up discouraging any sort of investment in the sector. The new legislative acts therefore aim at stimulating the supply of dwellings, particularly through the activation of the high numbers of vacant dwellings that are present in each of the three countries, although the evident downside of this liberal policy is the considerable weakening of the position of the tenant.

Beyond the failure in striking an effective balance, the legislative frameworks in each of the three countries additionally present a variety of other problems. These are mostly due to the neglect of the tenure by each of the respective governments that until recently continued to emphasise home ownership policies.

The main identifiable problems in the three countries, summing both legislative as well as structural shortcomings, are the following:

1. The rental market is limited, since it only represents a minor proportion of the total housing stock, when nowadays and since 2007 the demand for rental housing is increasing because of those people in need of housing who are unable or unwilling to access housing through the homeownership type of tenure. Rental is therefore seen as an 'inferior' form of tenure.

2. The market is not affordable, because those with the lowest income have difficulty in paying the current market prices, particularly in Spain and Portugal. In addition, there is not enough social housing to meet the needs of those with low income. Moreover, young people are amongst the most disadvantaged with the three countries displaying relatively high figures in relation to the average age at which young men and women abandon the family unit.

3. The markets in the three countries lack transparency. A considerable percentage of leases are undeclared and there are no compulsory administrative registers allowing for the control of the existing tenancies or ensuring that tenancies are adapted to the law and do not contain unfair terms (although one such register is currently under development in Spain and in Malta it is foreseen by the legislation). A register would also constitute a way through which acquirers of property, especially foreigners, could obtain the necessary guarantees as to the true availability of the building.

4. The state of repair of housing stock. The low rents imposed by the legislation affects the quality of the leased dwellings since owners are discouraged from rehabilitating them. This, in turn, aggravates their deterioration.

5. In the there countries there is an evident binomial between homeownership and tenancy as far as housing access is concerned, which might pose problems when it comes to satisfying people's right to decent and adequate housing especially for those who do not have sufficient resources to buy a dwelling or do not want to make the economic effort that it entails. The autonomous region of Catalonia (Spain) is about to regulate intermediate tenures (shared ownership and temporal ownership) that offer flexible schemes intended to grant more availability and stability in housing, while being economically more affordable for users.

6. In the three countries there is the co-existence of various rent regimes. This situation has not only led to legal uncertainty but it has also created a tense climate within tenancy relationships leading to increased the litigation rates and unfair practices.

7. Urban tenancy is regulated as a personal right, in which the tenant needs the landlord's collaboration in order to stay in the peaceful enjoyment of the dwelling. The tenant does not have a direct and immediate power over the thing, and it does not entitle him to alienate his right without the owner's consent or to burden it (i.e. sublease), unlike what is possible with the leasehold in common law jurisdictions. Therefore, his right to dispose and take action is limited, and for this reason it is not fully considered as a real alternative to homeownership.

8. As mentioned above, the tenants' stability in the dwelling decreases: the protection period is reduced from five to three years in Spain whilst in Portugal and Malta no minimum term is applicable. Moreover, whilst the law leaves it up to the parties to agree on the amount of rent, it does not establishing any indexing system that limits the maximum rent and ensures the affordability of rental prices.

9. The eviction processes are considerably lengthy despite the simplified procedures that have been introduced. Methods of ADR, where available, are hardly encouraged.

10. There is no possibility for the tenant to withdraw unilaterally from a rental contract (unless it is so stipulated in the contact or else given certain specific conditions in Portugal or compensations to the landlord in Spain). This has an undoubted effect on the tenant's flexibility since it strongly limits his/her capacity to move to another place or to another country, even when his/her need to move away is based on unexpected circumstances such as unemployment or health problems.

11. There is a conspicuous absence of representation for tenants. This acquires even more significance given the current liberalising trends in the three countries. As a matter of fact, tenants do not have any common forum wherein they could raise their concerns or negotiate collectively with other bodies.

Predictably, the main differences between the countries are mostly owed to the varying impact that the crisis has had on each of the countries. Whilst in Spain and Portugal the economic slowdown spelt the reduction of available credit, in Malta it merely resulted in slowing down the growth of property prices

and improving the affordability of home ownership. Therefore, whilst the growth of the tenancy market in Spain and Portugal is attributable to the stricter conditions in the granting of mortgages, in Malta it is probably owed to the growing influx of immigrants (both EU as well as third-country nationals). The crisis has also meant the reorientation of the Spanish and Portuguese housing plans that unlike Malta, which continues to promote ownership, have now started emphasising on renting as a choice of tenure. Another interesting difference is that whilst the right to housing is contained in the Spanish and Portuguese constitutions it is absent from the Maltese; although it must also be said that in neither of the former jurisdictions is it directly enforceable.

It is also worthy to note, however, that promising solutions can also be pointed out in these countries. Most of these have been elaborated as a response to the economic crisis that has exposed particular categories to situations of vulnerability. The most interesting initiatives in Spain include:

1. The regulation of intermediate tenures in Catalonia (temporary ownership and shared ownership) so as to make the dichotomy between tenancy and homeownership more flexible.
2. The recognition of zero taxation to SOCIMI (S-REITS), which encourages the creation of large-cap companies that can help to structure the rental market thanks to a significant increase in both the supply of rental housing and the professionalism and transparency in this sector. In addition, the interest of international investors in the Spanish market is revitalized.
3. The regulation of the rehabilitation for rent, which allows the payment of the rent in kind; this makes the tenants' payment easier and improves the quality and conditions of rental housing.
4. The regulation of the State Housing Plan 2013-2016, which is aimed exclusively at promoting tenancy and not the purchase, and recognizes subsidies not only for the poorest groups but also for rehabilitation, regeneration and urban renewal purposes in order to improve the quality of cities and make them more sustainable.
5. The regulation of urgent measures so as to prevent the loss of the dwelling by the most disadvantaged groups, such as aids in case of default, for the benefit of long-term unemployed, emergency tables that award public housing quickly (about a month) in cases of necessity. Although these measures are insufficient at present, its implementation shows a greater involvement of public authorities to face the current problem of homelessness of many citizens since the international crisis that began in September 2007.

In Portugal, one of the most interesting solutions and factual practices is the Social Rental Market system, which was a result of the financial crisis. Since banks were not able to sell houses and apartments which they had repossessed following mortgage defaults, they created a partnership with public entities (municipalities and others) to advertise the available dwellings and select beneficiaries. The rents are, on average, 30% lower than normal market rents, and therefore the tenants are low middle-class families, who are not poor enough to access social housing but could not pay a current market rent. Curiously, many of those new tenants were the former mortgagees, who were not able to pay their mortgages. However, these contracts do not have a long duration. They are commonly made for 2 years with automatic renewal for

subsequent periods of one or two years as banks want to retain the possibility of selling these properties upon the recovery of the market.

The situation in Spain, Portugal and Malta therefore presents a period of transition where following years of marginal importance rental policies are once again being prioritised in the political agenda. Neither of the three countries could, however, readily proceed to propose rental as an alternative to ownership since they faced the prior task of reactivating a market that over the years had jolted into a state of paralysis. It is evident that the current legislative framework is not yet ready to offer a real and durable solution for households who cannot access the ownership market although increased legislative attention might certainly achieve the aim of strengthening the position of the tenant within an optimised and well-functioning market.

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