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

Intra-team Comparison Report for

MALTA, PORTUGAL, SPAIN

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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.²

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

¹ 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)).

² 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,³ 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.⁴ 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.⁵ Moreover, legislative oscillations from one position to another led to the simultaneous co-existence of various regimes.

³ 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 Estrategico 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].

⁴ 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.

⁵ 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.⁶ Tables 1, 2 and 3 show the evolution of the respective housing markets in Spain, Portugal and Malta during the past decades.⁷ 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.⁸

Table 1. Evolution of the percentage of tenure in Spain⁹

%	1950	1960	1970	1981	1991	2000	2006	2008	2010
Ownership	46.9	50.6	63.4	73.1	78.1	82.8	83.4	83.2	83.0
Tenancy	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 Portugal¹⁰

Year	2001	2011
Ownership	75,71%	73,24%
Rented	20,85%	19,91%

Table 3. Trends of Owner Occupied and Rented dwellings in Malta out of entire housing stock¹¹

Year	1948	1957	1967	1985	1995	2005	2011
Owner occupied	23.1%	26.1%	32%	53.9%	68%	75.2%	76.5%
Rented¹²	76.9%	73.9%	68%	46.1%	23%	20.7%	19.9%

⁶ 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 (Novaeconomics 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)

⁷ Portugal displays similarly high home ownership rates of 73%, as against a much inferior share of 20% rented dwellings.

⁸ E. Molina Roig, *TENLAW: Tenancy Law and Housing Policy in Multi-level Europe, National Report for Spain* (provisional draft), 2014, 6].

⁹ 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.

¹⁰ 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=gd9VVPeWLIzjaryyqOAL&usg=AFQjCNHrLmQHYbdnMhDkZD2oALiWV1t0w&bvm=bv.78677474,d.d2s }>

¹¹ 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.

¹² 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.¹³

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.

¹³ 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.¹⁴

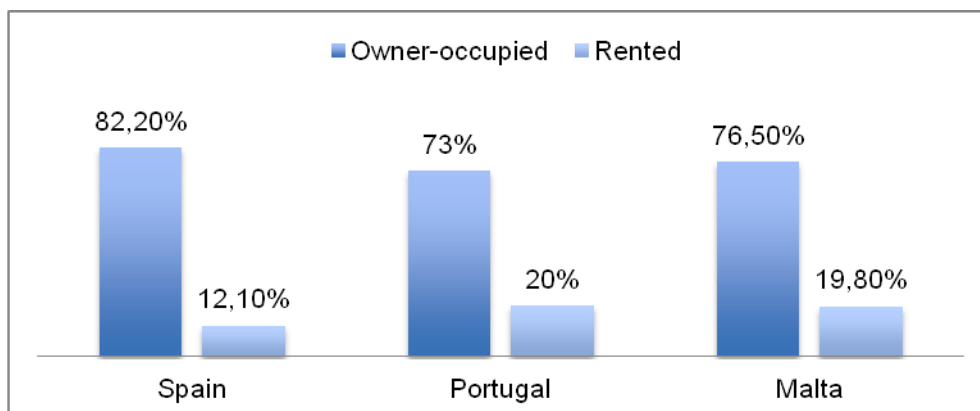
The number of potentially rented dwellings *per se* does not seem to be a problem due to the vast oversupply that is present in all the three countries; all three have, however, been putting significant efforts in incentivising landlords to put their vacant dwellings on the rental market, thereby activating 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

¹⁴ 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 existing formulas in 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 emphyteusis¹⁵ with 16.4% of the total housing stock owning their property with ground rent.¹⁶ 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 2009.¹⁷ The introduction of shared ownership and leasehold is currently (end-2014) being discussed in the Catalan Parliament.¹⁸

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%.¹⁹ The figures displayed by Portugal and Malta are closer since whilst the social dwellings represent 4% and 5.2% of the respective housing stocks,²⁰ 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).

¹⁵ Emphyteusis involves the transfer of ownership for a specified time, or in perpetuity, against the payment of a yearly ground rent.

¹⁶ Since emphyteusis 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).

¹⁷ 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].

¹⁸ 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.

¹⁹ These are mainly managed either by public administrations or non-profit entities.

²⁰ 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.²¹ 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.²²

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)²³ 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.²⁴ Construction and

²¹ In Spain the average size of single-family dwellings has increased by 38m² 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).

²² 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).

²³ 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).

²⁴ 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%.²⁵ Maltese figures, on the other hand, point to a decisively higher rate of 31.75%.²⁶

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.²⁷ 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.²⁸ 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.²⁹ 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 2008.³⁰ The increased tax and contributory burden is

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.

²⁵ INE, 2011 Census.

²⁶ 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%.

²⁷ As set out by M. Pareja-Eastaway & T. Sánchez-Martínez, 'El Mercado de vivienda en España', 42-43.

²⁸ As set out by J.M. Neredo Pérez, 'Perspectivas de la vivienda' *Revista de Economía ICE* 815 (2004), 153.

²⁹ 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.

³⁰ This Report has been elaborated by the Technicians Syndicate 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.³¹

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.³² 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.³³

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.³⁴ Social housing is run according to the respective national criteria and is detached from market values.

out that 65.8% of the rented dwellings whose tenancies are not declared are concentrated in the Autonomous Communities of Madrid, Andalusia and Catalonia.

³¹ 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%.

³² <http://www.arrendanahora.com/noticia/financas-vao-aumentar-inspeccoes-para-detectar-arrendamentos-ilegais> (visited 2-2-2015).

³³ 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.

³⁴ 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,³⁵ 58% in Portugal and 65% in Malta.³⁶ 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.³⁷

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 80m² 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)³⁸. 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 earner³⁹ and if the latter earned the minimum wage the income-rent relationship would even rise to a disconcertingly high 91.98%.⁴⁰

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.⁴¹ These figures do not compare well with Portuguese average monthly net income of €805 per person registered during the last quarter of

³⁵ 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.

³⁶ "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].

³⁷ 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*].

³⁸ Informe sobre el precio de la vivienda a octubre de 2013. Available in www.fotocasa.es/indice-alquiler-inmobiliario_fotocasa.aspx (visited 11 December 2013).

³⁹ The average net monthly salary of a Spanish worker is that of €1,100.

⁴⁰ The national minimum wage in 2012 was that of €641.4.

⁴¹ 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 €505⁴²

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 €3,537⁴³ which projects affordable figures even for households which depend on the minimum wage set at a monthly €717.95 in 2014.⁴⁴

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 value⁴⁵ besides that of its value in use.⁴⁶ 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%⁴⁷ of the tenant's income and a mortgage loan only up to 38.6%⁴⁸.

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 €361.⁴⁹ 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.⁵⁰

⁴² INE, *Inquérito ao Emprego*.

⁴³ 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.

⁴⁴ Department of Employment and Industrial Relations <https://dier.gov.mt/en/Employment-Conditions/Wages/Pages/National-Minimum-Wage.aspx> (visited 2-2-2015).

⁴⁵ Exchange value refers to the importance of the dwelling as an economic revaluated asset.

⁴⁶ 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?' en *El acceso a la vivienda en un contexto de crisis*, ed. S. Nasarre Aznar (Madrid: Edisofer, 2010), 110-111.

⁴⁷ 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>, 4 January 2010 (visited 2-2-2015).

⁴⁸ Source: <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).

⁴⁹ INE, *Taxas de Jura Implícitas no Crédito à Habitação* (Lisboa, November 2012).

⁵⁰ 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 2004⁵¹, 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.⁵²

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 sector⁵³ 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

⁵¹ Decree-Law no. 211/2004, 20 August 2004.

⁵² 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).

⁵³ 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.⁵⁴ 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.⁵⁵

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 2012.⁵⁶

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.⁵⁷

These financial difficulties, resulting in a drop in sales, seem to have in turn affected the tenancy market favourably,⁵⁸ 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.⁵⁹ 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

⁵⁴ 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].

⁵⁵ *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%.

⁵⁶ *Statistical Bulletin*, 1, (Lisboa, BdP, 2013), 36.

⁵⁷ *Relatório Dinâmica do Mercado*, 34.

⁵⁸ 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)).

⁵⁹ *Ibid.* D. Camilleri.

the increasing demand for mortgages on the part of first-time buyers.⁶⁰

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 2014⁶¹ (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.⁶² A common response came in the form of providing for the quasi-forced restructuring of debt in certain cases.⁶³ 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

⁶⁰ J. Ripard, "BoV's record profits: €110.7m in pre-tax profits", *The Times (Malta)*, 27 October 2012.

⁶¹ 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)

⁶² 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).

⁶³ 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 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.⁶⁴ 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 dwellings⁶⁵ 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.⁶⁶

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 areas⁶⁷) and accumulated public dwellings.⁶⁸ These areas commonly suffer from multiple interlinked problems of high unemployment, levels of crime and poor access to quality services.

⁶⁴ 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).

⁶⁵ J. Oliver Alonso, 'Informe sobre el sector inmobiliario residencial en España', Barcelona: CatalunyaCaixa y Departamento de Economía Aplicada de la UAB, 2012, 96.

⁶⁶ 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].

⁶⁷ J. Leal & A. Alguacil, 'Vivienda e inmigración', 129.

⁶⁸ 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.⁶⁹ The pattern recurring pattern involves public urban renewal projects that are then complimented as well as exploited by the private sector initiatives.⁷⁰ 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.⁷¹

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 year⁷² 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.⁷³

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.⁷⁴ 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.⁷⁵ This works to the detriment of rent which is often associated with the less affluent

⁶⁹ M.A. Sargantal, *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.

⁷⁰ 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).

⁷¹ 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.⁷¹

⁷² Fiscalía General del Estado, ‘Memoria de la Fiscalía General del Estado 2012’ www.fiscal.es, 18 January 2013.

⁷³ 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).

⁷⁴ M. Aramburu Otazu, *La resignificación de la tenencia de la vivienda en Cataluña*, 16.

⁷⁵ 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.⁷⁶

Over the years home ownership came to be associated with affluence and stability whilst rental became progressively imbued with negative connotations.

⁷⁶ 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.⁷⁷ 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 housing⁷⁸.

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 employer⁷⁹ 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 rent⁸⁰.

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.

⁷⁷ 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.

⁷⁸ 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.

⁷⁹ G. Pirotta, *A New Creation or an Image and Likeness? The Maltese Experience of Establishing Local Government in a Centralized Mirco-State*, Public Organisation Review (2001) 1.

⁸⁰ 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 Courts⁸¹ nor before the Constitutional Court.⁸² 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.⁸³

In Portugal, the right to housing is enshrined in article 65 of the Portuguese Constitution⁸⁴ 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)⁸⁵. 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 matters⁸⁶.

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

⁸¹ Judgement of the Supreme Court (STS, *Sentencia del Tribunal Supremo*) 31 January 1984 (RJ 1984/495) and 19 April 2000 (RJ 2000/2963).

⁸² In this sense, ATC 20 July 1983 (RTC 1983/359) and ATS 4 July 2006 (JUR 2006/190875).

⁸³ J. Muñoz Castillo, *Constitución y vivienda* (Madrid: Centro de Estudios Políticos y Constitucionales, 2003), 18-20.

⁸⁴ Vd. <http://www.tribunalconstitucional.pt/tc/en/crpen.html> (visited 2-2-2015).

⁸⁵ 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.

⁸⁶ http://www.tribunalconstitucional.pt/tc/content/files/relatorios/relatorio_004_confwashingt on.pdf (visited 2-2-2015).

are the Charter of Fundamental Rights of the European Union⁸⁷ and the European Social Charter.⁸⁸

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),⁸⁹ and the Local Administration. Within the Local Administration, City Councils have the competence on housing according to articles 25.2 and 28 of Act 7/1985.⁹⁰ 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 national⁹¹, 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 1976⁹². No regional or local level is involved either in the designing of the policies or in the allocation of property to applicants.

⁸⁷ 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.

⁸⁸ 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".

⁸⁹ Judgement of the Constitucional 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.

⁹⁰ Ley 7/1985, de 2 de abril, reguladora de las bases de régimen local (BOE 03/04/1985 núm. 80) (LBRL).

⁹¹ <http://www.portaldahabitacao.pt/pt/ihru/> (visited 2-2-2015).

⁹² 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).⁹³

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).⁹⁴

⁹³ <http://www4.seg-social.pt/publicacoes?bundleId=322036> (visited 2-2-2015).

⁹⁴ 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 debt⁹⁵. 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 schemes⁹⁶.

⁹⁵ http://www.portugal.gov.pt/media/371369/mou_20110517.pdf (visited 2-2-2015).

⁹⁶ 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.⁹⁷

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)⁹⁸. 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 situation⁹⁹.

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

€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.

⁹⁷ Ministry for Social Policy, *The Need for Reform: Sustainability, Justice and Protection*, 30.

⁹⁸ G. Ruiz-Rico Ruiz, *El derecho Constitucional a la vivienda Un enfoque sustantivo y competencial*, Madrid: Ministerio de Vivienda, 2008, 30-32.

⁹⁹ 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 Autònoms 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 landlords¹⁰⁰.

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 housing¹⁰¹.

¹⁰⁰ Fondazzjoni Suret il-Bniedem, *Housing Asylum Seekers*, 2010, 37-38.

¹⁰¹ <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 families¹⁰².

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 38/1999¹⁰³ and in Royal Decree 314/2006¹⁰⁴, which establish the basic quality requirements of both buildings and their facilities to allow them to be functional, safe and habitable¹⁰⁵. Quality conditions are controlled through the compulsory municipal licence of first occupation and through a subsequent public certificate, which must be renewed periodically.¹⁰⁶

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 conditions¹⁰⁷. 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 time¹⁰⁸.

In Malta, properties must conform with the parameters established by the Environmental Development Planning Act¹⁰⁹ in relation to the regulation of sizes of dwellings¹¹⁰ and the limitations for the various kinds of properties.¹¹¹ They

¹⁰² 'Families get housing help', *The Times (Malta)*, 16 March 2012.

¹⁰³ Ley 38/1999, de 5 de noviembre, de Ordenación de la Edificación (BOE 06/11/1999 núm. 266).

¹⁰⁴ 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).

¹⁰⁵ 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.

¹⁰⁶ Either the municipal licence or the licence of primary occupation may be regulated by the local council but in any case they are compulsory.

¹⁰⁷ 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.

¹⁰⁸ Decree-Law n.160/2006, amended by Decree-Law n.266-C/2012.

¹⁰⁹ Chapter 504 of the Laws of Malta.

¹¹⁰ "Development Control Policy and Design Guidance 2007" Part 3 entitled "Site Coverage, Dwelling Type, Plot Size, Dwelling Size (Sections 3.1 to 3.8).

¹¹¹ 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 'Maisonnettes' 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 Laws¹¹² and the “Technical Guidance Document F - Conservation of Fuel, Energy and Natural Resources”.¹¹³ 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 13/2012¹¹⁴, 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 pollution¹¹⁵. 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 purpose¹¹⁶, 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-effectiveness¹¹⁷. 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 buildings¹¹⁸ the choice of more energy efficient

¹¹² Chapter 10 of the Laws of Malta.

¹¹³ Published through Legal Notice 238 of 2006.

¹¹⁴ RDL 13/2012, de 30 March 2012 (BOE 31/03/2012, no. 78).

¹¹⁵ 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.

¹¹⁶ It is required that the 70% of the edifiability is destined to residential purposes.

¹¹⁷ 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.

¹¹⁸ 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)].

products¹¹⁹ and the use of energy from renewable sources.¹²⁰ 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.¹²¹

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

¹¹⁹ 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)].

¹²⁰ *Ibid.* Directive 2009/28/EC.

¹²¹ '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 Lisbon¹²² 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 €14,394.¹²³ 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 indented 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 payments¹²⁴.

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 €5,000.¹²⁵ 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.¹²⁶

Although subsidisation is available in the three countries, in all three there seem to be problems relating to its effectiveness.

¹²² <http://habitacao.cm-lisboa.pt/index.htm?no=151000101225> (visited 2-2-2015).

¹²³ 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.

¹²⁴ See more in section 2.c in the second part of questionnaire, 'Restrictions on choice of tenant - antidiscrimination issues', supra.

¹²⁵ 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).

¹²⁶ *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 transfer¹²⁷. The landlord would be jointly and severally liable if he receives the first rent without having requested proof of the tax payment from the lessee¹²⁸. 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.¹²⁹

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.¹³⁰ 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 neither 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

¹²⁷ 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.

¹²⁸ Arts. 9 RDL 1/1993 and 37 RD 828/1995.

¹²⁹ The state fee scale is regulated by art. 12 LITPAJD.

¹³⁰ 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 2014.¹³¹

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.¹³²

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.

¹³¹ Legal Notice 393 of 2013.

¹³² 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.¹³³ 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.¹³⁴

The net return for Maltese landowners was similarly estimated at a low 3%.¹³⁵ 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.¹³⁶

In this respect, Portugal has introduced a new advantageous fiscal regime for landlord-investors in order to incentivise rental investments.¹³⁷ 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:

¹³³ 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 €/m², 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%).

¹³⁴ '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, 18 January 2013 (visited 2-2-2015).

¹³⁵ *Ibid.* D. Camilleri, 34.

¹³⁶ *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.

¹³⁷ 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).¹³⁸ 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.

¹³⁸ 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.¹³⁹ 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.¹⁴⁰ Similarly in Malta it is the tenant's responsibility to prove that they occurred through accident or through a force beyond his control.¹⁴¹

As a general rule, **violation of the lease contract** by the tenant is a cause for his **eviction** in Spain, Malta¹⁴² 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 law¹⁴³ 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 15th January, concerning the protection of minors.¹⁴⁴

In Portugal, the tenant can also apply to court if, based on social needs,

¹³⁹ 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).

¹⁴⁰ 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).

¹⁴¹ The responsibility of the tenant extends to the acts of his dependants and even subtenants who have not been acknowledged by the landlord.

¹⁴² Kan. Lorenzo Micallef et v. Carmelo Zahra, decided by the Court of Appeal on the 10 March 1952.

¹⁴³ 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.

¹⁴⁴ 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 tenant¹⁴⁵ but courts decided that financial difficulties of tenants would not exempt him from payment.¹⁴⁶

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.¹⁴⁷ 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

¹⁴⁵ 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 on the 28 June 2012.

¹⁴⁶ Francesco Sciberras v. Ignatius Peter Busuttill, decided by the First Hall (Civil Court) on the 17 March 2005.

¹⁴⁷ 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 belonging 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 period¹⁴⁸ 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).

¹⁴⁸ This was the case in *Awtorità tad-Djar v. Anita Doris Savona* (decided by the 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 Spain¹⁴⁹, 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 Marked”. 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 years¹⁵⁰ (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 aid¹⁵¹) and; b) public or private entities that

¹⁴⁹ Eurostat, ‘Housing Statistics in the European Union. Income and Living Conditions’, (2010).

¹⁵⁰ Article 14.

¹⁵¹ 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.¹⁵²

As has been already mention, 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 for 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.¹⁵³ The revision may be done annually according to the percentage changes of the CPI.¹⁵⁴ 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.

¹⁵² Articles 24 and 28.

¹⁵³ Article 5.6 of the Spanish Housing Plan 2013-2016 and second and fifth of the First Additional Provision LAU 1994.

¹⁵⁴ 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 budget¹⁵⁵ 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.¹⁵⁶ 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

¹⁵⁵ 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.

¹⁵⁶ 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 three 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 contract 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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