GENERAL REPORT

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Introduction: European Dimensions of Tenancy Law

Tenancy law is an area of private law existentially affecting the daily lives of European citizens, as more than one third of them depend on rental housing.[1] However, tenancy law has up until now almost never been analysed in a European perspective.[2] This is probably due to the fact that housing markets and their regulation have hitherto been dominated nationally as hardly any other sector.

The direct importance of tenancy law for the Common Market is indeed limited. Whilst tenancy rules may certainly be among the parameters influencing the choice for the establishment of natural and legal persons and, even more so, for investments in real estate in another Member State, their impact is normally too small as to significantly affect such choices and transactions.[3] Correspondingly, a violation of the basic freedoms by national tenancy rules should regularly be excluded in the absence

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[1] A study by *BIPE* (ed.), European public policy concerning access to housing, 2000, 19, 29, available at: http://www.bipe.fr, indicates the following figures: In the EU-15, the total housing stock has been estimated at 171,4 million units in 2000, of which 22% is the private rental and 11% in the social rental sector, the rest being owner-occupied (60%) or vacant (7%).

[2] The only exception known to us is J. Stabentheimer (ed.), Mietrecht in Europa, Manz 1996 (including a comparison of French, Italian, Dutch, German and Austrian tenancy law, by now in part outdated through recent reforms).

[3] Exceptions may however lie in extreme cases, e.g. when protective regulation did not even allow owners of holiday homes in Spain to evict tourists who had just rented the dwelling for short periods. Another important exception concerns commercial tenancies which are crucial to investments in international real estate funds .

of any form of direct or indirect discrimination and market access restriction.[4] In line with this, the Community legislator has only in few cases harmonised some aspects of housing matters related to the Common Market. Thus, Regulation 1612/68, which implements equal treatment rights emanating from the free movement of workers according to Art. 39 TEC, stipulates in its Art. 9 that a national of a Member State who is employed in the territory of another Member State shall enjoy the rights and benefits accorded to national workers in matters of housing, including home ownership and in the allocation of public housing. In private law, contracts containing lease elements have been regulated in the directives on package tours and the time sharing rights in immovables.[5] For the core of tenancy law, however, the harmonisation requirements of Arts. 3h and 95 TEC ("approximation of legislation to the extent necessary for the proper functioning of the common market") are not fulfilled, nor would the subsidiarity test contained in Art. 5 TEC be passed. Moreover, Art. 295 TEC according to which national rules governing the system of property are unaffected by the Treaty might restrict European measures in this field, though the ECJ has traditionally given a narrow interpretation of this provision. European harmonisation of tenancy law would therefore seem to be not only politically unrealistic, but also legally excluded. In line with this policy, no official texts, neither the Communication on European Contract Law of 2001, the Action Plan of 2003, nor the resolutions of the European Parliament, mention this field as a candidate for harmonisation. On account of its perceived political character,[6] tenancy law has not even been analysed in a European perspective by the large European academic research groups such as the Lando Group on European Contract Law, the Study

[4] If one were to apply the famous Keck distinction to private law, too, tenancy law rules could be qualified as certain "selling arrangements" and lie therefore outside the scope of protection of the fundamental freedoms (see joint cases C-267 and C-268/91, *Keck and Mithouard*, ECR I-1993, 6097). The same result would be reached by drawing on the argument of their "too indirect effect" on the basic freedoms which the ECJ has frequently used to distinguish private law rules.

[5] Directives 90/314/EEC and 94/47/EEC.

[6] Personal information from Prof. Martijn Hesselink, Amsterdam, Member of the Study Group on a European Civil Code.

Group on a European Civil Code, the Pavia Group on a European Civil Code and the Trento Common Core Project.[7]

Despite the lack of reflection to date on this issue from a European perspective, Community law and policy do have significant indirect influences on tenancy law. Firstly, just as with other specific types of contract, a partial harmonisation or unification of tenancy law might be the consequence of the adoption of an "optional instrument", the euphemistic new term for a European Civil Code containing provisions on general contract law applicable to both internal and cross-border situations. Indeed, following the regular division of national private law systems, codifications in particular, into general and special rules on contracts, the subsisting special national rules on tenancy contracts would be forced to co-exist with the new European contract law, which would be under the central jurisdiction of the ECJ. Thus, in Member States where important fields of contract law - such as the conclusion of contracts, the control of standard terms (used by a non-commercial landlord[8]) via general clauses or a specific statute, rent increases and possibly even the termination of long term contracts - which are currently left to general contract law - would be regulated by European rules. The interplay of general and special rules, albeit tailored to one another, already creates problems in one and the same legal order. Much greater friction and inconsistency may be expected when one general contract law is required to interact with 15 or more widely different national tenancy laws, and this interaction has by no means been harmonised by one legislator. Alongside problems of coherence, legitimacy problems may also be expected as uniform rules and their uniform interpretation by a centralised court could hardly be expected to do justice to diverse national and local, social and economic features of housing policies and laws.

In addition, national tenancy law is increasingly affected by European social policy aiming at the amelioration of housing conditions.[9] The treaty basis of this policy is the

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[7] Thus, the authoritative *International Encyclopedia of Comparative* Law does not deal with tenancy law at all.

[8] If a commercial party is involved, the European *Directive on Unfair Terms in Contracts* (93/13/EEC) and the corresponding national implementation legislation apply.

[9] See *Housing in EU Policy Making*, Background Paper of the European Federation of National Organisations working with the Homeless (Feantsa), available at. http://www.feantsa.org.

task to counteract social exclusion, first contained in the Maastricht Social Policy Agreement of 1992 and integrated in Art. 136 para. 1 TEC by the Treaty of Amsterdam after the withdrawal of the British opt-out in 1998. On this basis, the Lisbon European Council has in March 2000 launched an ambitious Community strategy against poverty and exclusion to be implemented by action under the Structural Funds (in particular the European Regional Development Fund (ERDF) and the European Social Fund (ESF)).[10] The revised objectives of these funds include urban development in particular with regard to social exclusion. Even though Art. 2 of the Regulation 1260/1999 (laying down general provision of the Structural Funds) and the Community Social and Regional Policy Initiatives INTERREG III and Urban II do not allow for the direct financing of housing, housing-related measures such as the redevelopment of public spaces, investment in land for public buildings, demolition of unfit or vacant housing, the renovation of buildings to accommodate economic and social activities have been financed in the past. In addition, a considerable number of direct housing measures in the accession States have been funded under the PHARE programme. Likewise, investments in urban renewal have become part of the financing objectives of the European Investment Bank following the Amsterdam Council resolution on Growth and Employment of June 1997.[11] The Community Strategy against poverty and social exclusion was reaffirmed and concretised in the later European Councils of Nice and Laeken, and gave rise to a specific Action Programme with a total budget of 75 million Euro from 2002-2006, which also includes housing policy measures.[12] The Social Protection Committee,[13] established in June 2000 by Council Decision 2000/435/EC as a body of representatives which supervises the Community strategy, has proposed to develop a set of social inclusion indicators to benchmark effectively the quality and cost of housing. [14] Due to the primary competence of Member States, the European contribution to housing policy is, apart from financing activities, limited to coordinative action through the so-called open method of co-ordination, whose

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[10] See http://europa.eu.int/comm/employment_social/soc-prot/soc-incl/index_en.htm.

[11] See *Housing in EU Policy Making,* op. cit., 2 and http://www.eib.eu.int

[12] See http://europa.eu.int/comm/employment_social/soc-prot/soc-incl/ex_prog_en.htm.

[13] http://europa.eu.int/comm/employment_social/social_protection_commitee/index_en.htm.

[14]See http://europa.eu.int/comm/employment_social/news/2002/jan/report_ind_en.pdf.

principal tools are benchmarking, sharing and spreading of best practices, target-setting and peer review.[15] National housing policy has also been shaped by European competition and state aid rules more recently. Thus, the Commission allowed Ireland to provide bank guarantees for borrowings by the public Housing Finance Agency. Interestingly, the decision did not exempt the measure under the state aid provision (Art. 87 TEC), but qualified the provision of "a good dwelling in a good housing environment to every household and especially the most socially disadvantaged" as a service of general interest not to be affected my competition rules according to Art. 86 para. 2 TEC.[16] Likewise, the Commission has recently allowed public subsidies for housing developers aimed at promoting home-ownership amongst socially disadvantaged groups in deprived urban areas.[17] In tax law, the Council has decided in 1992 that supply, construction, renovation and alteration of housing provided as part of social policy may be subject to reduced VAT rates,[18] whilst the letting of accommodation is completely exempted from VAT in all Member States.[19] Finally, the provision of housing has recently also been incorporated in European anti-discrimination legislation. Based on Art. 13 TEC, which was introduced by the Treaty of Amsterdam, the Council adopted a Directive against discrimination based on race and ethnic origin in June 2000.[20] This Directive includes in Art. 3 para. 1 lit. h) access to and supply of goods and services available to the public including housing.

Against the background of the planned Europeanization of general contract law as well as the manifold European dimensions of, and contributions to, housing policy, it seems useful to provide a complete and up-dated survey and comparison of the contents, role and implications of national private tenancy laws. The immediate goal of this endeavour, namely enabling a smooth interaction of general contract law and specific tenancy regulation, is self-evident and does not require further justification. Yet, housing policy, too, is deeply interrelated with and conditioned by private tenancy law. The aim of European co-ordination measures to optimise national

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[15] On this topic, see the background report to this project by Christian Joerges.

[16] Case N 209/2001.

[17] Cases N 497/2001 and 239/2002.

[18] See Annex H of Directive 92/77/EEC.

[19] See *Housing in EU Policy Making,* op. cit., 5.

[20] Directive 2000/43/EC.

housing policies as well as the objectives of direct European funding of national housing projects may be gravely impaired by conflicting private law rules. Thus, for example, social housing provided or subsidised by the State would be of little help to tenants who do not enjoy a sufficient degree of security of tenure, i.e. may be evicted easily. Conversely, the function of social housing is also diminished, if the protection of the tenant is "too high", for example when even tenants who are no longer in need of subsidised housing cannot be evicted, with the effect that no public housing space may be left for people in actual need. For these reasons, this project has aimed at providing the first complete and exhaustive survey of national tenancy laws, the focus being on housing (or private) tenancy. To this end, a general picture of national tenancy laws is provided, as well as concrete answers to typical problems in the legal relationship between landlord and tenant (and occasionally also third parties), which have been formulated as practical cases and structured in six sets. Thereby, this project aims to provide a reliable basis for further efforts at both harmonising general contract law and co-ordinating and optimising national housing policies at the European level.

Part 1: General Foundations of Tenancy Law in Europe

I. Origins and Basic Lines of Development of National Tenancy Law

In the history of European private law since its origins in Roman and tribal law, the lease of land and chattels has long been present as a specific type of contract.[21] As such, it was further refined and reshaped in the process of reception of Roman law starting in the 12th century and finally incorporated in the major 19th century codifications (France and Belgium 1804, Austria 1811, The Netherlands 1838, Portugal 1867, Spain 1889, Bulgaria 1892, Germany 1900).[22] In the codifications, residential tenancy was not generally distinguished from ordinary leases. A liberal vision of tenancy dominated virtually everywhere, which did not pay heed to the

[21] See *R. Voelskow* in Münchener Kommentar, 3rd ed. 1995, Einl. zu §§ 535-537.

[22] The same is true for a number of the later national codes of the first half of the 10th century (Italy 1943), some of which were inspired by foreign models (Greece 1945, taking as its example the German BGB).

social needs of tenants.[23] As a result of the emancipation of peasants after the Revolutions and increasing industrialisation from the second half of the nineteenth century onwards, which entailed mass migration of former peasants to the rapidly sprawling cities and the emergence of a proletariat of workers, tenants were subject to manifold abuses including overcrowding, poor living conditions, high rent and eviction rates, with rent arrears punishable on occasions by imprisonment. As a response, social housing, i.e. the provision of cheap housing by private persons such as factory owners, private institutions (charities, foundations etc.) and public, particularly, local authorities ("council housing") was introduced in Western Europe from the 1850s onwards. That notwithstanding, the critical situation of tenants led to social unrest in many countries, in which tenants' und workers' movements united. These protests were, however, mostly unsuccessful. As a consequence, the Paris Commune in 1870 tried to introduce short term rent relief and the requisition of homes for refugees, but these measures were found to be in contradiction with the constitutional guarantee of freedom of property and were abolished after the fall of the Commune. In line with this policy decision, the first pieces of French tenancy legislation dating back to this period are accused of both failing to protect tenants and to organise rental markets, but instead of pursuing "hygienist and moralising ideas", their main objective being the prevention of riots".[24] Similarly, the provision of subsidised social housing by factory owners and public authorities as a reaction to social unrest such as the riot of German weavers in 1844 has been criticised as a diversionary tactic in the face of persistent social inequality and tension in the production sector.[25]

It is only during or shortly after World War I that specific protective regulation of tenancy agreements - which typically consisted in the freezing of rents and the exclusion or limitation of notice of termination - came into force in most European countries. Generally, these measures abolished the liberal style of tenancy legislation provided for by the leading codifications in favour of strongly interventionist, State-controlled systems. The main driving forces behind these measures were of course the

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[23] All references to countries are based on the national reports of this project; only the precise place of direct quotations will be indicated.

[24] French report, introduction.

[25] Cf. *P. Derleder*, Alternativkommentar zum BGB, 1979, vor §§ 535, p. 203 at no. 5.

aggravation of existing problems of housing shortage by the war (with a drastic decrease of building activities during the war period) added to the insolvency of many tenant families, particularly when men were obliged to serve in the field. Though an outspoken socialist philosophy lay behind protective tenancy regulation in many Western European countries, such regulation has also been introduced by conservative governments or monarchies elsewhere. Thus, in Austria, protective regulation was adopted by the late Habsburg monarchy during World War I and was explicitly intended to strengthen the moral of "tenant-soldiers" in combat. The massive rise in subsidised housing development by local authorities in England under the slogan "homes fit for heroes" goes in the same direction. The need for nationwide solidarity during the war, which had to overcome former tensions among the classes, has also had an influence in the adoption of protective tenancy regulation.

Though tenancy regulation enacted during or after the first World War had a generally provisional character, it was frequently upheld in the economic crisis following the war. Whereas in some states (e.g. Austria and Sweden) the core of this regulation is still in force, it has been replaced by less restrictive legislation elsewhere. These changes illustrate the notorious politicisation of tenancy law, entailing periodic oscillations between socially protective and more liberal regimes in most European countries in the course of the 20th century.[26] Abrupt changes in tenancy regulation were often triggered not by developments of the housing market, but by changes of government (with right wing parties being typically more in favour of freedom of contract) and altered preferences of day-to-day politics. These oscillations have generally frustrated the objective of a socially adequate and economically efficient balance among the rights and interests of landlords and tenants, and frequently led to unintended adverse real world phenomena. The Second World War gave rise to another period of strong state interventionism, which was however relaxed in many

[26] The Swiss report aptly summarises the political character of tenancy law as follows: "The tenancy law currently in force reflects the development of the modern welfare state; with 'conservative' political forces criticising the law for its interventionist approach, and for its failure in the face of housing shortage to create incentives for the construction of additional housing. This mirrors the general dispute between 'progressives', aiming at social justice and stability through regulation, and 'conservatives', seeing the market mechanism and incentives as the basis for social housing provision" (p. 1).

States after the recovery of the economy in the 1950's and 60's. The economic crisis of the 1970's often led to the (re-)introduction of more protective regimes, typically complemented by creative judicial constructions, sometimes backed by constitutional mandates, aiming at adapting law to social and economic realities.

In the last decade, approximately, one may however observe a certain degree of consolidation and convergence among tenancy laws in Europe. Indeed, extreme solutions have been withdrawn in favour of more balanced regimes. Thus, strict rent price control, frequently entailing dysfunctional social and economic phenomena such as excessively low prices for affected dwellings and black market mechanisms, was abandoned in Italy in 1998. Excessively liberal regimes have been replaced in favour of more balanced systems, e.g. in France (1989) or most recently in Ireland (2003), where approximately 90% of all buildings were owner-occupied. The political need for protective legislation did not exist until very recently, but was brought on by increased immigration and internal mobility with the expansion of the "celtic tiger" economy.

The former socialist or communist Eastern European countries form yet another particular category of interest. Though they all share the civil law roots of tenancy law, under Communism the provision of housing was perceived as a public task, with buildings erected by the government or local authorities who assigned tenants to these properties. Generally, this appears to have led to sufficient supply, but poor quality. After the fall of Communism, one could observe a reverse development, with housing stock divided between the very large (cheap and generally low quality) former State-owned properties and an emerging smaller and much more expensive private market (in which protective contractual instruments may be of a limited nature, or even completely lacking, such as in Bulgaria). Yet, with their accession or association to the EU, a general tendency of adopting a higher degree of tenant protection may be observed even in Eastern Europe. Pertinent examples may be found in recent legislation in Poland, Romania and Slovenia.

To summarise, the development of tenancy law since the beginning of the 20th century has first and foremost been a matter governed by the national peculiarities of the housing market and national political preferences. In no single case could a considerable influence of foreign models be found.

II. The Economic and Social Function of Tenancy Law

As with any other branch of contract law, tenancy law seeks to enable a just and adequate exchange of performances (in terms of commutative justice) among the parties. Yet, due to the critical need to house citizens, tenancy law has been shaped more than other legal fields by social and economic rationales of distributive justice, often at the expense of one party. Together with national housing regulation, private tenancy law needs to ensure a sufficient supply of dwellings for rent at affordable price, in order to prevent excessive financial burdens on tenants which may result in homelessness, social exclusion and disadvantages for families. In this respect, public and private law regulation of tenancy forms an integrative part of the modern welfare state. However, the social function of tenancy regulation is strongly conditioned by economic factors. In modern market economies, the State is normally unable and unwilling to provide all citizens in need. Housing policy also needs to rely more consistently upon the market, which presupposes that renting remains attractive for landlords and investors. This implies that social burdens are not too onerous for landlords, and that adequate gains and returns may be made. In addition, the landlord must not be restricted too much in his freedom to use his premises as he wants - in particular for himself or his relatives when the necessity arises -, as such a restriction might otherwise dissuade him from renting premises not only for reasons of economic efficiency but also of personal convenience. Regulatory instruments of private tenancy law, such as rent control and security of tenure (protection of the tenant against notice) in particular, must therefore strike a fair balance between the need to provide tenants with housing at affordable and sufficiently stable conditions, and the need to impose only acceptable burdens upon landlords and investors, and which do not act as disincentives. Unbalanced solutions may not only be socially unfair, but also economically inefficient. Not only do excessive state interventions generate adverse effects on the market mechanism; as economic analysis of law has shown, the same is true for an excessively high level of freedom of contract and the lack of protective regulation.[27] Thus, rent control mechanisms and security of tenure prevent the landlord from being able to charge a higher rate than the market rent, which a

[27] See *H.-B. Schäfer/ C. Ott*, Die ökonomische Analyse des Rechts - Irrweg oder Chance wissenschaftlicher Rechtserkenntnis, Juristenzeitung 1988, 213, 222.

tenant wishing to avoid the costs and the personal disadvantages of moving might be ready to pay. Without these instruments, the landlord would therefore be able to benefit from a "monopoly rent" contrary to an efficient allocation of goods within society. So there is more harmony between the social and economic function of tenancy law than one might expect. It is against this social and economic background, that the structure and contents of current tenancy law regulation will now be assessed.

III. Basic Structure and Contents of Housing Regulation

1. Private Tenancy Law

In national legal systems, the social and economic tasks of tenancy law are fulfilled by rules from different sources: constitutional law of national and international origin, general contract law, specific tenancy regulation and collective self regulation by landlord and tenant associations.

Constitutional Law Foundations

The impact of national constitutional law on housing tenancies may take several forms.[28] Firstly, in the federal states pertaining to the EU (Austria, Belgium, Germany, Spain), the division of tasks and competencies among the federal and the regional level is stipulated in national constitutions. Whereas in no case do the regions generally enjoy competence for private tenancy regulation, they are often competent for administrative law measures related to tenancy law, in particular as regards the allocation and management of social housing. In Belgium, the regions have also the competence to legislate on the "healthiness of housing", standards which may also affect the private law notion of a defects in premises.

The more important constitutional dimension of tenancy law relates to fundamental principles, e.g. the landlord's freedom of contract and property on the one hand and the protection of the tenant as the weaker party on the other. Whereas the former is recognised in all constitutions containing human or fundamental rights, the latter may find its expression in different instruments and structures. A number of countries (Belgium, Finland, Greece, the Netherlands, Portugal, Poland, Spain, Sweden, and by

[28] On this subject, see also the background report by J. Ziller.

interpretation also France)[29] grant an explicit constitutional "right to housing". This is however generally restricted to a programmatic clause obliging the State to undertake best efforts in the provision of housing and does not give an individual citizen an unconditional subjective right to a dwelling provided by the state. In Germany, a largely equivalent position has been reached *via* the recognition of the tenant's possession as a form of property in the sense of Art. 14 of the Basic Law (Grundgesetz – GG). Though the constitutional courts of Italy, Spain, Poland and Portugal have also become active in tenancy law, this influence has proven greatest in Germany, where Bundesverfassungsgericht has in several hundreds of decisions shaped the whole area distinctively. Highlights of this jurisprudence include the tenant's right to install a television antenna (considered in approx. 30 decisions)[30] protected by the freedom of information, the grant of permission to alter a dwelling in order to facilitate its use by disabled tenants, the permission of extensions to property by ordinary courts, of the legal succession rights of spouses (§ 569 a BGB) in the event of a tenant's death (i.e. unmarried partners).[31] Another important constitutional influence is reported by Ireland, with the constitutional court's interpretation of the right to private property in a 1981 court decision[32] - in which rent restrictions in social housing and limitations on the landlord's right to regain possession were found unconstitutional. This decision appears to have been frequently interpreted as a restriction of protective regulation of all kind.

In States that do not have substantive constitutions (Austria, the Nordic Countries and the UK), but also elsewhere, the European Convention of Human Rights[33] has been applied to tenancy law. However, compared to the activity of the German constitutional court, the interventions from the Strasbourg institutions have remained

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[29] See the summary in *N. Boccadoro*, La Reconnaissance d'un Droit au Logement en Droit Européen, Working Paper, Institut International de Paris La Défense, 2001.

[30] See case 19 below.

[31] For a survey see *J. Sonnenschein*, Die Rechtsprechung des Bundesverfassungsgerichts zum Mietrecht, NJW 1993, 161.

[32] *Blake v. Attorney General*, [1982] IR 117.

[33] On the impact on the latter on tenancy law see *F. Matscher*, Wohnrechtsfragen und Europäische Menschenrechtskonvention, in: J. Stabentheimer (ed.), Mietrecht in Europa, Manz 1996, 141.

sporadic and have by no means shaped the entire field.[34] As an example, in a line of cases concerning extremely long waiting periods for eviction in Italy – even in cases in which the landlord intended to use a house or apartment for his own personal use or that of his family – the ECHR has found a violation of the right of property as laid down in the First Protocol to the European Convention of Human Rights (ECHR).[35] However, in accordance with its reticent approach towards social rights in general,[36] this court has so far not recognised the protection of tenants as a social right – which has been criticised as an unsatisfactory constitutional imbalance. In addition, national implementation legislation of the ECHR has in a number of countries, the UK in particular, been applied by national courts. As opposed to the ECHR, the Nice Fundamental Rights Charter may not be expected to play a significant role as it is not applicable to the violations of human rights by Member States (Art. 53). All in all, even though the influence of constitutional law is expanding thanks to the ECHR, the role of this source is still conditioned by national constitutional law and the competencies of national constitutional courts, where considerable differences exist all over Europe.

General and Special Contract Law

The constitutional principles of freedom of contract and the protection of the tenant are found at the core of all national tenancy legislation. In all Member States, this is divided between general contract law and specific tenancy regulation, even though the borderlines of these two instruments diverge quite a lot. In most countries, general contract law remains competent for matters such as offer and acceptance, validity, and the general terms of a contract, whereas specific statutes, sometimes inscribed in a wider consumer law context, supplement and derogate from the former in core issues

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[34] On the impact on the latter on tenancy law see *F. Matscher*, Wohnrechtsfragen und Europäische Menschenrechtskonvention, in: J. Stabentheimer (ed.), Mietrecht in Europa, Manz 1996, 141.

[35] See recently case 22774/93, *Immobiliare Saffi v. Italy* of 28/7/99; case 22534/93, *A.O. v. Italy* of 30/5/00; case 28272/95, *Ghidotti v. Italy* of 21/2/02.

[36] See e.g. S. Sonelli, *I Diritti Sociali nella Giurisprudenza della Corte Europea dei Diritti dell'Uomo*, EUI Paper Law; see also I. Daugareilh, La Convention européenne de sauvegarde des droits de l' homme et des libertés fondamentale et la protection sociale, *Revue Trimestrielle du Droit Européen* 37 (2001), 123; G. Maestro Buelga, Constitución económica y derechos sociales en la Unión Europea, *Revista de Derecho Comunitario Europeo* 4 (2000), 123.

such as rent increase and security of tenure. Whilst general contract law is typically premised more on freedom of contract and commutative justice (aiming at the adequacy of performance and counter-performance), special regulation seeks to protect the tenant through instruments of distributive justice intervening in the free play of market forces and contractual freedom. Similarly, whereas general contract law is normally dispositive, protective regulation is mandatory. In some cases, the interplay between general contract law and specific regulation is complex, which is true e.g. of Austria and Germany, where tenancy law has not yet been fully adapted to the new law of obligations in force since 2002.

Though there is, as noted, a trend in cutting back extreme solutions regarding rent control and security of tenure, one may still observe a certain range of models. As regards restrictions on the unilateral termination of the contract by the landlord, two main forms may be indicated: Whilst in some countries, unilateral termination is completely excluded for certain periods of time, other States allow it (in contracts unlimited in time) under certain narrow conditions, in particular the intention to personally use the dwelling by the landlord or close relatives or of more efficiently using the dwelling, e.g. by a restoration or division of the property in several apartments. As regards rent regulation, whilst strict rent control has been widely abolished (with the exception of Sweden), rent increases are in most States still limited by caps and references to average market rents. These limitations are generally set forth in specific legislation, which complements the general private law mechanism of price control such as unconscionability or the violation of bonas mores or criminal law provision such as usury. Rent control and security of tenure constitute key points of this project and are dealt with in more detail below.[37]

Self Regulation by Landlord and Tenant Associations

The dichotomy of the landlord's freedom of contract and property and the protection of the tenant, is complemented, and to a certain extent overcome, by the procedural mechanisms of self regulation by representative organisations.[38] This mechanism is in principle able to compensate the typical inferiority of the individual

[37] Cf. for details below set 3.

[38] On this subject, see also the background report by F. Cafaggi.

tenant and thus to re-establish the factual equality of the parties as a precondition of just bargaining outcomes. It may therefore substitute legislative interventions through mandatory contract terms or the judicial control of the parties' agreement.

Yet, self regulation through representative associations in tenancy law is in most European States not as widely developed as in labour law, the classic field of collective bargaining. Whilst landlord and tenant associations exist in nearly all States (except in Eastern European States such as Romania and Bulgaria[39]) they are often limited to acting as a lobby for their members in the legislative process and to offering them services, in particular free legal advice and representation before courts. Beyond that, in some other States such as Sweden, Holland or France, rent tribunals or conciliation bodies are, alongside "lawyer-judges", also composed of representatives of these associations.

The most widespread existing form of self regulation is the elaboration of standard contracts. Whilst in States such as Germany and Austria, landlord and tenant associations tend to adopt competing models (with those proposed by landlord associations being naturally more important in practice),[40] there are other States in which, often under the initiative and formal responsibility of the ministry of justice, both associations elaborate common models. In Italy, such contracts are, as mentioned, even promoted by the legislator through the granting of tax privileges to landlords who employ them in their contracts, though this option does not appear to have been widely used thus far.

A more advanced, but rare form of self regulation of associations is the elaboration of tenancy law codes of practice or even legally binding rules through some form of collective bargaining. Such a mechanism seems to exist only in France, Sweden and Finland. In France, the competent institution bringing together landlord and tenant associations, the *Commission Nationale de Concertation*, created in the 1989 *Loi Mermaz*, elaborates national agreements governing mostly minor issues such as management or increase of service charges, depreciation, improvement of housing

[39] In Poland and Slovenia such associations are reported to exist, but they are mostly occupied with privatisation and restitution issues.

[40] It should however be noted that in some States such as Denmark, model contracts issued by the Ministry of Justice, in whose elaboration the associations collaborate actively, are dominant.

and common parts of premises and the provision of common areas. The agreements are binding towards all members of the associations and may be extended by the authorities to a whole sector of the rental market. In Finland, self regulation seems to have filled partly the regulatory gap created by the abolition of any form of rent control in 1992. After some large institutional landlords had put into effect drastic rent increases, the government and the Finnish Real Estate Union (the association representing the landlords) elaborated codes of "good leasing practise", capable of concretising the general clauses on unconscionability and post-notice compensation contained in the Tenancy Act. This approach was continued in recommendations of the landlords and tenants associations from 1998 and 2003 in which basis standards (rent increases not to exceed 15%, to be communicated with advance notice of at least six months; exclusion of the threat of giving notice in rent negotiations). In Sweden, collective bargaining of the powerful housing associations enjoys an even more powerful position, in that rents and rent increases may be determined by them pursuant to the 1978 Tenancy Bargaining Act. The fixing of the rent may happen directly, when a contractual clause ("bargaining clause") refers to the collective agreement; but also indirectly as the said act provides that similar dwellings (according to size and standard) shall have the same rent – with the effect that any tenant or landlord may claim before a rent tribunal that the rent be adapted to the "bargained rent". Remarkably, Swedish tenancy also contains a series of important provisions on rent and termination which are mandatory in individual contracts but may be derogated from in collective agreement. However, this system is criticised for keeping rents so low as to provide little economic incentive for the development of necessary new housing.

Obligatory or Real Character of Tenancy?

Tenancy law is by its very nature situated at the borderline of contract and real property law. Whereas in all continental systems, tenancies are regarded as contracts, they vest an interest in land in the UK and Ireland. In reality, the distinction seems to be more one of words than of facts, as the continental contract characterisation is complemented by several real right elements bridging the gap to property law. Thus, tenants generally enjoy possession and defence claims against trespassers and persons

causing disturbances, noise and smells, and in the case of a transfer, tenancies automatically pass on to the new owner of a building ("emptio non tollit locatum"[41]) and may mostly be registered in the land register if the parties so wish (exception: Germany). Whilst tenancies must not be sold, this is also true for ordinary leases under the Common Law, whose transfer also requires the owner's agreement. A major difference seems to exist in respect of very long leaseholds, possible under the Common Law, which can regularly be freely sold and purchased for a lump sum by the tenant and foresee only a (mostly small) annual ground rent as a regular payment.[42] Yet, this arrangement exists also in continental systems, albeit not as a form of tenancy but as a specific real property right, called *tomträtt* ("site lease") in Sweden and *Erbbaurecht* in Germany.

Other Instruments of Lawful Possession

Alongside tenancies, there exist a series of different legal instruments containing rights to occupy a dwelling. Alongside gratuitous loans (of houses), in all continental countries, also real housing rights (right of abode) exist. These need to be registered in the land register and give the beneficiary normally a lifelong right of residence, which are often (but need not necessarily) be complemented by monthly payments. Real housing rights are granted e.g. in rural contexts when farms are transferred to successors, often the children, but the old owners wish to stay in the buildings. In countries with strong protective tenancy regulation, e.g. in Italy during the *equo canane* period 1978-1998, real housing rights granted against monthly payments have often been agreed with a view to circumventing that regulation. A similar problem is inherent in the Common Law distinction between leases (real rights) and licences (purely contractual rights to occupy a dwelling), as the latter are not subject to any protective regulation applicable to housing tenancies. With the only firm criterion for differentiation being the "exclusive possession" of the tenant (lessee), this distinction is criticised for being unclear. A particular category is formed by corporation or cooperative law arrangements, particularly prominent in Sweden, Finland and Eastern

[41] This adage is an adaptation from Roman law where the contrary was true: A purchaser could "throw out" a tenant, see *R. Voelskow* in Münchener Kommentar, 3rd ed. 1995, Einl. zu §§ 535-537.

[42] In this sense *J. Ball*, Chaos or Necessity? Studying how England, France and Germany regulate tenancies in at least four different ways, paper presented at the ENHR conference, Vienna 2002, 4.

European countries such as Poland, under which the "tenant" becomes member to a housing corporation or co-operative which in turn grants him a (typically perpetual) housing right. According to the Swedish version, such arrangements constitute perpetual leases, with the "tenant" paying an initial lump sum (similar to a purchase price) and a monthly rent. This arrangement has become very popular in Sweden in the last decades as it enables housing companies to gain higher profits than with tenancy apartments, whose rent is tightly controlled by the housing associations. It is also possible to convert tenancy houses into cooperative houses (via a pre-emption right legally granted to a 2/3 majority of tenants in a house requesting the conversion). Yet, their downside seems to be an increased segregation of cities, as of co-operative apartments are normally only affordable for the middle class.

Tenancy and Consumer Law

Though tenancy and consumer law share the main rationale of protecting the weaker party and a "consumer perspective" is alleged to underlie recent tenancy law reform proposals such as in the UK,[43] both legal branches are separate and their interconnections limited almost everywhere in Europe. A first important articulation is less legal but institutional in that consumer associations frequently help and advise also tenants and sometimes also issue model contracts. The main legal interconnection seems to be the 1993 Unfair Terms Directive and its national implementation legislation. This is generally applicable to tenancy contracts, too, provided that the landlord is a professional landlord (for which characterisation no clear guidelines seem to exist) or, pursuant to additional national consumer legislation, also to contracts concluded through a professional broker (Austria, Spain). [44] English implementation legislation, whose applicability to tenancy contracts has recently been confirmed by the High Court,[45] has prompted the Office of Fair Trading to issue detailed guidance notes and an information leaflet on unfair terms in tenancy agreements in 2001. However, due to the predominance of private landlords, the unfair terms directive as well as other consumer protection instruments (such as the

[43] This is the position of the English Law Commission which has in 2001/2002 elaborated proposals for a complete overhaul of residential tenancies in the UK.

[44] This requirement is necessary everywhere but in the Netherlands.

[45] *Khatun v. London Borough of Newham and Office of Fair Trading*, October, 10th, 2003, nyr.

doorstep sales directive containing a withdrawal right) is of little practical importance for tenancies contracts in most countries.

2. Social regulation affecting private tenancy law

Social regulation affecting private tenancy law and contracts is a hugely important and complex area, which requires a study on its own.[46] In a very basic survey, one may distinguish the following phenomena: Houses built or subsidised by State authorities ("social housing"), subsidies paid to the tenant and the landlord and, indirectly affecting the rental market, incentives for the construction of owned housing.

Social Housing

Social housing plays a dominant role on the rental markets of the Nordic States, the UK and Ireland, the Netherlands Austria and Eastern European states, whereas its influence is more limited in Germany, France and less still in Mediterranean countries (Italy, Spain, Portugal; non-existent in Greece). In the UK, it accounts for about two thirds of rental housing. Social housing is organised differently, and different types of owners may be found. Firstly, local authorities still account for a large share of the public housing stock in some countries (UK, Sweden, Finland, Portugal, Ireland), though there is a tendency towards privatisation in particular in the UK.[47] Secondly, public or private non-profit associations, private companies or individuals whose activity is the construction and administration of houses (defined as the category of "registered social landlords" in the UK) may be owners. Finally, one also finds public/private combinations such as the French *société d'économie mixte*.

In return for the subsidies received, the owner of social housing is in most countries bound to contract with tenants in need, though such limitations may apply for a certain period only (Finland and Germany). Tenants in need are generally legally defined by priority criteria (such as income, children, age special cases such as young

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[46] For an introduction, see *BIPE* (ed.), European public policy concerning access to housing, 2000, available at: http://www.bipe.fr.

[47] In the UK, the Thatcher governments promoted the sale of social dwellings to their tenants as well as their transformation into private associations or companies, "registered social landlords". The main objective was to bring in private capital and to liberate local authorities from their management duties

couples, single families, handicapped persons), and dwellings are distributed by the authorities via waiting lists. Other countries (the Nordic Countries, Portugal, the UK, Ireland and Belgium) grant all households access to social housing, but set rents according to the resources and social situation of the individual tenant. In all theses cases, lower prices, calculated on the basis of legally pre-defined coefficients (mostly based on capital expenditure and maintenance costs without profits),[48] and more favourable contract rules, granting a higher degree of security of tenure and limiting rent increases, apply.

The direct and indirect influences of social housing on private renting are manifold and complex. Thus, in Sweden private rents are legally coupled with public rents at the outset, which represents a massive restriction of freedom of contract and works as a disincentive for landlords/investors. In Austria, the relatively high offer of social housing, often at rents comparable to the private sector, has led to a strong direct competition among both sectors.[49] This prevents private rents from exceeding public rents with the effect that housing also becomes largely unattractive for private investors. Finally, in the UK, the predominance of social housing has entailed the expansion of contract law rules developed in this context to private renting as well. Thus, the right of the tenant to ask for a decrease of rent in the event of serious defects of the dwelling is very much restricted. This restriction originates in case law dealing with public landlords who are not allocated the necessary funds to turn large stocks of pre-Second World War dwellings into decent conditions – a fact reflected by a kind of "political question doctrine" in English tenancy law, according to which the public landlord enjoys discretion in deciding which kinds of defects will be repaired with priority, without that an individual tenant would have any corresponding right.[50]

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[48] In Italy, the Constitutional Court has even decided explicitly (Judgement No. 155 of 11/2/1988) that the rent for social houses must not be superior to the (hypothetical) private rent for the dwelling in question, see *P. Pedrazzoli*, Das Mietrecht in Italien, in J. Stabentheimer (ed.), Mietrecht in Europa, Manz 1996, 97, 106.

[49] See alongside the Austrian report also *M. Wagner*, Mieten, Wohnraumversorgung und gesellschaftliche Stabilität, in J. Stabentheimer (ed.), Mietrecht in Europa, Manz 1996, 39.

[50] See solution to Case 16 in the English report.

Another important element of the social regulation of tenancies are rent subsidies for tenants in need. These exist in nearly all Western European countries, either in the form of direct allowances, mostly distributed by local authorities to tenants (sometimes, e.g. in Ireland, paid directly to the landlord), or equivalent instruments such as the reduction of social rents depending on the tenant's income, or tax reductions.[51] Yet, the actual number of tenants receiving some form of social subsidy varies greatly:[52] whereas in Spain and Greece such aid is inexistent, it is awarded to about 25-50% of tenants in most western European countries, with Denmark (60%), the UK (70%) and Portugal (100%).[53] Apart from general rent subsidies, there are also subsidies covering special circumstances. Thus, the Belgian report mentions aid that may be granted to compensate for rent increases or the forced removal of a tenant. In other countries such as Germany, help in such emergencies would also be available, but would be granted under a general social assistance scheme.

Subsidies for landlords are also available in most European countries and take yet more complex forms. First, one needs to mention *tax incentives* for the development or renovation of housing stock, typically in the form of the deductibility of interest payments and/or a percentage of the building costs; in this context, further privileges may apply to the construction of special housing, such as student accommodation. Such subsidies may prove necessary to attract private landlord investors. This is demonstrated in Ireland where tax deductions were repealed in 1998 in order to restrict competition among investors and first time buyers (owner occupiers), which was suspected of contributing to price rises. However, tax relief had to be essentially reintroduced in 2001, after a significant decrease of investment in housing, which further limited the already short supply. Moreover, one may find different types of minor landlord subsidies. For example, in Ireland, one may also find "rent a room tax reliefs" granted to landlords renting rooms in their own apartments. Another interesting form of tax relief is provided by the new 1998 Italian tenancy legislation by virtue of which tax advantages are granted if parties use a standard contract drafted

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[51] See BIPE-Report, op. cit., 21.

[52] Statistics from BIPE report, op. cit., 21.

[53] This is due to the consideration of the tenant's income in the calculation of the rent.

by landlord and tenant associations in union.[54] This form of incentive aims at promoting just and fair default agreements.

Unlike tax incentives, direct allowances paid to landlords are rare. An example is provided by French legislation offering a prospective landlord benefits when he rents a dwelling to the economically disadvantaged under certain conditions. Moreover, only in a minority of countries, such as Denmark and France, will ordinary private landlords developing housing for families (to be rented under normal market conditions) have the possibility of receiving direct subsidies. A more important category of subsidies - which may be granted to social building associations or companies in most countries - are loans by public or private lenders offered at advantageous interest rates or with state guarantees. Finally, subsidies granted for the building of family homes are also indirectly relevant for tenancies. Such subsidies (again primarily in the form of tax relief) may be found in most countries, but their amount and effectiveness varies considerably. Against the backdrop of the current financial crisis affecting most European states, direct subsidies to individual tenants in need are increasingly preferred to the more expensive and less "socially targeted" general subsidies for new buildings (or the restoration of older properties).[55]

In sum, given the wide range of available allowances, tax benefits and other privileges for landlords, tenants and homeowners, it is in most cases difficult to ascertain whether national housing policies favour rented housing or home-ownership, though Germany, Spain and Portugal report a priority towards the latter option. Whereas former housing policies seem to have preferred ownership in other countries as well, housing tenure might become politically more valued with the recent increase of social and economic mobility given homeowners typical reluctance to move.

Other Public Law Interventions

Alongside social housing and the grant of subsidies to tenants, landlords and developers, there are in addition other more powerful public law interventions into private tenancy law. Thus, the assignment of homes to those in need, particularly

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[54] See Statute of 9 December 1998, no. 431, Gazetta Ufficiale 203/L of 15 December 1998, on this, see, *C. Martone*, La Nuova Disciplina delle Locazioni Abitative, *AS* 1999, 741ff.

[55] See BIPE-Report, op. cit., 56f,

where a risk of homelessness exists, has become a widespread phenomenon. To the extent that this entails the assignment of housing contrary to contractual arrangements, it is normally complemented by financial compensation to be paid by public authorities to the owner. Other public law interventions, which may however be found only in a minority of countries, aim at preventing dwellings from remaining empty. Measures include fines imposed on owners unwilling to rent property (as in Germany or Denmark) or tax incentives (as in France); yet, even in these countries such measures are reportedly applied only rarely. In sum, differences in social tenancy regulation are far larger than in private tenancy law, and determine to a significant extent the current shape and functioning of private tenancy law.

IV. Core Elements of Tenancy Law in Action

The General Situation of Housing

The general situation of housing throughout Europe displays strong national and local divergences. To start with, the percentage of people who do not have their own homes and depend on rented housing varies considerably.[56] Whereas in Switzerland and Germany around 60% of all households are accommodated in rented private dwellings, this figure is between 30 and 40% in most other countries and falls to only 18% in Ireland and about 10% in less developed Eastern European Countries such as Romania and Bulgaria, where owner-occupancy reaches nearly 100% in rural areas. Notwithstanding these discrepancies, there is in Europe a far more similar picture regarding the overall supply of housing: Virtually everywhere, there have in recent years been periods of massive shortage in larger cities, even though a substantial amount of vacant dwellings exist in the countryside in some States. Together with the recent relaxing of rent control (often intended as a counter measure against shortage), this situation has led to sharp rent increases in cities such as Paris, which reports a doubling over the last 5 years and the reappearance of slums in the outskirts. In other European capitals such as Zürich, the shortage is so acute that virtually no buildings are available on the market. In such cases, current rents are frequently reported to consume up to 50% or more of the average salaries of poorer families. That notwithstanding, only few States (such as Germany) report that building and renting

[56] See BIPE-Report, op. cit., 5

of housing is perceived as a lucrative activity for landlord investors.[57] Most other countries refer to high tax burdens, the protection of tenants including rent control and the availability of more profitable alternative types of investments as disincentives against building and renting houses. As a consequence, the role of the social state in providing housing seems to be as important as ever.

Access to Courts, Procedure and Alternative Dispute Settlement in Tenancy Cases

As a rule tenancy law is enforced before ordinary civil courts, including the possibility to lodge an appeal, guaranteed everywhere. However, one may find much more variations than in other private law matters. First, specialised bodies may be found, whose status may often be located between courts and public authorities. Thus, in the UK, the Netherlands, Denmark and Sweden, separate "rent tribunals" exist which handle disputes about rents and rent increases exclusively. A similar "rent commission" is reported to be foreseen in Portuguese law, but not yet put into effect. In the Swedish *Langborger* case,[58] such a body has, once and in certain constellations only, been found in contradiction with the guarantee of a fair trial enshrined in Art. 6 ECHR, as members from representative associations were found to act as judges in their own case, *i.e.* in matters in which the associations had qualified interests. Moreover, discrimination issues (which may arise at the stage of selecting tenant candidates) are in several countries, including England and Ireland, assigned to special equality tribunals or commissions.

Another distinctive feature of tenancy proceedings is the emphasis on judicial and administrative conciliation mechanisms. Not only do several national laws foresee the first instance competence of a peace judge (e.g. Portugal, Italy, Belgium) and/or a conciliatory hearing before the actual adversarial hearing may take place (Germany, Denmark, Belgium); beyond that, in the German case, most regions have upon delegation of authority by the Federation established a mandatory conciliation procedure, which is to be held typically before a solicitor or notary public and limited to small claims up to 750 €, neighbour and personality rights disputes. A special

[57] However, this assessment is limited to middle and upper class dwellings in attractive West German cities and their surroundings, whereas the East suffers from internal migration to the West and an artificial supply boom due to massive tax incentives provided in the wake of reunification.

[58] ECHR A/155 of 22.6.1989.

conciliation authority exists also in Switzerland, whose intervention is mandatory, free of charge and reported to be frequently successful. In Austria, a similar municipal arbitration board exists, whose intervention is however voluntary. As opposed to judicial and administrative conciliation mechanisms, private arbitration is generally rather rare in tenancy law, and in the case of Sweden even forbidden. Greece in a similar vein reports arbitration to be an undesired mechanism, as the public trusts much more judges and the official court system than representatives of private institutions, pressure groups in particular. Against this trend, representative associations have set up meditation centres or similar bodies in France and Germany whose decisions may be directly enforced if the respective ministerial authority has been granted, but which seem to be used only rarely in tenancy disputes up until now. Procedurally, ADR faces the huge additional conflict problem that most national laws presuppose judicial decisions, especially for controversial rent increases or cases of termination which ADR decisions, even if generally allowed, do not qualify.

Fair and effective access to courts depends on the general situation of the court system in each country. In this respect, huge differences may be found, in particular as regards the length and cost of procedures needed to obtain executable judgements. Figures range from half a year for two instances in Sweden up to 10-15 years in Italy (should an appeal on legal grounds be lodged with the National High Court, the Corte di Cassazione). High legal fees may frequently dissuade average tenants to go to court. This situation is reported to have led to the proposal of setting up a Private Residential Tenancies Board in the recent reform of Irish tenancy law. Legal counsel is mandatory in no European first instance court dealing with tenancy matters, be it a general or a special court, but of course possible and widely used. Legal aid is generally available everywhere, but reserved to the very poor in most countries and often unattractive to good lawyers because of the low remuneration it foresees. Alongside free legal advice by tenant associations, legal insurance may bear the costs of litigation, but it is affordable and widely used only in a few countries such as Germany and Denmark; furthermore, it has the downside of encouraging excessive and superfluous litigation, thus contributing substantively to the roughly 300,000 tenancy lawsuits handled every year in Germany.

Particular difficulties are often inherent to the enforcement procedures in eviction cases. In most countries, this may be suspended if the tenant would otherwise face

homelessness (whereas as in others this question is dealt with already at the level of substantive law). Moreover, there are other socially inspired limitations such as the prohibition of eviction in the winter months in France, or the administrative delay of eviction in densely populated urban districts according to a ranking of social need. As mentioned, such massive delays, which may render eviction ineffective even in the case of substantial rent arrears, have in several cases brought Italy into dispute before the Strasbourg institutions for violating a landlord's freedom of property.

Legal Certainty and Information

Legal certainty in tenancy law is generally far from optimal in most European countries. Firstly, the interaction of general contract law and specific legislation poses problems in many countries. This may be due to the fact that both areas have not been tuned to one another as in Germany. Even more frequently, interaction problems result from frequent changes in specific legislation, entailing the co-existence of different, sometimes not only national, but also regional regimes. Such intertemporal and interregional conflicts are reported to affect legal certainty in a number of countries including France, Belgium, Denmark and Greece. Such an overlap of different layers of regulation is also reported to lead to inequalities, e.g. when tenants of identical dwellings in multi-storey buildings pay completely different rents, as their contracts have been concluded under the different rent control regimes. More generally, important elements of specific tenancy legislation such as provisions on the calculation of the rent, are often accused of being overly complex, rendering tenancy law a "dark discipline" surveyable by specialised lawyers only in the eyes of the Austrian reporters. Finally, recent comprehensive reforms in a number of countries including Ireland and all Eastern European states require the elaboration of a new body of case law before legal certainty may reach higher levels.

Reliable information outlining tenants awareness of their rights is largely absent, even though it is described as being particularly low by some reports such as the English study. The availability of specialised information for lawyers is generally satisfactory. Basic treatises, law reviews, often even specialised reviews on housing law, and (sometimes expensive) electronic databases exist not only in western Europe, but also in the first wave of eastern European accession states. A certain problem lies in the fact that the decisions of lower courts - the most important cases in tenancy law,

are not regularly reported in a majority of countries. Therefore, local practice and local divergences in jurisprudence play a huge role in most countries.

Part II: Core Issues in Tenancy Contracts

I. Conclusion of the Contract

General Foundations

The conclusion of a tenancy contract is subject to general contract law everywhere. The commonalities and differences of national contract laws are well-known: whereas most systems require an offer and an acceptance, added to consensus as to the essentials of a contract, the Roman-French legal family further requires "cause" or "causa" whilst the Common Law requires "consideration" to uphold a contract as valid. Moreover, all national laws agree on a newspaper ad as constituting merely an "invitatio ad offerendum" , i.e. an invitation to make an offer, and not an offer itself.

Freedom of contract is the most fundamental principle of all European private law systems: The parties may decide whether to conclude a contract or not and what contents it may have. Thus, duties to contract constitute rare exceptions. One such exception may lie where the offeror has a monopoly, the classic example being contracts for utilities (gas, electricity, water) or public transport. In tenancy law, monopoly situations are very rare. A German commentator gives the example of a disabled person who would like to rent an apartment in a new building area where the landlord enjoys a monopoly and the prospective disabled tenant requires certain utilities that can only be found in an area close to his work.[59] Beyond that, the German and the Dutch report mention (public law) exceptions for social housing in which the landlord is obliged to contract solely with people of low income.[60]

Moreover, all continental countries limit the possibility to withdraw arbitrarily from contractual negotiations on grounds of good faith. Thus, if one party breaks off negotiations without an acceptable and lawful reason, she may be liable for damages

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[59] *R. Voelskow*, in: Münchener Kommentar, op. cit., §§ 535, 536 at no. 16.

[60] For example, in Germany, if a dwelling was (partly) financed through public funds, the owner can rent it only to people in possession of a so-called *"§ 5 Schein"*, a certification issued by local authorities to people with a low income; cf. § 5 Wohnungsbindungsgesetz.

to the other party, with specific performance, i.e. a duty to enter into the contract being generally excluded. In tenancy law, one may in this context think of a landlord asking questions about the tenant, e.g. about his solvency, intentions to use the dwelling or personal characteristics. If for example the landlord breaks off negotiations because he discovers the financial background of the prospective tenant insufficient, this is of course an acceptable ground that does not give rise to any liability. However, breaking off negotiations may be unlawful and liable to damages when the landlord has asked a question that displays discriminatory motives. In this way, as the Italian report notes, the duty to negotiate in good faith may work as the doctrinal link between tenancy law and fundamental freedom and equality rights.

Discrimination

A frequent constellation in tenancy law is that an owner rejects a prospective tenant for discriminatory reasons, e.g. when the former does not want to rent to large families, people of a certain race, religion, sexual orientation, disability, musicians, owners of pets etc. As regards large families, the English report observes that discriminatory policies are practised even in the public sector as a result of concerns over nuisance and anti-social behaviour and remain a high profile concern for the current government. Thus, local authorities and other social landlords are said to conduct “area profiles”, in order to limit the “child density” of the area, without there being any legislative restriction on such policies.

From a more general perspective, there is a first group of countries (including Spain and Poland) in which freedom of contract is reported to be absolute, without there being any remedies against discriminatory behaviour by the landlord in her choice of tenant. In a second and larger group of countries including Austria, Portugal, England, Germany, Sweden, the Netherlands, Ireland, Italy and Romania, certain forms of discrimination only - mostly regarding the personal characteristics of the prospective tenant - may be challenged, even though the law is often not consolidated and uncertainties remain. On the one hand, all of these countries except Ireland appear to allow a landlord's refusal to rent to families not only for objective reasons (e.g. the small size, often defined by specific regulation, of a dwelling to be rented to a large family), but also when no such reasons are presented and the refusal is based on the fear of noise or wear and tear. Likewise, all countries seem to accept that the owner

may refuse tenants who play music or own pets even without any particular reason. On the other hand, the case of personal characteristics of the tenant is treated differently. Thus, a refusal based on the prospective tenant's religion, race, sexual orientation or disability is unlawful and may in theory give rise to remedies for damages or even specific performance. Yet, high burdens of prove and the cost and length of proceedings seem to entail in all these countries that in tenancy cases such discrimination claims are almost never brought before courts. This might change with the European Race Discrimination Directive 2000/43/EC[61] which in Art. 3 para. 1 lit. h) also covers equal access to housing. Though the Directive has already been implemented in most EU Member States (the deadline being July, 19th, 2003), its practical effect may not yet be assessed.

The highest degree of protection against discrimination may be found in France.[62] There, the 2002 *Modernisation Sociale* Act prohibits discrimination in the choice of the tenant, with the list of possible discriminatory behaviour of the landlord being extremely broad: "No-one shall be denied the power to rent a dwelling on the grounds of his origin, name, physical characteristics, gender, family situation, health, disability, habits or sexual orientation, political opinions, activities within unions, or his true or assumed belonging or non belonging to an ethnic group, nation, race, or religion".[63] More importantly, this provision is also endowed with an effective implementation mechanism.[64] Indeed, the refused candidate tenant has to "*present factual elements that infer the existence of direct or indirect discrimination*", thereby shifting the burden of proof upon the landlord who must show that his refusal was justified. Against this background, a number of commentators fear that discriminatory

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[61] OJEC 2000, L 180, 22.

[62] The following passage relies in part explicitly on the French report.

[63] The 6 July 1989 Act, art. 1 §2 : "Aucune personne ne peut se voir refuser la location d'un logement en raison de son origine, de son patronyme, son apparence physique, son sexe, sa situation de famille son état de santé, son handicap, ses mœurs, son orientation sexuelle, ses opinions politiques, ses activités syndicales ou son appartenance ou sa non-appartenance vraie ou supposée à une ethnie, une nation, une race, ou une religion déterminée". To compare with Directive 2000/43/EC (O.J. 2000, L 180/22) on the principle of equality, prohibiting discrimination on ethnical grounds, to be implemented by 19/7/2003, also covers equal access to housing (Art. 3 § 1 lit. h).

[64] See, the action before the French Constitutional Court : *O.J.* 18 Jan. 20002, p. 1072 ; see also *V. Canu*, Modernisation sociale et bail d'habitation : *Rev. Administrer*, May 2002, p. 9

allegations would multiply and that landlords, forced to prove their good faith, would be unable to give the required "*justification*". The French Constitutional Court interpreted the provision by underlining that the rejected tenant will have to "*establish the veracity of accurate and concordant factual elements he presents to ground his allegation*" and that the landlord will have to "*prove that his decision is motivated by the normal management of his estate or by objective elements*" foreign to any discrimination.[65] The judge will have to decide "*after having ordered, if needed, every instruction measure he deems useful*". The only civil sanction imposed upon a landlord convicted of discrimination would appear to be damages. These damages may be material or immaterial. Though the contrary has been claimed by the French government during the legislative procedure, [66] such a conviction for discrimination may have additional consequences in criminal law. Article 225-1 of the French Penal Code punishes with penalties foreseen in article 225-2 (up to two years imprisonment or a fine up to 30,000 €) "*every distinction made between individuals according to their origin, gender, family situation, health, disability, political or union activities, religion, race, nation, ethnic identity*". On this ground, a landlord was convicted of discrimination for demanding supplementary guarantees after having learnt the tenant had AIDS.[67]

Finally, in all countries where discrimination based on personal characteristics is illegal, it may be assumed that a prospective tenant has a right to lie when the landlord asks such questions. However, if a question, e.g. regarding domestic animals, is permissible and the prospective tenant lies, this may give the landlord the right to rescind the contract on the grounds of fraud. Yet, several countries such as Belgium, the Netherlands and Sweden report that this conclusion is not automatic (as it is under the Roman law maxim "fraus omnia corrumpit" applicable inter alia in Italy, Germany and Austria), as a judge may find the pertinent circumstance inessential and consequently deny rescission of the contract. Against this background, a prospective tenant may be better off lying to these questions.

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[65] *O.J.* 18 Jan. 20002, p. 1059, n°88.

[66] *O.J.* 18 Jan. 20002, p. 1082.

[67] Cass. Crim., 25 Nov. 1997: *Rev. Administrer*, June 1998, 37, obs. G. Teillais.

Formal Requirements and Registration

In all European countries examined, written tenancy contracts are customary, but oral contracts are also valid. Yet, to prevent tax evasion and facilitate prove, most national legislators have a clear preference for written agreements and provide for disincentive measures against oral contracts, directed mostly against the landlord. Thus, oral contracts may not only be more difficult to prove. For example, in Poland a contract for a period longer than one year that is not in writing will automatically become a contract for an indefinite period. Likewise, in Finland and Austria, a tenancy contract not made in writing will be considered as unlimited in time. In England, an oral contract in the private sector, which is legally possible for leases under 3 years (longer leases requiring a deed at law and a written form in equity), will be treated as an assured shorthold tenancy (i.e. with only six months of security of tenure). However, the landlord will be denied access to the accelerated termination procedure otherwise foreseen for this kind of regime. In Italy, a violation of the expressly stipulated written form requirement, on the landlord's initiative, will mean the contract being upheld by a court in accordance with mandatory rules.[68] Importantly, the rent will then be fixed at the amount determined by local associations' agreements, which typically represent a low average of market rents.[69] In Ireland, other formal requirements include the payment of a stamp duty and the provision of a rent book which contains mandatory information about the contract and payments effectuated. This is meant to serve as a basic form of protection for the tenant.

Additionally, in a majority of States (exceptions being Germany and the Netherlands), tenancy contracts can or even must be registered in tax and/or land registers. Compulsory registration is provided for in the case of very long contracts (e.g. more than 6 years in Portugal, more than 7 years in England, and more than 9 years in Italy). Whilst registration has no effect on the legal position of the tenant towards the landlord, it enables the former to assert his rights against a third party who purchases the dwelling, even where the property has been sold at auction (provided that the registration is made prior to the birth of the creditor's right after

[68] Art. 13 subs. 5 L. n. 431/1998.

[69] Art. 2 subs. 3 L. n. 431/1998.

auction). This feature may constitute an incentive for registration even in countries such as Poland, Sweden or Austria where registration is voluntary. Yet, when a duty of registration is violated, this may also entail other sanctions, particularly when the registration serves mainly fiscal purposes as in Italy. Again, without registration, a rent agreement exceeding the amount determined by local associations' agreements will not be enforceable, even though the constitutionality of this provision is controversial. Moreover, landlords were barred from serving an eviction notice, a provision which has however recently been declared unconstitutional.[70]

Extra Payments ("Key Money") and Commission of Estate Agents

Extra payments at the conclusion of the contract ("key money") are current in countries with strict rent control in the private and/or social housing sector, where they aim at compensating the advantages of a tenant provided with cheap housing (in particular Sweden, the Netherlands and Austria). In Sweden for example, such payments take the form of payments to L as a condition for accepting a new T, or from a new to the former tenant when two apartments are exchanged (which is a legal and frequent practice). Estimates speak of 3,000 illegal apartment exchanges made yearly in Stockholm with an average black market price of 35.000 € per apartment. Typically, all such extra payments are classified as criminal offences and all money paid may be claimed back. This is also true for extra payments charged as reservation fee, as mentioned explicitly in recent Guidelines of the English Office of Fair Trading. However, minor compensations such as an adequate fee for the draft of the contractual documents may be allowed (Germany); also extra payments reflecting actual transactions such as the sell of a fitted kitchen are of course legal.

The remuneration of estate agents who lawfully act as intermediaries in the conclusion of the tenancy contract is regulated merely in some countries, whereas in others no administrative control exists, and courts are limited to the general instruments against excessive pricing, notably the unconscionability doctrine. Against this background, huge differences may be found as regards the admissible maximum. Whereas in Sweden the maximum commission, fixed by a governmental agency, is currently about 200€, an amount corresponding to two monthly rents to be paid by the

[70] Const. Court, 5 October 2001, n. 333, in [2001] *Giust. Civ.*, I, p. 11.

tenant is customary and legal in most other countries including e.g. Germany and Poland. Legislation in other countries such as France provides that the fee must be divided among tenants and landlords. In Finland, as a response to the former practise of shifting the fee to the tenant entailing a low degree of price competition among agents, a 2001 statute stipulates that only the principal, i.e. the person who has commissioned the agent, shall be liable for the fee. The effectiveness of this provision has even been strengthened by recent jurisprudence according to which it is illegal for the landlord to charge a higher rent during the first months of the tenancy, in order to compensate for the fee. However, this jurisprudence is said to have promoted fixed-term agreements whose termination before the final deadline is difficult, thus preventing the landlord from having to pay the fee twice within a short period.

Taking in Other Persons and Subletting

If a tenancy contract has been concluded by a tenant in his own name only, taking in other persons, without the agreement being formally extended to them or a contract of sublease being established, is another frequent problem. As a general rule, the tenant is allowed to invite others to share the property, even without the permission of the landlord, but after communicating his intent to do so. Taking in a married partner and children is generally uncontroversial, with the married partner even becoming party to the contract ipso iure in some countries such as Poland. In all these cases, contractual stipulations to the contrary are invalid. This legal position may be claimed to possess constitutional backing at European level based on the protection of the family. Significantly, the French Cour de Cassation resorted to Art. 8 ECHR in invalidating a contractual clause which prevented a tenant from sharing an apartment with her husband.[71] Similarly, where the institution of "solidarity pacts" (e.g. *pacte de solidarité civil* in France, *eingetragene Lebenspartnerschaft* in Germany) exists, it always confers the right to share a rented apartment with a registered same-sex partner. Even though the position of cohabitees and unregistered same sex partners is more controversial, there seems to be a general tendency of allowing couples to share a dwellings. Alongside partners and children, the tenant is often also allowed to invite other persons who have previously "contributed financially" in sharing a property with him/her. In all such cases, public law requirements of minimum space per person

may however be invoked against enlarging a household. Finally, all persons who may be taken into the apartment generally have the right to take over the tenancy following the tenant's death, even though this right may exist only for the spouse in public housing schemes. Beyond spouses and children, this right generally presupposes that the common household must have existed for a certain period of time, and in no case less than one year.

Subletting, i.e. contractually letting the whole or parts of a rented dwelling to third persons, exists everywhere in principle, but it may sometimes take different legal forms (licence and lease in the Common Law), and its admissibility is also assessed differently. The requirement of previous authorization exists in a majority of countries, whereas others such as Sweden and Bulgaria do without it under ordinary circumstances. Reasons for this division are difficult to discern; sometimes, as in Italy, the question is even regulated differently in general and special contract law.[72] Another differentiation to be found e.g. in Spain or the Netherlands says that a sublease of the whole apartment is forbidden without the previous authorisation of the owner, whereas it is allowed if restricted to a part thereof. Despite these differences, there appears to be large consensus on the issue that if the tenant has a justified interest (e.g. the financial need to divide the rent among several persons), the owner must not prohibit a sublease unless he has himself objective reasons to do so. In this situation, an increase of the rent is not provided for by any European law, yet such a stipulation is of course possible. To the extent that subletting is allowed pursuant to these guidelines, a contractual prohibition, which may be found frequently in model contracts all over Europe, will frequently, though by no means always and in all countries, be declared invalid. The admissibility of sublease under these conditions is interpreted as an implied term in English assured tenancies, but one may find them inter alia also in German,[73] Austrian[74] and Swiss[75] law. The frequent case in which an apartment is rented to a group of students, with only one of them dealing with the owner, may be characterised as a sublease or joint conclusion of the contract; in either

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[71] Cass. Civ., 6 March 1996, III ch. Civ. In Dalloz Jurisprudence 1997, 167, obs. B De Lamy.

[72] Cf. Art. 1594 para. 1 CC and Art. 2 para. 1 of Legge 392/1978 (the "equo canone" law).

[73] § 553 BGB.

[74] § 11 MRG.

[75] Art. 262 para. 2 OR.

case, a co-opting right according to which the remaining tenants may themselves, and possibly even against the will of the landlord, appoint successor tenants in the event of a departure of one them, may be inferred from interpretation.[76]

When the tenant unlawfully sub-rents an apartment or parts thereof to a third party, the landlord is entitled to give immediate notice, usually after an appropriate warning. Moreover, the question whether the sub-rent collected may be claimed by the landlord as unjust enrichment or damages is not, apparently, discussed in many countries, whereas in Germany it is the object of a complex controversy.

II. Duration and Termination of the Contract

General

The duration and termination of tenancy contracts constitutes a key issue. At a general technical level all countries know the distinction between contracts limited and unlimited in time. The latter type constitutes the statutory default regime in most Western and Northern European countries. Though termination is in principle possible by either party serving notice, termination by the landlord is often temporarily excluded or made dependent upon special justifications (such as the desire to use the property for personal of family use or make necessary renovations). Notice is equally possible in important circumstances, the most frequent being substantial rent arrears or a tenant's gross misconduct.

Fixed term contracts are the statutory default regime in most Southern and Eastern European countries, but one may find huge variations depending on the length of the term. Under such contracts, notice of termination is generally excluded for the whole term, though exceptions for important reasons apply again. As short term contracts - in particular periodically renewable "chain" contracts - may restrict security of tenure, in much the same way as unrestricted notice under open term contracts, such arrangements are frequently subject to legal restrictions.

Another commonality attaches to the transfer of the contract in the event of a change of the landlord. In no country does the contract end with the death of the landlord, but it is automatically transferred to his heir(s). Likewise, the sale of the

[76] This solution is addressed explicitly in the Dutch and German reports.

dwelling does not, generally, affect the tenancy contract (the rule "emptio non tollit locatum", already mentioned), even though some countries such as Bulgaria render the protection of the tenant in this case dependent upon the registration of the contract. Moreover, some countries such as Germany and Slovenia, grant special notice rights to buyers dwellings at compulsory public auctions.

Procedurally, one may distinguish a majority of systems under which the declaration of notice, if lawful, terminates a tenancy contract eo ipso, whereas in others termination must always be authorised by a judge, with the serving of notice constituting merely a condition for the availability of such a decision (e.g. Belgium, France and the Netherlands). It is obvious that the latter solution may render termination more lengthy, complex and costly.

Models of Tenant Protection

In a substantive comparison, the decisive factor is the degree of security of tenure attributed to the tenant on social grounds (i.e. statutory protection of the tenant against unilateral notice by the landlord). In this perspective, different national solutions may be located on an open-ended scale.

At the bottom end of the scale, one may find a small group of countries in which tenancies are typically regulated together with standard leases in civil codes, without any particular protection being granted to the tenant. The clearest example for this model is provided by Bulgaria where any open term residential tenancy contract may be terminated by either party with a delay of one month only, even though fixed term contracts up to 10 years are also allowed and their termination is not specifically regulated at all. A similar liberal regime applies to ordinary private rental dwellings also in Romania where notice is also always possible even though it must respect local custom which may concede to the tenant a certain period in order to find a new dwelling. However, an emergency ordinance from 1999 regulating the privatisation and restitution process in the wake of Communism establishes five years security of tenure for social dwellings owned by the State or local authorities and private dwellings recovered by former owners or transferred to companies in the privatisation process. Among Western European countries, a similarly low degree of tenant protection exists only in Ireland, where weekly or monthly periodic tenancies are the norm and may be terminated at any time simply by serving notice to quit and without

giving any reason. The far-reaching absence of protective regulation in Ireland was due to an extremely high percentage of owner occupiers (approx. 90%), with private tenancies playing no politically significant role. As this situation has changed with increased immigration and internal mobility, a new Residential Tenancies Bill of 2003 heralds significant reform. These include the introduction of longer periods of notice (among 28 and 112 days depending on the length of the tenancy) and a 4 year period of security of tenure, with the first six months serving however as a probationary period during which the landlord may still give notice without alleging any reasons.

A second group of countries including England, Switzerland and Finland grant a low degree of security of tenure, be it that, apart from notice periods, requirements for termination by the landlord are inexistent or minimal and/or that short fixed term tenancies are allowed. In England, this assessment applies to the most frequent form of tenancy, the so-called "assured shorthold tenancy", which was established in the 1996 amendment of the Housing Act 1988 and which constitutes the statutory default regime for private renting where the parties have made no differing provision. Assured shorthold tenancies provide for security of tenure of 6 months only, and they may be terminated without giving reasons with two months notice, which may be served at any time after a minimum period of 4 months. This regime has in practice widely displaced its 1988 predecessor the so-called "assured tenancy", under which repossession was only available on one of 18 grounds (with eight of them being mandatory, the rest left to the judge's discretion if found reasonable), eviction being admissible as ultima ratio only.

A similarly low degree of tenant protection may be found Switzerland. There, too, as a rule, L may terminate the agreement for any reasons and without specific justification by serving three months' notice, referring to termination dates established by local custom. However, a termination in contravention of good faith is invalid. Such a situation is presumed to exist when notice is given in retaliation for a claim made by T or if L exerts pressure on T to further her own interests – such as the purchase of the apartment by T, or a unilateral amendment of the agreement. For these reasons, L must provide a justification for the termination upon T's request. Fixed term contracts are possible without particular restrictions. Finally, for particular reasons rendering performance of the contract intolerable, L may give three months' notice at any time.

A somewhat higher degree of protection under similar doctrinal structures, consisting also of a vague general clause, may be found in Finland. There, protective regulation was repealed in 1995 in order to create incentives for construction and the lease of apartments. There, too, the landlord may at any time give a three or six months' notice (the latter if the contract has been in effect for at least one year), even with the sole purpose of increasing the rent, unless the new rent is not excessively high. However, on giving notice, the landlord must state the grounds for termination, and these must not be unreasonable in the individual circumstances. This may be the case when e.g. the tenant has difficulties in finding a comparable apartment whereas the landlord has no justifiable reason for termination. Fixed-term contracts are allowed if the term is more than three months (otherwise they are ipso iure considered of unlimited duration). Nonetheless, a court may allow termination by either party for important reasons, but the other party will then be entitled to compensation for losses incurred as a result of the premature termination. Finally, as an alternative to having an unreasonable notice served against "good leasing practise" annulled, the tenant may always claim damages, including removal costs and up to three months' rent to compensate for his inconvenience.

A third, smaller group of countries composed of Poland and Slovenia grant a high degree of tenant protection by providing, as default regimes, for longer periods of secure tenure or massive limitations of notice, but allow their full or partial circumvention through fixed-term contracts. In Poland, contracts unlimited in time may, with a notice period of three months, be terminated in eight precisely defined cases only, which include gross misbehaviour of the tenant, massive rent arrears and the landlord's intent to use the dwelling; in the latter case, tenants are however granted a supplementary period ranging from 6 months to 3 years to find a new apartment, if the landlord were not to provide it. As regards fixed-term contracts, these had to be of a minimum of three years, but this restriction was abolished unconditionally in July 2003, as a stronger need for short term contracts was felt and black market phenomena increased. Even more restrictively, in Slovenia, contracts without time limit may be terminated only in exhaustively defined cases of fault on the part of the tenant; in other instances, e.g. if the landlord needs the dwelling for himself or family members, he must provide the tenant with an equivalent substitute

apartment, unless termination in such cases has been agreed upon in the contract. However, contracts limited in time are allowed without any particular restriction.

A fourth group of countries composed of Denmark and Germany practise considerable limitations on both the termination of contracts unlimited in time and the conclusion of fixed term contracts. Under these regimes, contracts unlimited in time may be terminated by the landlord with three months' notice (minimum extendable by contract) only if legitimate grounds exist. These include personal or family use and an economically more profitable use (esp. through renovation), but in the German case may only be enforced in a special court procedure in which the reasonableness of the notice will be assessed in the particular circumstances. Thus, landlords were not allowed to give notice to families inhabiting a 120 square metre apartment, into which the landlord's children wanted to move when beginning their university studies. Moreover, fixed term contracts also require specific justifications in order to be lawful. These include again personal use or an economically more profitable use planned after a certain amount of time; if these grounds cease to exist, the tenancy is converted into a contract without time limit. In either case, an "extraordinary" termination remains possible in case of important reasons such as massive rent arrears or gross misbehaviour on the part of the tenant.

The fifth and largest group of countries including Portugal, Spain, Italy, Austria, France and Belgium do not practise - or even forbid, as in the French case[77] – contracts unlimited in time, but ensure the tenant more or less long minimum terms. During this period, only termination on important grounds (again e.g. massive rent arrears or gross misbehaviour of the tenant) is possible whereas any other grounds, such as personal or family use, are not relevant. The guaranteed period is 5 years in the case of Portugal and Spain, 4 years in Italy (3 years if the parties follow the local agreement of the housing associations), 3 years in Austria, Greece and France (6 years when the landlord is a legal person). Sometimes, as in France, these contracts are capable of automatic renewal if no notice is served until 6 months before the end of

[77] The French prohibition of contracts unlimited in time goes back to a 1790 Decree which probably wants to parry engagements which are thought to be too long as to be reasonably planned – an idea which is also behind the identical restriction of the English Common Law which is however widely displaced in tenancy matters by special legislation.

the term. In any case, the landlord will be heard with usual justifications for termination (personal or family use, renovation etc) after the lapse of the period. A similar solution is practised in Belgium. There, the default term for residential tenancies is 9 years, with an earlier termination by the landlord for qualified reasons (including personal or family use) being possible only after 3 or 6 years and obligating to pay a compensation of 9 respectively 6 months of rent. However, it is also possible to circumvent this protection to a certain degree by concluding a short term lease up to 3 years maximum (renewable once, as long as the period of 3 years is not exceeded) without a justification for the limit being necessary; however, if continued beyond this term, such a contract is automatically converted into one of 9 years. Also in the Italian case, the circumvention of the guaranteed period is possible when a contract is stipulated for transitory use (generally up to 18 months only), for which some justification is however required normally.

At the top end of the scale of tenant protection, one may situate the Netherlands and Sweden. In both countries, any termination of all kinds of contracts is difficult, unless the tenant misbehaves grossly. Thus, in the Netherlands, when wishing to inhabit the dwelling himself (family members do not qualify), the landlord must always show that his interest is greater than that of the tenant in keeping the dwelling. In many cases, the landlord needs to show that the tenant would have access to a comparable alternative dwelling (or that the tenant has turned down a reasonable offer for such an alternative dwelling) and bear any costs caused by the loss of the dwelling. Fixed term contracts are only admissible on a short temporary basis (around one year) if the landlord wishes to use the premise again after a certain time, e.g. due to a temporary absence for professional reasons. In Sweden, even personal use will not normally be sufficient to evict a tenant in an apartment house, though the landlord's position is slightly better if the property is an individual family house or co-operative apartment. The tenant's right of prorogation applies even in limited contracts. All in all, in these countries the claim is made that it is easier to enforce a divorce than the termination of a tenancy agreement.[78]

[78] Cf. *R.V.H. Jonker*, Das Mietrecht in den Niederlanden, in J. Stabentheimer (ed.), Mietrecht in Europa, Manz 1996, 109, 112.

III. Rent Stipulation and Control

Payment Modalities and Deposits

As regards payment modalities, a wide consensus all over Europe may be found. Usually, the rent is to be paid on the first day of each month, with anticipatory payments being forbidden or limited. Whereas in former times, landlords used to collect the rent themselves or send auxiliaries, transfer by bank giro has become the usual way of payment. However, in Eastern European candidate, cash payment in hard foreign currencies is sometimes usual (though forbidden in Bulgaria) as a means to compensate for inflation. Moreover, all over Europe, deposits are customary. These cover all kinds of claims the landlord may have against the tenant at the end of tenancy. In most countries, a maximum deposit of no more than three monthly rents is fixed by law. However, most countries do not ensure that the deposit be paid by the owner on a separate bank account and paid back with interests to the tenant. In exceptional cases, such as in Poland, excessive deposits up to 12 monthly rents are allowed (though not practised frequently). These are to compensate the generous protection of the tenant against eviction, which may last from several months up to more than two years. This solution may be criticised as inadequate and clearly falls back behind a common European standard as deposits should not be an anticipated sanction for a tenant making use of his statutory rights.

Models of Rent Control

Just as with duration and termination of tenancy contracts, one may also distinguish different models for rent control. These may likewise be located on an open-ended scale indicating the degree of tenant protection. Importantly, different models may be found not only in a comparison between countries, but also within one single country, when different kinds of dwellings (i.e. social or private housing) or different kinds of contracts (normally older or newer ones) are subject to different rent regimes. Therefore, it seems useful to distinguish not countries but different models of rent control.

Under a first model, there is no specific rent control at all. Instead, a tenant who wants to challenge an excessive rent must rely on general contract law mechanisms. This is the case in Bulgaria where the general doctrines of duress or “unfair

advantages" are reported to constitute the only limitations to excessive rents. In Italy, too, after the 1998 reform abolishing the former administrative rent control system, new contracts are no longer subject to any specific rent limitations, unless the parties decide to adhere to the local agreement of the housing associations under which rent increases must be limited to 75% of the annual increase of the consumer price index. As a result, rents have increased drastically in this country since 1998. In a subgroup of countries, the absence of rent control is restricted to specific kinds of dwellings only. Thus, in Romania, it is only for dwellings not subject to the 1999 legislation that the rent may be set freely according to lose criteria fixed in the Civil Code, whereas for dwellings covered by that legislation, rents are determined individually and must not exceed 15% of the yearly income of the tenant (provided that the latter is not superior to the national average income). Similarly, in Slovenia, rent control exists only for State or local authority housing, whereas rents for private dwellings may only be challenged on grounds of usury if they exceed usual rents by at least 50%. Moreover, a partial absence of rent control may also be found in Western European countries outside guaranteed rental periods as described above. Thus, in Belgium, outside the 9 years default period and in short term contracts, rents may be set freely by the parties, whereas within that period, ordinary increases must follow the official consumer price index.

Under a second model, one may find more effective forms of rent control based on general concepts such as "reasonableness" or "neighbourhood average", which are regulated in specific tenancy regulation. Just as under the first model, this scrutiny is mostly left to courts or specific rent tribunals or committees, which operate ex post controls at the request of a party. In some countries such as England and Switzerland, rent control generally extends to increases only, whereas in others it applies also to the initial rent. A mixed solution may be found in Germany, where rent increases may be fully controlled, whereas the fixing of the initial rent is free within a margin of 20%. The latter is to be determined on the basis of the "comparative rent", *i.e.* the average rent which is usual for dwellings of the relevant kind in the neighbourhood and illustrated by rent indices elaborated by local authorities (Mietspiegel). In most countries, though, courts and rent tribunals enjoy a more or less wide degree of discretion in the determination of the concepts of "reasonableness" or "neighbourhood average". As e.g. the Danish, Finnish, Portuguese and French report mention,

reference to investment and running costs, inclusive of the costs of necessary renovation or improvement works, and a certain profit is normally admitted. Finally, in some countries such as Spain and Portugal, the "reasonableness" or "neighbourhood average" control operates for increases outside guaranteed rental periods only, whereas during these periods increases are tied to consumer price indices.

Under a third and last model, both the initial rent and rent increases are pre-determined, precisely or within minor margins, by administrative agencies. Firstly, this model encompasses the frequent cases, in part already mentioned, where rent increases are tied to official indices such as the consumer price index (in France a separate building prices index). At a second stage, this model also includes the regime under which not only rent increases but also the initial rent in private contracts is determined by pre-established through certain reference criteria and formula. Typically, these operate on the basis of points allotted to a particular dwelling according to its location, size, facilities and fittings, age and state of renovation. Such models may currently be found in Austria and the Netherlands, whereas in Italy an analogous model has been abolished in 1998. A further functionally similar solution may be found in Sweden. As mentioned, the rent is usually determined by collective bargaining among tenants' and landlords' associations there, with rents for private dwellings being adapted to those of non-profit state rental apartments. These restrictions constitute the most far-reaching limitations of private autonomy in tenancy law to be found in Europe.

Conclusions

Linking back to the aims of this project, this general comparison enables a final evaluation of the different national regulatory models and the co-existence of national regulation and a common European (general) contract law.

Summary evaluation of the different regulatory models

An evaluation of the different national regulatory models, particularly in respect of termination and rent control, shows that many of them are not able to fulfil the economic and social functions of tenancy law, *i.e.* to provide citizens with housing at

affordable and sufficiently stable conditions, without imposing excessive burdens upon landlords that may act as disincentives to build and rent dwellings.

To start with the ultraliberal regulation to be found in Bulgaria and (still) in Ireland, under which no notice protection and rent control exist, this clearly fails to do justice to the basic mandate of the modern democratic welfare state to ensure the supply of housing at affordable conditions. Likewise, it is not even economically efficient as the threat of eviction enables rent increases against sitting tenants which the market would not always allow.[79] A similar, though more complex assessment holds true for the opposite extreme of a nearly total protection of the tenant against notice and high rents, which may be found, albeit with variations, in Sweden, the Netherlands and Austria. This scheme places excessive burdens on the landlord, rendering it often impossible for him to recover even his own investment and running costs and to repossess a dwelling urgently needed for proper or family use. It therefore comes as no surprise that in these countries, black market phenomena such as illegal extra payments abound, and the State and local authorities have to play the most important role in the provision of housing, as incentives for private investors are largely absent. In these cases, even constitutional challenges of a violation of the owner's property freedom, though hitherto mostly unsuccessful under the ECHR, might have realistic chances.

Moderate social solutions to be found in a majority of European countries, characterised by a period of secure tenure and the tying of rent increases to consumer price indexes, provide a more adequate interest balancing among the parties. Yet even there, one may note manifestly adverse phenomena. Thus, such models are worth little if their circumvention by a chain of fixed term contracts is possible, as it seems to be the case under current Polish regulation. Also, some of these solutions are excessively complex, require lengthy judicial procedures and therefore risk to be ineffective in practise. This may be true for Belgian regulation under which 9-year contracts exist which can be terminated after 3 or 6 years for qualified reasons and against considerable compensation payments only. More generally, it may be felt inappropriate if a landlord may repossess a dwelling at the end of a secure period without any objective ground or impose practically unlimited rent increases on the

[79] See above at Fn. 27.

tenant. This critique refers for example to the new Irish draft legislation under which a tenant wishing to renew a first secure period of four years must even pass a second probationary period of six months. Finally, such a protective scheme may be overly burdensome for the landlord when eviction of a tenant after the lapse of a secure period may take very long and be delayed on social grounds, as it is the case in Italy. Against this background, one might ultimately prefer the moderate liberal solution to be found in Germany and Denmark under which the landlord may terminate a contract at any agreed notice date, but for qualified reasons only (especially proper or family use), and rent increases are limited to neighbourhood averages. Yet even there, the judicial repossession procedure in the event the tenant challenges the landlord's notice is sometimes said to be overly costly and time-consuming and therefore working as a disincentive for landlords to be build and rent dwellings.

Whilst a more thorough analysis would need to be extended to all social framework regulation setting additional parameters for private contracting, even this summary comparative assessment shows that European legislators could learn a lot from each others' experiences, and contrary to most other legal branches such an exchange of ideas does not seem to have taken place in tenancy law to date. Therefore, the European Community should be urged to extend the open method type co-ordination already existing in many areas of social policy to tenancy law.

Implications for the Harmonisation of General Contract Law

Whereas a European co-ordination of national tenancy laws might therefore be fruitful, this assessment needs to be qualified for the harmonisation of this field. Generally speaking, its strong local nature and embeddedness in different national social and economic regulation and its dependence on variable political priorities, which have been shown throughout this project, render tenancy law an unsuitable candidate for European harmonisation, let alone unification. Although the harmonisation of tenancy law does not seem to be seriously envisaged by anyone at the present stage, strong European influences may come from the planned

harmonisation of general contract law in the form of an optional instrument, as envisaged in the latest Action Plan of the Commission.[80]

Specific dangers could arise as follows:[81] Assuming that some upgraded version of the Lando principles were to become the general contract law part of a European codification, it would seem to be logical that these apply also to tenancy contracts, at least to the extent to which no specific national regulation exists or supremacy is granted to the rules of the new European instrument - which the ECJ, generally focussing on the effet utile of Community law, might easily be inclined to do. Then, all tenancy law issues which are governed by general contract law in a Member State would come to be regulated by European provisions. A pertinent example is provided by the *actio quanti minoris* enshrined in Art. 9:401 of the Principles of European Contract Law, which foresees price reduction in all cases of non-conformity of the performance with the contract. Yet, in many national laws, a right to decrease the rent on account of defects of the dwelling does not exist. Whereas such a right does exist in Germany and Austria, in Italy, the tenant can in principle only claim the reparation of the defect. In England, even that right is very much restricted. This restriction originates in case law dealing with public landlords who are not allocated the funds needed to turn large stocks of pre-Second World War dwellings into decent conditions. This situation is reflected in a kind of "political question doctrine" in English tenancy law, according to which public landlords enjoy wide discretion in deciding which kinds of defects in which apartments will be repaired with priority, without an individual tenant having any corresponding right. However, this kind of discretion is the outcome of reasonable national policy choices into which Europe should not interfere were it not to risk its legitimacy.

Against this background, an important conclusion for a European Civil Code may be drawn: Unlike planned up until now, a European instrument should at any rate be limited to an enumerated list of particular types of contracts, whose regulation at European level can be demonstrated as socially and economically advantageous. Otherwise, the Code project will inevitably encounter massive legitimacy problems

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[80] Com (2003), 68 final. For a general comment on private law harmonisation, see the background report by Ch. Joerges.

[81] On such tensions, see also the background report by O. Remien.

similar to the scenario just described. As a general conclusion, it may therefore be formulated that only some lose form of European intervention, such as an open method type co-ordination, may do justice to the national and infranational nature of tenancy law, its embeddedness in different social and economic frameworks and its dependence on diverging political preferences.