United Nations
Educational, Scientific and
Cultural Organization

UNESCO Chair on
the Right to Housing,
University Rovira i Virgili

UNIVERSITAT
ROVIRA i VIRGILI
Housing Chair

Leases as an alternative to homeownership in Europe. Some key legal aspects

Working Paper No. 2/2014

Author

Sergio Nasarre-Aznar
Universitat Rovira i Virgili
sergio.nasarre@urv.cat

This working paper corresponds to the pre-print of the article published at the *European Review of Private Law*. Suggested citation: Nasarre-Aznar, S. 'Leases as an alternative to homeownership in Europe. Some key legal aspects'. *European Review of Private Law*, vol. 22, Iss. 6/2014, pp. 815-846. Published paper may be found at: https://www.kluwerlawonline.com/abstract.php?area=Journals&id=ERPL2014064

Leases as an alternative to homeownership in Europe. Some key legal aspects

Sergio Nasarre-Aznar

Abstract. Leasing a property is sometimes not a real alternative to homeownership in many countries. A low proportion of rented housing hinders the efficiency of the housing market. Reasons for this may be of different natures but, for sure, most of them have roots in the urban leases legal system. A lease conceived as not flexible, not stable and not affordable for tenants has little opportunity to be successful. At the same time, if it entails legal uncertainties, has low guarantees and does not have an efficient eviction process, it is neither attractive for landlords, who might prefer to close down their properties and leave them in disrepair. This paper analyses some key legal features in the three countries with the highest proportion of rented dwellings and in five Southern European countries with low proportions of rented properties and tries to find common elements that encourage or discourage citizens from opting for renting a property instead of buying it.

Keywords: leases, tenancies, housing, tenures, rent control, stability, affordability, flexibility, profitability

1. Introduction

Generalisation of homeownership and deeper housing and financial crises are related since the 2007 crash[1]. Not by chance, the most affected European countries have (and have reached in the recent years) the highest rates of homeownership and, accordingly, the lowest rates of rented-housing (if Eastern European countries are excluded) on the Continent[2]. And it is no coincidence that the main reforms of the law of residential leases have been undertaken in most of them very recently, as a reaction to the current crisis, even in some cases compelled by the so-called "Troika"[3] as a requirement to get international financial aid.

[1] S. NASARRE AZNAR, ´A legal perspective of the origin and the globalization of the current financial crisis and the resulting reforms in Spain`, in P. KENNA (ed.) *Contemporary Housing Issues in a Globalized World* (Ashgate Publishing, 2014), 71 and 72.

[2] See it at http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Population_by_tenure_status,_2011_(%25_of_population).png&filetimestamp=20130522183046 (last checked 30-11-2013).

[3] The so-called "EU Troika" (composed by the European Union, European Central Bank and International Monetary Fund) has intervened in recent years in several countries to press (even require) for changes in many fields of the law and economy, including leases. These countries are Greece (*Greece: Memorandum of understanding on specific economic policy conditionality*, 2-5-2010, available at http://peter.fleissner.org/Transform/MoU.pdf) and Portugal (*Portugal: Memorandum of understanding on*

This work relates to some core elements of the law of leases that help to understand how law affects the good or bad functioning of a housing leases market in a comparative perspective. And this is essential because an inefficient rented housing market dramatically encourages the globalization of homeownership as a form of housing tenure, especially where no other alternatives exist (such as intermediate tenures[4]), thus favouring those bad banking practices that led to the US (sub-prime mortgages) and international (moral hazard in securitizing those sub-prime mortgages) crisis in 2007 that still continues today in many EU countries[5].

To undertake the comparative perspective some Southern European countries (Spain, Portugal, Greece, Italy and Malta), that, according to Eurostat 2011 (see Figure 1), have relatively low rates (in fact, the lowest, leaving apart former communist countries) of rented housing and the three European countries (Switzerland, Germany and Austria) with highest rental rates (social and private combined) have been chosen.

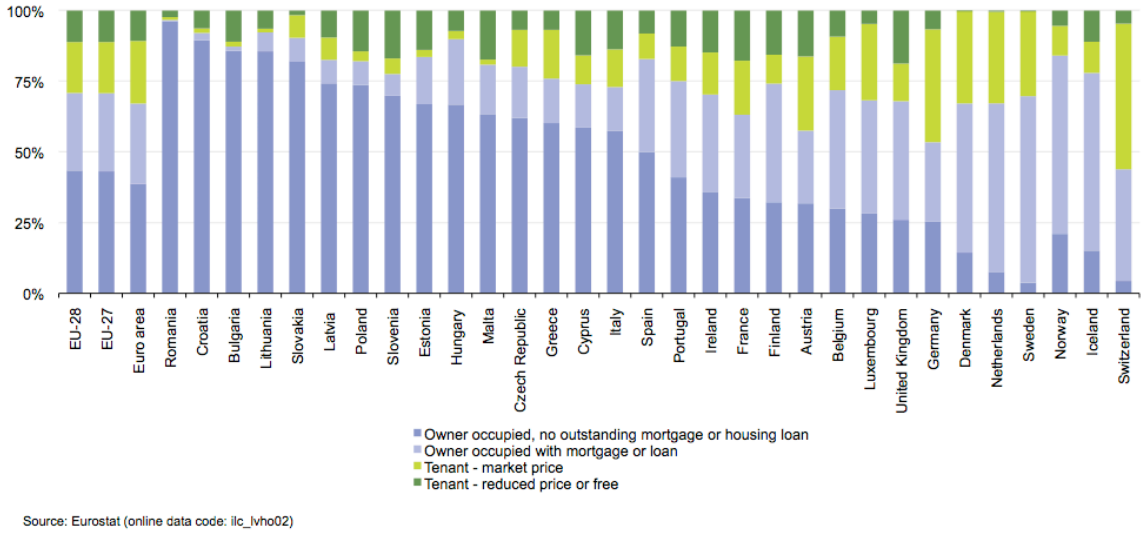

Figure 1. Population by tenure status, 2011 (% of population). Source: Eurostat.

Present work has been possible thanks to the provisional country reports[6] of the first deep European-wide research on law of leases backed by the 7th Framework Programme of the

specific economic policy conditionality of 3-5-2011, available at http://economico.sapo.pt/public/uploads/memorandotroika_04-05-2011.pdf ; last checked on 14-6-2013).

[4] See an economic approach in S. MONK &, C. WHITEHEAD (eds.), *Making Housing more Affordable: The role of intermediate tenures* (Oxford: Wiley-Blackwell, 2010). See a legal approach in S. NASARRE AZNAR & H. SIMÓN MORENO, ´Fraccionando el dominio: las tenencias intermedias para facilitar el acceso a la vivienda`, 739 *RDCI (Revista crítica de Derecho Inmobiliario)* 2013, p. 3063-3122.

[5] See S. NASARRE AZNAR, ´A legal perspective of the origin and the globalization of the current financial crisis and the resulting reforms in Spain`, in P. KENNA (ed.) *Contemporary Housing Issues in a Globalized World* (Ashgate Publishing, 2014) *in toto*.

[6] The Spanish report's author is Elga Molina; the Maltese's report was written by Kurt Xerri; the Portuguese one by Décio Correia, Maria Olinda Garcia and Nelson Santos; the Greek one by Thomas Konistis; the Italian one by Ranieri Bianchi. The author of the Swiss one is Anna Wehrmüller, of the German one is Joanna Rzeznik (assisted by Julia Cornelius) and, finally, the Austrian one is authored by Raimund Hofmann. Currently (November 2013), Part I and Part IIa have been finished and delivered, although no international peer-review undertaken so far. Those versions of the reports (sometimes some of them a bit

EU Commission, the TENLAW project (2012-2015), led by Prof. C. Schmid of the University of Bremen[7].

2. Core aspects of the efficiency of the law of leases

Landlord and tenant hold different positions under a lease contract. While the former sees it a source of income and a way of keeping an unused dwelling up and running, the latter regards it as his home. And, if the property is mortgaged, the mortgagee sees it purely as a financial asset[8].

These twofold (or threefold) and, even, contradictory positions seem to be sometimes irreconcilable. Proof of this is that lease law is seen in some jurisdictions as a pendulum (e.g. Malta or Spain) that sometimes is too close to the homeowner's position and sometimes too close to the tenant's one. It is difficult, as a legislator, to reach a true equilibrium that somehow satisfies both parties.

But what seems important for a healthy rented housing market is that both the offer (landlords) and the demand (tenants) feel comfortable with this type of tenure. Figure 2 shows some factors that, to my view, are likely to be most relevant for both parties to consider leasing a property.

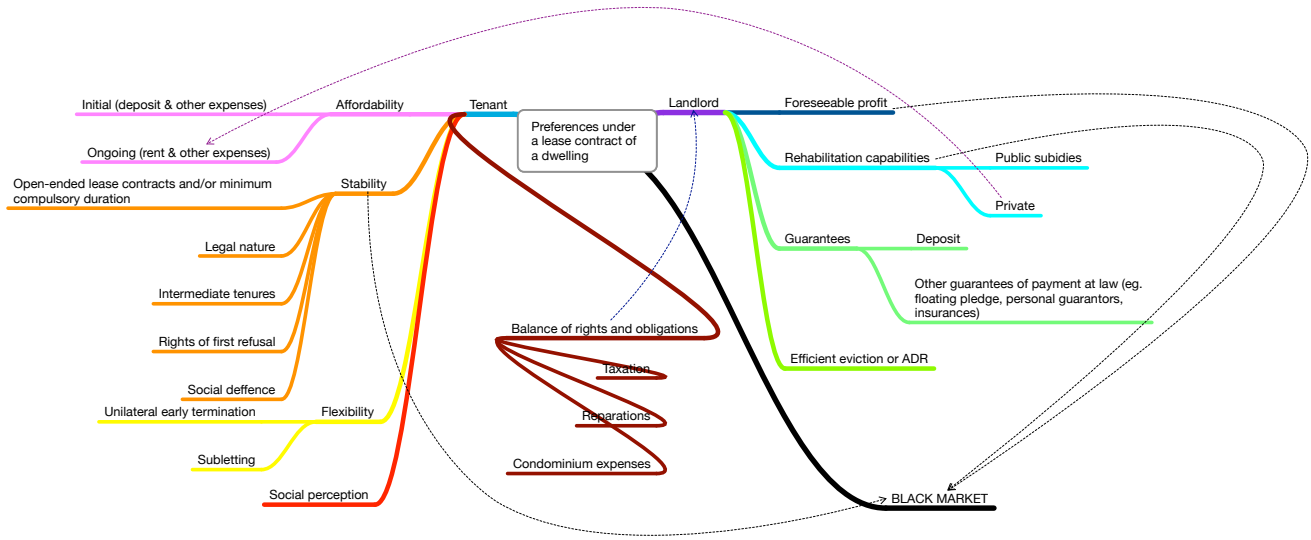

Figure 2. Most relevant drivers for landlords and tenants. Links to the black market. **Source**: own elaboration.

As a starting point, both professional and non-professional landlords' initial motivation to rent their empty dwellings is the return they could get[9]. In relation to this, modest

more updated) are used throughout this work to get the information on each country to make the comparative study and sometimes are quoted as "TENLAW Spanish report, Part I, p. X", etc. This author is the team leader for the TENLAW project for South-West Europe (Portugal, Malta and Spain).

[7] http://www.tenlaw.uni-bremen.de (checked on 30-9-2013).

[8] See a discussion at S. NASARRE AZNAR, *The shift in the concept and protection of 'home' within the Spanish legal system in the context of the international crisis of 2007* (2014), forthcoming.

[9] In this sense, **M. OXLEY and J. SMITH** pointed out in relation to the British housing policy four important factors that help the private rental sector to be a success. One of them is the rate of return required by investors ("to encourage sustained investment in a variable private rented sector landlords must be able to

returns such as the one in Spain (3%, very close to a term deposit, for example)[10] provide little incentive for them to get entangled in all of what renting a property entails (eg. risk of default in the rent payment, state of disrepair of the property). That is why I have pointed out that at least two more relevant aspects for a landlord: first, the existence of certain guarantees to assure the payment of the rent and an efficient eviction process; second, the existence of rehabilitation capabilities for landlords.

In its turn, from my perspective, renting a house should be seen and should be legally ready to work as a true alternative to homeownership or, at least, to work efficiently as a last resource mechanism of access to a dwelling for those who cannot afford to buy (either because they are not granted the loan or do not have the required initial amount, which usually represents 20% of the value of the property) that should be able to overcome the financial barriers buying a dwelling entails. That is, if the initial income (i.e. deposit) is too high or burdensome, the system is inefficient as it is leaving that person without the possibility of accessing a dwelling (by either buying or renting), except for those countries that provide for systems of intermediate tenures. That is why the affordability of the lease is not only linked to the rent but also to the initial required amount. In connexion to this are the expenses related either to the ownership or to the use of the property. Theoretically, those expenses (including taxes) related to ownership (e.g. expenses of the condominium, taxes over land) should be born by the landlord and those related to the use (e.g. refuse tax, gas, electricity, water) by the tenant. However, it is possible that, in the praxis, all expenses are born by the tenant (lack of balance of rights and obligations), which could represent an extra monthly cost for him in addition to the rent, which directly affects the affordability of the property.

The last three main factors that are important to the tenant are the stability, the flexibility and the social perception[11] of renting a dwelling (instead of buying it)[12]. In relation to the

achieve a competitive rate of return"); see **M. OXLEY and J. SMITH,** *Housing policy and rented housing in Europe* (London: E & F Spon, 1996), p. 170. With reference to the social perception, for instance, under English law the leaseholder has a proprietary right; as a result, the leaseholder can transfer or mortgage the leasehold. This way, the leaseholder has the perception of being a true owner and not just a simple tenant; see M. DAVEY, ´Long Residential Leases: Past and Present`, in S. BRIGHT (ed.), *Landlord and Tenant Law. Past, Present and Future* (Hart Publishing: Oxford, 2006), p. 147-148.

[10] TENLAW Spanish report, Part I, p. 45. A European-wide comparison of rental yields may be found at *Global Property Guide* (http://www.globalpropertyguide.com/Europe/rent-yields, last visited 20-3-2014). It shows gross rental yields that are a bit different among the countries we compare in this study: while Spanish, Portuguese, German and Italian returns are rather similar (from 3.84% Italy to 4.42% Germany), Austrian, Maltese, Swiss and Greece gross returns rank below the other group (from 2.87% Greece to 3.54% Austria). European countries with much higher gross rental yields are mainly Eastern European countries (from Moldova (10%) to Hungary (5.83%)), while the gross rental yield in The Netherlands is 5.68%, 5.18% in Denmark and only 2.09% in the UK.

[11] Social perception of renting a dwelling instead of buying is very relevant because if this type of tenure is perceived to be only for low-income families, the amount of properties available and their quality would drop and families would try to avoid this possibility (e.g. maybe by investing too many economic resources and personal efforts in buying). On the contrary, if it is seen as a true alternative to homeownership (e.g. transmit similar or substitutive values), buying or letting would be only a matter of deciding the most convenient property for those who could afford both types of tenures.

[12] In this sense, "in particular, private renting is more flexible than other tenures and its benefits include low entry and exit costs and the fact that tenants can rent units that are smaller and cheaper than in other tenures" (CENTRE FOR HOUSING AND PLANNING RESEARCH (CCHPR), University of Cambridge, *The Private Rented Sector in the New Century. A Comparative Approach* (Cambridge: September 2012), p 71. Available at: http://www.cchpr.landecon.cam.ac.uk/Downloads/The%20Private%20Rented%20Sector_WEB.pdf (visited on 26-2-2014). The same Report points out that "Security of tenure is a set of provisions in the

fist one, tenants should have a degree of certainty that they are able to stay in the property or, at least, in the neighbourhood (this is related to the location of the property, which is directly linked to the aid net of the tenant, or proximity to health centres, schools, etc. or even related to the involvement of the tenant in the community and/or in the neighbourhood) as long as they fulfil their obligations (basically, paying the rent and keeping the property in good repair). Ways to achieve this may vary: periods of protection, rent control, etc. But this is not the case in all jurisdictions.

Flexibility is also an essential advantage for leases in contrast with homeownership[13]. However, some legal jurisdictions might establish limits to the tenant's freedom of movement to protect landlords. This would be the case, for example, of compelling the tenant to pay the rent due for the remaining time of the lease even if he leaves the property (e.g. he finds a job in another city or country); or, instead, he can leave the property but with a burdensome compensation for the landlord. From my perspective, these measures might go against the right of free movement that is present in many constitutions (e.g. Spain, Portugal) or even against EU law[14].

But, of course, many other aspects are taken or could be taken into account by landlords and tenants that might affect their decision, such as the energy efficiency of the property (see Directive 2012/27/EU[15]), the possibility for the tenant and/or landlord to get tax exemptions or reductions due to the mere fact of renting a property (as a public incentive to improve the rate of rented properties, such as in Spain since 2011[16]), the legal certainty for both of them if there is a coexistence of several regimes (eg. overlapping of law of leases due to the fact that very old rented properties' legal regime is maintained after new laws, as these are not retroactive), if there is a constitutional/fundamental right to housing or at least a broad interpretation of the social function of ownership (which would compel a landlord to keep tenants in a home in unexpected circumstances)[17], the existence of

landlord-tenant contract which provide the tenant with protection against a number of types of occupancy risks. Most importantly, it provides security against the risk of 'economic eviction', when the landlord gets rid of the tenant in order to let the property to someone prepared to pay more. Taken together with rent regulation, security of tenure reduces the uncertainties concerning the future path of rents. This can help both landlord and tenant as vacancy and turnover costs are also reduced", p. 30.

[13] CENTRE FOR HOUSING AND PLANNING RESEARCH (CCHPR), University of Cambridge, *The Private Rented Sector in the New Century. A Comparative Approach*, p 71.

[14] See, for Portugal, Mª OLINDA GARCIA, *Arrendamento urbano anotado: regime substantivo e processual: (alterações introduzidas pela Lei no. 31/2012)*, (Coimbra: Coimbra Editora, 2012), pp. 57 and 58. In relation to the EU, the ECJ finds it sometimes difficult to distinguish between freedom of services, freedom of capital or freedom of movement of persons in connection with cases involving immovable property (see the comments of Advocate General Geelhoed in the case *Reisch* at B. AKKERMANS, ´Property law and the internal market`, in S. van Erp et al. (eds.), The future of European property law, (Munich: Selp, 2012), p. 227-229). See, in relation to the restrictions of acquisition of inmovables within EU member states and their violation of the principle of free movement of capital and services in cases ECJ 1 June 1999, C-302/97 *Klaus Konle v Republik Österreich*; two Austrian laws that required administrative authorisation to be obtained prior to the acquisition of land in the Tyrol region were found contrary to Art. 56 EC Treaty) and ECJ 5 March 2002, Joined cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99, *Hans Reisch and Others*.

[15] OJEU L 315/1, 14-11-2012.

[16] See articles 23.2 (landlords) and 68.7 (tenants) of Act 35/2006, of 28 November, *del Impuesto sobre la Renta de las Personas Físicas* (BOE 29 November 2006, num. 285, p. 41734); both articles were only introduced in 2010, by Act 39/2010, 22nd December.

[17] See H. SIMÓN MORENO, *The regulation of the right to housing in certain European countries* (2013), paper presented at DAAD Seminar 'The Housing Markets of Southern Europe in the face of the crisis', 1-5 December 2013, Hochschule Zittau/Görlitz, Görlitz (Germany).

social defence for the tenant or the possibility for the professional landlord to massively securitize his leases, thus getting extra funding.

Some of these aspects cannot be covered in this article due to length constrains. I'll focus into those more relevant from a legal point of view: guarantees for landlords and the core aspects of stability, flexibility and affordability, for tenants. This is a clear limitation of this piece of work.

3. The comparative perspective: the landlord's position. Guarantees in case of default or misuse

Guarantees landlords can get from the legal system can be both *ex ante* (deposit) and *ex post* (extra guarantees beyond the deposit and the effectiveness of the eviction process).

3.1. Deposit

There are at least two central aspects to be discussed about the deposit. First, its nature and function: a guarantee for the landlord in case of misuse of the property and/or the default of the rent payment by the tenant. And, second, its amount should be related to this and not so high that it works as a deterrent or a barrier for any tenant to access a dwelling (ie. leases cannot be funded by third parties such as banks; therefore, tenants must pay the deposit upfront with their own resources).

These aspects are compared among low-rental rate states and high-rental rate states in Table 1.

	Spain	Portugal	Malta	Greece	Italy	Switzerland	Germany	Austria
Nature	The purpose of the deposit is to ensure the performance of the contract and especially the rent payment, as well as the damages caused to the dwelling or premises at the time of the contract termination. So it is technically a "guarantee" and not a true "deposit".	Portuguese legislation (art. 1076.1 PCC) allows the landlord to receive the payment by the tenant of three months in advance plus the first month (four in total, then). Moreover, the parties can arrange any other security (bond; art. 1076.2) to assure the proper payment of the rent; normally it consists of requiring a personal guarantor.	It is used to pay any damage caused to the property by the tenant or if he has defaulted in paying any utility.	Under Greek law, the deposit is a guarantee for the landlord's claim against the tenant	The deposit, according to Italian law, is a form of guarantee for any kind of breach of the contract by the tenant. It is considered a form of irregular pledge (on fungible goods, ie. money).	The deposit is considered as a security for the landlord and can be in the form of cash or negotiable securities.	According to §551 (1) BGB, the security deposit may amount to a maximum of three monthly rents, excluding utilities. The tenant can pay it in three monthly instalments.	It has been recently regulated in 2009, and it is used as a security for the coverage of all future claims of the landlord arising from the tenancy contract. It may be paid either in cash or in the form of a surrender of a bankbook.
Amount	Equivalent to one month's rent (art. 36.1 LAU). During the first three years of contracts, it		There is no specific maximum amount foreseen in the Civil Code. However, any payment equivalent to	There is no legal maximum foreseen, although in the praxis it amounts to the	Art. 11 Act no. 392/1978 establishes that the deposit cannot exceed three months' rent .	There is a legal maximum of three months' rent (net rent plus utilities). However, a study of 1999 reveals that		The law does not provide any limit, and the Supreme Court has stated that its amount must be fixed taking into

	cannot be increased.		more than 6 months is void if any prejudice is caused to the landlord's mortgagee or to the person that will succeed him in the title. In the praxis, for leases of more than 6 months, a deposit equivalent to 1 or 2 monthly rents is required.	equivalent of 1 to 2 months of rent.		only 1/3 tenants pay deposits.		consideration the landlord´s interests (e.g. the property value, the size of the dwelling…). An amount equivalent to 6 months has been accepted by the Supreme Court.

Table 1. Deposit issues in a comparative perspective**. Source:** own elaboration.

3.2. Floating charge over tenant's chattels.

An important deterrent measure to prevent default in the payment of the tenant is that all chattels that he introduces into the rented property are automatically charged (pledged) to the landlord, such as occurs in Germany, regulated at §562 BGB (*Vermieterpfandrecht*[18]). The risk for the tenant of losing his belongings in payment of the defaulted rent or due to caused damages could encourage him to fulfil his obligations under the lease contract. A similar disposition exists in Austria (§ 1101 ABGB), which charges with a lien the money and other chattels that belong to the tenant and his relatives living within the premises of the rented dwelling as a security of the rent, overheads, taxes and other costs and expenses considered as service of the landlord.

In Spain, this measure is not foreseen in the legislation, although there is no problem in accepting an express agreement on this between the parties, taking into account that there is a general legal limit on certain personal belongings of the tenant that cannot in any way be seized (eg. clothes). In Portugal there is also no legal provision on this possibility, but a personal guarantor is often required. However, Maltese law foresees that the landlord has a privilege over the value of all things that serve to furnish the dwelling, except for those things that are within the property premises but belong to a third party. In Greece, art. 604 GCC foresees a security interest (legal pledge) in favour of the landlord over the things brought upon the premises by the tenant or his spouse and children if they live with him, unless such things are not subject to attachment. Only rents defaulted in the previous two years are secured with this pledge and it grants the landlord a privilege (if those chattels are auctioned off, he is entitled to payment first). Tenants can discharge certain chattels from the pledge if they substitute them. It seems that the legal pledge has not been very successful and has been substituted in the praxis by the guarantee deposit that also covers damages. According to art. 2764 Italian Civil Code, the landlord of a dwelling is the holder of a particular kind of lien –'movable special privilege' – over the things brought upon the premises by the tenant. Its scope of application is limited to furniture and does not include, for example, money, jewels, clothes and other similar things that can anyway be found in the dwelling. It can be used not only for the payment of rents, but also for any claim arising from a breach of the tenancy contract, such as the refund for repairs not carried out by the tenant or damages to the dwelling.

Although the special lien over the tenant's chattels used to exist in Switzerland, it was abolished with the new tenancy law of 1990, but it still remains for commercial leases.

3.3. Eviction process

[18] According to the BGB, this security right may not be asserted for future compensation claims and for rent for periods subsequent to the current and the following year of the tenancy contract, and the security right of the landlord is extinguished upon the removal of the things from the plot of land, except if this removal occurs without the knowledge of or despite the objection of the landlord (§562a BGB). In this sense, the landlord may prevent the removal of the things that are subject to his security right, even without having recourse to the court, to the extent that he is entitled to object to removal (§562b BGB). Finally, The lessee may ward off assertion of the security right of the lessor by provision of security (§562c BGB). In case of non-payment of rent, the landlord can start an enforcement procedure of these goods with preference to other creditors (art. 50 *Insolvenzordnung* 1994, 5 October 1994 (BGBl. I S. 2866).

Spain has reformed its rules on eviction in the field of leases twice in the last three years[19]. The main cause behind this is the traditional inefficiency of the lease enforcement procedure, which could last up to 18 months or more in certain cases until the defaulting tenant is effectively evicted from the property, despite the fact that there is a special (theoretically quicker) procedure foreseen in Spanish procedural law. During that period, the tenant is allowed to stay in the property for free (he does not need to pay anything to be able to stay); this time he remains in the property should be added to the months in arrears (the cause for the eviction process to start) during the process. This situation has led to "professional defaulting tenants" that go from one property to another staying there for free (only paying the first month) for several months. The main cause of such a delayed process of eviction is the constitutional procedural guarantee, ie. nobody is evicted without previous notice, no one can enter another house or prevent him from entering without a judicial order, right to appeal all court resolutions, etc. An additional extra legal cause is the traditional delay of Spanish courts, as no special courts for tenancies exist and lease cases are solved together with any other civil law matters. In addition to this, alternative dispute resolution methods (mediation or arbitration, ADR) are not commonly used and they have only been expressly foreseen in the urban leases law in 2013.

In Portugal there are also no specialized courts on leases, so civil law courts decide on this matter. Nor are there any in Italy, although the procedure for eviction under residential leases is quicker than an ordinary procedure. There is even an additional procedure – so called, "notice to quit" - just for cases of eviction for termination of the lease contract or because of default in payment. Greece has a similar situation with a special procedure but civil courts are the ones competent to decide. In 1997 an even more special process was introduced in arts. 662A-662Θ GCCP, that covers evictions in cases of non-payment of the rent: after 15 days of giving notice to the tenant, the landlord can file for an order of eviction to a judge, which he issues without hearing the tenant; the order is enforceable 20 days thereafter, during which the tenant can oppose it.

On the contrary, Malta has a special judiciary board for leases called Rent Regulation Board (RRB), but not on an exclusive basis, as ordinary civil law courts can also decide, for example, in relation to the validity of the lease contract. Act X 2009 also empowers RRB to decide cases of eviction through a summary procedure, which can be appealed to the Court of Appeal.

Meanwhile, Switzerland requires a conciliation process between the parties before filing a claim before a court (art. 197 Swiss Civil Procedure Order). The cantons provide for a special joint conciliation authority (*paitätische Schlichtungsbehörde*), with a chair person and an equal number of representatives of tenants and landlords, that hear such conciliation processes and give advice to the parties. Clear cases are excluded from the compulsory previous conciliation process. Processes cannot last more than 12 months. The conciliation process can end with an agreement by the parties (which is binding for them), or without one, so the authority grants authorisation to process to court to the plaintiff or the authority itself proposes a judgement, which can be rejected by the parties within 20 days. There are ordinary courts and those specialising in leases. Most tenancy matters benefit from simplified proceedings (eg. those for less than CHF 30,000 and

[19] First, through art. 4 of the Act No. 37/2011, 10th October (BOE 11 October 2011, num. 245, p. 106726), and later by the Act 4/2013. The rules concerning the eviction process are gathered in the Spanish Code of Civil Procedure 1/2000 (BOE 8 January 2000, num. 7, p. 57).

disputes regarding the deposit, protection against abusive rent or against termination, etc.).
In Germany, civil law courts are the ones competent to decide on tenancy cases. In some *Länder* it is required to have a pre-trial conciliation for disputes for less than €750.

In Austria the ordinary court ("Bezirksgericht", District Court) – has generally exclusive competence on tenancy issues. However, in some municipalities, like Vienna, Graz or Salzburg, there are arbitrational boards authorized to deal with specific tenancy law issues in first instance, for example the tenants' claim to review the adequacy of an agreed or demanded rent.

4. The comparative perspective: the tenant's position

The principle of demand and supply establishes that in order to achieve a healthy rented-property market, not only should landlords be protected (guarantees, efficient evictions) and economically interested (return, possibility of rehabilitation with external help, public or private), but also the tenant should find in this type of tenure a certain attractiveness (affordability, flexibility) and protection (stability).

However, in countries in which this second aspect is too high, the position of landlords is too weak (both economically and legally speaking) and/or the quality of dwellings is essential to achieve a valid transaction and controls are not enough, a "black market" of rented properties may appear. According to SCHMID[20], black market contracts are "unofficial, informal contracts, which violate legal regulations and therefore remain in an extra-legal, unprotected sphere, typically to the detriment of the tenant".

4.1. Affordability

To lease a property is often the last resort in the private housing market for a person/family to access housing when he does not have enough savings or does not get enough external funding to buy the property.

Therefore, any restriction on its access (affordability) would have a tremendous impact on the housing system. In fact, art. 18.5 a) of the Directive 2014/17/EU of the European Parliament and of the Council of 4-2-2014 *on credit agreements relating to residential immovable property*[21] does not allow credit institutions to grant mortgage loans to people that presumably will not be capable of repaying them. Even if this is considered a proper measure to avoid overindebtedness[22], its strict application would expel many families from the homeownership market (e.g. those unable to pay upfront with their own resources at least 20% of the value of the property); and in those countries without mature intermediate tenure markets, this would mean that leases are the last possibility for them to access housing in the free market (leaving apart, of course, those non-cost hosting

[20] C. SCHMID, *Comparative tenancy law and black rental contracts in Europe*, plenary speech, 25th international conference of the European Network for Housing Research (Tarragona, Spain, June 2013). See the full speech at http://www.youtube.com/watch?v=XGzUHqd8HD4 (last checked on 20-11-2013).
[21] OJEU 28-2-2014, L 60/34. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2014:060:0034:0085:EN:PDF.
[22] For the importance of this phenomenon in the origins and spread of the 2007 financial crisis see S. NASARRE AZNAR, ´A legal perspective of the origin and the globalization of the current financial crisis and the resulting reforms in Spain` (2014), 50-53.

situations, such as rights of use or habitation or even alimony or child support granted by law or a court resolution).

An additional perspective is whether renting a property, in the long run, is really less expensive than homebuying. Although this may vary according to the mortgage interest rates, taxation and the possibilities of revision of the rent over the years, in general, at least for Spain, it must be said that *ceteris paribus* renting is usually more expensive than buying and it requires more family economic effort every month[23].

4.1.1. Rent

The initial affordability for a lease has already been covered above in relation to the deposit. Dealing now with the ongoing affordability, the amount of the rent plays a central role to determine the attractiveness of renting.

In Spain there is no rent control system for private market rented housing (a version of this exists only for the social one), so the principle of freedom of contract applies (art. 17.1 LAU) without any control for excessive rents. The rent can be updated on an annual basis according to what the parties have agreed. If they have not agreed anything, the "consumer price index" increase is applied.

In Portugal there is also no system of rent control or rules for excessive rent. The same for Greece, but the commonly known *rebus sic stantibus* rule has been applied by courts to (commercial, so far) leases arranged before the current crisis started (2007) as this is considered an unexpected changes of circumstances, as an exception to the *pacta sunt senrvanda* rule. From 1978 until 1998 the Italian legal system imposed a legal rent ceiling for residential tenancies. The following statute (Law n. 431/1998) introduced amendments. The contracting parties have the faculty to choose between two different possibilities: in one case the rent is freely negotiated and in the other the rent is determined by local agreements between landlord and tenant associations.

In Switzerland, the principle of freedom of contract also applies to fix the rent, but in leases for residential purposes (no holiday or luxury apartments), there are legal provisions against "unfair rents" (Art. 269 ff. CO). In this sense, tenants can challenge, within 30 days after taking possession of the property, the initial rent (on the basis that the tenant felt compelled to accept this rent due to personal or family hardship or for reasons prevailing on the local market for residential premises; or if his rent is significantly higher than the previous rent for the same property); or within 30 days of receiving the notice, any rent increases (it is the landlord who has to give reasons for that increase); or even they can request a reduction during tenancy (in this last case, if the landlord makes excessive profit because of significant changes to the calculation basis; eg. reduction of costs for the landlord or when he reduces the services). Under Swiss law, in general, where a rent permits the landlord to derive excessive income from the lease (i.e. it is still reasonable if the rate of return of the lease exceeds 0.5% of the reference mortgage rate) or where the rent is based on a clearly excessive sale price (i.e. when it exceeds the earning value of a comparable property, calculated on rents customary in the

[23] TENLAW Spanish report, Part I, p. 43. With reference to the economic effort of the so-called intermediate tenures in Catalonia in comparison to homeownership and rent, Mª JOSÉ SOLER, *Cálculo del esfuerzo económico de las tenencias intermedias*, Paper presented at the ENHR Conference "Overcoming the Crisis: Integrating the Urban Environment", Tarragona, June 2013.

locality or district), the rent is considered to be unfair, although there are exceptions to this (e.g. the rent falls within the range of rents customary in the locality or district).

In Germany, according to §558 (I) BGB, the landlord may demand approval of an increase in rent without the consent of the tenant[24] only a) up to the reference rent customary in the locality (*ortsübliche Vergleichsmiete*) and b) if, at the time when the increase is to occur, the rent has remained unchanged for fifteen months. It can be made at the earliest one year after the most recent rent increase. The rent may not be raised within three years by more than 20%, or even 15% in regions which can be determined by the *Land* governments (section 558 (III) BGB), such as in Berlin, Hamburg and Bavaria[25]. The reference rent customary in the locality is formed from the usual payments that have been agreed or that have been changed in the last four years in the municipality or in a comparable municipality for residential space that is comparable in type, size, etc. (§ 558 (II) BGB). Many municipalities, including the twenty-five metropolises in Germany (except Bremen), have lists of representative rents (*einfacher Mietspiegel*). These tables, showing the reference rent customary in the locality, have to be jointly produced or recognized by municipalities or by landlord and tenant associations (§558c (II) BGB).

In Austria, there are three rent control systems for most properties purported for human habitation, which are usually ruled under the *Mietrechtgesetz* 1982 (MRG, §1 par. 1). § 16 MRG establishes strict limits to rent increase: the resulting rent after the increase cannot exceed the limits of an "adequate rent" (normative rent control system that limits free market rents depending on size, type, location, maintenance condition and furniture of a dwelling; adequate rent is fixed by the judge), the "category rent" (maximum monthly rent is fixed per m2 and enacted by Decree, according to the classification of dwellings according to their equipment level) or the "standard value rent" (for statute-so-defined "standard dwellings", a certain basic rent per m2 and month is fixed for each Austrian State separately in bylaws).

4.1.2. Utilities and taxation of the property

General rule for all countries is that the parties can arrange what they want in relation to who is liable for the payment of the utilities of the leased property. However, in practice this may change.

In Spain, for example, it is common to apply what the law establishes (art. 20 LAU), especially when the parties have not agreed otherwise. That is, the tenant pays the individual expenses (i.e. utilities; eg. water, electricity, gas) and the landlord pays the non-individual expenses (i.e. those related to ownership of the property; e.g. contribution to the condominium expenses, rubbish collection fees and tax over property's ownership). However, in a context of falling rent prices (since 2007), tenants are usually paying also the non-individual expenses.

In Greece, tenants pay the utilities as they are considered to be "expenses for the use". These include the share of the common expenses (eg. cleaning) in case of condominiums. In Malta, the electricity and water company may require the landlord and the tenant to be

[24] Both can agree on future increase in rents according to §§ 557a (*Staffelmiete*) and 557b (*Indexmiete*) BGB. If either of those two systems are applied, application of §558 BGB is excluded.
[25] TENLAW, German report, p. 144.

jointly and severally liable for the bills. Art. 1078.2 Portuguese Civil Code (PCC) establishes that, in case of non-agreement, the expenses of supplies of goods or services are borne by tenants and it is the landlord who pays all costs related to the condominium (eg. use of common services).

In Italy the parties are free to agree who has to pay the expenses. They usually specify that the tenant has the duty to manage the supply of utilities, because if nothing has been agreed in the contract, the landlord cannot pass them on to the tenant (Art. 9 Law no. 392/1978) (i.e. if he remains the contractor in the supplies contracts, he must pay them and cannot claim reimbursement from the tenant, if nothing otherwise is stated).

In Switzerland, however, there is another perspective. It is not permitted for the landlord to make a profit out of the charges for utilities (in general, "accessory charges") and he has to stipulate which utilities are not individually included in the rent; otherwise, all are included. Utilities may include, not only heating and hot water, but also taxes arising from the use of the property (e.g. basic fees for water, waste water and waste collection), common-areas electricity or even service contracts (repair of elevator or washing machine). The same can only be transferred by contract to the tenant if they cover regular checks and minor maintenance works, but not if they refer to major repair works, as it is a duty of the landlord to maintain the dwelling. Finally, on the one hand, real estate taxes, mortgage interests or building insurance premiums, and also maintenance costs and general administrative expenses are not covered by the term "utilities". And, on the other hand, tenants should always pay for the costs arising exclusively from their consumption (eg. electricity within the dwelling and telephone charges).

In Germany, pursuant to section 535 (I 3) BGB, the landlord must bear all costs to which the rented object is subject. However, the parties may agree that the tenant is to bear the operating costs (*Betriebskostenverordnung*; section 556 (I 1) BGB) (i.e. real estate tax, the charge for sewage water, the costs for the supply and the consumption of water and heating as well as the costs for the maintenance of the heating system, for street cleaning, waste disposal, house cleaning, disinfestations, garden maintenance, lighting for shared parts of the building, chimney cleaning, lifts, caretaker, insurances and benefits in kind and performances rendered by the owner). In relation to electricity, in the absence of an agreement, the tenant must bear its supply and consumption costs.
In Austria, the general expenses (such as water supply, facility management, fire insurance, etc.), public charges (taxes on land and buildings and taxes of the states) and extraordinary costs (lifts, central heating, laundry room or green keeping) are expenses of the landlord, but the tenant has usually to pay them.

4.2. Stability

4.2.1. Open-ended lease contracts and compulsory minimum duration

As mentioned above, the stability of the tenant can be achieved through more intrusive (direct, paternalistic) methods or less intrusive ones. If a piece of legislation establishes a compulsory (*ius cogens*) minimum duration for residential leases, this is an intrusive way of compelling the landlord to rent a property at least for that number of years.

However, a similar result can be achieved through less paternalistic ways, such as allowing open-ended lease contracts or, even, limiting the amount of every rent increase, meaning that the landlord does not have any incentive to evict the tenant (as long as he

fulfils his obligations) because he is not allowed to charge more rent to anybody else (e.g. he is getting at any given time the adequate rent for a given neighbourhood), as has been shown above.
Those more intrusive measures that tend to protect tenants might be a source for a black market of rented housing[26].

In Spain, open-ended lease contracts are not allowed, as lease contracts require a time limit (art. 1543 CC), although the parties can stipulate it in a very vague way (e.g. "you can stay as long as you work in this city"); if there is no stipulation, the law provides for a duration (e.g. a year, if the rent is paid yearly; art. 9 LAU). However, they must have a minimum duration of 3 years (until 2013, it was 5 years), that is, even if the parties have agreed on a shorter duration, the contract will be legally and automatically extended yearly up to three years (art. 9.1 LAU).

Portugal allows the creation of open-ended contracts (art. 1094 Portuguese Civil Code) and until 2012 (Act 31/2012) there was a minimum duration period of 5 years (art. 1095.2 Portuguese Civil Code). Greece also requires a 3-year minimum duration for first residence leases (Act 1703/1987, amended by art. 5.1 Act 2235/1994). In Malta, open-ended contracts are not allowed, as any lease contract must provide for a specific duration. Maltese law does not require contracts to have a minimum duration.

Italy draws a distinction between open-ended contracts and contracts limited in time. The former cannot last more than 30 years, but they are automatically renewed at the end of the contractual term (arts. 1573-1574 CC). In relation to the latter, it is also possible to agree a contract for the lifetime of the tenant plus two more years, and the minimum contract term is four years (art. 1 Law no. 431/98).

Swiss law does not establish any minimum duration for lease contracts, but they can be arranged for long duration, such as for the lifetime of one of the parties (although eternal contracts are not allowed). However, if the duration seems obviously excessive, the parties are allowed to terminate the contract in advance (art. 266g CO).

For its part, Germany allows open-ended contracts; which are the most common type, because fixed-time tenancies are only allowed under certain reasons (§ 575(I) BGB; if the landlord, upon termination, wishes to use the premises as a dwelling for himself or his family; or if he wishes then to eliminate the premises or change or repair them; or he wishes to rent the premises to a person obliged to perform services, *Werkswohnung*).

Finally, in Austria, the legislator has a preference for the conclusion of contracts unlimited in time, which serves the protection of tenants, because these contracts unlimited in time are only terminable by the landlord under exceptional circumstances. However, landlords can limit the duration of tenancy agreements to three years in written form and do not need to allege any particular reason, unlike German law.

4.2.2. Legal nature of the lease contract

As an initial assumption, the conception of a lease as a property right or, at least, with regard to some of its elements, contributes to the tenant's stability. That is, if entitled with

[26] See above.

a property right, a tenant is able to possess and use the property by himself, not depending on the landlord's right (existence, new owner of the property, etc.) or tolerance (idea of "living in someone else's house"). Moreover, in principle, property rights are those that are normally registered in the Land Register, thus giving notice to buyers, forced-buyers or prospective owners of other property rights over the dwelling that a lease exists and they should respect it. Rights in rem can also be used as a basis to obtain funding, such as the possibility that exists of mortgaging long leases (leaseholds) under English law. However, landlords often see property rights with reluctance as they encumber their property and maybe dislike long-term relationships (due to which the contents of their right-of-ownership over the property is emptied).

In Spain, leases are contracts, i.e. of personal nature. However, they can be registered in the Land Register after formalising them through a notarial deed. If the lease is registered, then the buyer of the property must respect it (art. 14 LAU); also buyers of a forced sale must respect it if the lease was registered before the enforced mortgage (art 13 LAU).

Meanwhile, in Portugal there is a big debate regarding its nature (either personal or real). Although a majority of arguments are in favour of the former, tenants are protected as possessors of the dwelling and the right of possession is only conceded to a holder of a right in rem (arts. 1251 and 1276 Portuguese Civil Code); moreover, the principle of *emptio non tollit locatum* is applied, which is a consequence of the tenant holding a right of sequel, that is, that its right is respected regardless of who the landlord of the property is (art. 1057 PCC). For this same reason, the qualification of leases as personal rights in Malta should be nuanced, as there is also a doctrinal debate there.

In Italy, leases are directly considered as a *tertium genus*, differentiated from personal and real rights. On the one hand, tenants can file a proceeding directly against the molesters that cause nuisances to the former, just as the landlord can; and, on the other hand the principle of *emptio non tollit locatum* is applied, although with limits if it is not registered (the buyer has to respect the tenant for a maximum of 9 years). The first reason is also shared under Greek Law (art. 997 GCC), although it seems clear that a lease is created by a personal contract.

In Germany, tenants also enjoy only a personal right, but they are also considered real possessors, who can defend themselves from nuisances and deserve compensation for damages in case their position is injured (§§ 823 (I) and 858 BGB). Another clear exception is the obligation of the buyer of the rented property to respect the lease under § 566 BGB.

Austrian law considers that a lease is not a real property right. But the jurisprudence has led to considering the tenant as holding a quasi in rem position (*quasi-dingliches Recht*)because he is legitimated to claim against disturbances and infringements by third parties, just like the landlord.

Also in Switzerland, since 1990, the buyer of the rented property must respect the lease, regardless of whether or not it is registered in the Land Register. However, art. 261b CO, allows its registration, thus preventing the buyer from terminating the lease even under exceptional circumstances (e.g. he claims he or his relatives need the premises urgently).

4.2.3. Rights of first refusal

Pre-emption rights also give tenants stability: as soon as the landlord wants to sell the property or is compulsorily deprived of the property (e.g. due to a mortgage enforcement) legislation can allow tenants to acquire the property's ownership with preference over any third party for the same sale/enforcement price. This gives tenants the possibility to remain in the same property, but now as homeowner, thus stabilizing their tenure.

Thus, while in Spain pre-emption rights for tenants are legally foreseen in art. 25.1 LAU, for contracts signed after 6-6-2013 they can be excluded by the parties to the contract. Before then, this used to be a *ius cogens* (mandatory) statutory provision of which the tenant could not be deprived. On the contrary, in Italy, a statutory pre-emption right exists in art. 3.1 g) Law 431/1998. In Portugal it exists for leases of more than 3 years and not only for the case of sale of the property but also in case of leasing the property to a third party. In Malta, they do not exist.

In Germany, a statutory pre-emption right exists as a mandatory provision in §577 (I) BGB, except if the landlord sells the property to a member of his family or a member of his household. While in Switzerland it does not exist, discussions to introduce it are ongoing in 2013.

4.3. Flexibility

Broadly speaking, "flexibility" refers here to the real possibility for the tenant to leave the property before the duration agreed in the contract without the need for the consent of the landlord, without compensating him or giving him any valid reason, without the obligation to stay for a minimum period of time or without the obligation of finding someone else, or any other related constrains.

In fact, this freedom includes two possible options for the tenant that might help him to move out: simply, a tenant's right to freely (i.e. without having any valid reason to do so) leave the property and/or giving him the right to unilaterally sublet the property (i.e. to allow the tenant to let a third party occupy the dwelling, who takes care of it and of the payment of the rent instead of him without the need for the consent of the landlord).
Finally, it must be taken into account that, sometimes, strong limits to the transferability or subletting might contribute to increase the "black market", such as in Austria, The Netherlands and Sweden[27].

4.3.1. Early, unilateral and free termination by the tenant

In Spain, a tenant who wants/needs to unilaterally terminate the lease contract before the agreed number of months or years and without the need to allege any valid reason for that must pay the first 6 months of rent even if he is not living there and, after that, he can terminate the contract but, usually, paying the landlord a compensation, which consists of the value of as many monthly rents as the number of remaining years of the contract (art. 11 LAU)[28]. The law does not clarify what happens if the landlord does not suffer any

[27] See Ch. SCHMID, *Comparative tenancy law and black rental contracts in Europe*.
[28] E.g. in a 4-year contract, the tenant wants/has to leave the very first month; he must pay the regular rent for the first six months; after that, he has to pay three-months rent for the 3 remaining years and a half-a-month rate for the last half remaining year.

damage (e.g. he rents the property to another tenant immediately after the first one has left) due to the early termination of the contract.

Portuguese law of leases (art. 1098.3 PCC), since 2012, does not allow the tenant to terminate the lease contract in advance until 1/3 of the initial duration or its renewal has passed, although he does not need to pay any compensation to the landlord (just to give him notice in advance). Another situation in which an early termination is allowed is when the landlord opposes the automatic renewal of the lease, which is valid for both time-limited and open-ended lease contracts.

Under Maltese law, tenants cannot unilaterally terminate contracts before the agreed term is reached if the landlord has fulfilled his obligations. The single exception is those lease contracts of "presumed duration" (none are possible after 1-1-2010 as the term must be fixed) that can be terminated by either of the parties at any time. And under Greek law art. 609 GCC, for leases of more than a month's duration, only 3 months' advance notice is required; no compensation is due to the landlord.

In Italy, the tenant may withdraw from open-ended contracts by giving adequate notice to the landlord (Art. 1974 CC). For contracts limited in time, it is necessary to distinguish between contracts with free rent and contracts with limited rent. In the former (4 years + 4 years extension), the tenant may withdraw once 8 years have elapsed and giving notice 6 months in advance (Art. 2.1 Law no. 431/1998); in the latter (3 years + 2 years extension), the tenant may withdraw at the end of the 5 years giving notice 6 months in advance (Art. 2.5 Law no. 431/1998). In addition, art. 3.6 Law no. 431/1998 entitled the tenant to terminate the contract at any time by giving six months' notice due to serious causes. The parties may agree other causes of termination or withdrawal without cause and fix other periods of notice provided that there is no prejudice to the tenant.

In Austria the tenant may unilaterally put an end to a tenancy contract concluded for a limited period of time, once the first year of the contract has elapsed. Furthermore, a three-month period of notice is foreseen. The landlord has no right to compensation whatsoever. The same takes place in contracts concluded for an unlimited period of time, but here the notice to be respected depends on the contract terms (if nothing has been agreed upon, the notice period shall be one month).

In Germany, the tenant can unilaterally terminate the lease contract in advance by giving ordinary notice to the landlord (§ 573 BGB) with a notice period of three months in leases arranged for an indefinite period of time (not for those that are time-limited). He does not need to give any reason. The TENLAW reporter emphasises the idea that this is to promote the mobility of tenants.

And finally, in Switzerland, tenants can terminate indefinite duration lease contracts, giving notice 3 months in advance and in writing. But if he does not want to observe the notice periods or if the tenant wants to terminate a time-limited lease early, he can do so without negative consequences by proposing to the landlord a new tenant who is solvent and acceptable to the landlord and who will accept the same conditions under the lease.

4.3.2. Subletting by the tenant

Table 2 summarises this possibility.

COUNTRY	ALLOWS SUBLETTING WITHOUT THE CONSENT OF THE LANDLORD?
SPAIN	No (art. 8.2 LAU)
PORTUGAL	No (1038 pcc)
MALTA	NO (art. 1514 CC)
ITALY	Yes, but only in partial subletting (Law art. 2 no. 392/1978)
GREECE	No (art. 593 GCC)
SWITZERLAND	In principle no, but landlord has limited causes for opposition (art. 262.1 CO)
GERMANY	In principle no, but landlord has limited causes for opposition (§§ 540 (I) and 553 (I) BGB)
AUSTRIA	In principle no, but landlord has limited causes for opposition (§ 11 par. 1 MRG).

Table 2. Unilateral subletting by the tenant. Source: own elaboration.

5. Conclusions

The goal of this paper was to evidence how crucial points of the law of leases might influence a low or a high ratio of the same. While affordability, stability and flexibility are crucial for tenants, profitability, incentives for rehabilitation, guarantees and an efficient eviction process are important values for landlords. All these factors are influenced directly or indirectly by the law of leases: who bears the costs, how is the rent fixed (limits to the freedom of contract), possibility to substitute it by reparations, control of the tenancy by the tenant (early termination without reason possible or subletting), minimum duration period by law, etc.

But although this is a preliminary study based on some preliminary national reports for the EU Project TENLAW, it is hard to say whether and how the law of leases influences the (higher or lower) rate of leases in a given country, or if it depends on many other legal dispositions as well (taxation, subsidies), or even if the main driving factor should be found outside the law, just in socio-economic and cultural factors such as social values (private wealth instead of social wealth), who is renting and who is buying (immigrants, ghettoization), investment, safety, etc.

However, it seems clear that, for some of these values, a straightforward link can be traced down to some legal roots. Therefore, from the point of view of the tenant, stability is

directly linked to the time the tenant can remain within the premises without depending on the opinion of the landlord (forced minimum duration, open-ended contracts) or if conditions are legally created to avoid an abuse in the rent so he can afford to continue paying it (controlled rents). Flexibility is linked to the tenant's possibility of early termination of the contract without too many burdens and without giving any valid reason or, at least, the possibility for him to sublet the property with certain freedom. And from the point of view of the landlord, public and private law incentives for rehabilitation should be available to him to rehabilitate his property and to allow him to legally rent it instead of abandoning it; policies towards a healthy tenancies market should be created and a good balance of obligations and costs should be legally established to guarantee him a minimum profit to make it attractive for him to let instead of investing elsewhere (e.g. a long term bank deposit); legal deposits and other legal guarantees should be available to him to prevent bad behaviour of the tenant towards the property or his default in payment; and an efficient eviction procedure (in time and costs) should be available along with efficient alternative dispute resolutions methods that can help to prevent too much litigation.

That is, it was the intention of this work to compare the laws of leases of those countries with the highest urban tenancy rates with those with the lowest. Once again, it is a North-South comparison. Table 3 summarises the attitude of each studied country's urban leases legislation towards the key issues that it has been considered might affect the attractiveness of renting (for both landlords and tenants).

		Spain	**Portugal**	**Malta**	**Greece**	**Italy**	**Switzerland**	**Germany**	**Austria**
LANDLORD (Guarantees only)	**a) deposit b) Legal pledge over tenant's chattels**	a) Yes; not too burdensome for tenant b) No	a) Yes; quite burdensome for tenant (3 months and personal guarantor) b) No	a) Yes; quite burdensome sometimes (up to 6 months in advance) b) Yes	a) Yes; not too burdensome for tenant (1 or 2 months) b) Yes	a) Yes; quite burdensome for tenant (3 months) b) Yes	a) Yes; rather burdensome (up to 3 months rent) but only 1/3 tenants pay deposit b) No (yes until 1990)	a) Yes; rather burdensome (up to 3 months rent) b) Yes	a) Yes, very burdensome (up to 6 months has been accepted by jurisprudence). b) Yes
	Efficient eviction process and ADR	Special process with important delays (up to 18 months) but not special courts. ADR only available since 2013	No special courts	Special judiciary board	Special process but not special courts	Special process but not special courts	Conciliation compulsory prior to the judicial process (not for clear cases)	No special courts. In some *Länder*, pre-trial conciliation is compulsory	a) No special courts, but arbitrational boards deal with specific tenancy cases

TENANT	**Affordability** **a) Rent** **b) Utilities and taxation**	a) No rent control b) Tenant often pays all taxes and expenses	a) No rent control b) Tenant pays costs related to supplies of goods or services	N/A b) Tenant and landlord often jointly liable for electricity and water	a) No rent control b) Tenant pays expenses for the use	a) Yes, rent control for one kind of contracts. b) Tenants usually pay, but it may be agreed by the parties.	a) A sort of: measures against "unfair rent" b) Many utilities included in the rent	a) A sort of rent increase control (*Mietspiegel*) b) Except for electricity, if nothing is agreed against, it is the landlord who pays all costs	a) Three rent control systems b) Tenant often pays all taxes and expenses

	Stability **a) Open-ended contracts and/or compulsory minimum duration** **b) Legal nature of lease contract** **c) Statutory pre-emption rights**	a) No open-ended contracts but minimum duration compulsory (3 years) b) Not a right in rem but shares elements with them (eg. registration in Land Register) c) Yes, but can be excluded by the parties	a) Open-ended contracts possible. No minimum duration since 2012 (before, 5 years) b) Doctrinal discussion between personal and real right (tenant is considered as possessor and *emptio non tollit locatum*) c) Yes, but only for leases of more than 3 years	a) Neither open-ended contracts nor compulsory minimum duration b) Doctrinal discussion between personal and real right (*emptio non tollit locatum*) c) No.	a) Minimum duration of 3 years for residential leases b) It seems clear it is a personal right, but tenants can defend themselves from molesters c) No	a) Open-ended: 30 years that may be renewed. Limited in time: Free rent. compulsory minimum duration of 4 years. Limited rent: compulsory minimum duration of 3 years b) Leases are considered as *tertium genus*, as tenant can defend himself from molesters, and principle of *emptio non tollit locatum* c) Yes	a) No minimum duration, but can be arranged for long periods b) *Emptio non tollit locatumi* and leases can be registered in the Land Register c) No	a) Open-ended contracts are common, as fixed-time tenancies are only allowed under certain circumstances b) Personal right, but *emptio non tollit locatum* and tenants can defend themselves from molesters and can claim for damages c) Yes. Mandatory provision	a) Open-ended contracts possible, legislator´s preference towards contracts unlimited in time b) Tenant holds a quasi in rem position, as he can defend himself from molesters c) N/A

TENANT	**Flexibility** **a) Unilateral early termination by the tenant** **b) Unilateral subletting**	a) Yes, but minimum compulsory stay of 6 months and compensation to the landlord b) No.	a) Tenant cannot terminate the contract early until he has stayed 1/3 of the duration. No compensation due to the landlord b) No.	a) Tenants are not allowed to terminate the contract early b) No.	a) Yes, with 3 months in advance notice. No compensation for the landlord b) No.	a) Possible in open-ended contracts; more limited in other cases b) Yes, but only in case of partial subletting.	a) Yes in open-ended contracts, with 3 months notice. However, no notice or even for limited-time contracts, also accepted if tenant finds a new suitable tenant. b) No, but landlord has limited causes to oppose the tenant's decision	a) Yes in indefinite lease contracts, with a notice period of 3 months. b) No, but landlord has limited causes to oppose the tenant's decision	a) Yes, after a stay of one year plus 3 months notice (limited in time contracts). No compensation due to the landlord. b) No, but the landlord has limited causes to oppose the tenant's decision.

Table 3. Conclusions. Comparative study among 8 European countries in relation to their leases system. **Source**: own elaboration.

From Table 3, the following conclusions may be driven:

1. **Guarantees for landlords**:
    a. in all of the jurisdictions studied there exist at least two (**deposit** plus **pledge** over tenant's chattels or **personal guarantor**), except for Spain, where only the deposit is legally foreseen.
    b. There are no **special courts** for lease contract-related cases in any of the jurisdictions, except for Malta, and specific arbitrational boards in Austria. Alternatively, there are relatively effective ADR in Switzerland and Germany, with only recent reforms in Portugal and Spain to push forward these methods of dispute resolution.
    c. **Deposit** can be considered to be very **burdensome** in Malta and Austria (equivalent to up to 6 months of rent) and quite burdensome in Portugal, Italy and Germany (at least equivalent to up to 3 months of rent). This combined with **no unilateral subletting** in all studied Southern European countries (except for partial subletting in Italy) and important constrains in **unilateral early termination** in Spain, Portugal and Malta, and this raises a question: does this framework contribute to configure tenancies as a real **flexible** type of tenure? Contrast all this with:
        i. limited causes of opposition by the landlord to **subletting** by the tenant in Germany, Austria and Switzerland (i.e. to some extent, freedom for the tenant to find third parties to subrogate in his position or to share expenses of the lease).
        ii. tenants have always the possibility of **early termination** of the lease contract without compensation for landlords with only 3 months advance notice in Switzerland, Germany and Austria (similar provisions in Greece and Italy).
2. **Affordability** for tenants:
    a. In general, tenants pay possession-related **expenses and taxes**, but not in Spain (where for the tenant, since 2007, paying for everything, including ownership-related costs such as property tax and condominium expenses, is increasingly common). Generally speaking, Switzerland and Germany, depart from the principle that it is the landlord who has to pay the utilities and expenses of the rented property, which are included in the rent if not otherwise stated in the lease contract.
    b. No **rent control** in SE countries, except for one type of lease contracts in Italy (more liberalization since 1998). However, several types of rent control and rent control increase do exist in Germany, Switzerland and Austria (quite strict).
3. **Stability** for tenants**:**
    a. all countries studied (except Malta) have mechanisms of **duration protection** for tenants (compulsory minimum duration, rent control or open-ended contracts), but in all Southern European countries the measure is, or used to be until very recently, very intrusive through the "minimum compulsory duration" rule, which has been substantially reduced in Spain (2013) and recently disappeared in Portugal (2012). While in Germany, Austria and Switzerland there is a preference for the combination of long-run lease contracts plus a system of rent (increase) control.
    b. Clear ***emptio non tollit locatum*** rule in 5 jurisdictions. But trend in **Spain** (needs notarial deed and registration; reduced minimum duration) and **Portugal** to reduce it (no minimum duration since 2012). Is this the way to improve the rented housing ratio?
    c. In all Southern European countries, except in Italy, there are no ***pre-emption rights*** in favour to the tenant to guarantee him stability in case of sale of the property to a third party, or they are limited (in Spain they can be excluded by the parties and in Portugal they only exist for leases of more than 3 years of duration). However, they exist in Germany and in Switzerland they are under consideration.

From all this, it may be extracted that the main differences between Southern European countries and those three with highest rental market share in Europe are the following:

1. It seems that tenants in Switzerland, Germany and Austria, as far as they fulfil their own obligations, have more stability and more flexibility (freedom) and it is a type of tenure oriented to be more affordable. Table 4 summarises this.

	Switzerland, Germany and Austria	**Studied Southern European countries (majority or all)**
Stability	- preference for long-run lease contracts - *emptio non tollit locatum* - pre-emption rights (Germany)	- more intrusive system of minimum compulsory duration - weaker *emptio non tollit locatum* - weaker pre-emption rights
Flexibility	- limited causes of opposition of the landlord for unilateral subletting by the tenant - early termination of the lease contract without compensation for landlords with only 3 months notice in advance	- no subletting allowed without the landlord's consent - important constrains in unilateral early termination in Spain, Portugal and Malta
Affordability	- rent control - profits of the deposit for tenants - tenant-friendly system of costs	- no rent control - profits of the deposit are not for the tenant in either Spain or Malta - more landlord-friendly system of costs

Table 4. Tenants' stability, flexibility and affordability in Switzerland, Germany and Austria and in studied Southern European countries. Source: own elaboration.

2. This is not contradictory, and is even combined with having in Switzerland, Austria and Germany mechanisms to avoid or against "bad tenants", both *ex ante* (quite burdensome deposits plus a statutory pledge over tenants' movables) and *ex post* (efficient recourses for eviction).

All this probably contributes to the size of the share of the tenancy-occupied housing in each country.

Bibliography

B. AKKERMANS, ´Property law and the internal market`, in S. van Erp et al. (eds.), The future of European property law, (Munich: Selp, 2012).

R. BIANCHI, *Italian (provisional) Report on residential leases*, Project 'Tenancy Law and Housing Policy in Multi-level Europe' (TENLAW), EU 7th Framework Programme, http://www.tenlaw.uni-bremen.de (2013).

CENTRE FOR HOUSING AND PLANNING RESEARCH (CCHPR), University of Cambridge, *The Private Rented Sector in the New Century. A Comparative Approach* (Cambridge: September 2012).

M. DAVEY, ´Long Residential Leases: Past and Present`, in S. BRIGHT (ed.), *Landlord and Tenant Law. Past, Present and Future* (Hart Publishing: Oxford, 2006).

K. DOL & M. HAFFNER, *Housing Statistics in the European Union 2010* (The Hague: Ministry of the Interior and Kingdom Relations, September 2010).

GESTHA, *Informe de rentas sumergidas en España*, 4th Ed. (Madrid, 2008).

Mª OLINDA GARCIA, *Arrendamento urbano anotado: regime substantivo e processual: (alterações introduzidas pela Lei no. 31/2012)*, (Coimbra: Coimbra Editora, 2012).

Mª OLINDA GARCIA, D. CORREIA AND N. SANTOS, *Portuguese (provisional) Report on residential leases*, Project 'Tenancy Law and Housing Policy in Multi-level Europe' (TENLAW), EU 7th Framework Programme, http://www.tenlaw.uni-bremen.de (2013).

R. HOFMANN, *Austrian (provisional) Report on residential leases*, Project 'Tenancy Law and Housing Policy in Multi-level Europe' (TENLAW), EU 7th Framework Programme, http://www.tenlaw.uni-bremen.de (2013).

J. KEMENY, *The myth of homeownership. Private versus public choices in housing tenure* (London: Routledge & Kegan Paul Ltd, 1981).

T. KONISTIS, *Greek (provisional) Report on residential leases*, Project 'Tenancy Law and Housing Policy in Multi-level Europe' (TENLAW), EU 7th Framework Programme, http://www.tenlaw.uni-bremen.de (2013).

E. MOLINA, *Spanish (provisional) Report on residential leases*, Project 'Tenancy Law and Housing Policy in Multi-level Europe' (TENLAW), EU 7th Framework Programme, http://www.tenlaw.uni-bremen.de (2013).

S. MONK &, C. WHITEHEAD (eds.), *Making Housing more Affordable: The role of intermediate tenures* (Oxford: Wiley-Blackwell, 2010).

S. NASARRE AZNAR, *The shift in the concept and protection of 'home' within the Spanish legal system in the context of the international crisis of 2007* (2014), forthcoming.

S. NASARRE AZNAR, ´A legal perspective of the origin and the globalization of the current financial crisis and the resulting reforms in Spain`, in P. KENNA (ed.) *Contemporary Housing Issues in a Globalized World* (Ashgate Publishing, 2014).

S. NASARRE AZNAR & H. SIMÓN MORENO, ´Fraccionando el dominio: las tenencias intermedias para facilitar el acceso a la vivienda`, 739 *RDCI (Revista crítica de Derecho Inmobiliario)* 2013.

J. RZEZNIK, *German (provisional) Report on residential leases*, Project 'Tenancy Law and Housing Policy in Multi-level Europe' (TENLAW), EU 7th Framework Programme, http://www.tenlaw.uni-bremen.de (2013);

assisted by Julia Cornelius.

M. OXLEY and J. SMITH, *Housing policy and rented housing in Europe* (London: E & F Spon, 1996).

C. SCHMID, *Comparative tenancy law and black rental contracts in Europe*, plenary speech, 25th international conference of the European Network for Housing Research (Tarragona, Spain, June 2013).

H. SIMÓN MORENO, *The regulation of the right to housing in certain European countries* (2013), paper presented at DAAD Seminar 'The Housing Markets of Southern Europe in the face of the crisis', 1-5 December 2013, Hochschule Zittau/Görlitz, Görlitz (Germany).

Mª JOSÉ SOLER, *Cálculo del esfuerzo económico de las tenencias intermedias*, Paper presented at the ENHR Conference "Overcoming the Crisis: Integrating the Urban Environment", Tarragona, June 2013.

K. XERRI, *Maltese (provisional) Report on residential leases*, Project 'Tenancy Law and Housing Policy in Multi-level Europe' (TENLAW), EU 7th Framework Programme, http://www.tenlaw.uni-bremen.de (2013).

A. WEHRMÜLLER, *Swiss (provisional) Report on residential leases*, Project 'Tenancy Law and Housing Policy in Multi-level Europe' (TENLAW), EU 7th Framework Programme, http://www.tenlaw.uni-bremen.de (2013).