

A legal perspective of the current challenges of the Spanish residential rental market

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A legal perspective of the current challenges of the Spanish residential rental market

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Abstract. This contribution explains the main difficulties of the Spanish residential rental market to become a true alternative to homeownership. Currently, the Spanish rental market only meets temporary housing needs; it is very atomized and lacks professionalism. It neither has an adequate legal framework to fulfil the parties' aspirations (ie. stability, affordability and flexibility for tenants; profitability, security and guarantees to landlords). Overcoming these constrains, it is essential to double the rate of residential leases in Spain and get closer to the average European one, thus achieving a true diversification of housing tenures to avoid future housing bubbles.

Keywords: Housing, tenures, tenancies, leases, rental market, tenant, landlord, stability, affordability, flexibility, profitability, security, homeownership, intermediate tenures

1. The current need of a well-functioning housing rental sector in Spain

The Spanish residential rental market has not always been a residual market as it is today, representing only 15,6% in 2015: it is far away from the European average (29.6%)¹ and even more away from countries with the highest housing rental sector in Europe, ie. Switzerland (56%)², Germany (57%) and Austria (40%)³.

According to Paragraph 33 of the UN Habitat New Urban Agenda, October 2016: “We commit to stimulate the supply of a variety of adequate housing options that are safe, affordable, and accessible for members of different income groups of society, taking into consideration socio-economic and cultural integration of marginalized communities, homeless persons, and those in vulnerable situations, preventing segregation”.

This necessarily includes the existence of a true variety of housing tenures to prevent new housing bubbles and housing unaffordability. This idea was also raised as a mechanism to prevent evictions and homeless in Europe in March 2016⁴: “It is important for a balanced housing system that

¹According to EUROSTAT, *Distribution of population by tenure status, type of household and income group* (source: SILC) a 16/06/2014 (visited 23/02/2017).

²EUROSTAT, *Distribution of population by tenure status, type of household and income group* (source: SILC) a 16/06/2014 (visited 23/02/2017).

³CECODHAS-USH-Dexia, *The development of Social Housing* (2008).

⁴ Kenna, P., Busch-Geertsema, V., Benjaminsen, L. and Nasarre-Aznar, S., “Pilot project - Promoting protection of the right to housing - Homelessness prevention in the context of evictions”, VT/2013/056, European Commission-DG Employment, 2016, p. 198 (available at <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7892&type=2&furtherPubs=yes>; visited 8/3/2017).

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development and availability includes sufficient owner-occupied, private rented, intermediate tenures (shared ownership-like tenures, cooperatives and community land trusts) and social housing schemes. It is suggested that the EU and its Member States promote a continuum of tenures, and that the potential role of intermediate tenures in preventing household over-indebtedness, enhancing flexibility and housing system stability be explored”.

Spain is the West European country with less rental sector (see the evolution at point 2), there is an increasingly need for the Spanish rental market to work as a true alternative to homeownership to avoid further housing bubbles. The existence of a single viable and predominant type of housing tenure leads to bubbles and deeper crisis⁵. In fact, the stagnation of mortgage lending since 2007 and the high unemployment rate (around 20%) has forced many households to rent their homes, causing a high increase of rents in biggest cities⁶. This is another proof that providing a single viable/attractive housing tenure leads to undesirable results.

Below (see point 3) we address the main barriers for residential renting market to become a real alternative to homeownership in Spain, as it is in the case of countries with highest rental rates. It is, in fact, a scarce market that is composed mainly of homes in formation or with temporary housing needs and not by households with stable living projects. In addition, it is a very atomized market and lacks professionalism (see point 4): most landlords are private individuals looking for the highest profitability for their homes, sometimes to complement their meagre income or retirement pensions⁷

Meanwhile, the legal framework of residential leases (basically, since 1994) has not helped to improve this situation (see point 5), nor has the reform of 2013, which liberalized more the lease contract. As an example, while in 1991 there were 15% of households living under a lease, in 2013 they were 15.4% and, in 2015, 15.6%. We advocate for a profound reform of the legal framework that should offer guarantees that facilitates doubling the rental rate to bring Spain closer to the European average, thus having at least a true alternative housing tenure to avoid further housing bubbles. This reform has started somehow in Catalan civil law (see point 6).

2. The evolution of Spanish private rental sector

The form of housing tenures in Spain has varied considerably in the past sixty years. Whilst the most common one in 1950 was tenancy, representing 51.4 % of the total number of households, this regime reached its lowest rate in 2006: only 10 % of the total housing stock, which is represented in Table 1.

⁵ UNECE at *UNECE Draft Regional Report to HABITAT III*, 8-7-2016, p. 66, stated that “Reliance on, and disproportionate support to, one tenure model proved to be unsustainable in the long term, to be insensitive to local housing market volatility, and to be exposed to national and international financial market fluctuations”.

⁶ See the discussion at Nasarre Aznar, S., “Cuestionando algunos mitos del acceso a la vivienda en España en perspectiva europea”, *Cuadernos de Relaciones Laborales*, 35(1) 2017, pp. 43 a 69. See the news about the sharp increase of rents in Barcelona in 2016 <http://www.lavanguardia.com/local/barcelona/20161002/41720510856/aumenta-precio-pisos-alquiler-barcelona.html> (visited 8/3/2017).

⁷ In relation to salaries, 34% of Spanish employees earned less than 645 euros/month in 2014 (<http://www.elmundo.es/economia/2014/11/21/546e5c3dca4741a15b8b457d.html>; visited 14-3-2017). In relation to retirement pensions, their public scheme is constantly at risk: in 2016 the public pensions’ fund had 15 billion euro but five years ago it was of 66.8 billion euro (US system of billions) (see <http://www.elmundo.es/espana/2017/01/04/586c0a0de2704e8f4b8b45ac.html>; visited 14-3-2017).

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This evolution towards homeownership regime in Spain with regard to main family dwellings took place for several reasons⁸. Firstly, the less (or even lack of) institutional and tax incentives for tenancies. Secondly, the low mortgage interest rates in the last decade and the wide expectations of increase of the value of real estate, both coupled with a context of a relatively weak Welfare State⁹, in which homeownership is perceived as a “savings” instrument for periods of need. Thirdly, it should be highlighted the decline in the supply of rental housing (both in the public and private sectors) caused by its historical relatively low profitability, the risk of default by the tenant and the poor legal protection that landlords had experienced in the past¹⁰.

The most recent data on the land tenure distribution in the Spanish housing market are collected by the Survey on Living Conditions (ECV, *Encuesta de Condiciones de Vida*) from the *Spanish Institute of Statistics* (INE). According to data published in 2015, which we set out in Table 1, 77.3% of Spanish households are homeowners, while 15.6% are tenants.

%	1950	1960	1970	1981	1991	2004	2006	2008	2010	2012	2013	2014	2015
Ownership	46,9	50,6	63,4	73,1	78,1	79,5	79,5	79,6	79,4	79,2	77,7	78	77,3
Tenancy	51,4	42,5	30	20,8	15	13,9	13,5	14,2	14,5	14,5	15,4	14,9	15,6
Other uses	2,6	6,9	6,5	6,1	7,7	6,7	7	6,1	6,1	6,3	6,9	7	7,1

Table 1. Evolution of tenure’s percentage in Spain (1950-2015)¹¹.

Consequently, it can be perceived that there is not a real “menu” of different housing tenures available in Spain as there are basically only two available regimes (leaving apart other informal or cost-free tenures -7.1%- such as licenses or widows’ usufructs) but very much concentrated in homeownership, which is a pattern only suitable to be altered in Catalonia (north-East region of Spain) thanks to new legal framework for intermediate tenures: the shared ownership and the temporal ownership.¹²

Despite the clear homeownership prevalence, tenancies are slightly increasing in recent years, but not because it is an appealing form of housing tenure¹³, but due to the negative externalities of the economic crisis, that is to say, the loss of the primary residence by homeowners (evictions, divorces), constrain of mortgage loans due to banking liquidity crisis and rise of unemployment¹⁴.

⁸ See a deeper discussion regarding the causes at Nasarre, S., Garcia, M.O. and Xerri, Kurt, *¿Puede ser el alquiler una alternativa real al dominio como forma de acceso a la vivienda? Una comparativa legal Portugal-España-Malta*”, *Teoría y Derecho*, 16/2014, pp. 194 and 195.

⁹ See some indicators in relation to the recent postponement of reiteration age until 67 and cuts in public health and education at Nasarre Aznar, S., *Cuestionando algunos mitos del acceso a la vivienda en España en perspectiva europea*, *Cuadernos de Relaciones Laborales*, 35(1) 2017, p. 54.

¹⁰ According to Borgia Sorrosal, S. *El derecho constitucional a una vivienda digna. Régimen tributario y propuestas de mejora*, Dykinson, Madrid, 2010, p. 27.

¹¹ Source: Borgia Sorrosal, S. *El derecho constitucional a una vivienda digna...ob. cit.* and *Encuesta sobre Condiciones de Vida* (ECV) of the *Instituto Nacional de Estadística* (INE).

¹² See some details of these institutions at Garcia Teruel, RM., Lambea Llop, N. and Molina Roig, E., “The new intermediate tenures in Catalonia to facilitate access to housing”, *Revue de Droit Bancaire et Financière*, Lexis Nexis. no. 2, 2015, pp. 116 ff.

¹³ Only 20% of current tenants are happy being so; the others would rather like to become homeowners if they could according to FOTOCASA: *Los españoles y su relación con la vivienda 2015*. Available: http://images.fotocasa.es/inmesp/noticias/sala_prensa/notasdeprensa/17731/Los%20espa%C3%B1oles%20y%20su%20relaci%C3%B3n%20con%20la%20vivienda%20en%202015_.pdf; visited 21/09/2016).

¹⁴ Although the unemployment rate has diminished in the second term 2016 to 20% (4.5 million unemployed people) according to last data available by INE, in May 2014 Spain ranked the second in the EU (25.1%) after Greece, according to EUROSTAT. See more details at Prieto, C., Arnal, M. y Potroni, J., “La calidad del empleo en España: una aproximación teórica y empírica” in *Revista Política y Sociedad*, no. 2, v. 48, 2011, pp. 411 a 415.

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This should be coupled with the fact that since 2012, renting is already more expensive than home buying (as it was until 2007). In fact, in 2017 only in 3 Spanish regions (*provincias*; Orense, San Sebastián and Lugo) out of 50, renting a home is more affordable than buying¹⁵. One consequence of these (difficulties of taking and paying off a mortgage loan and expensive rents) is that Spain is the second country in Europe where young people become independent later from their family unit due to a lack of affordable housing prices¹⁶, which is going to cause mid-term structural consequences to the country.

Nevertheless, the 2007 financial and real estate crisis opened the way to a new situation in which homeownership has lost much of its appeal because of the economic implications: restrictions on obtaining a bank loan, the end of tax relief for the purchase of a dwelling in 2011 and a market downturn where expectations of revaluation are lost¹⁷. Indebtedness, arrearage and foreclosures¹⁸ make families rethink the benefits of home ownership in terms of stability, security and profitable investment. In addition, the imminent transposition of EU Directive 2014/17 into Spanish law in 2017, constraining mortgage loans' granting to only those that will be able to repay them (art. 18 Directive), might prevent many Spanish households to become homeowners ever (at least in the property, the area or the city where they want to live). These elements revitalize the interest in tenancies, as a theoretically more feasible way to have access to a dwelling in a context of instability¹⁹.

Finally, the Spanish tenancy market distinguishes between private sector housing and housing with a public task. In the latter, housing for tenancy purposes is very residual, barely 2% of the total housing stock, whilst European average reaches 9%²⁰. Due to the scarcity of rented social housing in Spain, it is usual that the private rental sector works as a way to access housing for vulnerable groups in risk of residential exclusion²¹. Thus, the private rental market works as a residual type of housing tenure, both for those that cannot afford buying a property and those that cannot access to social housing.

Thus, it can be concluded that the slight increase of the rental sector since 2007 is mainly due to a forced option of many families due to the bad economic situation, to the lack of alternative attractive housing tenures²² and the rental black market (which represented in 2015 41.4% of the total)²³,

¹⁵ http://www.elconfidencial.com/vivienda/2017-01-29/si-pagases-lo-mismo-de-alquiler-que-de-hipoteca-comprarias-casa_1315309/ (visited 8/3/2017).

¹⁶EUROSTAT: Youth in Europe (2009), p. 31. Available at: http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-78-09-920/EN/KS-78-09-920-EN.PDF. (visited 15/10/2015).

¹⁷The average inter-annual housing price started to decrease in the second semester of 2008, which is a trend that continues today. According to INE, (15-9-2012), the accumulated fall in the period 2008-2012 was 21,9%.

¹⁸In 2012, mortgage foreclosures of first residence took place 39,051. Since then, they have been reduced every year (2013 they were 38,961; 30,056 in 2014 and 29,327 in 2015) (see press releases of the Bank of Spain 19/05/2014 and 20/07/2016).

¹⁹It is the opinion of Aramburu Otazu, M., *La resignificación de la tenencia de la vivienda en Cataluña delante de la crisis económica: aproximación a través de grupos de discusión*, Secretaria d'Habitatge i Millora Urbana de la Generalitat de Catalunya, Barcelona, 2010, pp. 14 and 38.

²⁰EUROSTAT: Housing Statistics in the European Union. Income and Living Conditions (2010).

²¹Pareja-Eastaway, M y Sánchez-Martínez, T., "El Mercado de vivienda en España: La necesidad de nuevas propuestas" in *El acceso a la vivienda en un contexto de crisis*, coord. por S. Nasarre Aznar, ed. Edisofer, Madrid, 2010, p. 46.

²²More details, Nasarre Aznar, S., "Leases as an Alternative to Homeownership in Europe. Some Key Legal Aspects" en *European Review of Private Law 6-2014*, Kluwer Law International BV, 2014, pp. 815-846.

²³EL MUNDO. Cuatro de cada diez alquileres de vivienda no se declara a Hacienda. Available: <http://www.elmundo.es/economia/2016/04/19/571600d722601dd3048b45ba.html> (visited 03/03/2017).

which, in its turn, ballasts the transparency of the rental sector and the quality of rented properties and worsens the situation of tenants²⁴.

3. A mere temporary or frictional demand

The Spanish tenancy market is still associated with a temporary or frictional demand for occupational, personal or family reasons: a person who chooses this market does so because he/she is opting for a temporary strategy before accessing home ownership, as long as a job and/or family stability and a sufficient/stable income are not achieved²⁵.

This kind of cyclical demand occurs mainly in the middle class and among young people, who believe that the purchase of dwellings requires onerous requirements in the short to medium term given the current situation. In fact, only 41.7% of Spaniards between 18 and 30 years old want to become tenants. And while the vast majority of tenants live under this tenure for labour or economic reasons, only 40% do so because of the flexibility that tenancies offer (eg. possibility of moving home due to a bigger family, labour mobility, variations in economic situation, etc.). Spaniards between 35 and 55 years old prefer buying, but homeownership loses interest in the group of more than 55 years old. In fact, a high percentage of tenants of this group of age are happy with their current type of housing tenure (44.5% between 55 and 65 years old and 50.2% of those older than 65 years old)²⁶. However, the working class is willing to make a greater effort to buy a home than the middle class (rich in cultural capital). Latter are less willing to waive certain tangible and intangible goods (e.g. travelling) in order to purchase a dwelling in the future²⁷.

Usual short-term of leases (especially since Act 4/2013) and high rents (free establishment of initial rent and its updates since 2013) difficult that tenancies are perceived as an adequate or attractive way for accessing to housing for families that pursue to establish a long-term life project in a property.

In such sense, a report of 2013 reveals that the reasons for a household to rent instead of buying a property are their economic (19%) or labour (17%) situation. 9 % of them acknowledge that they cannot afford the expenses that entails buying a property (probably, initial 20% of property's value that is usually required and also probably the 13% extra costs in taxes and fees to be paid also upfront) and an additional 9% reveal that they are waiting for home buying prices to decrease. In fact, as long as the usual duration of new tenancy contracts arranged since 2013 is 3 years (due to the reduction of minimum duration from 5 years) and due to the unaffordability of homeownership for many, speculation with properties is contributing to cause a major increase in rents in Barcelona and Madrid by the end of 2016 and 2017²⁸ (precisely when those contracts arranged in 2013 expire), as far as Catalan new intermediate tenures are not widespread enough.

In general terms, then, it can be affirmed, that Spaniards today do not buy a property because they cannot afford it (i.e. mortgage loans' granting constrains and high unemployment rates since 2007). But, who answered such 2013 survey said that 72% prefer buying instead of renting (only 12%). In

²⁴Nasarre Aznar, S. and Garcia Teruel, R.M., "La persistencia del problema del acceso a la vivienda en España tras diez años de crisis. La búsqueda de soluciones a través de la democratización de la propiedad y de la estabilidad del alquiler", *Vivienda y Financiación*, ADICAE, December 2016, p. 50.

²⁵Aramburu Otazu, M., *La resignificación de la tenencia de la vivienda en Cataluña...ob. cit.*, p.16.

²⁶López Letón, S., "Los jóvenes se decantan por el alquiler" in *El País*, 26 of June 2015. Available: http://economia.elpais.com/economia/2015/06/25/vivienda/1435247957_070961.html (visited 06/10/2016).

²⁷Aramburu Otazu, M., *La resignificación de la tenencia de la vivienda en Cataluña...ob. cit.*, pp.72-73.

²⁸ See <http://www.elperiodico.com/es/noticias/economia/burbuja-precios-alquiler-llega-grandes-ciudades-5621351> (visited 16-3-2017).

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addition, for 73% buying a property is preferred in the long-run and 63% said that a dwelling is the best inheritance that can be delivered to a son or daughter²⁹.

There are different groups that are potentially the main target in need of private rental sector: less affluent families³⁰ unable to become homeowners but they do not comply the requirements to access to social housing (only 2%); or those, which fulfilling such criteria, find that their demand cannot be met: young workers; single, separated or divorced people, who are living alone or with others³¹; and single-parent families; all of them with low-income. The studies carried out on poverty show that these groups comprise the main demand in tenancy market. They tend to have inadequate living conditions, high risk of poverty and to be excluded. Consequently, households who rent dwellings in Spain have a higher risk of poverty³².

Taking into account the demographic factor and accessibility threshold, standing at around 30% of disposable wage income, the report drawn up by CatalunyaCaixa in 2012³³ assessed that rental housing demand would be potentially close to 658,000 rental homes, of which about 95,000 are from young people without a spouse, and about 563,000 are from couples, according to 2010 data.

Also, it is important to analyse the endogenous changes in households' structure. Young people are changing their emancipation patterns and households' composition varies often, to the extent that provisional coexistence increases.

Before the real estate crisis in Spain in 2007, the number of households increased quickly despite the stagnation of population, causing a reduction in dwellings' average size and an increase in provisional coexistence and single-person households, due to the constant variation in the composition of these households³⁴. However, this residential dynamic has changed since 2007, since people, who have been affected by the economic situation of the country, must renounce access to a dwelling. For instance, the following phenomena are commonly increasing:

- a. The renunciation to emancipation by young people.
- b. Individuals or families that are unable to pay for their own home and are obliged to share one with relatives or strangers. In this sense, 300,000 families (tripled since 2008) have all their members' unemployed and they live thanks to the retirement pensions of their elderly relatives³⁵. And 1/5 of all unemployed people live on the pension of an elderly relative.
- c. Forced coexistence caused by the impossibility of affording a separation or divorce. In such sense, divorce is considered a major cause for eviction and homelessness and about 120,000 people/year lose the use of their family homes, even if they own them. Usually, middle-aged men are more affected by the loss of the right to use a family home due to divorce³⁶.

²⁹FOTOCASA: Los españoles y su relación con la vivienda (2013). Available: <http://prensa.fotocasa.es/informes/page/3/> (visited 06/10/2016)

³⁰ Eurostat defines poor families as those whose resources are so scarce that they cause them to be excluded from consumption patterns and activities that comprise the minimum acceptable level of life of the society they belong to. In EUROSTAT: In-work poverty in the EU (2010). Available at: http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-78-09-920/EN/KS-78-09-920-EN.PDF. (visited 15/10/2016).

³¹Trilla Bellart, C., *La política de vivienda en una perspectiva europea comparada*, La Caixa, Barcelona, 2001, p. 90.

³²As set out by De La Fuente Lechuga, M, Faura Martínez, F. & García Luque, O., *Las condiciones de vida y pobreza consistente*, ASEPUMA, Burgos, 2009, p. 7.

³³Oliver Alonso, J., "Informe sobre el sector inmobiliario residencial en España" in *CatalunyaCaixa and Departamento de Economía Aplicada de la UAB*, Barcelona, 2012, p. 96.

³⁴ See Trilla Bellart, C. *La política de vivienda en una perspectiva europea comparada...* ob. cit., pp. 23-29.

³⁵Laparra, M. and Pérez Eransus, B., "Crisis y fractura social en Europa. Causas y efectos en España" in la Caixa, Barcelona, 2012. And report Fundación Encuentro 2013, p. 227, available at http://www.fundacionencuentro.org/informe_espaa/indiceinforme.php?id=IE20 (visited 6-10-2016).

³⁶According to Kenna, P., Busch-Geertsema, V., Benjaminsen, L. and Nasarre-Aznar, S., "Pilot project - Promoting

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- d. The residential expulsion to isolated areas of one's social circle or the inadequacy of housing³⁷.

All these factors can give rise to substandard and overcrowding situations in dwellings. In addition, as LEAL and ALGUACIL³⁸ point out in their report on immigration and housing of 2012, more than two-thirds of immigrants from developing countries rent their homes, whilst it is only the preference for 17.4% of Spanish households. The main reasons for that are the uncertainty about their future employment and the lack of resources to buy a dwelling. Thus, in the same report it is pointed out that as the duration of the stay in the country increases, the number of immigrants who access home ownership also grows, following the same pattern of the Spaniards. That is because home ownership is perceived as a way to channel savings; meanwhile, tenancy is considered an expense³⁹.

4. A not professionalized and atomized market

The Survey on Tenancy Dwelling in Spain (2006) evidences that 86% of landlords are non-professional, 7.2% are of the public sector and 6.7% are private entities⁴⁰. This distribution has also an impact in the nature of the current Spanish rented market, as non-professional landlords usually look for short term benefits (ie. they prefer free establishment of initial rent and updates)⁴¹, seek to maximise benefits (e.g. might be more keen to find new tenants ready to pay more, not motivated to maintain the dwelling properly) and prefer shorter duration of lease contracts (eg. to recover the property for a son). Although some professional landlords might act in the same way, they are more ready to compensate loss of earnings with other tenants and thanks to the economy of scale, they might incur in more expenses finding new tenants so they'd rather prefer to keep current ones, they do not have "family needs" and they are more publicly supervised (e.g. to keep the dwelling in adequate conditions⁴²), while tenants are more protected as they have the condition of consumers⁴³.

Among the latter, they should be distinguished between those that are for profit and those that are non-profit entities:

- a) Among profit entities that currently manage a portion of the housing stock can be found:
 - The asset-holding companies aimed at housing development or leasing. They are generally incorporated as capital companies (mostly corporations but sometimes they are limited liability companies).
 - Real Estate Investment Funds (FII, *Fondos de Inversión Inmobiliaria*) are regulated in the Collective Investment Institutions Act 35/2003 since they are a non-financial collective investment institution modality aimed at urban real estate investment. Their income comes from both rents and the annual increase of the real estate value through appraisals. They have

protection of the right to housing - Homelessness prevention in the context of evictions", VT/2013/056, European Commission-DG Employment, 2016, p. 73.

³⁷Riba Renom, N., *El Dret a l'habitatge*, Departament d'Interior, Relacions Institucionals i Participació, Oficina de Promoció de la Pau i dels Drets Humans de la Generalitat de Catalunya, Barcelona, 2010, p. 21.

³⁸Leal, J. & Alguacil A., "Vivienda e inmigración: las condiciones y el comportamiento residencial de los inmigrantes en España" in *Anuario de Inmigración en España*, ed. J. Oliver, J. Arango & E. Aja, CIDOB, Barcelona, 2012, p. 131-134.

³⁹As the report points out, the access to home ownership will only take place in very advantageous situations, when a contribution of a minimum of a 20% may be made and with a guarantee of job stability.

⁴⁰Available: www.ine.es (visited 06.10.2016).

⁴¹NASARRE AZNAR, S., *La eficacia de la Ley 4/2013...* ob. cit., pp. 227 y 228.

⁴²See <http://www.nolo.com/legal-encyclopedia/difference-between-renting-individual-landlord-property-management-firm.html> (visited 21/03/2017).

⁴³More details in AVILÉS GARCÍA, J., "Perspectiva general" in *La protección del arrendador. Como instrumento para dinamizar el mercado de alquiler de viviendas. Perspectiva desde la reforma*. Aranzadi, Navarra, 2014, pp.192-197.

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some structural problems that have ballasted their full development⁴⁴. Additional problems have similar institutions called Real Estate Investment Companies (SII, *Sociedades de Inversión Inmobiliaria*)⁴⁵.

- The SOCIMI, the Spanish version of the REITs (real estate investment trusts) is created as corporation through the enactment of Act 11/2009, which shares are admitted to trading on an official stock market. Its main corporate purpose is direct or indirect acquisition and development of urban real estate to be earmarked for tenancy, in the terms and requirements established in the law. However, unlike the previous collective investment institutions, SOCIMI participates in the stock-exchange market, which provides investors with a higher liquidity, and since the 2012 reform, they are 0% taxed at corporation level⁴⁶, which encompass them to international REITs taxation benefits⁴⁷. In the current situation of 3.5 million empty dwellings, SOCIMI might be a useful instrument to put them into the market as they could conform a diversified stock at a better price than during the last years⁴⁸. In this context, there has been an important increase in the creation of new SOCIMI, which got properties worth €2.6 million in 2015. The three biggest SOCIMI are **Merlin Properties**, **Axiare Patrimonio** and **Lar España**⁴⁹.

b) Non-profit entities, that currently manage a small portion of the housing stock are:

- Housing cooperatives (Spanish Act 27/1999 plus many regional legislations): the cooperative owns either the ownership or a right to build of a block and arrange with its partners either the sale of the unit or a tenancy contract, in exchange for a payment of an initial and recoverable amount, as well as the payment of a periodic rent. The assignment of a right of use of units by cooperatives is not widespread in Spain with only specific cases in progress⁵⁰ and, in general terms, although housing cooperatives might have contributed to some extent to palliate housing availability problems⁵¹, it is hard to assess its extent and impact so far.

- Non-governmental Organizations (NGOs) with an associative base: these are non-profit entities aimed at promoting the satisfaction of the right to decent and adequate housing, encouraging the development of accommodation programmes offering affordable housing, and also improving the quality of socioeconomic residential stock and/or accompanying especially vulnerable communities by facilitating their residential inclusion. In order to meet these goals, they have adopted the legal form of an association⁵², which is characterized by being a democratic entity managed through the government and representation organs agreed in its Statutes and that are

⁴⁴See Nasarre Aznar, S., and Rivas Nieto, E. "Trust e Instituciones Fiduciarias. Problemática civil y tratamiento fiscal" *Instituto de Estudios Fiscales* no. 28, 2006, p. 9.

⁴⁵See Menéndez Serrano, M.M., *Los Fondos de Inversión Inmobiliaria y los arrendamientos urbanos: otra alternativa al problema de la vivienda en España*, La Ley, Madrid, 2007, p. 49.

⁴⁶Ley 16/2012 que modifica la Ley 11/2009.

⁴⁷Nasarre Aznar, S. and Rivas Nieto, E., "La naturaleza jurídico-privada y el tratamiento fiscal de las nuevas Sociedades Cotizadas de Inversión en el Mercado Inmobiliario (SOCIMI) en la Ley 11/2009", in *Revista de Contabilidad y Tributación* no. 321, 2009, pp. 14 y ss.

⁴⁸García Garnica M.C. & Rojo Álvarez-Manzaneda, R., "Las sociedades cotizadas de inversión inmobiliaria: Un nuevo instrumento impulsor del mercado inmobiliario y de alquiler en España" at *El acceso a la vivienda en un contexto de crisis*, coord. S. Nasarre Aznar, Edisofer, Madrid, 2010, pp. 308 and 322.

⁴⁹"Las socimis se reafirman como una de las nuevas estrellas del mercado inmobiliario" in *Diario el Mundo*, 5 of January 2016. Available: www.elmundo.es/economia/2016/01/05/568b7679268e3e4b278b4663.html (visited 06/10/2016).

⁵⁰ See, for example, La Borda. Available: <http://www.laborda.coop/es/> (visited 29/10/2016).

⁵¹ See some cases at Sostre Cívico (<http://sostrecivico.coop>) and some data at http://economia.elpais.com/economia/2016/01/26/vivienda/1453812758_615096.html (visited 29/10/2016).

⁵²Regulated in the Ley Orgánica 1/2002, de 22 de marzo, reguladora del Derecho de Asociación (BOE 26/03/2002 núm. 73).

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independent from public authorities. Some examples of these associations are *Provivienda*, *Prohabitatge* and *Plataforma para una vivienda digna*.

- In addition, there are others generalists NGOs that among their social action sphere also promote residential integration and accommodation programmes. These have different legal forms, such as foundations, religious entities, confederations, etc. The following are the most relevant: *Caritas*, *Fundació Foment de l'Habitatge Social*, *Red Acoge* and *Cruz Roja*.

Although non-professional landlords manage most of the rented-housing stock in Spain, the number of rented dwellings managed by investment funds and corporations have increased in recent years. In 2016, 65% of dwellings' acquisition was undertaken by investment funds, which intention is to resell them in the future (i.e. when housing prices increase) and, meanwhile, to rent them to get some returns⁵³, thus contributing to keep that temporary or frictional demand (see point 3 above). In 2013, the investment fund Blackstone bought 18 buildings (1,860 social dwellings) from the Public Housing Company of the municipality of Madrid (EMVS)⁵⁴. In this vein, the Public Housing Institute of the region of Madrid (IVIMA) sold to the fund Azora-Goldman Sachs 2,935 social dwellings⁵⁵. In addition, SAREB⁵⁶ sold 24,000 properties during its two first years (22% of its initial stock) to private developers and investment funds⁵⁷.

5. Current Spanish legal framework for tenancies and subsequent changes in the rental market

Act 4/2013 is the most significant amendment of the Urban Leases Act (LAU) 1994 since this year and regulates measures, among others, to increase the flexibility of the contractual relationships between the parties and to provide more agility to the eviction process⁵⁸.

According to this Act:

- a. The minimum duration of the lease contract is reduced from 5 to 3 years (art. 9.1 LAU).
- b. The duration of the term extension was also reduced from 3 to 1 years (art. 10 LAU).
- c. The possibility to freely arrange the initial rent and the rent increases (before the 2013 reform the first 5 years was capped until the Consumer Price Index) by the parties (art. 18.1 LAU).
- d. The possibility for the tenant to renounce to his pre-emption rights in case of sale or forced sale of the rented property (art. 25 LAU).
- e. The legal possibility (before an express agreement was needed) for the landlord to recover the dwelling when he evidences the need of it (art. 9.3 LAU).
- f. The possibility for the tenant to unilaterally terminate the lease contract only after the first 6 months, with compensation to the landlord if agreed (art. 11 LAU).

⁵³According to report of Observatorio para la Protección del Propietario de la empresa Alquiler Protegido www.alquilerprotegido.es/noticias/el-65-de-los-compradores-de-viviendas-son-fondos-de-inversion-pisos-com (visited 06/10/2016).

⁵⁴Available: www.idealista.com/news/inmobiliario/vivienda/2016/04/28/741923-estas-son-las-reformas-que-blackstone-no-ha-hecho-en-los-pisos-de-la-emvs-segun-la (visited 06/10/2016).

⁵⁵Available: http://politica.elpais.com/politica/2016/04/05/actualidad/1459876286_119185.html (visited 06/10/2016).

⁵⁶ The “bad bank” created by law to get rid off of the extra housing stock of the banks intervened by the State because of the crisis.

⁵⁷Gallego, J.G., “La SAREB ya ha vendido un 22% de su cartera de inmuebles” in *Diario el Mundo*, 1 of April 2015. Available: www.elmundo.es/economia/2015/04/01/551aec23268e3e7a288b457b.html (visited 06/10/2016).

⁵⁸Molina Roig, E., Informe español sobre “Tenancy Law and housing policy in Multi-level europe”, TENLAW (2012-2015) del 7th Framework Program of the European Commission, supervised for S. Nasarre and led by Prof. C. Schmid, University of Bremen (Ref. 290694), p. 78.

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- g. The *emptio non tollit locatum* principle is applied only if the tenancy is registered in the Land Registry (art. 14 LAU), while with the previous version of the law (LAU 1994), the buyer of any rented property should respect up to the first 5 years lease in any case.

In conclusion, the Act 4/2013 was essentially aimed at protecting landlords' interests (in particular, professional ones) in order to promote rental housing. But the reduction of the compulsory minimum time extension, the landlord's possibility of increasing the rent without limits or to waive the right of pre-emption for the tenant in case of sale of the property, are measures that presumably will hardly achieve the intended purpose (the widespread of tenancy as a true alternative type of tenure), as it seems clear that they neither provide stability nor legal certainty to tenants nor facilitate their access to decent and adequate housing⁵⁹.

In fact, first, accordingly to Table 1 above, the increase of tenancies as housing tenure has only increased by 0.2% from 2013 to 2016 and mainly, as it has been explained, due to "forced" tenants; and, second, we have also evidenced that the reduction of tenants' stability to 3 years has contributed to new tenancies' rent increase in big cities in late 2016 and 2017 due to the maturity of most contracts arranged in 2013, the lack of credit for home buying (much more affordable in 2017 in Barcelona and Madrid, for example) and the lack of widespread alternative housing tenures.

In such sense, Barcelona⁶⁰ is the city that has recorded the highest increase (17%), followed by Madrid, Málaga and Palma de Mallorca, mainly because the demand is much higher than the number of offered properties⁶¹. In addition, the offer of private rented properties has been constrained also due to the increase of the holiday apartments⁶² and the rent of rooms (instead of whole dwellings) in these cities (300%), which results to be, at the end of the day, more profitable for landlords.

Due to these evidences, it is difficult to say that Act 1/2013 has been successful neither to increase the Spanish residential rental sector nor to contain the rent prices; on the contrary, it has contributed to their increase in key cities and areas. This dubious result should be combined with the limited success⁶³ of many intrusive (into the market) measures adopted by several Autonomous Communities to increase taxation or to impose penalties⁶⁴ on empty properties⁶⁵ or to expropriate them for social reasons⁶⁶.

⁵⁹Molina Roig, E., Spanish Report on "Tenancy Law and housing policy in Multi-level Europe"...ob. cit., p. 41. See above the conjunctural reasons for the slight increase of the private rental sector during the last years.

⁶⁰More details, DEPARTAMENT D'ESTUDIS I PROGRAMACIÓ DE L'AJUNTAMENT DE BARCELONA, "Informe sobre el preu dels lloguers d'habitatges a Barcelona", 29 January 2016. Available at: <http://file02.lavanguardia.com/2016/03/02/54444689056-url.pdf> (visited 21/10/2016).

⁶¹Available at: http://economia.elpais.com/economia/2016/02/14/actualidad/1455477137_281474.html (visited 21/10/2016).

⁶²See Lambea Llop, N., *A policy approach to the impact of tourist dwellings in condominiums and neighbourhoods in Barcelona*, Urban research & Practice, 2016, pp. 2 to 8. See also EY BUILDING A BETTER WORKING WORLD, Alojamiento turístico en viviendas de alquiler: Impactos y retos asociados. Exceltur, 2015, pp. 23 and ss.

⁶³Some of them have been rendered unconstitutional and some others are suspended by the Spanish Constitutional Court. In addition, there is no transparent calculation of their cost-benefit. See below for more details.

⁶⁴For example, arts. 5.2.b, 41, 123.1.h, 113 and 118.1 of Catalan Act 18/2007.

⁶⁵For example the Catalan Act 14/2015, 21 July.

⁶⁶Several Spanish regions have developed measures in this sense during the last years, but most of them have been challenged before the Spanish Constitutional Court. In Catalonia art. 7 Act 24/2015 was suspended by Constitutional Court ruling of 24 May 2016 (BOE 03/06/2016 no. 36606). The art. 72 Act 3/2015 of Basque Country's Act was suspended by Constitutional Court ruling 19 July 2016. Also in Andalusia Act 4/2013, 1 October de 2013 was suspended by Resolution 17 February 2015.

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This has led us to conclude that there exists a real need for the introduction of deep and structural reforms in the legal infrastructure of residential leases to make them a true alternative to homeownership⁶⁷.

All in all, the main current drawbacks for landlords in the Spanish PRS are:

- a. Historical scarce profitability of the PRS when compared with other uses of the property, such as renting it for holiday purposes or room rental.
- b. Bad state-of-repair of a big part of the Spanish housing stock (55% of buildings were built before 1980⁶⁸) and lack of incentives to reparations granted by the public administrations.
- c. Slow repossession of property in cases of rent default or misbehaviour of the tenant. With regard to eviction process, the law has been reformed on several occasions (many of them quite recently) in order to reduce deadlines and to try to simplify the process. However, this goal is difficult to achieve unless the courts' workload is reduced, either through resolution by means of other mechanisms, e.g. ADR, or through the provision of more human and technical resources in order to get a faster resolution⁶⁹.
- d. The Spanish rental market is very atomized and is not professionalized. There is also a need for a proper training of real estate conveyancers.

And the main current drawbacks for tenants are:

- a. The market is neither affordable, nor stable nor flexible. On one hand, the average rent in Spain is nearly to the same amount of the minimum salary and since 2013 it is free for the parties to agree any amount for the initial rent and for subsequent rent increases. Having the smallest PRS in Western Europe does not help to develop a healthy rented housing market. On the other hand, the reforms made by Act 4/2013 have dramatically reduced the protection of tenants (e.g. shorter minimum duration) and have not increased the capabilities of tenants to make their tenancy more flexible (e.g. if they unilaterally terminate the contract, they have to compensate the landlord).
- b. For most vulnerable households there is not enough affordable housing, in a way by which the PRS ends up completing this function, which has generated a sort of stigmatization of the tenure. The inter-change of roles (public administration managing private dwellings while private landlords manage public dwellings) neither helps.

Then, to go beyond Act 4/2013, there is now a real need for a mechanism that helps to the stabilization of rents' prices, to guarantee a duration of lease contracts, which may help households to remain in a property as long as they fulfil their obligations, the transparency, guarantee and attractiveness of the market and, basically, to reach an equilibrium between the rights and obligations of the parties.

6. The need for major legislative changes. Catalan principles 2017.

These are precisely the reasons why Catalonia has started to develop a new legal framework (a new model) for urban leases since July 2016, following the outcomes of TENLAW project⁷⁰, which pursues to offer stability, affordability and flexibility to tenants and profitability, legal certainty and

⁶⁷ Queralt, R. "Hoy alquilar no es una opción rentable" interview to Nasarre Aznar, S., en *La vanguardia* a 28 September 2016. Available at: www.lavanguardia.com/vida/20160927/41611060317/sergio-nasarre-alquiler-catedra-habitatge-urv.html (visited 14.10.2016).

⁶⁸ INE, Censo de viviendas del 2011.

⁶⁹ Molina Roig, E., Spanish report "Tenancy Law and housing policy in Multi-level Europe"...ob. cit., p. 185.

⁷⁰ <http://www.tenlaw.uni-bremen.de> (visited 30/10/2016).

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guarantees to landlords⁷¹. A proper Act is foreseen to pass by end-2017 but the Tables for a rent-reference system will be available by mid-2017.

The residential leases model we proposed to the Catalan Government, who assumed most of them in January 2017⁷², was enclosed into a range of parameters that were agreed with the 15 housing-related institutions (that ranged from consumers' associations, public administrations and NGOs to landlords' representatives, real estate conveyancers, real estate funds, etc.) that tried to focus the discussion within a range of general rules that could be assumable by all involved parties.

It ended up being a functional model based partially on German (eg. rent reference system, co-liability in the maintenance and improvements on the rented property, role of associations of landlords and tenants), Swiss (e.g. landlords' and tenants' causes for unilateral contact resolution, subleases) and Austrian (e.g. open ended contracts) existing models, combined with other models for particular matters such as methods for alternative dispute resolution (Irish model) or the register of residential leases (English and Scottish models). Apart from these key aspects we considered essential to make a change following these comparative law models, but other functional rules of the Spanish tradition of urban leases were respected (e.g. rules in relation to rented property in case of divorce or death of the tenant) or recovered from older versions of the law of 2013 (minimum compulsory duration re-established in 5 years).

The parameters that facilitated the discussion and the agreement in crucial points by all involved parties were, basically:

- a. Residential tenancies should be a true alternative to homeownership. Thus, any new rule that may move away tenancies to really be attractive enough for both parties and reduce their functionality and appeal should not be included. For example, introducing open-ended contracts (good for good tenants) without "exit" cases for landlords in case they reasonably need the value of the rented property would not make these new rules functional for landlords, thus, not functional at all (e.g. to mobilize the 3.5 million empty properties instead of having them closed down).
- b. The equilibrium between rights and obligations of the parties must be reached. We have identified that, on one side, landlords seeks to get as much profitability as possible from the dwelling (eg. from the rent), they want to use it as a "piggy bank" in case of need (eg. through its sale) and want to be awarded as many guarantees and certainty as possible in case of default or misbehaviour of the tenant. On the other side, though, tenants look for stability, affordability and flexibility. Thus, in trying to combine so opposed interests, crucial decisions should be taken on what happens in case of sale of the property by the landlord (should the tenant be evicted? on which basis if he comply with his duties?) or how to balance the amount of the initial deposit (a guarantee for the landlord) and the role of tenancies as a last resource mechanism for someone to access to housing (it should be affordable).
- c. If the tenants are granted more rights on the property (e.g. based on the protection of their right to housing), such open-ended contracts and a mechanism of rent reference, they should be involved in it. For example, while there is a need for incentivizing reparation of rented properties (in 2011, about 10 million primary residences out of a total of 18 million were more than 30 years old and about 3,5 million were over 50 years old⁷³) a way should be

⁷¹ Nasarre Aznar, S., "Leases as an Alternative to Homeownership in Europe. Some Key Legal Aspects" en *European Review of Private Law 6-2014*, Kluwer Law International BV, 2014, pp. 837 to 844.

⁷²http://www.diarimes.com/es/noticias/tarragona/2017/01/19/la_generalitat_asume_propuestas_vivienda_una_catedra_la_urv_13902_1091.html (visited 10-3-2017).

⁷³ See *Instituto Nacional de Estadística (INE), Census on population and housing 2011*, <http://www.ine.es/jaxi/Datos.htm?path=/t20/e244/viviendas/p01/10/&file=01009.px> (visited 14-3-2017).

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found to involve a long-term tenant in the payment of those works if they represent a real improvement of the dwelling's habitability, because, although the landlords get an economic improvement of the property, it is the tenants who will enjoy the dwelling as long as they behave and therefore they will be the single benefitted of the improvement as long as they remain in the premises. This is for example the solution at §§ 559 and 554 German Civil Code (BGB).

- d. There is a need for combining historical law (ie. historical Spanish law of residential leases) with disruptive and innovative rules (sort of transience). Many rules present in functional residential leases in Europe (eg. Germany, Austria and Switzerland) evoke to many real estate stakeholders classical rules of Spanish law of leases of the 60s, which brought the Spanish rental market to freeze and collapse (e.g. due to rents freeze for decades and generational linked-up of lease contracts). Therefore, we find the need to have an optional approach to new rules (combined with the classical ones) that should be as much attractive as possible to be opted-in by the parties. Therefore, we think more advisable to make coexist open-ended contracts with time-limited contracts (attractiveness for landlords of open-ended contract should be to keep a loyal tenant that contributes to the maintenance and improvement of property) and keeping the possibility of agreeing upon a rent increase referenced in market-oriented tables or arranging the updates freely (attractiveness for landlords here is to be sure that rent increases will not be neither challenged by the tenant nor become old-fashioned because rent increases are Tables-based).

7. Conclusions

The main disadvantages of current Spanish rental market are the lack of a sufficient offer to respond to all possible households in need in cities and regions where people want/have to live, regardless if they have temporary or permanent housing needs or regardless if they have economic resources or don't.

The two main causes for this are the bad state-of-repair of many dwellings in Spain (that even prevents many properties to be able to be rented legally as they do not fulfil the minimum conditions to be habitable, thus increasing the rental black market) and the legal framework that makes tenancies a "risky" and "not-so-profitable" operation for landlords and an undesired option for tenants as most of them would become owners if they could.

Therefore, there is a need for a true professionalized market and a suitable regulation that make tenancies truly available for a bigger audience. Thus, a stable, flexible and affordable rental market could be offered to tenants that cannot become homeowners, but can neither access social housing (due to its scarcity). In addition, it is necessary to provide landlords with sufficient mechanisms to guarantee the payment of rent and other expenses, conservation of housing, sufficient profitability and to promote the conservation and rehabilitation of the rental housing stock, to double current Spanish rental rate up to European standards.

In short, there exists a need for a deep change in the leases legal framework in Spain combined with advanced housing policies (e.g. to increase the stock of social housing for rent for the less affluent, to increase and professionalize the rental market stakeholders) to make tenancies really an alternative to homeownership. This is the path taken in 2017 in Catalonia where a set of well-balanced principles have been adopted to work as a basis for a new legislation.

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