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

National Report for

SPAIN

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National Report for Spain

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1.1. General Features

1.2 Historical evolution of the national housing situation and housing policy

• Please describe the historic evolution of the national housing situation and housing policies briefly

o **In particular: Please describe briefly the evolution of the principal types of housing tenures from the 1990s on. Explain the growth and decline of the different tenures and the reasons why that happened**

Spain has evolved differently from most countries in the European Union (EU), since in Europe the massive construction process took approximately three decades, while in Spain it was concentrated between 1964 and 1976. The capacity of the housing stock was close to meeting the population's needs in 1970[1]. Therefore, the further growth of housing construction did not respond to the needs of the housing demand, but mainly to purely economic and speculative interests. In the early 1970s, the Spanish housing market was one of the smallest in Europe, with 313,000 dwellings, a bit more than the Netherlands (289,000) or Ireland (244,000). Conversely, the housing stock in Spain was one of the largest in Europe in 2005, above countries such as Germany, Denmark, France or Ireland[2].

With regard to the form of tenure, it has varied considerably in the past sixty years. Whilst the most common type of housing tenure in 1950 was tenancy, representing 51.4 % of the total number of main family dwellings, this regime had the lowest rate in 2006: 10 % of the total housing stock according to table A. This evolution towards the home ownership regime in Spain with regard to main family dwellings took place for several reasons. Firstly, the lack of institutional and fiscal incentives for tenancy, far less than those for home ownership. Secondly, the decline experienced by interest rates in the last decade and the wide expectations of revaluation of real estates, both linked to public policies that, as we shall see, have been oriented towards the purchase of dwellings. Thirdly, we should highlight the decline in the supply of rental housing, both in the public and private sectors, caused by its low profitability, the risk of non-payment by the tenant and the poor legal protection that lessors had experienced in previous years.[3]

Table A. Evolution of the percentage of tenure[4]

[1] R. Rodríguez Alonso, 'La política de vivienda en España en el contexto europeo. Deudas y Retos', *Boletín CF+S*, *47/48* (2011): 125, 172, <http://habitat.aq.upm.es/boletin/n47/arrod_2.html> 29 November 2012.

[2] R. Rodríguez Alonso, 'La política de vivienda en España en el contexto europeo. Deudas y Retos', 125, 172.

[3] According to S. Borgía Sorrosal, *El derecho constitucional a una vivienda digna. Régimen tributario y propuestas de mejora* (Madrid: Dykinson, 2010), 27.

[4] Source: own elaboration based on the data of the *Instituto Nacional de Estadística* (INE). Since 2006 using the provisional data provided by the *Encuesta sobre Condiciones de* Vida (ECV) of the INE.

%	1950	1960	1970	1981	1991	2000	2006	2008	2010
Ownership	46.9	50.6	63.4	73.1	78.1	82.8	83.4	83.2	83.0
Tenancy	51.4	42.5	30.0	20.8	15	10.5	10.0	10.9	11.4
Other uses	2.6	6.9	6.5	6.1	7.7	6.7	6.6	5.9	5.7

In order to understand this evolution, an analysis of the housing policies that have been developed after the Spanish civil war is needed, either those implemented during General Franco's regime or, in particular, the ones implemented during the democracy once the Welfare State was established in 1978.

At the end of the Spanish civil war, the problem of housing shortage was accentuated, mainly due to the destruction of dwellings and the null construction activity exerted during the previous few years. With the *Plan de Estabilización* (Stabilization Plan) of 1959, the country experienced economic growth and began to open up to the rest of the world. Basically, housing supply was encouraged, giving primacy to construction and property development activities,[5] and a tax deduction of 15%[6] for the purchase of a dwelling was approved. In addition, the low profitability originated from both the freezing of the rental income and the forced extension of tenancy contracts (established in the 1920s, but remained with the entry into force of the Urban Leases Act of 1964 [LAU 1964, *Ley de Arrendamientos Urbanos*]),[7] discouraged the supply of rental housing, since the owners preferred to sell their dwellings to tenants or third parties rather than to rent them. Thus, a decrease of the supply of rental housing took place: it was reduced by up to 10% with every passing decade between the 50s and 80s.

With the approval of the Spanish Constitution in 1978 (CE, *Constitución Española*), housing came to be considered a social right. Article 47 foresees a mandate to public authorities so that they promote the necessary conditions and establish the appropriate standards in order to make this right effective. The mechanism most widely used for this purpose is the *Plan de Vivienda* (Housing Scheme), which contains the public policies that are intended to have an impact on the real estate market in a certain number of years.[8]

Thus, the State, on the basis of its competence, as regulated in article 149.1.11 and 13 CE, intervenes in the elaboration of the primary regulations that governs financing through the *Planes Estatales de Vivienda y Suelo* (State Housing and Land Plans). Accordingly, from the CE approval onwards the *Plan Trienal* (Triennial Plan) 1981-1983,[9] the *Plan Cuatrienal* (Four-year Plan) 1984-1987,[10] the *Planes de Modulación*

[5] S. Borgía Sorrosal, *El derecho constitucional a una vivienda digna,* 125.
[6] It was provided for in the tax reform carried out by the Ley 44/1978, de 8 de septiembre, que regulaba el Impuesto sobre la Renta de las Personas Físicas (BOE 29/11/2006 núm. 285).
[7] Decreto 4104/1964, de 24 de diciembre, por el que se aprueba el Texto Refundido de la Ley de Arrendamientos Urbanos (BOE 29/12/1964 núm. 312).
[8] According to J. Jaria i Manzano, 'El derecho a una vivienda digna en el contexto social' en *El acceso a la vivienda en un contexto de crisis*, ed. S. Nasarre Aznar, (Madrid: Edisofer, 2010), 74.
[9] Approved by the Real Decreto 2455/1980, de 7 de noviembre, sobre financiación y seguimiento del programa 1981-83 de construcción de viviendas de protección oficial (BOE 13/11/1980 núm. 273).
[10] Approved by the Real Decreto 2329/1983, de 26 de septiembre, sobre actuaciones del Estado en materia de vivienda y suelo (BOE 03/10/1980 núm. 238) and Real Decreto 3280/1983, de 14 de diciembre, sobre financiación de actuaciones protegibles en materia de vivienda (BOE 05/01/1984 núm. 4).

Anual (Annual Modulation Plans) regulated by the *Real Decreto* (Royal Decree) 1494/1987, of 4th of December, and the *Real Decreto* (Royal Decree) 224/1989, of 3rd of March, the *Plan* (Plan) 1992-1995,[11] the *Plan* (Plan) 1996-1999[12] closed prematurely, the *Plan* (Plan) 1998-2001,[13] the *Plan* (Plan) 2002-2005,[14] the *Plan* (Plan) *2005*-2008,[15] and the current *Plan* (Plan) 2009-2012[16] have been enacted. However, the *Comunidades Autónomas* (Autonomous Communities) will be responsible for agreeing a complementary regulation and/or the execution and implementation of the *Planes de Vivienda* (Housing Plans).

The main objective of the *Plan Trienal* (Triennial Plan) 1981-1983 was the construction of 571,000 units of public sector housing (VPO, *viviendas de protección oficial*).[17] However, the strong crisis in the real estate market at the beginning of the 1980s, the increase in unemployment, inflation and the financial market liberalization resulted in the rise of public subsides for private housing, in order to reactivate housing construction towards the home ownership regime.[18] With the recovery of the economy at the end of the 1980s, the real estate market experienced a strong increase in the demand of dwellings that, together with the insufficient elasticity of supply, caused an incessant growth of prices of home ownership. These factors affected the social classes with fewer resources because of the completely inaccessible market prices and the very small number of VPO available. As may be seen in table B, since the 1970s the number of public homes built has been decreasing by up to 47.5% in thirty years. At the same time, the number of dwellings built in private sector housing has been substantially increased.[19]

Table B. Homes built per 1,000 inhabitants and percentage of social housing[20]

	1970	1980	1985	1990	1995	2000	Variation
Homes built	313	391	414	440	463	486	+ 55.3%
% Social housing	60.2	47.6	67.2	21.7	29.5	12.7	- 47.5%

[11] Real Decreto 1932/1991, de 20 de diciembre, sobre medidas de financiación de actuaciones protegibles en materia de vivienda (BOE 14/01/1992 núm. 12).
[12] Real Decreto 2190/1995, de 28 de diciembre, sobre medidas de financiación de actuaciones protegibles en materia de vivienda y suelo (BOE 30/02/1995 núm. 312).
[13] Real Decreto 1186/1998, de 12 de junio, sobre medidas de financiación de actuaciones protegidas en materia de vivienda y suelo (BOE 26/06/1998 núm. 152).
[14] Real Decreto 1/2002, de 11 de enero, sobre medidas de financiación de actuaciones protegidas en materia de vivienda y suelo (BOE 12/01/2002 núm. 11).
[15] Real Decreto 801/2005, de 1 de julio, por el que se aprueba el Plan Estatal 2005-2008**,** para favorecer el acceso de los ciudadanos a la vivienda (BOE 13/07/2005 núm. 166).
[16] Real Decreto 2066/2008, de 12 de diciembre, por el que se regula el Plan Estatal de Vivienda y Rehabilitación 2009-2012 (BOE 24/02/2008 núm. 309).
[17] [17] Public sector dwellings are those classified as such by the public administration. They must meet certain requirements: maximum m2, maximum price, minimum protection period, according to art. 77 LDVC.
[18] According to L. Estival Alonso, *La Vivienda de Protección Pública,* 37-38.
[19] R. Rodriguez Alonso, 'La política de vivienda en España desde la perspectiva de otros modelos Europeos' *Boletín CF+S, 29/30* (2002), 5. <habitat.aq.upm.es/boletin/n29/arrod2.html> 29 de noviembre de 2012.
[20] Source: R. Rodriguez Alonso, 'La política de vivienda en España en el contexto europeo,' 6. (Tabla elaborada de acuerdo a los Censos de Viviendas del INE).

In terms of tenancy, the approval of the Royal Decree 2/1985[21] intended both to encourage the supply of housing for tenancy purposes and to reduce their rent, but it produced the completely opposite effect. Thus, the abolition of the forced extension of the tenancy contract and the freedom of will in relation to the rent caused both a rise in the latter and increased precariousness for new tenants, placing them in a situation of comparative inequality with regard to the previous tenants who were still governed by the LAU 1964. To this we must also add the almost non-existence of construction of new public housing for tenancy purposes from the 60s, since the majority of dwellings were built to be destined for sales. In addition, since the 1990s the households' income increased, financial facilities for the acquisition of a dwelling were given and tax benefits that encouraged the purchase of a dwelling to the detriment of tenancy were kept.[22] These measures were translated into a tenancy rate of 10% in 2006, the lowest of the past sixty years.

The housing policies of the 1990s increased the prices of subsidized housing to encourage its construction. On the one hand, the *Plan Nacional de Vivienda* (National Housing Plan) 1992-1995 regulated the price-controlled dwellings (VTP, *viviendas de precio tasado*), the amounts of which were higher than the VPO. On the other hand, during the period of 1996-1999 the increase of the maximum selling prices of VPO in Madrid and Barcelona was approved. In this way, by the start of the 21st century, public policies were still oriented to housing construction in the general regime, whilst the special regime (destined for rental housing or rehabilitation) remained scarce. In order to equate both the tenancy and home ownership regimes, a deduction of 15% in the quota to be paid from the amounts originated from the lease of the main dwelling was approved in Act 18/1991.[23] However, this measure was not proportional, since the deduction limit for tenancy was much lower than the one established for the purchase of a dwelling.[24]

During this period the LAU 1994 was also approved[25], which sought to strike a balance between the rights and obligations of both lessor and lessee by means of regulating a five-year protection period for the tenant regarding the duration of the lease, the update of the rent and the transmission of the leased dwelling. However, this legislation was not enough to alleviate the legal uncertainty of the market and to foster tenancy as a real alternative to home ownership, because three different tenancy regimes were coexisting depending on the date of conclusion of the contract. The LAU also failed to reduce market prices and it did not offer the sufficient stability to the lessee. Furthermore, it was also decided, in the fruitless attempt to increase the supply of housing available for tenancy purposes , to promote the constitution of enterprises and real estate investment funds in order to encourage the channelling of financial resources towards the investment in immovable property for tenancy purposes.[26] Both types of tenures are included in the Draft of the *Plan por el derecho*

[21] Real Decreto Legislativo 2/1985, de 30 de abril, sobre medidas de política económica (BOE 09/05/1985 núm. 111).
[22] These reasons are discussed in M. Aramburu Otazu, *La resignificación de la tenencia de la vivienda en Cataluña delante de la crisis económica: aproximación a través de grupos de discusión,* (Barcelona: Secretaria d'Habitatge i Millora Urbana de la Generalitat de Catalunya, 2010), 14.
[23] Ley 18/1991, de 6 de junio, que regula el Impuesto sobre la Renta de las Personas Físicas.
[24] S. Borgía Sorrosal, *El derecho constitucional a una vivienda digna,* 131-134.
[25] Ley 29/1994, de 24 de noviembre, de Arrendamientos Urbanos (BOE 25/11/1994 núm. 282).
[26] The Collective Investment Institutions were regulated in the Ley 19/1992, de 16 de noviembre, de reforma de la Ley 24/1988, del mercado de valores (BOE 17/11/1998 núm. 275) and in the Ley

a la vivienda de Catalunya 2013-2016 (Plan for the right to housing of Catalonia 2013-2016), currently under a process of public information.[27]

The 2002-2005 Plan introduced incentives for the construction of VPO. Nevertheless, these measures did not have the expected success for several reasons: the possibility of disqualification of a dwelling before the end of the legal deadline, the absence of a strong political will to control fraud and, above all, the equalization of prices of both housing with a public task and private sector housing.[28] Thus, in the context of a housing market boom, with available resources to households, financial facilities to acquire a dwelling and a constant increase in prices, the *Plan de Vivienda* (Housing Plan) 2005-2008 was approved. It was intended to increase the social housing supply, to encourage housing for rent and to pay special attention to the most disadvantaged groups.

In order to stimulate the tenancy market, public authorities have used both legislative measures and public participation (through the creation of companies and public offices to operate in the tenancy market). At the state level, it created the Tenancy Public Society *(SPA*, *Sociedad Pública de Alquiler*) in 2005,[29] with the aim of providing guarantees, information and advice to lessors and lessees in order to increase both legal certainty and affordable housing. However, the SPA was dissolved in 2012 because of its failure[30] in the promotion of affordable housing due to the low number of allocated homes and the high constitution and maintenance cost.[31] Thus, it was agreed to the transfer its funds to the Autonomous Communities, which are the competent public administrations on housing matters.[32]

From 2007 on, coinciding with the real estate and economic crisis, market access for new acquirers was hindered by the high unemployment rates, the tightening of mortgage conditions and the impossibility of selling one's own dwelling. Most new acquirers would only be able to enjoy their right to housing access through tenancy.[33] At a State level, the Basic Emancipation Income[34] (RBE, *Renta Básica de Emancipación*) was approved in 2008, which consisted of a 210€ grant for young people between 22 and 30 years old who have signed a tenancy contract. This grant

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20/1998, de 1 de Julio, reforma régimen jurídico y Fiscal de las Instituciones de inversión colectiva (BOE 02/07/1998 núm. 157).

[27] (DOGC 05/06/2013 núm. 6390).

[28] L. Estival Alonso, *La Vivienda de Protección Pública,* 42.

[29] On 8 April 2005 the Council of Ministers agreed to authorise the Housing Ministry to constitute the *Sociedad Pública de Alquiler*, which was created on 20 April 2005 as a sole-shareholder commercial company (*sociedad mercantil anónima de carácter unipersonal*).

[30] About the failure of the SPA, see S. Nasarre Aznar (ed.), 'La insuficiencia de la normativa actual sobre acceso a la vivienda' en *El acceso a la vivienda en un contexto de crisis* (Madrid: Edisofer, 2010), 147.

[31] Orden HAP/583/2012, de 20 de marzo, por la que se publica el Acuerdo del Consejo de Ministros de 16 de marzo de 2012 (BOE 24/03/2012 núm. 72).

[32] See in this sense Salas Murillo, 'El arrendamiento en el marco del acceso a la vivienda'. El arrendamiento en el marco del acceso a la vivienda, en *Construyendo el derecho a la vivienda*, ed. F. López Ramón, (Madrid: Marcial Pons, 2010), 265-273.

[33] M. Pareja-Eastaway y T. Sánchez-Martínez, 'El Mercado de vivienda en España: La necesidad de nuevas propuestas' en *El acceso a la vivienda en un contexto de crisis*, ed. S. Nasarre Aznar (Madrid: Edisofer, 2010), 40.

[34] Approved by the Real Decreto 1472/2007, de 2 de noviembre, que regula la Renda Básica de Emancipación (BOE 07/11/2007 núm. 267).

was removed in 2012 for new applicants.[35] Other grants or subsidies for tenancies were approved at both regional and local level. As we will see later, the Listed Investment Companies in the Property Market[36] (*SOCIMI*, *Sociedades Cotizadas de Inversión en el Mercado Inmobiliario*) were created in 2009 with the goal of increasing the flexibility of the market, as well as to boost and professionalise it. However, their constitution has not been stimulated enough to become as attractive to landlords as the international Real Estate Investment Trusts (REIT).[37]

Another indicator that shows the growing importance of tenancy in social housing policy is that the first political objective with regard to the *Plan Estatal de Vivienda y Rehabilitación* 2009-2012 (PEVR, Housing and Rehabilitation State Plan) is to guarantee the freedom of decision with regard to the housing access model and to assure that tenancy is available for the same levels defined for home ownership access. However, the tenancy rate in 2010 was still standing at 10.4% of the total main housing stock, very far from the European average, which is around the 33.2%.[38]

- **In particular: What is the role of migration within the country, immigration or emigration from/towards other countries inside and outside the EU**

Spain has gone from being one of the big emitters of emigrants in the 1950s to consolidating its position as an immigration destination country until recently. However, in the current economic crisis Spain is becoming an emigrant issuer again.[39] According to data from the National Statistics Institute (INE, *Instituto Nacional de Estadística*) 2012,[40] there are 5,711,040 foreigners registered in Spain, which represents 12.1% of the total. Foreigners residing in Spain belonging to the EU-27 are in total 2,440,852. Within these, the most numerous are Romanians (895,970), followed by the British (397,535) and the Germans (196,729). Among non-EU foreigners, Moroccan citizens (783,137), Ecuadorians (306,380) and Colombians (244,670) are the most numerous. Therefore, immigration in Spain is a great demographic and economic phenomenon. Consequently, it has a certain impact on the composition of the housing market.

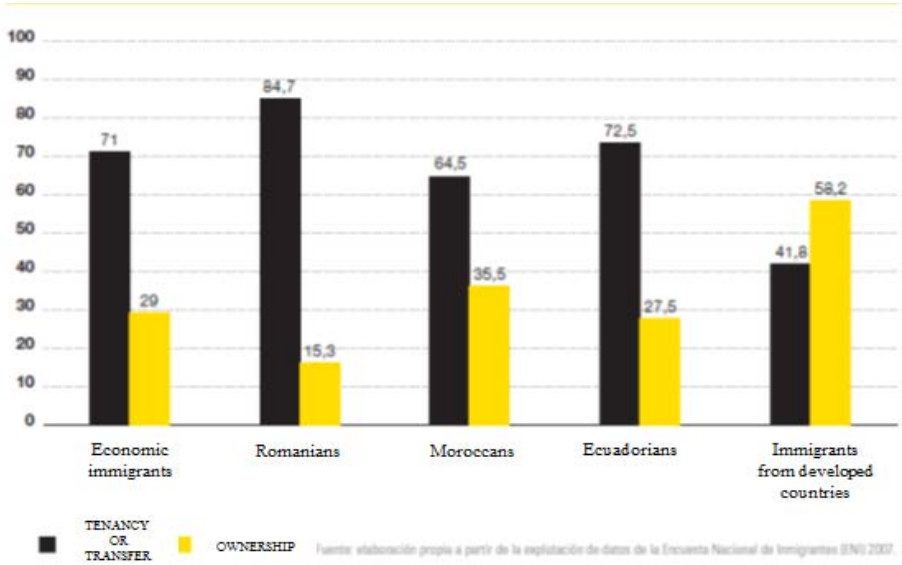
With reference to the immigrants' forms of housing tenure, these differ from those of the Spanish population, since while home ownership prevails among Spaniards; tenancy prevails among foreigners, although this varies depending on the country of origin, as shown in Figure 1. Thus, in 2007 dwellings owned by immigrants from developed countries, such as from EU-25, made up the highest rate of home ownership (58.2%), followed by the Moroccans, with a 35.5% home ownership rate,

[35] According to the Real Decreto-ley 20/2011, de 30 de diciembre, de medidas urgentes en materia presupuestaria, tributaria y financiera para la corrección del déficit público (BOE 31/12/2011 núm. 315).
[36] Regulated in the Ley 11/2009, de 26 de octubre, de Sociedades Cotizadas de Inversión en el Mercado Inmobiliario (BOE 27/10/2009 núm. 259).
[37] See S. Nasarre Aznar & E. Rivas Nieto, 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, en *Revista de Contabilidad y Tributación* 321 (2009), 11 et seq.
[38] J. Oliver Alonso, 'Informe sobre el sector inmobiliario residencial en España' *CatalunyaCaixa y Departamento de Economía Aplicada de la UAB* (2012), 85.
[39] A. Rivera, 'Cerebros que hacen las maletas', El País, 9 de diciembre de 2012, sec. Sociedad <sociedad.elpais.com/sociedad/2012/12/09/actualidad/1355066316_201774.html> 14 January 2013.
[40] According to the *Avance de la explotación estadística del Padrón* 1 January 2012 at <www.ine.es>, 30 November 2012.

clearly due to their longer stay in Spain. But Romanians have a 15.3% home ownership rate, as their main objective is to save money to purchase a dwelling in their own country.

As LEAL and ALGUACIL[41] point out in their report on immigration and housing, more than two-thirds of immigrants from developing countries currently 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. This is why the choice of this type of tenure takes place most frequently when foreigners have not set their migratory project yet, either in relation to work or to family conditions. 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 seen as a way to channel savings; meanwhile, tenancy is considered an expense.[42]

Figure 1. Housing tenure regime according to country of birth. 2007[43]



There is no state housing policy in Spain specifically addressed to the immigrant population. Article 13 of Act 4/2000[44] establishes that foreigners are entitled to access to the public system of housing subsidies under the same conditions as Spaniards. However, specific interventions have been done in exceptional cases so as to alleviate particularly conflictive situations or to deal with events with a media impact. Some examples are shanty town relocations, such as the ones of Boadilla

[41] J. Leal & A. Alguacil, 'Vivienda e inmigración: las condiciones y el comportamiento residencial de los inmigrantes en España' en *Anuario de Inmigración en España*, ed. J. Oliver, J. Arango & E. Aja, (Barcelona: CIDOB, 2012), 131-134.
[42] As 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.
[43] Graphic elaborated by J. Leal & A. Alguacil, 'Vivienda e inmigración', 131.
[44] Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social (BOE 12/01/2000 núm. 10).

del Monte and Peña Grande in Madrid,[45] or the construction of pre-fabricated modules to accommodate seasonal immigrants.

At a regional level, plans are implemented in order to coordinate the actions of the different administrative levels on immigration and to promote actions to put the rights, duties and opportunities of immigrants on an equal footing, as well as to safeguard the recognition of their right to difference and inclusion.[46] These policies are also implemented in collaboration with local administrations, which provide citizen support services in the various fields in which immigrants may be affected: health, work, housing, etc. There are also several civil society organizations seeking to complement these public policies. Three types of initiatives may be distinguished:[47] temporary accommodation for homeless people, such as hostels and welfare flats;[48] intermediation in rental housing for groups with difficulties;[49] and information and support agencies for immigrants who have problems with housing access.[50]

1.3 Current situation

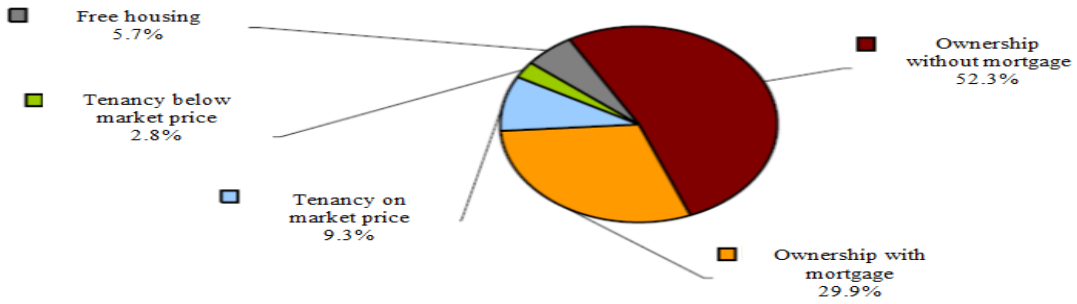
- **Give an overview of the current situation**

- **What is the number of dwellings? How many of them are rented vs. owner-occupied? What would be the normal tenure structure (see summary table 1)? What is the most recent year of information on this?**

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*) 2012, from the INE. According to provisional data published in October 2012, which we set out in Figure 2, 82.2% of Spanish households are owners, while 12.1% are tenants. Consequently, it can be seen that there is no flexible tenure structure in Spain because it is distributed basically in two regimes, arising then a dichotomy between home ownership and tenancy. Other tenure forms represent only 5.7% in total and respond mainly to forms of tenure that are provided for no consideration. Despite the clear home ownership prevalence, tenancy is increasing in recent years due to the economic crisis, as discussed later, because of both credit restrictions and the rise in unemployment.

Figure 2 Housing tenure distribution. Percentages. Source: INE[51]

[45] In more detail, see 'La problemática de la inmigración y el alojamiento' *Boletín de la Asociación Española de Promotores Públicos de Vivienda y Suelo* (2000): 53-57.
[46] For instance, the Plan de Integración 2009-2012 de la Comunidad de Madrid, Plan de Ciudadanía e Inmigración 2009-2012 de Catalunya, II Plan Integral de la Rioja 2009-2012, the Plan Valenciano de Inmigración y Convivencia 2008-2011, among others.
[47] As set out by C. Pereda, A. Walter & M.A. de Prada (Colectivo IOE), *Inmigración y Vivienda en España* (Madrid: Ministerio de Trabajo y Asuntos Sociales, 2005), 87- 91.
[48] This service is offered, for instance, by Caritas, Cruz Roja or Red Acoge, and several religious institutions.
[49] This service is offered by the Local Housing Offices and also by Associations, such as Provivienda.
[50] For instance, through the intercultural mediators, as happens in the *Centro de Atención Social a Inmigrantes de Madrid*, or through non-governmental organisations, such as *Asociación Probens*.
[51] Source: ECV from the INE, october 2012.



Anyway, it must be stressed that there are discrepancies between the percentages offered by the different agencies. In this sense, the *Ministerio de Fomento* (Ministry of Development) situates the tenancy rate at 13.2% in 2010 and at 17% in 2012.[52] Furthermore, the on-going *Encuesta de Presupuestos Familiares* (*EPF,* Household Budgets Survey) establishes that the tenancy rate was 16.09% in 2010.[53] In any case, it seems clear that the tenancy sector has experienced an increase of 18.6% between 2006 and 2010.[54]

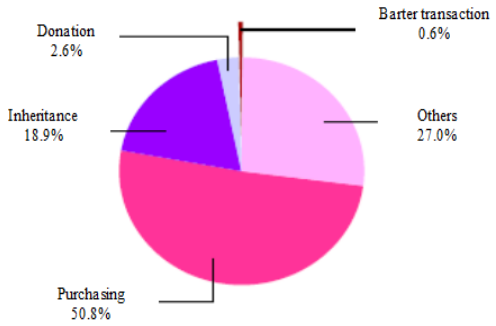
1.4 Types of housing tenures

o **Home ownership**

- **How is the financing for the building of homes typically arranged**

In some cases access to home ownership is possible through the buyer´s own savings, the money obtained by him/her thanks to the alienation of other properties or through received donations or inheritances or loans granted by close relatives. Although most dwellings are acquired by sale contracts (50.8% of the total acquisitions in 2011 according to Figure 3), they may also be acquired by donation (2.6%), inheritance (18.9%) or in exchange for another piece of real estate (barter transaction, 0.6%).

Figure 3 Dwellings transferred according to the way of acquisition 2011. Source: INE[55]



Nevertheless, according to provisional data on mortgage statistics presented by the INE, only 37% of the acquired dwellings have been financed through a mortgage in

[52] 'Informe sobre el ajuste del sector inmobiliario español' (Madrid: Ministerio de Fomento, 2012), 4.
[53] Depending on the data consulted by the INE <www.ine.es> 12 December 2012.
[54] 'Informe Ejecutivo sobre la Coyuntura global del mercado inmobiliario español' (Madrid: Aguirre Newman, 2011).
[55] Figure prepared by the INE in its publication on housing and construction which summarise the data for 2011 <www.ine.es>, 19 December 2012.

September 2012. In contrast, in 2006 more than 60% of the owned dwellings were financed in that way. Thus, 21,195 dwellings were mortgaged in September 2012, 0.4% less than the previous month. The average amount granted by financial institutions to finance their acquisition was 102,407€, with an average interest rate of 4.12%, the lowest since June 2011. The amount granted has dropped 7.1% with respect to September 2011, mainly due to credit restrictions.

In addition to this, it is usual in new construction works that buyers subrogate themselves into the mortgage loan initially granted to the developer, since in the last decade it was frequent that housing developer´s mortgage interest rates were lower by comparison with those granted to purchasers.[56] In this respect, 1,469 debtor's subrogations were carried out during September 2012, a decline of 24.6% compared with the previous month and an increase of 19.7% with regard to September 2011.

As for personal loans, they are not an optimal way to finance the purchase of a dwelling, since their interest rates are higher than the ones for mortgage loans, because the credit institution does not have the purchased good as a guarantee. According to the Bank of Spain data provided in August 2010, the annual percentage rate (TAE, *Tasa Anual Equivalente*)[57] in consumer loans was 9.35% in Spain and 7.37% in the Eurozone, in contrast to mortgage loans, which, in the same month, had a TAE of 3.31% in Spain and a TAE of 3.48% in the Eurozone.

Nevertheless, these personal loans are often used to finance the part of the purchase price that the financial institution is unwilling to include in the mortgage loan. Thus, while during the real estate boom (1995-2007) financial institutions quite often disbursed 100% of the capital needed to purchase a dwelling, nowadays they usually disburse only 80% of that amount, except for the purchase of dwellings seized precisely by financial institutions. In the latter case, they usually offer 100% of their value as a mechanism to attract more purchasers due to the large number of dwellings that banks have on their balance sheet, as a result of the foreclosures that have taken place in the last years. In this context, more competitive interest rates and lower constitution expenses are offered as well.

Non-banking financial instruments specialized in the funding of social housing and rehabilitation has not been developed in Spain yet, as has been the case for example in Germany.[58] The funding of housing with a public task is regulated in the PEVR 2009-2012 through an agreement between the Public Administration and certain collaborating financial credit institutions to achieve mortgage loans with better conditions for disadvantaged people. Therefore, loans are granted for each protected action without banking fees and with either a floating interest rate based on the Euribor at 12 months (taking into account the month prior to the conclusion plus a 0.65%), or at a fixed interest rate, if it is agreed upon. In addition, it is ensured that the repayment terms are at least 25 years minimum (art. 12).[59] It must also be kept in

[56] J. Rodríguez López, 'Crédito y coyuntura inmobiliaria' en *La política de vivienda en los albores del Siglo XXI,* ed. P. Morón Béquer (Murcia: Colección de libros formación inmobiliaria UAM, 2005), 247.
[57] Weighted average for all instalments.
[58] As set out by A. Inurrieta Beruete, 'La financiación de la política de vivienda' en *La política de vivienda en España*, ed. J. Leal Maldonado (Madrid: Pablo Iglesias, 2010), 298.
[59] B. Bueno Miralles, *Poliedro de la vivienda. Estudio de la vivienda protegida de acuerdo al Plan Estatal 2009-2012*, (Madrid: La Ley, 2009), 288-289.

mind that loans are granted by the financial credit institutions to both purchasers and developers (art. 33).

o **Rental tenures**

▪ **Are rental tenures with and without a public task distinguished? If so, how are they called and what is their share in the housing stock?**

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 in Europe it reaches 18%.[60]

Within the private sector housing market those dwellings that are at market price can be distinguished from those that are below it. Thus, if it is taken into consideration that housing with a public task for tenancy purposes represents up to a 2%, only 0.8% of tenancies below market price are provided by the private sector according to Figure 2, although they are mainly managed by either public administrations or non-profit entities.[61]

Concerning housing with a public task, the PEVR distinguishes between two types of programmes: *El Programa de Promoción de Vivienda Protegida para Alquiler* (Rented Subsidized Housing Promotional Programme) provided for in Section 1 of Chapter 1 of Title II, and the *Programa de Promoción de Alojamientos Protegidos para Colectivos especialmente vulnerables y otros Colectivos específicos para el Alquiler* (Rented Protected Accommodation for specially vulnerable Groups and other specific Groups Promotional Programme), regulated in Section 3 of Chapter I of Title II.

These programs distinguish between three regimes based on the income of the family unit and the reference price, and in each regime one may choose a tenancy of 10 or 25 years. Below we set out the quotas for each regime, including the dwellings to which the second programme refers. Table C includes the objectives financed for the PEVR on May 31st, 2012.[62]

Table C Number of dwellings and budget according to type of rented subsidized housing

Tenancy regimes[63]		Duration	Number of dwellings	Allocated budget
1rst Prog.	Special	25 years	4,213	89,647,579.35
	General		7,972	137,981,028.82
	Concerted		0	0
	Special	10 years	4,436	65,624,119.09
	General		7,673	98,736,037.06
	Concerted		379	

[60] 'Housing Statistics in the European Union. Income and Living Conditions', (Eurostat, 2010).
[61] Infra, section 1.4 of the first part.
[62] Source: Ministry of Development.
[63] Special regime, up to 2.5 of the Public Index of Multiple Purpose Income, IPREM, *Indicador Público de Renta de Efectos Múltiples)*; general regime up to 4.5 IPREM; and concerted regime up to 6.5 IPREM.

2nd Prog.	Dwellings	4,913	86,692,096.8
TOTAL		29,583	478,680,861.12

However, the current State Plan of Rental Housing Promotion, rehabilitation, regeneration and urban renewal 2013-2016 (*PEFAV, Real Decreto 233/2013, de 13 de abril, que regula el Plan Estatal de Fomento del Alquiler de Viviendas, la rehabilitación, regeneración y renovación urbana) regulates the Programa de Vivienda Protegida en Alquiler* (Rented Social Housing Programme) in two types of housing with a public task (article 13): rented social housing in rotation (*viviendas de alquiler social en rotación*) and protected rental housing (*viviendas de alquiler protegido*). With this new Housing Plan there is an important change, since tenancy is the basis of public policy for the first time. There is no data regarding these programmes, discussed further below, because the plan has not entered into force yet, as it is awaiting approval.

- **How is the financing for the building of rental housing typically arranged? (Please be brief here as the questionnaire returns to this question in Part 1.3)**

Developers that build dwellings for tenancy-occupation purposes may use the same funding mechanisms already explained in the previous question '*How is the financing for the building of homes typically arranged?*'

However, while the PEVR regulated agreed loans, Subsidisations to loans and non-repayable grants, the new PEFAV only recognizes certain subsidies for the construction or rehabilitation of blocks for tenancy purposes, as can be seen in section 3.6 of the questionnaire, when talking about subsidies.

o **Intermediate tenures: do you classify intermediate forms of tenures between ownership and renting?**

As has already been pointed out above, there is a dichotomy in Spain between home ownership and tenancy, whereas intermediate tenures have not been sufficiently developed to reflect measurable results in the market. Nevertheless, the current housing problems, which have evidenced the ineffectiveness of the binomial home ownership-tenancy, have led certain Public Administrations or other entities aimed at social housing to use already existing alternative formulas in our legal system to provide more accessible, flexible and stable tenures than the traditional ones. In this way, the *arrendamiento con opción a compra* (lease-purchase contract), the *derecho de superficie* (right to build), the *usufructo* (usufruct) and the *cooperativas de vivienda en régimen de cesión de uso* (housing cooperatives with a use assignment scheme) are worthwhile to mention. These are housing tenures that, more or less successfully, may operate without an *ad hoc* policy because they are already regulated in our legal system.

Attempts have been made to stimulate the lease-purchase contract, which allows all or a portion of the monthly payments delivered by way of rent to be charged as part of the purchase price at the time when the lessee exercises the right of option. Although the purpose is to facilitate housing access through the home ownership

regime, the time limit for exercising the option (three or five years) is too narrow[64]. This legal institution is not technically speaking an intermediate tenure, since the LAU applies during the lease contract, but if the lessee decides to exercise the purchase option, then the Spanish Civil Code of 1889 (CC) and other related property rights rules are applicable.

The right to build is a property right provided for in articles 40 and 41 of the *Real Decreto Ley* (Royal Decree Act) about Land Law 2/2008 (LS, *Ley del Suelo*)[65], and in articles 16.1 and 30.3 of the *Decreto* (Decree) of 14th February 1947 (RH, *Reglamento Hipotecario*).[66] This system separates the ownership of land and building. It enables the holder of the right (*superficiario*) to build on land that does not belong to him. He is required to perform the construction committed to within a definite period of time. A maximum duration of 75 years is established when the surface right is granted by municipalities or other public institutions; and it increases to 99 years when it is agreed between individuals, making rotation difficult. Once the expiration of the time agreed takes place, the reversal of the construction occurs in favour of the landowner without any compensation, unless otherwise agreed, and any personal or property right existing on the real estate becomes extinguished. The *Plan de Vivienda de Barcelona* (Barcelona Housing Plan) 2008-2016 recognizes the possibility of assigning housing with a public task through the right to build. Currently, three property developments in this regime have been completed in this city, while eight more are in the process of joining this project.[67] In Madrid, a selling process of the land to those who had been *superficiarios* or holders of the right to build since 1984 started in 2010. This project aims at the consolidation of the domain in the medium-term, as a sale with a deferred payment of the land takes place with a soil immobilization by the Administration for the period of 75 years. In these cases, it is not required that the *superficiarios* build the dwelling, which is contrary to the legal nature of this right, but it is allowed according to article 40.1 of the LS.[68]

Usufruct is a property right by which the use and enjoyment of a good is transferred *inter vivos* or *mortis causa*, without the possibility of altering its form or substance. This right may be created for free or otherwise, and may be created on a voluntary or on a legal basis and granted either for a definite period of time or for life. It entitles the holder of the right (*usufructuario*) with a broad power of disposition, i.e. he is entitled to alienate and to encumber the right. However, this figure, regulated in articles 522 to 467 CC, has been used mainly in both the inheritance and donations fields and very rarely for housing purposes.[69] In addition, the current regulation of the

[64] S. de Salas Murillo, 'El arrendamiento en el marco del acceso a la vivienda', 283, points out that these deadlines are the most frequently used, recognizing that if the option is exercised on the fourth or fifth year, no discount is applied generally to the dwelling´s price, losing the tenant the amounts of rent paid so far.

[65] Real Decreto Ley 2/2008, de 20 de junio, por el que se aprueba el texto refundido de la Ley de Suelo (BOE 26/06/2008 núm. 154).

[66] Decreto de 14 de febrero de 1947 por el que se aprueba el Reglamento Hipotecario (BOE 16/04/1947 núm. 106).

[67] See the details in <www.pmhb.org/promocions_mapa.asp?id=3&subid=1&tipus=Dret+de+superf%EDcie>, 11 December 2012.

[68] As set out by S. Nasarre Aznar, 'Les tinences intermitges: combinant assequibilitat, flexibilitat i estabilitat en l'accés a l'habitatge' en *Governs locals i polítiques d'habitatge. Balanç i reptes* (Barcelona: Observatori Local d'Habitatge, Diputació de Barcelona, 2012), 8.

[69] L. Diez-Picazo, *Sistema de derecho civil*, Vol. III (Madrid: Tecnos, 2005), 326.

usufruct is not oriented to strike a balance between the parties' right and obligations, as is the case in the tenancy.

The assignment of use as a form of housing tenure is based on the cooperative housing activity. The cooperative owns either the ownership or the right to build a block and assigns to its partners the right to use a dwelling in exchange for the payment of an initial and recoverable amount, as well as the payment of an affordable periodic rent.[70] These organisms are regulated at the state level in Act 27/1999[71], although it is also regulated at a regional level.[72] The assignment of use through cooperatives is not widespread in Spain; however, it may be a good way for the construction, promotion and rehabilitation of dwellings thanks to its social character: on the one hand, by seeking a more flexible, stable and affordable regime for its partners; on the other hand, by contributing to the achievement of certain housing policy objectives of different public administrations. Although housing cooperatives have contributed effectively to solve housing problems, it is complicated to quantify this contribution due to the lack of official statistics.[73]

In Spain, company law regulates the constitution of corporations aimed at renting dwellings. However, it is unusual for the partners to be tenants at the same time. Its main purpose is to channel the investment made by them towards the promotion or acquisition of immovable property in order to destine them to tenancy purposes afterwards. Nevertheless, it should be taken into account that article 36.4 of Act 35/2003 (LIIC)[74] lays down that shareholders or unit-holders of an IIC related to real estate may also be tenants of the dwellings acquired by the Collective Investment Institutions (ICC, *Instituciones de Inversión Colectiva)*. Due to the low use of these institutions, there are no data that can demonstrate the use of this faculty in the tenancy market.

Condominium causes a decrease in the faculties of use and enjoyment because of the neighbourhood relationships, which are limitations on the right of ownership. Thus, this legal institution is much closer to intermediate tenures than to absolute ownership. At the State level, condominiums are regulated in Act 49/1960[75] as entities without legal personality that determine both the way in which an immovable is divided and the relationship between the owners of private and common parts of the block. The holder of a private unit is entitled to an absolute and exclusive right of ownership, and with regard to the common parts a co-ownership regime is created. In addition, the existing share on the common parts is completely inherent to the right of ownership of the private unit, being inseparable from it. This is the so-called

[70] See D. Martínez García, *Els habitatges cooperatius. El sistema de cessió d'ús.* Col.lecció de Textos d'Economia Cooperativa (Barcelona: Departament de Treball de la Generalitat de Catalunya i Federació de Cooperatives d'Habitatges a Catalunya, 2008).

[71] Ley 27/1999, de 16 de julio, de cooperativas, que será de aplicación cuando actué en varias comunidades autónomas o reste inscrita en el Registro Nacional de Cooperativas (BOE 17/07/1999 núm. 170).

[72] For instance, in Catalonia it is regulated in the Ley 18/2002, de 5 de julio, de cooperativas (DOGC 31/12/2002 núm. 3791) and in Madrid in the Ley 4/1999, de 30 de marzo, de cooperativas (BOCM 14/04/1999 núm. 87). Regional rules will apply when they are registered in a Cooperative Register of the corresponding regions.

[73] L. Estival Alonso, *La Vivienda de Protección Pública,* 111-112.

[74] Ley 35/2003, de 4 de noviembre, de Instituciones de Inversión Colectiva (BOE 05/11/2003 núm. 265).

[75] Ley 49/1960, de 21 de julio, sobre Propiedad Horizontal (BOE 23/07/1960 núm. 176). There are autonomous regions that have enacted their own rules on this subject.

standard condominium, but the law regulates other modalities. For example, there is the possibility to constitute real estate complexes comprising private urbanizations [*propiedad horizontal tumbada,* lying condominium)], as well as sub-condominiums, where there are a plurality of owners in a standard condominium and a second condominium is created on certain elements subject to independent use (e.g., parking spaces, storerooms, offices, shops, etc.). Condominiums are a very popular way of organising dwellings in Spain[76].

Finally, we must mention the shared ownership regime (*propiedad compartida*). It implies the transfer to the acquirer of the ownership of a part of the dwelling and the retention of the rest by the seller, involving the progressive or future transmission to the transferee of the full ownership of the dwelling. In the meanwhile, the buyer has to pay a rent to the seller. This figure is not in force in the whole of Spain. It was introduced only in Catalonia by Act 9/2011.[77] It is worth noting that it is expressly foreseen that rental subsidies may be granted to this tenure in order to subsidise the rent that the acquirer has to pay for the part that he/she has not acquired yet. In order to develop this legal institution, a modification of the Catalan Civil Code (CCC) is needed. Nevertheless, access to a dwelling would be allowed with lower economic effort and with greater stability and security than exist in personal and temporary legal relationships, such as tenancy, because it is possible to have access to a percentage of the ownership. Different research projects have been conducted[78] aimed at the study of intermediate tenures as a way to make housing access more flexible through shared ownership (*propiedad compartida*) and temporary ownership (*propiedad temporal*), and have pushed forward a complete regulation of these intermediate tenures in the CCC, foreseen for 2013[79].

o **What is the market share (% of stock) of each type of tenure and what can be said in general on the quality of housing provided?**

Please consider the following criteria: type of building (single family versus multifamily versus high-rise; plus definition); construction period; number of rooms, number of square meters or average number of rooms or average

[76] See below.

[77] Ley 9/2011, del 29 de diciembre, de promoción de la actividad económica (BOE 14/01/12 núm. 12), which amends article 71 of the Catalan Housing Act that regulated the co-ownership regime.

[78] The Research Group on Housing Access at University Rovira i Virgili, headed by Prof. S. Nasarre Aznar, conducts several research projects on intermediate tenures: 'Alternativas en derecho privado para mejorar el acceso a la vivienda', granted by the Departamento de Justicia de la Generalitat de Catalunya por Orden JUS/3884/2009, 15 December (DOGC núm. 5557, 1-2-2010). 'Experiencias catalanas, inglesas e irlandesas en el mejoramiento de acceso a la vivienda', granted by Resolution de 21-12-2010 del Presidente de la Comisión Ejecutiva de Ayudas a la Investigación de la Agencia de Gestión de Ayudas Universitarias y de Investigación (AGAUR) de la Generalitat de Cataluña, en la Convocatoria de las Becas Batista y Roca de 2010, código 2010 PBR 00052. Furthermore, there is an agreement between the University Rovira i Virgili and the Catalan Housing Agency in order to "establecer un marco de colaboración para la investigación de nuevas figuras jurídicas que permitan y faciliten el acceso a la vivienda, en la actual coyuntura socioeconómica, que dificulta el acceso con las formulas tradicionales de la compraventa y el alquiler", signed in 13 December 2011.

[79] Regarding intermediate tenures, see the articles by S. Nasarre Aznar, 'La insuficiencia de la normativa actual sobre acceso a la vivienda', 120-172; S. Nasarre Aznar & G. Ferrandiz, 'Métodos alternativos de acceso a la vivienda en Derecho privado' en *Revista Iuris, Actualidad y Práctica del Derecho* 158 (2011); J. Ball, 'Fragmentando la propiedad para la asequibilidad: La shared ownership o "nuevas" tendencias en Inglaterra y Francia', 173-224; and P. Kenna, 'Modernizando las tenencias en alquiler en Irlanda', 411-454, ambos de la obra, *El acceso a la vivienda en un contexto de crisis*, ed. S. Nasarre Aznar (Madrid: Edisofer, 2010).

useful floor area per dwelling and per person; availability of bath/shower, hot running water and/or central heating, etc.)

According to the Statistical Yearbook of the Ministry of Development of 2011, the total existing dwellings in Spain is 26.018.179, 17.909.691 of which are main dwellings. "Main dwelling" is a homestead that is used as the usual residence of one or more families and is occupied by them most of the year.[80] As has been discussed previously, 82.2% are homeowners and 12.1% are tenants.[81]

According to the data provided by the Ministry of Development (collected in table D), it can be observed how the number of dwellings built has been decreasing since 2006 (727,893 building permits were granted that year). While in 2011 the number decreased to 77,725. When referring to new dwellings built in 2011, it can be observed that 65.8% are multi-family residential blocks, while 34.19% are single-family dwellings and 0.01% has been allocated to other types of housing, such as collective households or another type of non-residential housing. Consequently, it can be affirmed that the Spanish residential habitat is still mostly based on multi-family residential blocks, and the proportion of single-family dwellings remains small in relation to other EU countries.

Table D. Number of dwellings built and type of construction works[82]

	NEW CONSTRUCTION					REHABILITATION	DEMOLITION	
		RESIDENTIAL CONSTRUCTION FOR FAMILY DWELLINGS			COLLECTIVE AND NON-RESIDENTIAL	WORKS	WORKS	TOTAL
YEAR	TOTAL (1)	TOTAL	SINGLE-FAMILY	NON SINGLE FAMILY		TOTAL (2)	TOTAL (3)	DWELLINGS (1+2-3)
2011	**76,005**	**75,894**	**25,982**	**49,912**	**111**	**9,518**	**7,798**	**77,725**
2010	**91,645**	**91,509**	**28,932**	**62,577**	**136**	**11,704**	**8,716**	**94,633**
2009	**130,546**	**130,418**	**31,949**	**98,469**	**128**	**13,465**	**9,894**	**134,117**
2008	**268,435**	**267,876**	**63,352**	**204,524**	**559**	**16,984**	**15,842**	**269,577**
2007	**634,098**	**633,430**	**127,058**	**506,372**	**668**	**19,796**	**29,758**	**624,136**
2006	**737,186**	**734,978**	**163,569**	**571,409**	**2,208**	**23,128**	**32,421**	**727,893**
2005	**604,345**	**603,633**	**148,441**	**455,192**	**712**	**20,893**	**24,572**	**600,666**
2004	**544,578**	**543,518**	**134,508**	**409,010**	**1,060**	**21,099**	**22,184**	**543,493**
2003	**471,455**	**471,000**	**123,329**	**347,671**	**455**	**17,029**	**17,750**	**470,734**
2002	**403,789**	**403,271**	**106,423**	**296,848**	**518**	**13,980**	**15,927**	**401,842**
2001	**394,682**	**393,827**	**106,997**	**286,830**	**855**	**14,708**	**16,197**	**393,193**
2000	**440,065**	**439,682**	**117,598**	**322,084**	**383**	**14,147**	**15,006**	**439,206**
V.Acumul:	**-31.30**	**-31.30**	**-24.90**	**-34.10**	**-53.40**	**-34.20**	**-12.20**	**-33.80**
V. Intera:	**-29.70**	**-29.60**	**-19.00**	**-34.50**	**-47.80**	**-31.80**	**-18.30**	**-31.00**

Regarding the number of rooms, the most up-to-date statistical data available is that contained in the Housing Census elaborated by the INE in 2001. There were 14,187,169 households in Spain at that time, and most of them were composed of three, four and five rooms. Conversely, a mismatch between household size and the size of the dwelling has been detected, since there are old people who are living in

[80] Definition extracted from the glossary of terms of the INE <www.ine.es>, 16 January 2013.
[81] See section 1.3 '*What is the number of dwellings?,' supra*.
[82] Source: Stadistical Yearbook for the year 2011 by the Ministry of Development, according to the permits granted.

dwellings with three or four bedrooms while there are families with several children that are crowded into small dwellings.[83]

Table E. Number of dwellings according to the number of rooms[84]

Number of rooms	**Number of dwellings**
One	77,431
Two	346,131
Three	1,360,974
Four	2,838,537
Five	5,413,152
Six	2,811,754
Seven	742,915
Eight	321,495
Nine	131,370
Ten or more	143,410

In relation to the size of a dwelling, we can see that there is a tendency for this factor to be influenced by whether the dwelling has been constructed within a block (i. e. a single-family dwelling). While it is pretty clear how the average size of single-family dwellings has been increasing gradually from 149.4m2 in 1998 to 187.8m2 in 2010, the average size of the dwellings built in blocks has been declining, from 105.5m2 in 2000 to 96.8m2 in 2008. However, this figure increased slightly in 2010, standing then at an average of 100.2m2. This is due to the increasing number of secondary residences during the construction boom, among which apartments of one and two bedrooms abound, which are not so frequent among new primary residences.[85]

Table F. Average surface in square metres per type of built housing[86]

	1998	2000	2002	2004	2006	2007	2008	2009	2010
AVERAGE HOUSING AREA									
In residential buildings: single-family	149.4	145.1	154.9	159	166	168	172,7	183.3	187.8
In residential buildings: block of flats	104.4	105.5	103.3	102.4	99.5	98.3	96.8	99.1	100.2
In other buildings	99.3	97.8	97.9	107.2	97.8	101	147,5	159.5	128.4

Below we discuss the state of residential buildings in relation to the type of tenure in question, according to table G. Although the condition of the block is not always related to the dwelling's condition, since a dwelling located in a block in poor condition does not necessarily mean that it is in poor condition too and vice versa, it can be useful, however, to analyse the quality of each tenure regime. The data contained in table G show that 82% of rental dwellings are located in blocks in good

[83] J. Leal Maldonado, 'La formación de la demanda de vivienda en la España actual' en *La política de vivienda en los albores del Siglo XXI,* ed. P. Morón Béquer (Murcia: Colección de libros formación inmobiliaria UAM, 2005), 59.
[84] Source: Housing Census 2001, INE.
[85] J. Leal Maldonado, 'La formación de la demanda de vivienda en la España actual' en *La política de vivienda en los albores del Siglo XXI,* ed. P. Morón Béquer (Murcia: Colección de libros formación inmobiliaria UAM, 2005), 58.
[86] Source: Construcción y Vivienda del INE (2012) <www.ine.es>, 10 December 2012.

condition, 7% of them being in a poor or dilapidated condition; whereas the rate reaches 89% and 3% respectively of owned properties. These data confirm that rental dwellings are in worse conditions than the ones in home the ownership regime. Broadly speaking, it is also evident that the quality of blocks is good because in both cases over 80% are in good condition.

Table G Dwellings according to building condition[87]

Building condition	Number of buildings	% Tenancy	% Property
Total	3,091,596	100%	100%
Dilapidated	81,778	3%	1%
Poor	128,945	4%	2%
Deficient	358,428	12%	8%
Good	2,522,445	82%	89%

According to INE data gathered in table H, noises emanating from both the outside and neighbours is the most important problem perceived by the Spaniards in relation to the use of their dwellings. It should also be highlighted that this fact is quite more noticeable regarding rental housing. Tenancies below market prices are the ones that have the greatest problems, especially in terms of noise and vandalism. So, while in more than 70% of the households no problem has been detected, the percentage decreases to 55.40% regarding rental housing at below market prices.

Table H Households suffering certain problems in housing and its environment by type of tenure [88]

Housing problems	Property	Tenancy	Tenancy under market price	Free assignment	Total
Lack of natural light	4%	6%	12.60%	4.80%	4.40%
External and neighbours' noises	15%	17.70%	24.50%	14.70%	15.50 %
Pollution and other environmental problems	7.90%	7.30%	11.40%	7%	7.90%
Criminalism or vandalism	11.20%	7.30%	18.90%	6.90%	10.80 %
No problems	74.30%	74%	55.40%	76.70%	73.90 %

With regard to housing facilities, the obtained data refer to family dwellings used for all or part of the year as the habitual residence for their occupants. In this respect, it is relevant that only 0.29% of main dwellings do not have running water and only 0.96% do not have any sewage evacuation system. A block has central hot water when it has a fixed and common installation that supplies hot water to all or most of its dwellings. Nevertheless, there are other individual systems for heating water through the use of gas boilers or electric heaters (it explains why the provided data

[87] Housing Census 2001, INE.
[88] Source: Housing Census 2001, INE.

show that only39.65% of dwellings have central hot water). We can also see how 85.48% of main dwellings have some heating system; however, 37.5% of these dwellings use appliances that do not have a heating installation itself but instead appliances that allow certain rooms of the dwelling to be heated are used.

Table I Main housing percentage depending on housing facilities[89]

Kind of housing facility	**% Main housing**
Running water, public supply	95.88%
Running water, private supply	3.83%
Central hot water	39.65%
Waste water evacuation system (sewerage)	92.59%
Waste water evacuation system (others)	6.45%
Collective heating	9.43%
Individual heating	38.55%
Without heating installation but with appliances that allows some rooms to be heated	37.50%

o **Which actors own these dwellings (private persons, profit or non-profit organisations, etc.)?**

Among housing providers:

a) Regional and local public administrations, which own dwellings that they rent and sell through the protected actions explained above. They also manage private sector housing by means of two ways: as landlords because owners have assigned their dwellings to the Administration, or as intermediaries in the rental development programs.

b) Non-profit entities that currently manage a portion of the housing stock, among which the following can be found:

- The asset-holding companies aimed at housing development or leasing. They are generally constituted as capital companies, and are usually organized into corporations, though they also may be constituted as limited companies.

- Real Estate Investment Funds (FII, *Fondos de Inversión Inmobiliaria*) are regulated in the LIIC since they are a non-financial ICC modality aimed at urban real estate investment. Their income comes from both rents and the annual increase of the real estate value through appraisals. Partners' problems are mainly of a liquidity nature, since they can only recover the investment twice a year, or at least once[90]. Furthermore, their regulation reveals some inconsistencies, because although they do not have a legal personality, they are personified. Moreover, FII owners do not have any proprietary faculties, which are transferred to the manager, who is the only

[89] Source: Housing Census 2001, INE.

[90] According to article 93.3. c) del Real Decreto 1082/2012, de 13 de julio, por el que se aprueba el Reglamento de desarrollo de la Ley 35/2003, de 4 de noviembre, de instituciones de inversión colectiva (BOE 20/07/2012 núm. 173).

one that is not an owner according to law. In this sense, the fund may not survive more than one year without a manager.[91] Their creation has been really low if we take into account that while the outstanding balance of mortgage loans involved at the end of 2006 93.4% of the Spanish GDP, the FII for tenancy purposes meant only 0.9% of the GDP. In Germany real estate funds accounted for almost 3% of GDP in 2006 and had an equity of more than 70 billion euros. The equity of the Spanish FII was 8.4 million in 2006, a figure that has not changed too much today due to their limited constitution.[92]

- Real Estate Investment Companies (SII, *Sociedades de Inversión Inmobiliaria*) are also regulated by the LIIC, because they are an IIC non-financial modality. They have the same purpose as Funds. Nevertheless, they are constituted as corporations and have a fully paid-up minimum capital from the time of their constitution (art. 37). However, while the FII is set up by legislator as semi-open, because partners may ask for the reimbursement of the participation, although not at any time, the SII are closed. Thus, there is a default volume of assets that is intended to remain constant over time. As a consequence, once all shares are placed, new ones may not be subscribed if no participant is willing to sell theirs, nor will such participant be even able to dispose of them until there is an investor interested in acquiring them. Consequently, this corporate form is much less used mainly due to the liquidity problems that it involves.[93]

- The SOCIMI are created as corporations through the enactment of Act 11/2009, the shares of which are admitted to trading on an official stock market. Their main corporate purpose is the direct or indirect acquisition and the development of urban real estate to be earmarked for tenancy, in the terms and with the requirements established in the Law.[94] None of them have been created since then and Act 11/2009 has been amended in 2012.

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

- Housing cooperatives, already explained in section 1.4 on “intermediate tenures”.

- 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 association,[95] which is characterized by being a democratic entity

[91] S. Nasarre Aznar & E. Rivas Nieto, ‘Trust e Instituciones Fiduciarias. Problemática civil y tratamiento fiscal’ *Instituto de Estudios Fiscales* 28 (2006): 9.
[92] A. Inurrieta Beruete, ‘Mercado de vivienda en alquiler en España: más vivienda social y más mercado profesional’ (Madrid: Fundación Alternativas, 2007), 33, 34, 46.
[93] M.M. Méndez Serrano, *Los Fondos de Inversión Inmobiliaria y los arrendamientos urbanos: otra alternativa al problema de la vivienda en España* (Madrid: La Ley, 2007), 49.
[94] See in more detail section 2.3 ‘*may a bundle of tenancy contracts be included in Real Estate Investment Trusts (REITS) or similar instruments?’, infra.*
[95] Regulated in the Ley Orgánica 1/2002, de 22 de marzo, reguladora del Derecho de Asociación (BOE 26/03/2002 núm. 73).

managed through the government and representation organs agreed in its Statutes and that are independent from the public authorities. Nowadays, there are associations like *Provivienda*, *Prohabitatge* and *Plataforma para una vivienda digna*, among others.

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

1.5 Other general aspects

o **Are there lobby groups or umbrella groups active in any of the tenure types? If so, how are they called, how many members, etc.?**

In our legal system there is no specific legislation governing pressure groups or lobby groups, although attempts were made to regulate them, without success, during the drafting of the CE within article 77. Furthermore, they have been subject to several law proposals that have been rejected[96]. However, interest groups, pressure groups and lobbies, as entities that have the capacity to influence both policy elaboration and decision-making by public authorities, exist in our society, since in general terms 317 companies with fiscal address in Spain are registered in the European Transparency Register.[97]

Regarding pressure groups registered in the aforementioned Register that may have influence on the housing market, the following ones can be found:

- The Spanish Mortgage Association[98] *(*AHE, *Asociación Hipotecaria Española*) is an organization that brings together banks, savings banks, cooperatives and credit financial institutions that have a major presence on the mortgage market. The Association's members hold approximately 70% of the mortgages granted on the market. The members are sixteen banks, two credit cooperatives or credit unions, a financial institution, four institutions or associations and eight companies[99]. Consequently, they will have a direct influence on the housing market that requires the granting of mortgage loans (i.e. home ownership).

- The Spanish Confederation of Savings Banks[100] (CECA*, Confederación Española de Cajas de Ahorros*) is the National Association of the Spanish savings banks and its related entities. It was created in 1928 with the purpose of joining its members and representing the Spanish savings banks sector. Thirty-four Spanish saving banks and sixteen associated banks formed it[101]. At present, the Spanish financial system faces a process of consolidation and restructuring of the savings banks.

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[96] See in more detail H. Simón Moreno, 'El contrato de lobby', *Cuadernos Civitas de Jurisprudencia Civil* (2013), forthcoming.
[97] <europa.eu/transparency-register/index_en.htm>, 12 December 2012.
[98] Identification number in the Register 19134101993-37.
[99] See <www.ahe.es/bocms/images/bfilecontent/2006/05/11/245.pdf?version=29>, 12 December 2012.
[100] Identification number in the Register 16951471658-73.
[101] For more information see <www.cajasdeahorros.es>, 12 December 2012.

- The Consumers and Users Organization[102] (OCU, *Organización de Consumidores y Usuarios*) is a private and non-profit independent association founded in 1975 with the aim of promoting and defending the consumers' interests, as well as solving their consumer related problems and helping them to exercise their fundamental rights, which include the right to housing. Therefore, they shall act in the policies that may affect them with respect to the housing market. It is comprised of more than 300,000 partners that finance the association with their contributions.[103]

In addition, there are other entities that, despite not being registered in the European Transparency Register, are also pressure groups that give their opinion before the public authorities in the housing field.

- Spanish Banking Association (AEB, *Asociación Española de Banca*) is a professional association created in 1977, open to both Spanish and foreign banks operating in Spain. It is financed by the partners' contributions, which have voluntarily joined to represent their rights and interests. At the moment, it is comprised of eighty-nine banks[104].

- The National Building Confederation (CNC*, Confederación Nacional de la Construcción*) is a business organization established in Spain in 1977, which brings together almost all the existing associations in the sector, covering all areas and activities. Among these associations, we should highlight the *Agrupación Nacional de Contratistas de Obras Públicas* (ANCOP), the *Asociación de Empresas Constructoras de Ámbito Nacional* (SEOPAN), the *Asociación Nacional de Constructores Independientes* (ANCI), the *Asociación de Promotores, Constructores de España* (APCE) and the *Confederación del Alquiler* (CONFALQ).[105]

- *Grupo 14* (Group 14) is formed by real estate companies that are mostly publicly traded and hold shares in other large publicly traded companies and in other sectors of activity. Its members are *Ferrocarril grupo inmobiliario, Hercesa*, *Level*, *Martinsa Fadesa*, *Metrovacesa*, *Montebalito, SA*, *Nozar*, *Quabit Inmobiliaria*, *Realia*, *Restaura*, *Reyal Urbis* and *Vallehermoso.*[106]

- *Confederación de Cámaras de la Propiedad Urbana y Asociaciones de Propietarios Urbanos* (Urban Property Chambers Confederation and Urban Owners Associations) is a national body that is partnership-based, non-profit and independent from public authorities, created in 1996. It is responsible for promoting and defending urban property and the Chambers and associated Members, and it proposes formulas and initiatives to the Government so as to benefit and develop urban property. It consists of twenty-one organizations of different Autonomous Communities and has more than 160,000 owners associated to the different Chambers and associations comprising it.[107]

- **What is the number (and percentage) of vacant dwellings?**

[102] Identification number in the Register 59415653013-57.
[103] See <www.ocu.org>, 12 de diciembre de 2012.
[104] For more information about its composition <www.aebanca.es/es/BancosSocios/index.htm?pPage=6 >, 12 December 2012.
[105] All members may be consulted in <www.portal-cnc.com/Master/entidadesconfederadas.aspx>, 13 December 2012.
[106] See <www.g14inmobiliarias.com/>, 13 December 2012.
[107] For more detail, <www.tupropiedadurbana.com/>, 13 December 2012.

One of the consequences of the housing bubble and the subsequent housing crisis is the strong increase in vacant dwellings. It should be taken into account that difficulties in rent collection, the situation of the dwelling when it is returned by the lessee to the landlord, the state of disrepair of many dwellings and the lack of speed and efficiency of the eviction process are the issues that most concern landlords and the ones that have contributed to the rise of the number of empty dwellings in Spain. As a consequence, tenancy is deemed to be an unreliable investment alternative.

In Spain there were 3,417,064 empty dwellings built or under construction in 2010,[108] of a total of 25,837,108 dwellings, which represents 13.2% of the total of the housing stock. It reflects a worrying reality if we take into consideration that in 2010 there was the same percentage of occupied dwellings by way of a tenancy contract as there were empty houses.[109] Thus, the data provided by the Ministry of Development matches that offered by the Population and Housing Census 2001 elaborated by INE, which already set the existence of the same number of empty dwellings. INE defines unoccupied housing as "available for sale or rent, or simply abandoned".[110]

However, there are some sources arguing that the number of vacant dwellings may be between five and six million in 2012, representing more than 20% of the housing stock.[111] The Housing Census 2011, that will provide real and up-to-date data on the actual number of empty dwellings existing in Spain, is currently underway. However, according to provisional data provided by this Census, there were 3.443.365 empty dwellings (13.7%) in Spain. It must be also considered that the sale of these dwellings is mainly directed to the middle and upper middle demand segments. Thus, the primary real estate market malfunction is the mismatch between supply and demand, because having unoccupied housing in the market, there is an unsatisfied demands that is not a collective candidate to occupy it.[112] In addition, it is worth stressing the future conservation problems that this situation will generate if the rehabilitation and reuse of dwellings is not encouraged.[113] Consequently, there is no need to extend the existing housing stock in order to promote the tenancy market, as there is enough physical housing in existence.

- **Are there important black market or otherwise irregular phenomena and practices on the housing market (especially the rental market)?**

In Spain there are more than 1.2 million tenancies not declared to the State Tax Administration Agency (AEAT, *Agencia Estatal de la Administración Tributaria*), representing 55.38% of the total of the rented housing stock. Around 2.926 billion

[108] Source: Ministry of Development <www.fomento.gob.es/NR/rdonlyres/AEDC71E9-13C6-42A6-A4A1D30E90B9EAB4/99219/ESV_09.pdf>, 03 October 2012.
[109] According to the 'Informe sobre el sector de la vivienda en España' (Madrid: Ministerio de Fomento, 2010), 31.
[110] According to the glossary of terms of the INE <www.ine.es>, 17 January 2013.
[111] It is the opinión of Antonio J. Argüeso, subdirector general de estadísticas sociodemográficas del INE, en J.M. Martínez, 'En España un 20% de las viviendas están vacías' *El País*, 8 de enero de 2012, <economia.elpais.com/economia/2012/01/05/actualidad/1325752378_850215.html>, 17 January 2013.
[112] As set out by M. Pareja-Eastaway & T. Sánchez-Martínez, 'El Mercado de vivienda en España', 42-43.
[113] As set out by J.M. Neredo Pérez, 'Perspectivas de la vivienda' *Revista de Economía ICE* 815 (2004), 153.

euros a year in submerged revenues are derived from these undeclared tenancies, which have not been included in the taxable amount of the Physical Persons Income Tax (IRPF*, Impuesto sobre la Renta de las Personas Físicas*), according to the 'fourth edition of the submerged rents in Spain report'.[114] It must be considered that the minimum five-year forced extension of the lease contract, regulated in article 9.1 LAU, encourages the black market for tenancy, as there are owners who prefer not to declare the contract in order to circumvent this rule.

The report points out that 65.8% of the rented dwellings whose tenancies are not declared are concentrated in the Autonomous Communities of Madrid, Andalusia and Catalonia. The landlords who defraud the most are in Andalusia (71.59%), Canarias (65.92%) and Murcia (68%). Conversely, la Rioja (0.98%), Cantabria (65.92%) and Aragón (25.54%) are the Autonomous Communities with the fewest illegal tenancies, according to figure 4. GESTHA considers that this fiscal fraud situation is due to the four-year delay in the entry into force of the electric companies' duty to facilitate immovable consumption since the enactment of Act 36/2006.[115] This information will help to discover apparently unoccupied dwellings that actually hide a submerged tenancy, as long as the Ministry of Economy and Finance authorizes the technicians of this Ministry to use this information.[116] Finally, this measure is envisaged in the Resolution of February 24th 2012.[117]

Figure 4 Number of submerged rental dwellings in Autonomous Communities[118]

	Gestha estimation of tenencies not declared in 2008			Number of submerged tenancies variation, between 2007 and 2008	Estimated fraud variation, housing rental between 2007 and 2008 (in euros)**	Number of tenants that have deducted for main dwelling rental
CCAA	Number of submerged dwellings	% Submerged	Estimated fraud (in euros)			
Andalucía	220.644	71,59%	449.643.788	15.039	45.218.753	44.556
Aragón	15.892	25,54%	28.922.169	7.976	16.874.017	20.946
Asturias	21.341	42,20%	32.065.066	-3.104	-2.011.264	13.222
Baleares	17.285	36,49%	49.749.341	-11.116	-28.523.815	17.559
Canarias	77.529	65,92%	179.311.397	14.229	30.682.997	28.601
Cantabria	3.482	23,83%	5.741.296	-1.880	-2.521.546	4.724
C. y León	32.176	35,91%	50.846.124	4.129	9.252.423	14.198
C.-La Manch.	46.211	59,83%	82.742.182	29.343	55.078.662	27.643
Cataluña	312.781	59,12%	855.584.275	24.615	115.573.987	135.081
Extremadura	16.119	57,14%	22.043.861	-6.336	-5.912.614	6.046
Galicia	39.787	37,66%	64.610.507	2.002	6.950.597	32.062
La Rioja	77	0,98%	119.490	-1.242	-1.864.286	111.939
Madrid	273.056	60,10%	838.421.179	75.643	128.721.444	7.090
Murcia	30.151	68,53%	56.891.922	10.298	20.104.313	3.511
Valencia	119.111	61,26%	209.208.943	49.563	85.552.599	34.318
TOTAL *	1.225.642	55,38%	2.925.901.539	209.159	473.176.266	502.440

Fuente: Gestha, a partir de las Estadísticas de los datos del Ministerio de Vivienda y del Ministerio de Economía y Hacienda.

* Navarra and País Vasco managed their own IRPF, and their statistics are not available

** Reduced net yield, discounted the 50% or 100% reduction

Summary table 1 Tenure structure in Spain, 2012

[114] This Report has been elaborated by the Technicians Sindicate of the Ministry of Economy (GESTHA, Sindicato de Técnicos del Ministerio de Economía y Hacienda) from the INE data and the declaration of IRPF from 2008.

[115] Ley 36/2006, de 29 de noviembre, de Prevención del Fraude Fiscal (BOE 30/11/2006 núm. 286).

[116] As set out by the interview with Carlos Cruzada, President of GESTHA, 'En España existen más de 12 millones de alquileres no declarados', *Pisos.com,* 20 de junio de 2011, <http://noticias.pisos.com/entrevistas/en-espana-existen-mas-de-12-millones-de-alquileres-no-declarados/>, 17 January 2013.

[117] Resolución de 24 de febrero de 2012, de la Dirección General de la Agencia Estatal de Administración Tributaria, por la que se aprueban las directrices generales del Plan Anual de Control Tributario y Aduanero de 2012 (BOE 01/03/2012 núm. 52).

[118] Source: 'Cuarta edición del informe sobre los alquileres sumergidos en España' (Madrid: GESTHA, 2008).

Home ownership	Renting			Intermediate tenure	Other	Total
		Renting with a public task, if distinguished	Renting without a public task, if distinguished			
82.2%	12.1%	2%	10.1%	5.7%		100%

2 Economic urban and social factors

2.1 Current situation of the housing market

o **What is the current situation of the housing market? Is the supply of housing sufficient/ insufficient and where is this case (possibly in terms of areas of scarcity of dwellings in growth areas versus shrinkage areas)? What have been the effects of the current crisis since 2007?**

Rental housing supply has been historically insufficient to meet the market demand.

The present residential market phase is characterized by the coexistence of high volumes of new housing supply pending sale, amounting in 2011 to 687,523 dwellings,[119] along with a potential demand that is not satisfied, in particular the collective of young people between 18 and 35 years old, since 65% of this collective live with their parents, a much higher percentage than in other European countries.[120] This situation of mismatch in the market is aggravated by the almost non-existent volume of housing with a public task for tenancy purposes in Spain, which barely reaches 2%, while the European average is around 9%.[121] In this sense, it may be seen that despite the current situation of economic crisis and the high housing prices, only 2.8% of the households enjoy a rent below the rental market price.

Hence, the Bank of Spain has declared that it is necessary to reorient this surplus of unsold dwellings to the tenancy market. However, it should be borne in mind that 70% of this unsold housing stock is concentrated on secondary residences and on projects of primary residence in very decentralized areas, primarily in the municipalities with the lowest dimensions and, therefore, with the less potential rental demand. Additionally, this housing surplus is mostly of a medium-high quality, which does not correspond to the main needs of the tenancy market applicants and their current economic capacity to pay a rent.

Moreover, while the increase of the Spanish population is quantified at 5,836,696 people (15%) between the years 1991 and 2005, dwellings increased by 5,989,918 units, which represent an increase of 35%. However, this growth varies depending on

[119] 'Informe ejecutivo sobre la coyuntura global del mercado inmobiliario español' (Madrid: Aguirre Newman, 2011), 10.
[120] As set out by M. Aramburu Otazu, *La resignificación de la tenencia de la vivienda en Cataluña,* 14.
[121] Spain is at the bottom of the European countries regarding the provision of social rented housing. For example, Germany has 32%, Austria 23%, UK 20%, Czech Republic 20% and Denmark 19%. As set out in the 'Housing Statistics in the European Union. Income and Living Conditions', (Eurostat, 2010).

the municipality considered. Therefore, there are local differences in the market. Thus, the population increased considerably in tourist and second residence areas, such as the Balearic Islands, The Canaries, Valencia and Murcia, implying an important increase in the permanent municipal registrations. The city of Madrid, as the main city of Spain, also experienced a sharp increase. In contrast, the population stagnated or slightly decreased in Asturias, Castilla y León and the Basque Country, as may be seen in Figure 5. In this respect, it is important to highlight the housing increase that took place due to tourism in Canaries, Andalusia, Cantabria, Comunidad Valenciana, Murcia and Baleares, and the attractiveness of the economic growth in Navarre and Madrid.

Figure 5 Population increases and housing stock between 1991 and 2005[122]

	Population 1991	Housing stock 1991	Housing No. x 1,000 inhab. 2005	Population (1) 2005	Housing stock 2005	Housing No. x 1,000 inhab. 2005	Difference	%
Andalucía	6.940.522	2.842.751	410	7.975.672	4.032.264	506	96	23,4
Aragón	1.188.817	574.156	483	1.277.471	713.854	559	76	15,7
Asturias	1.093.937	462.778	423	1.076.896	569.923	529	106	25,1
Balears	709.138	415.512	586	1.001.062	551.480	551	–35	–6,0
Canarias	1.493.784	586.840	393	1.995.833	962.896	482	90	22,8
Cantabria	527.326	225.697	428	568.091	317.695	559	131	30,7
Castilla y León	2.545.926	1.270.626	499	2.523.020	1.576.866	625	126	25,2
Castilla-La Mancha	1.658.446	819.282	494	1.932.261	1.072.011	555	61	12,3
Cataluña	6.059.494	2.756.130	455	7.134.697	3.658.330	513	58	12,7
C. Valenciana	3.857.234	2.094.033	543	4.806.908	2.862.658	596	53	9,7
Extremadura	1.061.852	474.178	447	1.086.373	616.274	567	121	27,0
Galicia	2.731.669	1.137.653	416	2.767.524	1.437.554	519	103	24,7
Madrid	4.947.555	1.936.961	391	6.008.183	2.706.368	450	59	15,1
Murcia	1.045.601	483.131	462	1.370.306	670.134	489	27	5,8
Navarra	519.277	202.314	390	601.874	284.801	473	84	21,5
País Vasco	**2.104.041**	**775.396**	**369**	**2.133.684**	**952.202**	**446**	**78**	**21,1**
La Rioja	263.434	128.051	486	306.377	174.709	570	84	17,3
Ceuta y Melilla	124.215	34.910	281	142.732	50.298	352	71	25,4
España	**38.872.268**	**17.220.399**	**443**	**44.708.964**	**23.210.317**	**519**	**76**	**17,2**

Fuente: Elaboración propia a partir de los datos del INE y del Ministerio de Vivienda.
(1) Fecha 1-01-2006

o **How is the demand for housing expected to develop? What is the expectation about the growth and decline in the number of households in the future in a scenario of average economic development? Is there a year forecasted where growth in the number of households will stabilize or will start declining?**

According to the executive report carried out by Aguirre Newman for the year 2011, in the period 2012-2015 the new available housing stock will be absorbed (being 400,000 dwellings in 2015). From these, 194,000 will be dwellings with difficult prospects in the market and 205,000 will become the new unsold housing stock. It is believed that it is a reasonable stock figure for a market such as the Spanish one, with a housing creation rate around 250,000 a year and sales in the holiday market of approximately 50,000 to 75,000 units.

Future potential housing demand will decrease as a result of the significant adjustment in the creation of new households in Spain. The lower influx of immigrants combined with the fact that new generations reaching the age of emancipation are increasingly smaller in number, will place the housing creation rate

[122] Carried out by J. Bereziartua Rubio, *Reflexiones sobre el mercado de la vivienda* (País Vasco: Oñati, 2008), 44. Source: Rental Sector Survey of 2006 of the Ministry of Development and Population and Housing Census 2001 of INE.

at levels close to 250,000 a year. The holiday market will remains significant, assuming annual sales close to 75,000 units.

Theoretically, it is expected that the increase in potential housing demand is going to stabilize at around 325,000 units a year, taking into account both the new construction and second hand markets.[123]

o **What is the number/percentage of families/households depending on rental housing (vs. owner-occupancy and other forms of tenure)? What is the number/percentage of immigrants among them?**

In the current economic context, the number of applicants for housing stock for tenancy purposes has increased, not only because of the increasing number of housing applicants unable to purchase, but also because potential homebuyers facing economic uncertainty opt for a tenure that does not require financing or a large capital disbursement.

We can point out different groups who are potentially the main people in need of the private sector housing stock: poor families[124] unable to be owners but not meeting the requirements to access social housing or those that, fulfilling these, find that their demand cannot be met: young workers; single, separated or divorced people, who are living alone or with others;[125] 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 the tenancy market[126]. They tend to have inadequate living conditions and to be are at high risk of poverty and exclusion. Consequently, households who rent dwellings have a higher risk of poverty.[127]

In addition, we should take into consideration that, according to INE data, 21.8% of the resident population in Spain are below the poverty threshold, while in 2010 the percentage was 20.7%.[128]

However, in order to calculate the families or households who are in need of housing, we should consider other factors.

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[123] 'Informe ejecutivo sobre la coyuntura global del mercado inmobiliario español' (Madrid: Aguirre Newman, 2011), 11.

[124] 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-work poverty in the EU' (Eurostat, 2010), <epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-RA-10-015/EN/KS-RA-10-015-EN.PDF)>, 18 January 2013. Nevertheless, we must consider that in Spain the exclusion threshold for a mortgagor, as defined in the Real Decreto-ley 6/2012, de 30 de marzo, sobre medidas urgentes de protección de deudores hipotecarios sin recursos (BOE 10/03/2012 núm. 60), is stricter, since one of its requirements is the non-obtaining of any income derived from work or economic activities by any member of the family unit.

[125] C. Trilla Bellart, *La política de vivienda en una perspectiva europea comparada*, 90.

[126] *Supra.*

[127] As set out by M. De la Fuente Lechuga, F. Faura Martínez & O. García Luque, *Las condiciones de vida y pobreza consistente* (Burgos: ASEPUMA, 2009), 7.

[128] According to the ECV carried out by the INE on 20 October2011 <www.ine.es>, 15 November 2012.

Taking into account the demographic factor and the accessibility threshold, standing at around 30% of the disposable wage income, the report drawn up by CatalunyaCaixa[129] has calculated that the rental housing demand would be potentially close to 658,000 rental homes, of which about 95,000 for young people without a spouse, and about 563,000 for couples, according to 2010 data.

It is also important to analyse the endogenous changes in the households' structure. In addition, young people change their emancipation patterns and the households' composition varies often, to the extent that provisional coexistence increases.

Before the real estate crisis in Spain, the number of households increased quickly despite the stagnation of the population, causing a reduction in the dwellings' average size and an increase in provisional coexistence and one-person households, due to the constant variation in the composition of these households.[130] However, this residential dynamic has changed since 2007, since the people affected by the economic situation of the country must renounce access to a dwelling. For instance, the following phenomena are increasingly common: the renunciation of independence by young people, individuals or families because they are unable to pay for their home and are obliged to share one with relatives or strangers; the forced coexistence caused by the impossibility of affording a separation or divorce; the residential expulsion to isolated areas of one's social circle or the inadequacy of housing.[131] All of them can give rise to substandard and overcrowding situations in dwellings.

As the INE National Immigration Survey 2007 reflects, there were almost 2,160,000 dwellings in that year in Spain where at least one person born abroad lived. In addition, the increase in housing demand due to immigration between 1998 and 2002 was 432,000, that is to say, 108,000 dwellings a year.[132] These figures represent 35% of dwellings built during this period, which was 1.2 million.

The economic crisis, which has changed the labour market, has affected the development of immigrants within our environment. The employment of foreign workers has decreased, and the unemployment rate among the immigrant population was as much as 30% in 2010. The current economic situation has caused the emigration of the foreign population to their place of origin or to other countries less affected by the crisis. According to INE data, during the year 2011[133] the number of registered foreigners decreased by 40,447 (0.7%). Among them, those belonging to the EU-27 increased by 45,494, up to a total of 2,440,852 people, while non-EU decreased by 85,941 people, standing at 3,270,188. With regard to non-EU immigrants, the at-risk-of poverty rate for 2011, according to INE, was 43.5%, fairly high in comparison with EU foreigners (26.2%) or Spaniards (19.8%).[134]

2.2 Issues of price and affordability

[129] J. Oliver Alonso, 'Informe sobre el sector inmobiliario residencial en España', 96.
[130] See C. Trilla Bellart, *La política de vivienda en una perspectiva europea comparada*, 23-29.
[131] N. Riba Renom, *El Dret a l'habitatge* (Barcelona: Departament d'Interior, Relacions Institucionals i Participació, Oficina de Promoció de la Pau i dels Drets Humans de la Generalitat de Catalunya, 2010), 21.
[132] C. Pereda, A. Walter & M.A. de Prada (Colectivo IOE), *Inmigración y Vivienda en España*, 66.
[133] According to the *Avance de la explotación estadística del Padrón* 1 January 2012 in <www.ine.es>, 30 November 2012.
[134] ECV form the INE for the year 2011.

o **Prices and Affordability:**

- **What is the typical cost of rents and its relation to average disposable income (rent-income ratio per household)?**

The average rent price in Spain was around 590€ for an 80 m2 dwelling in October 2012.[135] However, it is higher in large cities such as Madrid or Barcelona, where it is around 778€, and lower in others, such as in Alicante (435€), Zamora (404€) or Teruel (374€).

The average gross annual salary in Spain during the 2010 was 22,790.20 Euros per year and worker, while the most common wage was 16,489.96 Euros.[136] Furthermore, the average annual income of Spanish households, involving the family unit, reached 24,609 Euros in 2011.[137]

With these data it can be concluded that the relationship between rent and average net income of Spanish households is 28.75%. However, it must be taken into account that a worker has an average gross monthly salary of 1,374€, equivalent to approximately 1,100€ net salary. In this case, if there is a single salary in the household, it implies that 53.6% of the income has to be destined to the rent payment.

Decent housing has also been linked to the cost of housing access, which, it is felt, should not exceed 30% of the family unit's income, 20% in cases of very low income. So, it is considered that people above these ratios are public aid candidates.[138] However, family units with a single wage as a means of livelihood or people who wish to become independent with the most frequent Spanish salary, allocate more income than they should do to enjoy decent housing. This is reflected in the Eurostat Youth 2009 report,[139] according to which Spain is the second country in Europe where young people become independent later from their family unit due to a lack of affordable housing prices.

Finally, if we look at the national minimum wage (NMW), which is 641.4€ for 2012, the income-rent relationship rises to 91.98%. Therefore, any person earning only the NMW is not in a position to access a dwelling provided by the private housing sector by himself/herself.

- **To what extent is home ownership attractive as an alternative to rental housing?**

[135] According to the 'Informe sobre el precio de la vivienda' (Fotocasa, october 2012) <www.fotocasa.es/indice-alquiler-inmobiliario__fotocasa.aspx>, 15 December 2012.
[136] According to the *Encuesta de Estructura Salarial* 2010 INE, which are the definitive results published in October 2012.
[137] According to the provisional data from the ECV carried out by the INE for the 2012, published in October 2012.
[138] Art. 76 Decreto 13/2010 del Plan por el derecho a la vivienda de Cataluña (PDVC) (DOGC 11/02/2010 núm. 5565) recognizes that households that are below this threshold are at risk of social residential exclusion, and must be eligible to receive a grant for the rent.
[139] 'Youth in Europe' (Eurostat, 2009), 31 <epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-78-09-920/EN/KS-78-09-920-EN.PDF.>, 15 de diciembre de 2012.

The Spanish attraction to home ownership stems mainly from the prevalence that is given to the dwelling's exchange value[140], to the detriment of the value in use,[141] especially in times when the price increases. If it is analysed from an economic perspective, the issue is the choice between paying the rent or the instalment of a mortgage loan. However, in order to make a proper balance between these two types of tenure, the cost may not be the same for both, since with the rent the value in use is included, while with the instalment of the mortgage loan the exchange value is also acquired, together with the value in use.[142] If we take into consideration that tenancy represents up to 42%[143] of the lessee's income and the mortgage loan may represents 38.6% of the owner's income[144], it is not surprising that most people who are able to choose opt for home ownership.

- **What have the effects of the crisis been since 2007?**

The origin of the current social problem of housing access in Spain stemmed from the real estate boom that started in the mid-nineties of the last century, when the construction sector became the engine of the country´s economy, generating employment and wealth until September 2007. Thus, residential construction doubled its weight in the GDP, rising from 4.7% in 1997 to 9.3% in 2007.[145]

With the start of the financial crisis that started in the USA in 2007, the Spanish housing bubble burst causing an almost total stoppage in the real estate sector. Spain reached the all-time highest number of dwellings initiated in the year 2006 (865,561), which decreased to 287,134 in 2010.[146] In 2009, completed unsold housing stock was around 700,000.[147] This situation caused a reduction in the developers' profit expectations, a house price adjustment[148] and a steady increase in empty dwellings. In addition, the rising prices of residential housing until 2006 and the trend towards home ownership have caused a sharp increase in family debt, which rose from 45% in 1995 to 76.7% in 2001, up to 143% in 2008. Therefore, families have to make a great economic effort today in order to meet their housing needs.[149]

[140] Exchange value refers to the importance of the dwelling as an economic revaluated asset.
[141] The value in use is the utility provided by the dwelling to satisfy the need for housing.
[142] As set out by A. Jiménez Clar, 'Algunas observaciones sobre el mercado de la vivienda y en especial sobre el uso residencial de los bienes inmuebles: ¿Es necesario una tercera vía?' en *El acceso a la vivienda en un contexto de crisis*, ed. S. Nasarre Aznar (Madrid: Edisofer, 2010), 110-111.
[143] As far as young people are concerned.
Source:<www.idealista.com/news/archivo/2010/01/04/0127889-ayuda-210-euros-j-venes-reduce-mitad-esfuerzo-emanciparse>, 4 January 2010.
[144] Source: <www.fotocasa.es/el-esfuerzo-salarial-para-comprar-una-vivienda-en-espana-es-aun-del-368-segun-deloitte__8289.aspx>, 8 April 2011.
[145] As set out by M. Pareja-Eastaway & T. Sánchez-Martínez, 'El Mercado de vivienda en España', 40.
[146]<www.firabcn.es/portal/ShowProperty?nodeId=/BEA%20Repository/464005//document>, 15 March 2012.
[147] According to al 'Informe sobre la situación del mercado de la vivienda' (Madrid: Ministerio de Vivienda, 2010).
[148] The annual average price of private sector housing began to fall in the second quarter of 2008, up to 0.3%, and since then the trend has not been reversed. The cumulative decline (2008-2012) is 21.9%, according to INE <www.ine.es>, 15 September 2012.
[149] Source: ADICAE <www.adicae.net/download/ADICAE_sob.pdf>, 21 September 2012.

In the first quarter of 2012, there were 46,559 evictions[150] and 24.792 mortgage foreclosures.[151]. In addition, in the same period there were 5,639,500 unemployed people in Spain and 1,728,400 households with all the active members unemployed.[152] Moreover, there is not a sufficient stock of housing with a public task (2%) to provide decent housing access to these collectives, who are showing the inability of the system to solve these demand problems.[153]

The financial and real estate crisis has opened the way to a new stage in which home ownership has lost much of its appeal because of the economic circumstances: restrictions on obtaining credit, the end of tax relief for the purchase of a dwelling in 2011 and a market downturn where expectations of revaluation are lost. Indebtedness, arrearage and foreclosures make people rethink the benefits of home ownership in terms of stability, security and profitable investment. These elements revitalize the interest in tenancy, as a more balanced way to have access to a dwelling in a context of instability.[154]

2.3 Tenancy contracts and investment

- **Is the return (or Return on Investment (RoI)) for rental dwellings attractive for landlords-investors?**

Tenancy produces a 3% annual net yield for trading companies entitled to tax rebate, 3.01% for SOCIMI, 2.9% for tenancies to young people between 18 to 30 years old, and 2.6% for the remaining tenancies.[155] This study also compares this profitability with the one produced by French owners, which is higher, distinguishing between the yield obtained for housing with a public task (4.8%) and for the rest of the dwellings (3.4%).

However, we need to take into account that both the purchase price of the dwelling and the location and housing conditions are essential to calculate profitability. The better these conditions are and the lower the purchase price is, the greater the profitability that can be obtained for the dwelling is.

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[150] This year we have included the number of evictions agreed by the Courts of First Instance without common services notifications. Evictions for common services performed by them were 18,424, representing 18.5%, more than the number of evictions produced in the same quarter of 2011. From 2007 until the first quarter of 2012 there have been 185,140 foreclosures.

[151] According to 'Datos sobre el efecto de la crisis en los órganos judiciales: datos estadísticos del primer trimestre de 2012' (Consejo del Poder Judicial, 2012), <www.poderjudicial.es>, 5 September 2012.

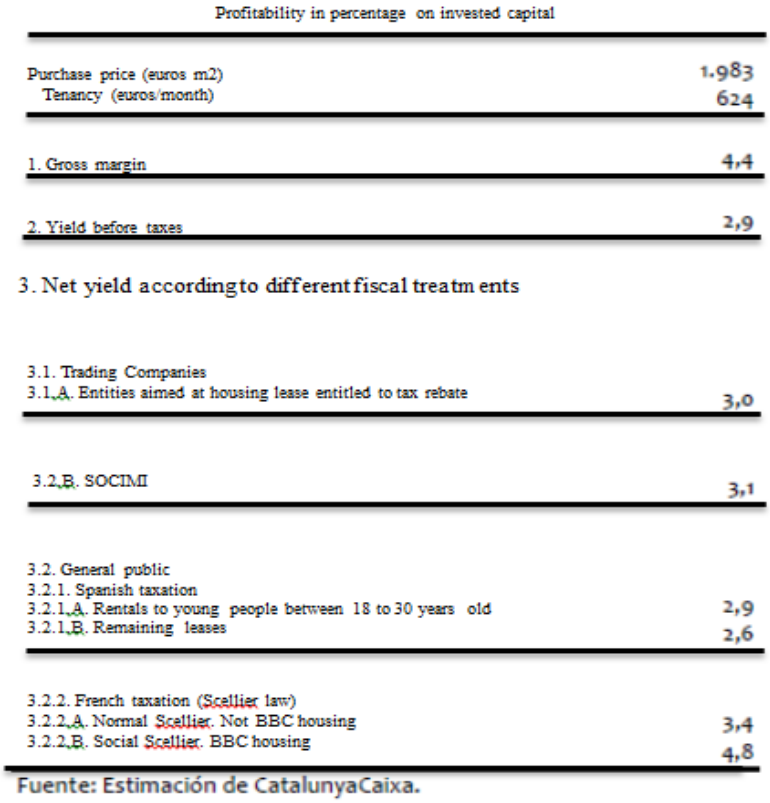
[152] According to the *Encuesta de Población Activa* , from INE, first quarter of 2012 <www.ine.es>, 5 September 2012.

[153] M. Pareja-Eastaway & T. Sánchez-Martínez, 'El Mercado de vivienda en España', 44.

[154] It is the opinion of M. Aramburu Otazu, *La resignificación de la tenencia de la vivienda en Cataluña,* 14, 38.

[155] J. Oliver Alonso, 'Informe sobre el sector inmobiliario residencial en España', 99 -103, includes an estimate of the annual return regarding new rental housing, according to the average capital invested, which is estimated according to the average value of the home purchase at 1,983 €/m2, as this study is concerned with the prices of big cities or provincial capitals such as Madrid and Barcelona, among others. The average rent is set at € 624, and takes into account the notary and registration expenses (1% of the dwelling value that is distributed over the period of 15 years of investment), 0.4% per annum of the value of the dwelling for repairs, insurance (1.4%), community expenses (8.7%), rental management (4%), IBI and other taxes (4.9%).

Figure 6 New rental housing profitability according to tax treatment, 2011[156]



Profitability in percentage on invested capital	
Purchase price (euros m2)	1.983
Tenancy (euros/month)	624
1. Gross margin	4,4
2. Yield before taxes	2,9
3. Net yield according to different fiscal treatments	
3.1. Trading Companies	
3.1.A. Entities aimed at housing lease entitled to tax rebate	3,0
3.2.B. SOCIMI	3,1
3.2. General public	
3.2.1. Spanish taxation	
3.2.1.A. Rentals to young people between 18 to 30 years old	2,9
3.2.1.B. Remaining leases	2,6
3.2.2. French taxation (Scellier law)	
3.2.2.A. Normal Scellier. Not BBC housing	3,4
3.2.2.B. Social Scellier. BBC housing	4,8

Fuente: Estimación de CatalunyaCaixa.

The annual profitability that tenancy offers is similar to the one provided by a long-term deposit, in other words, for more than one year, rising to 2.6% when it is contracted with a bank, 2.3% with a savings bank and 3% through online banking.[157] These data highlight the need to provide security in tenancy to make it a real alternative to other forms of safe investment, such as a simple bank deposit.

- **In particular: What have the effects of the crisis been since 2007?**

The construction sector has been inexistent since 2007. It has caused the generation of a large housing surplus, which was mostly destined for sale. But because of the impossibility of selling these dwellings, especially those held by banks and developers, they have been incorporated into the tenancy market producing an increase in the housing supply of this type of tenure, in both housing with a public task and private sector housing.[158]

The increase in the supply of tenancy housing and the landlords' economic difficulties have produced a readjustment in prices and a change in parties' behaviour. The lessee is not willing to accept the additional guarantees required, and

[156] J. Oliver Alonso, 'Informe sobre el sector inmobiliario residencial en España', 102.

[157] 'Informe trimestral sobre la rentabilidad de los depósitos bancarios', (iAhorro, 2012) <www.iahorro.com/ahorro/gestiona_tus_finanzas/informe-trimestral-la-banca-online-ofrece-mas-rentabilidad-al-ahorro-y-cobra-menos-intereses-en-sus-hipotecas.html>, 18 January 2013.

[158] 'Informe ejecutivo sobre la coyuntura global del mercado inmobiliario español' (Madrid: Aguirre Newman, 2011), 3.

the owner loses power, with both having an attitude that is more open to negotiation in terms of contract conditions, price and guarantees.[159]

Public authorities have established some measures to effectively protect the owners' position, agreeing measures of tenancy promotion and procedural facilitation in the event of an eviction.[160] Additionally, public measures have also been introduced to encourage the supply of dwellings for tenancy purposes, such as the "*avalloguer*" of the *Generalitat de Catalunya* that guarantees the tenancy until the non-payment of six monthly payments.[161] Other examples are social housing programmes, already mentioned, which offer guarantees in rental income collection, the state of the housing and legal defence. In order to make these measures effective, the competent bodies must be equipped with sufficient resources. For example, it is essential to empower Courts of Justice with enough means to be able to materialize in practice the shorter deadlines in the eviction process, or to give the guarantees offered by the Administration, such as the "*avalloguer*" or the public tenancy promotional programmes, sufficient resources in order to be effective and reach the maximum number of potential lessors.

o **To what extent are tenancy contracts relevant to professional and institutional investors?**

The private sector for housing for tenancy purposes has been mainly managed in Spain directly between lessor and lessee. Therefore, there is a lack of professionalization in the private sector, which has led to mistrust and an environment of insecurity, giving rise to numerous abuses by both parties.

With regard to the housing with a public task, the social housing stock has been managed in Spain mainly by regional or local bodies. In contrast to this, in Europe this management tends to take place through private bodies' rather than public administrations because non-profit associations have demonstrated that they are by far better managers. In addition, they implement more innovations and their is a greater potential for involvement by the tenants in housing maintenance and care[162]. Nevertheless, Spain does not have mechanisms to encourage the professionalization of housing providers as happens in other countries, where the investment in real estate assets for tenancy purposes is encouraged through the constitution of either non-profit housing associations, which are independent from local public authorities (Housing Associations in the United Kingdom or *Woningcorporaties* in the Netherlands), or housing associations with variable dependency levels from local authorities (real estate companies of public utility in Denmark, housing societies in Germany; municipal companies in Austria)[163].

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[159] 'Informe inmobiliario: actualidad y perspectivas' (Forcadell Consultores, 2009) <www.euroval.com>, 18 January 2012.

[160] In this sense, legislators enacted the Ley 19/2009, de 23 de noviembre, de medidas de fomento y agilización procesal del alquiler y de la eficiencia energética de los edificios (BOE 24/11/2009 núm. 283) and the Ley 39/2010, de 22 de diciembre, de Presupuestos Generales del Estado para el año 2011 (BOE 23/12/2010 núm. 311).

[161] Approved by Decreto 54/2008, de 11 de marzo, por el que se establece un régimen de coberturas de cobro de las rentas arrendaticias de los contratos de alquiler de viviendas (DOGC 13/03/2008 núm. 5090).

[162] C. Trilla Bellart, *La política de vivienda en una perspectiva europea comparada* (Barcelona: Fundación la Caixa, 2001), 75.

[163] Ibid., 78.

- **In particular: may a bundle of tenancy contracts be included in Real Estate Investment Trusts (REITS) or similar instruments?**

As seen above, SOCIMI were created in Spain in 2009 in order to achieve the professionalization of housing providers. The rental housing figures show, according to the current volume of managed real estate and the number of existing vehicles (none), the aim that these institutions should pursue in order to follow the REIT trend has not been achieved, which would require the generalization of tenancy promotion, involving an increase in both the quantity and quality of the housing stock.

It is mainly caused because they are not sufficiently attractive for other institutions in order to adopt this corporate form (SA, *Sociedad Anónima*), because there is no flexibility in their constitution and management and they have high costs in order to be listed on the stock exchange[164]. Moreover, Spanish SOCIMI do not meet the requirements for being considered an international REIT, because SOCIMI are taxed at 21%, while their international partners are not taxed at all (tax-transparent). However, the law governing the SOCIMI has been amended in 2012 in order to make its regime more attractive to international investors. Thus, SOCIMI are taxed at 0% nowadays.[165]

- **Is the securitisation system related to tenancies in your country? Are commercial (or other) landlords allowed to securitize their rental incomes? If yes: Is this usual and frequent?**

In order to securitise tenancy contracts a securitisation fund should be created, which is the vehicle used for both the transfer of contracts and the channelling of the profits obtained from them, either present or future. This Special Purpose Vehicle is an entity that has no legal personality and a securitisation management company should manage it.[166] It should be kept in mind that individuals cannot securitise these contracts. However, SOCIMI are allowed to do so; thus, obtaining funding quickly and in a stable way. This financial technique of securitisation has been widely used by financial institutions to delegate the risk of their loan portfolios to investors and by nonfinancial companies so as to securitise their debt from their client portfolios. Nevertheless, it seems that it has never been used in Spain to securitise tenancies, primarily because of the absence of an organised market with sufficient volume of activity to institutionalise securitisation funds coming from tenancy contracts.[167]

2.4 Other economic factors

[164] S. Nasarre Aznar & E. Rivas Nieto, 'La naturaleza jurídico-privada y el tratamiento fiscal', 7.

[165] Act 16/2012, December 27, adopting several tax measures aimed at the consolidation of public finances and the promotion of economic activity (*Ley 16/2012, de 27 de diciembre, por la que se adoptan diversas medidas tributarias dirigidas a la consolidación de las finanzas públicas y al impulso de la actividad económica*, BOE 28/12/2012 núm. 312), which amends the Ley 11/2009, de 26 de octubre, por la que se regulan las Sociedades Anónimas Cotizadas de Inversión en el Mercado Inmobiliario (BOE 27/10/2009 núm. 259).

[166] As set out by art. 12 of the Real Decreto 926/1998, de 14 de mayo, por el que se regulan los fondos de titulización de activos y las sociedades gestoras de fondos de titulización (BOE 15/05/1998 núm. 116).

[167] As set out by A. Inurrieta Beruete, 'Titulización de alquileres', *Cinco Días*, 5 de abril de 2008, secc. opinión, <www.cincodias.com/articulo/opinion/titulizacion-alquileres/20080411cdscdiopi_4/>, 30 January 2013.

o **What kind of insurances play a role in respect to the dwelling (e.g. insurance of the building, the furniture by the landlord; third party liability insurance of the tenant)?**

Normally, the multi-risk home insurance in dwellings is contracted by homeowners or landlords. It basically covers the damages to the dwelling or to goods inside it. Most policies cover damage caused by fire, water, theft and civil liability in the following ways:

- Container: it encompasses housing, garage, storage room, fixed elements (for example, built-in wardrobes), facilities, etc. For the calculation of the premium it takes into account the square metres of the floor, the house height and whether it is a primary or a secondary residence.

- Content: it covers furniture and goods that are inside the housing (household appliances, clothes, etc.). Unless it is expressly taken out, insurance companies tend to exclude from the content animals, plants, valuables (pictures, antiquities...), cars, jewellery, furs, etc.

- Civil liability: it covers personal injuries and material damages caused by either the insured person or his family to a third party and by the home itself.

It is common that the lessor takes out a multi-risk policy with container and continent and keeps it even when he leases the dwelling. It is also usual that while lessor assures housing continent, since he is responsible for its conservation, the tenant assures the content, especially if there is furniture, household appliances and electronic equipment, and the civil liability.

Every condominium normally contracts an insurance policy for the whole block. It covers the block, its container and the external urbanization. The insurance may be extended to other elements with respect to the insured property, such as fire, theft, water damages, civil liability, etc. The inside of homes is not covered. This insurance is satisfied according to the participation fee of each apartment in the block by paying out the community expenses receipt, which is usually done by the owners, but it may also be agreed to be paid out by the lessee.[168]

Both policies shall be governed by the particular and general contract terms, as well as by the specific legislation on the subject.[169]

o **What is the role of estate agents? Are their performance and fees regarded as fair and efficient?**

[168] According to art. 20.1 LAU.

[169] Ley 50/1980, de 8 de octubre, del Contrato de Seguro (BOE 17/10/1980 núm. 250), the Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores, Usuarios y otras leyes complementarias (BOE 30/11/2007 núm. 287). Amended by the Ley 25/2009, de 22 de diciembre, de modificación de diversas leyes para su adaptación a la Ley sobre el libre acceso a las actividades de servicios y su ejercicio (BOE 23/12/2009 núm. 308) and by the Ley 29/2009, de 30 de diciembre, por la que se modifica el régimen legal de la competencia desleal y de la publicidad para la mejora de la protección de los consumidores y usuarios (BOE 31/12/2009 núm. 315).

Real estate agents (API, *Agentes de la Propiedad Inmobiliaria*) are those natural, physical or legal persons engaged in providing mediation services, counselling and management in real estate transactions related to buying and selling, renting, barter or transfer of real estate and their corresponding rights, including the constitution of these rights.[170]

To work as a real estate agent it is not necessary to be in possession of any title nor belong to any professional body,[171] although they may belong to the Official real estate agents' College when they meet the professional qualification requirements.[172] An exception is Catalonia, where they should be registered compulsorily in the real estate agents' Register.[173]

The liberalization of this profession has generated some legal uncertainty due to malpractices and lack of information during the construction boom, where being a real estate agent was very profitable and the number of companies engaged in real estate brokerage proliferated to a surprising degree. They contributed, in fact, to the bubble in housing prices that abruptly burst in 2005.

It must be kept in mind that fees are not regulated. Therefore, there have been abuses or discrepancies in the collection of the same. Up to a 75% of the real estate brokerage issues that reach the courts are at the agent's request, in relation to their fees or commissions derived from their brokerage activity. The issues discussed are related to the existence of a sales agreement, the development of an effective brokerage and the legal requirements to be fulfilled so that the right to request the commission comes about, and the amount of any fees. The rest are claims against the real estate agent related to the duty of information.[174]

2.5 Effects of the current crisis

- **Has mortgage credit been restricted? What are the effects for renting?**

The number and volume of mortgages granted have decreased mainly due to credit restrictions imposed by financial institutions. Mortgage loans granted to acquire dwellings experienced an exorbitant increase between 1992, when 43.471 billion Euros in credits were managed, and 2006, when 519.224 million were granted, as reflected in Figure 7. 2005 reflects the highest year-on-year increase in the period 1992-2011, with a rate of 33.7%. However, since the beginning of the financial and real estate crisis (2007), the volume of mortgage loans has considerably decreased,

[170] Taking as a starting point the definition that can be found in art. 55.1 of the catalan LDVC.
[171] As regulated in the Ley 10/2003, de 20 de mayo, de medidas urgentes de liberalización en el sector inmobiliario y trasportes (BOE 21/05/2003 núm. 121), which modifies art. 3 of Real Decreto ley 4/2000, de 23 de junio (BOE 24/06/2000 núm. 151), in order to recognise API access, but allowing anyone to exercise this activity.
[172] Which is regulated by the rules of each autonomous region under its exclusive competence, according to art. 149.1.30 CE. Subisidiarily it will be governed by the Real Decreto 1294/2007, de 28 de septiembre, por el que se aprueban los estatutos generales de los colegios oficiales de agentes de la propiedad inmobiliaria y de su Consejo General (BOE 03/10/2007 núm. 237).
[173] Regulated in the Decreto 12/2010, de 2 de febrero, por el que se regulan los requisitos para ejercer la actividad de agente inmobiliario (DOGC 09/02/2010 núm. 5563).
[174] See 'La intermediación del agente inmobiliario en las compraventas,' *EL DíA,* 29 April 2007 <www.eldia.es/2007-04-29/vivir/vivir17.htm>, 15 December 2012.

the year-on-year rate (-0.6%) being negative in 2011 for the first time in all the entire period of time studied.

Financial difficulties and a drop in sales have impacted favourably on the tenancy market,[175] both in terms of housing demand (although in many cases it is a forced and not a freely chosen type of tenure) and in terms of housing supply, since the landlords-investors, faced with the impossibility of selling the dwellings, decide to rent them. However, arrearage becomes one of the landlords' main concerns, which tightens housing access conditions by establishing additional guarantees to the legal ones in order to ensure rent payment, as has been already mentioned above.

Figure 7. Outstanding amounts on the balance sheet (millions of Euros) in credits for housing acquisition[176]

PERIOD		Credit institutions				Credit financial institutions
	TOTAL	Total	Banks	Savings Bank	Cooperatives	
1992	**43.471,2**	*41.379,9*	16.819,2	22.883,3	1.677,4	2.091,2
1993	**50.725,5**	*50.486,7*	21.488,4	27.007,6	1.990,8	238,7
1994	**61.012,8**	*60.680,0*	25.234,8	32.829,3	2.615,9	332,9
1995	**69.611,1**	*69.274,3*	27.975,2	37.950,0	3.349,1	336,9
1996	**81.584,1**	*78.669,6*	31.715,1	42.915,9	4.038,6	2.914,5
1997	**101.401,9**	*98.642,2*	39.679,7	53.824,3	5.138,3	2.759,7
1998	**117.469,7**	*114.785,8*	44.350,9	63.982,4	6.452,5	2.683,9
1999	**138.699,3**	*135.819,5*	53.902,8	74.222,8	7.693,9	2.879,8
2000	**169.266,5**	*166.511,7*	68.997,0	88.470,6	9.044,1	2.754,8
2001	**197.175,3**	*194.185,4*	78.229,1	105.165,9	10.790,4	2.989,9
2002	**228.902,2**	*225.562,9*	86.769,1	126.815,5	11.978,3	3.339,3
2003	**263.174,3**	*258.390,2*	102.039,1	141.965,1	14.385,8	4.784,2
2004	**317.250,0**	*311.951,1*	124.330,8	171.131,7	16.488,6	5.298,9
2005	**424.220,0**	*418.441,9*	166.603,6	229.058,1	22.780,2	5.778,1
2006	**519.224,8**	*513.989,4*	199.826,5	286.475,4	27.687,4	5.235,4
2007	**590.580,2**	*583.795,6*	223.684,0	328.199,3	31.912,3	6.784,6
2008	**621.304,6**	*613.111,7*	236.848,1	341.911,5	34.352,1	8.193,0
2009	**624.733,7**	*616.486,1*	234.800,1	341.714,2	39.971,8	8.247,6
2010	**632.437,1**	*624.056,7*	239.247,9	343.457,7	41.351,2	8.380,4
2011	**626.607,9**	*613.840,1*	233.233,6	339.290,2	41.316,3	12.766,8

- **Indicate the current figures on repossession (seizures of houses in case of mortgage credit default of the buyer)? Have repossessions affected the rental market?**

From 2007 until the third quarter of 2012, 416,975 foreclosures were undertaken.[177] However, these data include not only mortgages on primary residences but also mortgages for commercial premises and other kinds of real estate, as well as secondary or subsequent residences. Although there are no official statistics on primary residence foreclosures, the Undersecretary of Economy and Competitiveness, Miguel Temboury, quantified them at approximately between 4,000 and 15,000.[178] In addition, it should be taken into account that the doubtful loans ratio

[175] In Catalonia the number of tenancy contracts signed has increased, in 2005 52.941 contracts were signed, 127,813 in 2011 and 32,993 in the first quarter of 2012. Consequently, since 2005 there has been an increase of over 45% in the number of tenancy contracts. 'Informe continúo sobre el sector de la vivienda en Cataluña', (Barcelona: Generalitat de Catalunya, 2012).

[176] Source: 'Anuario estadístico' (Madrid: AHE, 2011).

[177] See 'Datos sobre el efecto de la crisis en los órganos judiciales: datos estadísticos del tercer trimestre de 2012' (Consejo General del Poder Judicial, 2012) <www.poderjudicial.es>, 18 January 2013.

[178] E. García de Blas, 'El drama de las hipotecas abusivas' *El País,* 17 November 2012 <politica.elpais.com/politica/2012/11/16/actualidad/1353099253_599725.html#sumario_1>, 13 January 2013.

of mortgages on dwellings for housing purposes was 3.49%[179] in September 2012; therefore, more than 96% of Spanish families are meeting their payment duties under a mortgage.

At present, the main problem caused by the loss of the primary residence is the debt, which remains after the foreclosure and puts the debtor in a situation of socio-economic exclusion, sometimes for the whole his life. This is due to both the difficulty in selling the dwelling and the law, which allows the credit institution to assign it to itself for only 60% of its appraisal value when there is no bidder in the auction (article 671 Civil Procedure Act 1/2000; LEC, *Ley de Enjuiciamiento Civil*).

Finally, it is also noteworthy that the tenant is protected in the event of the foreclosure of the landowner´s mortgage, in accordance with article 13.1 LAU. In this way, if during the first five years of duration of the contract the lessor's right to the property is resolved by the forced alienation of the dwelling derived from a foreclosure, the lessee would be entitled, in any case, to continue living there until the five years have elapsed.

- **Has new housing or housing-related legislation been introduced in response to the crisis?**

We may highlight the following legislation:

a) The LEC was amended in 2011 in relation to the judicial procedure to follow against mortgage debtors.[180] Regarding the non-seizable minimum of the debtor´s estate, which used to be the SMI (641.40€), this is now set at 150% of this SMI, i.e. 962.1 Euros. It also increased from 50% to 60% the value by which the mortgaged property can be assigned to the financial institution when there is no bidder in the auction (art. 670.4 LEC).

b) The Code of good banking practices[181] is a voluntary affiliation convention that almost all financial institutions have adopted in 2012. Banks are invited to offer a debtor in special need 4 years period of grace, extension of the loan timeframe, release of 25% of the outstanding debt and an interest rate limited to Euribor + 0.25. It also stipulated the *datio pro soluto*. However, 12 months from the unsuccessful application of these solutions have to elapse (therefore, it is the last remedy available for mortgage debtors). However, these advantages are not completely effective because their benefits are limited to a very specific segment of debtors.

c) The Society of Asset Management from Bank Restructuring (SAREB, *Sociedad de Gestión de Activos Procedentes de la Reestructuración Bancaria*)[182] was created in 2012 and is a sort of "bad bank". It will purchase toxic assets from banks at discount to resell them at a profit. This is supposed to be a solution to sell the significant amount of housing stock that remains in the banks´ hands after the bubble burst.

[179] 'Tasa de dudosidad hipotecaria para el tercer trimestre de 2012' (Madrid, AHE, 2012), 3.
[180] Real Decreto-ley 8/2011, de 1 de julio, de medidas de ayuda a los deudores hipotecarios (BOE 07/06/2011 núm. 161).
[181] Regulated by the RLD 6/2012.
[182] According to Real Decreto-ley 12/2012, de 30 de marzo, por el que se introducen diversas medidas tributarias y administrativas dirigidas a la reducción del déficit público (BOE 31/03/2012 núm. 78). <www.sareb.org>, 16 December 2012.

d) The measures adopted by the RDL 27/2012[183] consist of the suspension of evictions until 16th November 2014. However, the applicant of this measure must fulfil very specific requirements. Therefore, a large portion of the affected population remains outside of its application. It is considered a palliative and urgent response to the most dramatic situations, and it is directed to the most vulnerable groups, such as large families, single-parent families with children under three, without unemployment benefits or with disabled members. Furthermore, when these families have been evicted after January 1rst, 2008, they may apply for the so-called "social housing fund", which is also regulated in this RDL.

e) The LMFFMAV is aimed at protecting the landlord's interests in order to promote rental housing. However, the reduction of the compulsory minimum time extension, the lessor's possibility of increasing the rent without limits or the possibility by the lessee to waive the right of pre-emption, 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 the lessee nor facilitate his/her access to decent and adequate housing.

f) Act 1/2013[184], of 14 May, on measures to strengthen the protection of mortgage debtors, debt restructuring and social rent, has been approved. This law lays down several measures, among which we should highlight the following: default interest is limited in mortgage loans on primary residences to three times the legal interest; it also prohibits the capitalization of these interests; the strengthening of the extrajudicial sale of the mortgaged property; the Notary is allowed to suspend the mortgage procedure if the parties have claimed before the competent court that the mortgage loan included unfair contract terms; the Judge is able to assess the existence of unfair contract terms, either *ex officio* or at the request of a party (as a consequence of the STJCE of 14th May 2013)[185]; it establishes that the appraisal value for the auction shall not be less than 75% of the appraisal value used for granting the mortgage loan; finally, the law strengthens the appraisal companies' independence from credit institutions. It also amends RDL 6/2012, in particular its scope of application and the characteristics of the measures that can be adopted.

2.6 Urban aspects of the housing situation

- **What is the distribution of housing types in the city scale (e.g.: are rented houses mainly in the city centres and owner occupied in the suburbs?) vs. the region scale (e.g.: more rented houses in the big cities, less in the villages?)**

In Spain, Cantabria, the Basque Country and Castilla - La Mancha have the highest home ownership rates. In contrast, for the immigrant population home ownership is more frequent in Canaries, Valencia and Melilla. The difference lays both in the disparities of residential strategies between natives and immigrants, and in the access difficulties of each community due to housing prices.[186]

[183] Real Decreto Legislativo 27/2012, de 15 de noviembre, que introduce las medidas urgentes para reforzar la protección de los deudores hipotecarios (BOE 16/11/2012 núm. 176). And Resolución de 29 de noviembre de 2012, del Congreso de los Diputados, por la que se ordena la publicación del Acuerdo de convalidación del Real Decreto-Ley 27/2012 (BOE 08/12/2012 núm. 295).
[184] Ley 1/2013, de 14 de mayo, de medidas para reforzar la protección a los deudores hipotecarios (BOE 15/05/2013 núm. 116).
[185] STJCE 2013\89.
[186] See figure 6.

The largest proportion of tenancies is found in regions with strong agricultural production, such as Aragón, Extremadura, Murcia and La Rioja, probably because seasonal work requires a greater flexibility with regard to the location of one's permanent residence.[187]

In principle, tenancy is typical for people who have not defined their home project yet, those who have no resources to acquire a dwelling or those who have a passing or temporary residence situation. That is why tenancy has been concentrated, on the one hand, in the central districts of large cities, especially with the first waves of immigrant population, due to the low price and deteriorated condition of these dwellings, although this may change depending on the urban centres' rehabilitation situation; and on the other hand, in high income areas of urban peripheries where the displaced professionals go.[188]

As dwellings in central areas are saturated and their rents rise, housing demand is moving to the periphery, following the so-called *Doughnut effect*. It implies that intermediate neighbourhoods between the centre and the periphery would have, in general, lower proportions of households with low residential mobility.[189]

- **Are the different types of housing regarded as contributing to specific, mostly critical, "socio-urban" phenomena, e.g. ghettoization and gentrification**

As we have already seen, the percentage of immigrants from developing countries living through tenancy is very high. It has influenced the "socio-urban" phenomena, creating their own patterns of behaviour, and tending to concentrate in areas of low rental prices, which are often affected by situations of deterioration or lack of essential elements. All this has given rise to the creation of ghettos in these areas of low cost rentals.[190]

It is also more common to have problems with overcrowding in the dwellings of the immigrant population. The overcrowding rate between foreigners coming from developing countries was 22.21% in 2007, while it stood at 2.17% for the native population.[191] Thus, renting rooms, in which an entire family may live within a dwelling, is becoming more widespread. In 2010 the demand for rooms for rent increased by up to 90%.[192]

In addition, we must take into account that in Spain, with a 21.1% poverty rate, these overcrowding situations are accentuated, which lead in many cases to substandard housing, particularly for groups at risk of social exclusion, such as poor people,

[187] As set out by J. Leal & A. Alguacil, 'Vivienda e inmigración', 135-136.
[188] Ibid, 129.
[189] S. Arbaci, '(Re) Viewing ethnic residential segregation in southern European cities: housing and urban regimes as mechanisms of marginalization' *Housing Studies* 23 (4), (Taylor & Francis, 2008): 589-613.
[190] J. Leal & A. Alguacil, 'Vivienda e inmigración', 129.
[191] According to the *Encuesta Nacional Sobre Inmigración y la Encuesta sobre Condiciones de Vida* 2007, <www.ine.es>, 30 November 2012.
[192] For more detail, see H. Simón Moreno, 'Propuestas de regulación para habitar parcialmente una vivienda' en *El acceso a la vivienda en un contexto de crisis*, ed. S. Nasarre Aznar (Madrid: Edisofer, 2010), 227.

single-parent families, elderly people over 65 years old or victims of gender-based violence.

Consequently, we must highlight two factors: a) on the one hand, in Spain there has been a progressive accumulation of housing with a public task for vulnerable collectives, due to both zoning and ordinances that do not facilitate the diversity of the supply in the same neighbourhood, and to public proceedings, medium or large scaled, that concentrate housing with a public task with the same size and price in order to accommodate the same type of households and social groups; b) on the other hand, there is also a progressive concentration of vulnerable groups in low rental areas, in central or peripheral ones, where in many cases substandard housing situations exist or have minimum conditions for habitability.[193]

Regarding gentrification, it does not occur evenly but in parts, in an economic and spatial restructuring context, such as the one that can currently be suffered by any medium-large city in Spain that tends to grow. However, we should highlight the phenomenon produced in the large cities centres, such as Madrid, in the Lavapiés neighbourhood, for example, and Barcelona, in the Raval neighbourhood for example, where two trends coexist in the housing market: the rental of flats in bad condition aimed at immigrants and the refurbishing of blocks intended for socially-economically well-placed groups, whether in the tenancy or home ownership regimes.[194] For example, in the Raval neighbourhood, rehabilitation has been driven, mostly, by the public sector since the end of the 80s, specifically by the Barcelona City Council and other administrations, which invested in the urban rehabilitation of the neighbourhood. And it was continued by the private sector initiative, promoting different operations of integral housing rehabilitation and new constructions that by their cost attract people with higher purchasing power than the majority of Raval's inhabitants.[195]

- **Do phenomena of squatting exist? What are their – legal and real world – consequences?**

We must be aware that as a result of the economic crisis, which began in 2007, illegal occupations increased considerably, as high unemployment rates and numerous housing evictions left many families homeless. In addition, it should not be forgotten that 20% of the Spanish housing stock are vacant dwellings, which often belong to financial institutions. According to data from the Prosecutor General's Office,[196] unauthorised buildings occupation has increased by 50%, and in Madrid 1,655 families occupied a dwelling last year, compared to 1,146 the previous year: this represents a rise of 44%.

Squatting is considered a crime as per article 245 of the Criminal Code (CP, *Código Penal*),[197] with a three to six months fine penalty. Conversely, it is also true that the legislator grants the "new" possessor of the property protection within the scope of

[193] J. Ponce Solé, *Poder local y guetos urbanos* (Madrid: Estudios Carles Pi i Sunyer, 2002), 97.
[194] M.A. Sargantal, *Gentificación e inmigración en los centros históricos: El caso del barrio del Raval en Barcelona*, Revista Electrónica de Geografía y Ciencias Sociales de la Universidad de Barcelona nº 94 (66), 2001.
[195] See S. Martínez Rigor, *El retorn al centre de la ciutat. La reestructuració del Raval entre la renovació i la gentrificació*. (Barcelona: Universitat de Barcelona, 2001).
[196] 'Memoria de la Fiscalía General del Estado 2012' <www.fiscal.es>, 18 January 2013.
[197] Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (BOE 24/11/1995 núm. 281).

Civil Law (art. 446 CC). Accordingly, the current LEC[198] provides in its article 250.2° possession protection under verbal proceedings.

2.7 Social aspects of the housing situation

- **What is (are) the dominant public opinion(s) towards certain types rental or tenure? (e.g. is renting considered as socially inferior or economically unsound in the sense of a "rental trap"?) In particular: Is only home ownership regarded as a safe protection after retirement?**

It is worth stressing that the popularity of one kind of property tenure over another is ideologically and culturally affected, and it depends on the economic, socio-political and legal circumstances that favour one or another option.[199]

Consequently, the preference for home ownership in Spain responds to a "*política de discriminación positiva neta hacia esta modalidad*" (net positive discrimination policy towards this modality)[200] that has generated the creation of a home ownership culture. Home ownership has been linked, contrary to tenancy, to values and meanings associated with stability, autonomy, confidence, peace of mind and privacy, and other psychosocial factors like self-esteem, personal fulfilment or pride. Comparative studies have pointed out that in countries such as Germany, with a broad and affordable tenancy market and a good legal coverage for lessees, tenants project these values onto their dwellings, these being values that are usually associated with home ownership in countries such as Spain, where it is the most common kind of property tenure.[201]

Ultimately, tenancy is deemed in Spain to be socially inferior to home ownership, and an economically unsound alternative as well. Tenants only rent until they can opt for home ownership: most tenants plan to buy as soon as they have sufficient income, a stable employment or certain marital stability.

- **What is the typical attitude of tenants towards different forms of tenure (e.g. owners of privatised apartments in former Eastern Europe not feeling and behaving as full owners)**

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, while job and/or conjugal stability and a sufficient income are achieved.

This kind of cyclical demand occurs mainly in the middle class and among young people, who believe that the purchase of dwellings requires hardly affordable requirements in the short to medium term given the current situation. However, the effort that the working class is willing to make is greater than that of the middle class (rich in cultural capital). The latter are less willing to waive certain tangible and intangible benefits in order to purchase a dwelling in the future.[202]

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[198] Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil (BOE 08/01/2000 núm. 7).
[199] As set out by M. Aramburu Otazu, *La resignificación de la tenencia de la vivienda en Cataluña*, 16.
[200] C. Trilla Bellart, *La política de vivienda en una perspectiva europea comparada*, 104.
[201] M. Aramburu Otazu, *La resignificación de la tenencia de la vivienda en Cataluña*, 16.
[202] Ibid., 72-73.

Surprisingly, home owners under a condominium consider themselves to be true home owners, despite the important costs and limits of use and alteration of the property that this type of tenure implies.

Summary table 3

	Home ownership	Renting **with a public task**	Renting **without a public task**
Dominant public opinion	Associated with stability, autonomy, confidence, peace of mind, privacy and personal fulfilment	Absence of these values of home ownership. Associated with temporary factors and instability	Absence of these values of home ownership. Associated with temporary factors and instability
Contribution to gentrification?	Main factor	Low impact	Low impact
Contribution to ghettoization?	Low impact	Main factor	Main factor

3 Housing policies and related policies

3.1 Introduction

- **How is housing policy related to the structure and concept of the (national) welfare state, to other welfare policies and the tax system?**

Spain was constituted as a Social State with the approval of the CE 1978. It created the so-called "Welfare State", which makes the State directly responsible for running those social policies that are needed to improve people's living conditions and to promote equal opportunities for citizens. The execution of all these benefits involves using a large amount of economic resources, to which citizens must contribute with their taxes. Thus, these public authorities' beneficial actions are limited by the available public resources and by the interpretation of the Welfare State at any given economic and political moment.[203]

In this regard, as we have seen before, housing policies in Spain have been mostly oriented towards enhancing the economic value of housing and not its social value. This is evident when we consider that Spain (48.5) is well below the European average in social spending on housing. Although social spending per person has increased, in 2007 that spending remained 147% below the average social expenditure per person in the EU-15 (120). This contrasts with policies such as the ones in the United Kingdom (426.3), France (205.5), Denmark (207.5) or Germany (173.7).[204]

Attempts have been made to reorient housing policies in view of the current situation: on the one hand, the PEFAV, which only governs protective actions for tenancies

[203] As set out by J. Jaria i Manzano, 'El derecho a una vivienda digna en el contexto social*',* 74-75.
[204] S. Borgia Sorrosal & A. Delgado Gil, 'Evolución de las políticas de vivienda en España. Comparativa con la UE-15' *Instituto de Estudios Fiscales*, 33 (2009): 35-36.

and rehabilitation, and on the other hand, through a change in fiscal policy, trying to equate the tax benefits of both regimes of property tenure.[205]

- **What is the role of the constitutional framework of housing? (in particular: does a fundamental right to housing exist?)**

Article 47 CE establishes the right to decent and adequate housing. It is located in Chapter III of Title I, which regulates the Guiding Principles of social and economic policy. Therefore, it is not provided for within the individuals' fundamental rights, while at the international level the right to housing has been incorporated into human rights, as an essential component of the individuals' fundamental rights. In fact, the right to housing is proclaimed in article 25 of the Universal Declaration of Human Rights of 1948 (UDHR). Nevertheless, under the Spanish Constitution it is a right of instrumental character, without which it would be impossible to guarantee the exercise of some of the basic civil rights, and especially those that are granted on the notion of human dignity. But, as it is not a fundamental right, it is neither directly brought before Ordinary Courts[206], nor before the Constitutional Court.[207] Its recognition as a Guiding Principle involves the application of the guarantees system of article 53 CE, which determines that Guiding Principles may only be alleged before the ordinary courts in the context of the legal provisions by which they are developed. Therefore, the Spanish Constitution highlights the importance given by the constitutional regulation to the implementing legislation as an essential instrument to materialize the right to housing, being subject to specific obtainment by the citizen.[208]

However, as in the case of health protection (art. 43 EC) and environmental protection (art. 45 EC) regulations, the enjoyment of a decent and adequate housing is expressly considered as a right. Thus, and in accordance with their exclusive competence on housing, some Autonomous Communities have given greater regulatory value to it, collecting it within a catalogue of rights and not only as a guiding principle of public policies. Some examples are article 26 Statute of Autonomy of Catalonia 2006 (EAC, *Estatuto de Autonomía de Cataluña*), article 16 of the Statute of Valencia 2006 and article 22 of the Statute of the Balearic Islands 2007.[209] Furthermore, Catalonia provides a regime by which it should be declared contrary to the Statute (by the binding opinion from the Council of Statutory Guarantees, *Consejo de Garantías Estatutarias*) if the legislator breaches the mandate provided in article 26 EAC (art. 38.1 EAC), and it should give rise to judicial control over the acts of development of such legislation that involves an open infringement of that right (art. 38.2 EAC).[210] In this regard, RUIZ-RICO RUIZ[211]

[205] The latest modifications of the first and seventh paragraphs of art. 68 of LIRPF, were introduced by arts. 67 and 68 of the Ley 39/2010, de 22 de diciembre, de Presupuestos generales del Estado para el año 2011 (BOE 23/12/10 núm. 311).
[206] Judgement of the Supreme Court (STS, *Sentencia del Tribunal Supremo*) 31 January 1984 (RJ 1984/495) and 19 April 2000 (RJ 2000/2963).
[207] In this sense, ATC 20 July 1983 (RTC 1983/359) and ATS 4 July 2006 (JUR 2006/190875).
[208] J. Muñoz Castillo, *Constitución y vivienda* (Madrid: Centro de Estudios Políticos y Constitucionales, 2003), 18-20.
[209] Regulated in the Ley Orgánica 6/2006, de 19 de julio, de reforma del Estatuto de Autonomía de Cataluña BOE 20/07/2006 núm. 172), Ley Orgánica 5/1982, de 1 de julio, Estatuto de Autonomía de la Comunidad Valenciana (BOE 10/07/1982 núm. 164) y Ley Orgánica 1/2007, de 28 de febrero, de reforma del Estatuto de las Illes Balears (BOE 01/03/2007 núm. 52), respectively.
[210] As set out by F. López Ramón, 'Sobre el derecho subjetivo a la vivienda' en *Construyendo el derecho a la vivienda* (Madrid: Marcial Pons, 2010), 14-15.

considers that these autonomous communities have a subjective right to housing guaranteed by their statutes, because the competent judges and courts may protect it. However, the ruling of the TC on June 28th 2010 points out in its legal basis 15[212] that "*los Estatutos de Autonomía no pueden establecer por sí mismos derechos subjetivos en sentido estricto, sino directrices, objetivos o mandatos a los poderes públicos autonómicos*" ("the Statutes of Autonomy shall not establish themselves subjective rights in the strict sense, but guidelines, objectives or mandates to the autonomous public authorities").

As JARIA I MANZANO[213] emphasizes, the regime of guarantees contained in article 53.3 CE in relation to article 47 CE has left a wide margin of manoeuvre to public authorities, and particularly to the legislator, since they are commissioned to design public policies and approve regulations leading to a more efficient right to housing. Nevertheless, Jaria thinks that article 47 CE establishes a duty to provide the conditions for housing access, and that therefore, the Constitutional Court could determine the incompatibility of any infra-constitutional regulations if these were manifestly contradictory to the CE. Consequently, he recognizes that once the regulatory control is performed, it should be extended to the control of the regulatory powers and the Administration actions.[214] This could occur, for example, if an administrative act involving an unfair eviction was issued. In such a way, it is also manifested in Agenda 21 of the United Nations Conference on environment and development 1992,[215] and in the Commission on Human Rights in 1993,[216] which qualifies unfair evictions as fragrant violations of human rights.[217]

3.2 Government actors

- **Which levels of government are involved in housing policy (national, regional, local); what are they called; how many are there of each?**

Housing and its legal development are based on the mandate of article 47 CE, which is addressed to public authorities, including the Administration of the State (art. 149.1.1 CE), the administration of the 17 Autonomous Communities and the cities of Ceuta and Melilla, which have the exclusive competence on housing (art. 148.13 CE),[218] and the Local Administration as well.

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[211] G. Ruiz-Rico Ruiz, 'La vivienda como derecho social y material competencial en los nuevos estatutos de autonomía', en *Dret a l'habitatge i servei públic d'allotjament català?* (Barcelona: Departament d'Interior, Relacions Institucionals i Participació, Institut d'Estudis Autonòmics de la Generalitat de Catalunya, 2009), 58.

[212] (RTC 2010\31).

[213] J. Jaria i Manzano, 'El derecho a una vivienda digna en el contexto social', 75-77.

[214] It is based on arts. 9.1 and 106 CE, as well as arts. 6 and 8 of the Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (BOE 02/07/1985 núm. 157) and art. 53.2 of the Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (BOE 27/11/1992 núm. 285).

[215] According to paragraphs 7(6) and 7(9.b) of the Agenda 21.

[216] Resolución 1993/77 de la Comisión de Derechos Humanos, 10 March 1993.

[217] As set out by the advisor to the United Nations Special Rapporteur on the Right to Food, Christophe Golay, and the D Director of the CETIM's Human Rights Programme and permanent representative of the CETIM to the United Nations, Melik Özden, with regard to the right to housing.

[218] Judgement of the Constitucional Court (STC, *Sentencia del Tribunal Constitucional*) 4 November 1982, FJ. 2 (RTC 64/1982) establishes that art. 53.3 CE comprises both national and regional legislation.

Within Local Administration, City Councils have the competence on housing according to articles 25.2 and 28 of Act 7/1985.[219] According to data provided by the INE, Spain had 8,114 municipalities in January 2010, which may perform actions on housing. In addition, there are also the 41 Provincial Councils and another 41 County Councils (*Consells Comarcals*) in Catalonia, which may be responsible for the pooled management of the smallest municipalities through agreements with the Autonomous Communities and City Councils.

- **Which level(s) of government is/are responsible for designing which housing policy (instruments)?**

According to the separation of powers, the Autonomous Communities shall develop housing regulations in the exercise of their exclusive competence recognised by article 148.13 CE and their own Statutes of Autonomy.

Nevertheless, due to the State's transversal competences, recognised in articles 149.1.11 and 13 CE, the State can develop the basic rules that, as a matter of general organisation of the State, impose conditions on the autonomous communities' legislative development. In this sense, the State has competences in credit management, in the general planning of economic activity and, above all, in the conditions that safeguard the real and effective equality of citizens' living conditions, regardless of their personal circumstances and aside from their administrative neighbourhood. This is possible as long as the design and implementation of autonomous public authorities' policies are not obstructed.[220]

Accordingly, the State may define protectable actions and financing modalities, mainly through the State Housing Plans.[221] However, the autonomous communities may also regulate public housing schemes, including substantive aspects and autonomic financing modalities.[222]

Local Corporations govern public development on municipal land and their own subsidies through Local Housing Plans and Orders, respectively.

- **Which level(s) of government is/are responsible for which housing laws and policies?**

The Autonomous Communities are responsible for executing housing policies by managing land development, public aids and subsidies included in the State Housing Plan. However, it should not be forgotten that the State Housing Plan basically

[219] Ley 7/1985, de 2 de abril, reguladora de las bases de régimen local (BOE 03/04/1985 núm. 80) (LBRL).
[220] As set out by G. Ruiz-Rico Ruiz, *El derecho Constitucional a la vivienda. Un enfoque sustantivo y competencial*, (Madrid: Ministerio de Vivienda, 2008), 48, 72.
[221] State regulation of housing, which will apply subsidiarily to the regional rules, is the Real Decreto-Ley 31/1978, de 31 de octubre, sobre política de vivienda de protección oficial (BOE 08/11/1978 núm. 267) and its development through the Real Decreto 3148/1978, de 10 de noviembre (BOE 16/01/1979 núm. 14), which in its Final Dispositon lays down that in the matters not regulated by itself, the rules on protected public housing apply: Real Decreto 2960/1976, de 12 de noviembre, por el que se aprueba el texto refundido de la Legislación de Viviendas de Protección Oficial (BOE 28/12/1976 núm. 311) and the Decreto 2114/1968, de 24 de julio, por el que se aprueba su Reglamento (BOE 07/09/1968 núm. 216).
[222] According to J. Muñoz Castillo, *Constitución y vivienda*, 47.

governs protected financing rules, making it necessary to qualify protected actions, process such matters and have administrate acknowledgment, which should be carried out by the Autonomous Communities according to their respective Statutes of Autonomy, approving their own Housing Plans and implementing their own public policies.

Furthermore, in order to make public policies contained in the aforementioned Housing Plans effective, it is necessary to implement these via the instrumentation of two types of conventions. On the one hand, the ones agreed between the State or any Autonomous Community with credit institutions, so as to set up essential financing measures. On the other hand, the conventions signed between the Ministry of Development and the autonomous communities themselves to ensure access to State Plan financing.[223]

Local Administrations should be included according to their competences in development and housing management, provision of social services, city planning and constitution of publicly-owned land heritages.[224] It is even recognised that municipalities can undertake complementary housing activities, which are normally a task ok public administrations.[225] For this reason, the figure of "*contractos-programa*" (contract programmes) is created: they are managed by municipalities, which facilitate the implementation of Housing Plans by the Autonomous Communities and improve the necessary cooperation and coordination between the different administrations (state, regional and local).[226]

3.3 Housing policies

- **What are the main functions and objectives of housing policies pursued at different levels of governance?**
- **In particular: Does the national policy favour certain types of tenure (e.g. rented housing or home ownership (owner-occupation)?**

Due to the current economic context, the objectives of the new State Plan 2013-2016 are directed at fulfilling two main functions: the promotion of tenancy as a way of housing tenure and the promotion of rehabilitation, regeneration and urban renewal. Therefore, the main targets, established in its Preamble, are:

a) To adapt the aid system to the current social needs and to the scarcity of resources available, concentrating them on two issues: the promotion of tenancy and the promotion of rehabilitation and urban regeneration and renewal.
b) To strengthen inter-administrative cooperation and coordination, as well as to encourage the co-responsibility in both financing and management.
c) To improve the quality of building construction and, in particular, its energy efficiency, universal accessibility and proper conservation.
d) To contribute to real estate sector reactivation from the two key issues stated above: the promotion of tenancy and the promotion of rehabilitation and urban regeneration and renewal.

[223] Ibid., 43-45.
[224] Art. 25.2.d) LBRL.
[225] Art. 28 LBRL.
[226] S. Borgia Sorrosal, *El derecho constitucional a una vivienda digna,* 124.

- **Are there measures against vacancies (e.g. fines or forced assignments of vacant houses)?**

At the State level, article 72.3 of the Local Revenue Authorities Act (LHL, *Ley de Haciendas Locales*)[227] entitles the City Councils to demand a surcharge of 50% in the final quota to be paid in property tax (IBI, *Impuesto sobre Bienes Inmuebles*) when it comes to real estate for residential purposes that is vacant permanently. However, this article is subjected to a regulatory development, which has never been carried out by the State and which is necessary for the application of the surcharge by City Councils[228].

In Catalonia, article 42.6 of the Right to Housing Act 18/2007 (LDVC, *Ley de Derecho a la vivienda*) granted public authorities the faculty to expropriate the usufruct of empty and underused dwellings in order to rent them, due to the failure to comply with their social function as per article 33.2 CE[229]. The aim of this rule was to provide housing access when the owners had their properties vacant, they had not accepted their use within any the existing social policies and the dwelling was located in a place of strong and proven demand. However, this figure has been repealed by the recent Act 9/2011[230], and, therefore, no action has been taken of its basis.

In the Basque Country, the draft legislation on the right to housing, of May 31st 2012, also regulates the compulsory expropriation of vacant dwellings in the aforementioned terms (art. 58), as well as when the owner fails to comply with the duty of conservation and rehabilitation (art. 71). In addition, it also grants the municipalities the authority to charge a fee for vacant housing (art. 57).

- **Are there special housing policies targeted at certain groups of the population (e.g. elderly people, migrants, Sinti and Roma etc)?**

In the constitutional framework, article 50 CE lays down the public authorities' duty to address the elderly population's specific problems as regards housing, culture and leisure. Moreover, a contextual approach to the Constitution reveals that it also gives a specific protection to both young (art. 48 CE) and disabled people (art. 49 CE)[231]. Some statutes of autonomy also establish this right for specific groups. For example, the EAC recognises the right to decent and adequate housing for persons who do not have sufficient resources. However, this general clause leaves a wide margin of interpretation, and it will be the legislation implementing the clause which shall determine at any given time the social groups that are considered worthy of protection due to their socio-economic situation[232]. As NASARRE AZNAR[233] points out, article 26 EAC does not make clear which subjects deserves decent and

[227] Real Decreto Legislativo 2/2004, de 5 de marzo, por el que se aprueba el texto refundido de la Ley Reguladora de las Haciendas Locales (BOE 09/03/2004 núm. 59).
[228] STSJC 19 November 2004 (JUR 2004\1188).
[229] See in more detail, S. Nasarre Aznar, 'La insuficiencia de la normativa actual sobre acceso a la vivienda', 150-155 and A. Vaquer Aloy, 'La expropiación temporal del usufructo de viviendas desocupadas en la ley catalana del derecho a la vivienda' *Revista General de Legislación y Jurisprudencia,* 1 enero-marzo (2009), 133-178.
[230] Ley 9/2011, de 29 de diciembre, de promoción de la actividad económica (BOE 14/01/2012 núm. 12).
[231] G. Ruiz-Rico Ruiz, *El derecho Constitucional a la vivienda*, 30-32.
[232] As set out by G. Ruiz-Rico Ruiz, 'La vivienda como derecho social y material', 56-58.
[233] S. Nasarre Aznar, 'La insuficiencia de la normativa actual sobre acceso a la vivienda', 120.

adequate housing, because it does not clarify whether those who already have the resources needed may also exercise this right.

The PEFAV 2013-2016 refers to the protection of the most vulnerable groups, but only gives protection as regards tenancy to those groups whose income is below three times the IPREM (IPREM= about 645€ in 2013). Conversely, art. 2.1 of the PEVR 2009-2012 established as preferential collectives for the Plan young people between 18 and 35 years old and legally emancipated minors, elderly people over 65 years old, women who are legally recognised as victims of gender violence, victims of terrorism, legally recognised dependent or disabled people and families who care for them, people legally separated or divorced, and both homeless people and those left over after the eradication of shanty towns; as well as other groups at risk of social exclusion determined by the Autonomous Communities and the cities of Ceuta and Melilla.

3.4 Urban policies

- **Are there any measures/ incentives to prevent ghettoisation, in particular: mixed tenure type estates, "pepper potting" and "tenure blind"?**

Urban development plans are the legal instruments that should focus on promoting a territorial and social balance, as well as cohesion and social sustainability in fulfilment of the mandate of article 47 CE[234].

To do so, the Autonomous Communities have adopted the General Territorial Plans, which in turn are ordered by the corresponding Partial Territorial Plans, which are approved by the Local Corporations. These corporations are competent to regulate and impose control over land planning. However, this urban development planning, in many cases and for years, has been done without coordination with the neighbouring municipalities, focusing on the economic growth of the cities through housing construction and without taking into account the needs and problems considered as a priority by the citizens[235].

Some Autonomous Communities, on the basis of their competence on housing, have regulated the anomalous situations that may occur in a dwelling, such as overcrowding, substandard housing or permanent vacancy in order to set up inspection programs to control, eradicate and prevent them. Catalonia, for example, regulates these three phenomena for primary residences in articles 41 to 44 LDVC, excluding secondary residences[236].

In Spain, housing policy has traditionally tended to homogenize residential areas, bringing together in some urban areas those in need of housing, thereby favouring the creation of ghettos. And although nowadays there are rules that seek to counteract these effects, allowing a property-rental mix on the same property, or the

[234] As set out in Article 10.1.b) LS, for policy development of land reserves that are established.
[235] R. López de Lucio, 'Las condiciones de producción de vivienda en los espacios metropolitanos: tendencias actuales y líneas de actuación' en *La vivienda y espacio residencial en las áreas metropolitanas* (Sevilla: Centro de Estudios Andaluces, 2007), 121-123.
[236] For more details, see J. Ponce Solé, *El Derecho de la vivienda en el Siglo XXI: sus relaciones con la ordenación del territorio y el urbanismo* (Madrid: Marcial Pons, 2008), 463 et seq.

so-called “pepper potting”[237], in practice it is now when they are beginning to deliver the foreseen results, because of the difficulties in selling such properties. For example, although the LVC recognises the possibility of qualifying developments in which various types of social housing coexist (art. 80.4), in practice, very few developments containing several regimes have been made. It is basically due to the fact that once developers satisfy the land price according to a particular regime, although they could change the housing regime for groups with lower incomes than the qualified one, this would involve for them a reduction in profits, since the reference prices of the new regimes would be lower. As this has been regulated as a non-compulsory policy, these measures have not been glimpsed with clarity until the difficulties in selling houses started to be seen.

- **Public authorities “seizing” apartments to be rented to certain social groups. Other “anti-ghettoisation” measures could be: lower taxes, making building permits easier to obtain or, in especially attractive localisations - as a condition to obtain a building permit, and the condition of a city contribution to technical infrastructure.**

Regarding taxes, some benefits for certain groups are the following:

- In the IBI, which is a local tax, there is a mandatory tax rebate of 50% for the VPO and, moreover, it is established that municipalities may agree a rebate of up to 90% for taxpayers with large families (3 or more children)[238].

- Regarding the Tax on Constructions, Installations and other Works, it is laid down that municipal ordinances may agree a tax rebate of 50% for the VPO and up to a 90% for works that favour access and habitability conditions for disabled people[239].

- It must be taken into account that the Autonomous Communities may agree other rebates in respect of taxes transferred to them by the State. For example, in the tax on property transfers, Catalonia establishes a reduced rate of 5% for large families and disabled people[240].

Furthermore, from July 1st, 2009 the so-called social bond (*bono social*) has been in force, whose main advantage is a freeze on electricity prices for domestic consumers that make use of the Last Resort Tariff (*Tarifa de Último Recurso*) in their primary residence. It applies to retirees over 60, large families and those in which all family members are unemployed; as long as the contracted power is lower than 3 kW[241].

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[237] For instance, it is established like this in art. 100.3 LVC, which lays down the following: “para garantizar una mixtura social efectiva en las promociones de viviendas de protección oficial, las condiciones de adjudicación concretas en cada promoción deben establecer sistemas que aseguren que la composición final de los adjudicatarios sea la más parecida a la de la estructura social del municipio, distrito o zona, tanto en lo que se refiere al nivel de ingresos como al lugar de nacimiento, y que eviten la concentración excesiva de colectivos que puedan poner la promoción en riesgo de aislamiento social”.

[238] Arts. 73 and 74.4 LHL.

[239] Arts. 103.2 .d) and e) LHL.

[240] Arts. 5 and 6 of the Ley 21/2001, de 28 de diciembre, de Medidas Fiscales y Administrativas (DOGC 31/12/2001 núm. 3543).

[241] Real Decreto-ley 6/2009, de 30 de abril, por el que se adoptan determinadas medidas en el sector energético y se aprueba el bono social (BOE 07/05/2009 núm. 111).

- **Are there policies to counteract gentrification?**

A common practice in the gentrification processes is real estate mobbing, to which are subjected the most disadvantaged residents, usually tenants under an old rental regime (subject to LAU 1964) who live in dwellings in poor condition. The owners, who want to coerce them actively and passively so that they are forced to abandon the dwelling, do not repair these dwellings. Then owners may rehabilitate or transform them into apartments to increase the price per square metre of the dwelling[242].

To counteract the gentrification processes, there was an amendment to article 173.1 CP in 2010, to criminalise real estate mobbing due to its proliferation in the last decade[243]. It is punishable with six months to two years imprisonment.

- **Are there any means of control and regulation of the quality of private rented housing or is quality determined only by free market mechanisms? (does a flat have to fulfil any standards so that it may be rented? E.g.: minimum floor area, equipment, access to technical and/or social infrastructure and/or public transport, parameters such as energy efficiency, power/water consumption, access to communal services such as garbage collection. If so: how are these factors verified and controlled?)**

The terms "decent" and "adequate" that are used in article 47 CE are undetermined legal concepts[244] covering, on the one hand, the minimum habitability conditions that a dwelling must comply with (because it is the place where the personal and family life unfolds), and, on the other hand, its environment, such as its location, communications, services and public facilities, that is to say, its integration into the urban context[245].

Requirements of habitability, health and hygiene, sustainability, comfort, spatial dimension, durability, security, energy saving, quality, economic aspects, etc., are regulated nowadays mainly in Act 38/1999[246] and in Royal Decree 314/2006[247], which are the regulatory framework that establishes the basic quality requirements of both buildings and their facilities to allow them to be functional, safe and habitable[248].

However, the Autonomous Communities, according to their competence on housing, also develop quality standards for the housing stock. For example, the Generalitat de Catalunya, in order to encourage the rehabilitation of dwellings and the prevention of overcrowding or substandard situations,[249] has started several support actions. In

[242] Real Decreto-ley 6/2009, de 30 de abril, por el que se adoptan determinadas medidas en el sector energético y se aprueba el bono social (BOE 07/05/2009 núm. 111).
[243] As set out by section IX of the preamble of the Ley Orgánica 5/2010, de 22 de junio, por la que se modifica el Código Penal (BOE 23/06/2010 núm. 152).
[244] STS 17 July 1990, FJ. 7 (RJ 1990/6566).
[245] According to J. Muñoz Castillo, *Constitución y vivienda*, 152.
[246] Ley 38/1999, de 5 de noviembre, de Ordenación de la Edificación (BOE 06/11/1999 núm. 266).
[247] Real Decreto 314/2006, de 17 de marzo, por el que se aprueba el Código Técnico de la Edificación (BOE 28/03/2006 núm. 74).
[248] As set out by F. López Ramón, 'Sobre el derecho subjetivo a la vivienda', 21.
[249] It approves inclusion and accommodation programs in section 5th of the Chapter II on housing programs, and rehabilitation programs in Chapter III PDVC.

addition, Catalan law also allows municipalities to define more stringent quality standards, so that the standards legally established are only a minimum.[250]

In relation to leased dwellings, the LAU requires that the habitability requirement of the building must exist when the contract is concluded, and it has to be maintained during its term of validity, essentially at the expense of the lessor (arts. 2.1, 21.1, 26 LAU). Nevertheless, there should be no obstacle to the parties agreeing that the works or repairs are be carried out by the lessee, even though the habitability is achieved after the signing of the contract[251]. In the foreseen reform of LAU 2013 there is a specific provision for this: "payment for rehabilitation", that is, the tenant, instead of paying a rent, rehabilitates the dwelling. Loss of the dwelling's fit state for habitation will be just cause for the suspension of the tenancy contract, and it is the lessor's responsibility to undertake the necessary works to bring the dwelling back to a state fit for habitation (art. 26 LAU); unless this loss is due to the building being declared to be in a state of ruin by the competent authority, in which case the contract shall terminate (art. 28.b LAU)[252].

Quality conditions are controlled through the obtaining of a public certification called "certificate of habitability", which must be renewed periodically, or through the municipal licence of first occupation, the technical inspection of buildings and building permits.

The certificate of habitability serves to evidence the habitable condition of the dwelling and the soundness of the building, and to control that the conditions for habitability remain in place. It is compulsory for all dwellings in the Autonomous Communities that regulate it, and it is required to lease or alienate the dwelling and to contract water, gas, electricity and telecommunications supplies[253]. Nevertheless, there are Autonomous Communities that for such procedures only require the municipal licence of first occupation, when they are newly built dwellings or for those that have been enlarged or reformed[254]. However, obtaining the "final qualification" is required for subsidised housing, which replaces the certificate of habitability in terms of compliance with these requirements.

[250] J. Jaria i Manzano, 'El derecho a una vivienda digna en el contexto social*',* 85.

[251] This supposition differs from the one where being the habitability requirement initially nonexistent, the tenant unilaterally decides to convert the building into habitable through works by altering the physical structure, as the consent of the parties to conclude the tenancy contract did not take as a starting point that the dwelling had to meet the permanent housing need of the lessee because the building did not have the habitable condition.

[252] As set out by Guilarte Zapatero, V., 'Artículos 1 a 8' en *Comentarios a la ley de arrendamientos urbanos*, ed. X. O'Callaghan (Madrid: Editoriales de Derecho Reunidas, 1995), 62-64.

[253] It is regulated for instance in Catalonia in the Decreto 141/2012, de 30 de octubre, por el que se regulan las condiciones mínimas de habitabilidad de las viviendas y la cédula de habitabilidad (DOGC 02/11/2012 núm. 6245), La Rioja in the Decreto 51/2002, de 4 de octubre, por el que se regulan las condiciones mínimas de habitabilidad que deben reunir las viviendas, así como la concesión y control de las cédulas de habitabilidad (BOLR 31/10/2002 núm. 132), or in Canary Islands in the Decreto 117/2006, de 1 de agosto, por el que se regulan las condiciones de habitabilidad de las viviendas y el procedimiento para la obtención de la cédula de habitabilidad (BOC 18/08/2006 núm. 1150).

[254] Such as Galicia for example, as provided in art. 43 of the Ley 8/2012, de 29 de junio, de vivienda de Galicia (BOE 08/09/2012 núm. 217).

In the praxis, some irregularities have been detected in relation to granting and issuing of certificates of habitability[255].

The technical inspection of buildings (ITE, *inspección técnica de los edificios*) is a preventive technical control, by which buildings are subject periodically to the revision of a number of elements affecting the safety of the property's and of the people inhabiting it. ITE are regulated by article 8 of the RDL 8/2011 and by the different autonomous regulations and Municipal Ordinances that determine the inspection conditions.

- **Does a regional housing policy exist? (in particular: are there any tools to regulate housing at a regional level, e.g.: in order to prevent suburbanisation and periurbanisation? Is it possible to distribute local taxes so that villages can afford the limitation of housing areas?)**

In accordance with local competences on housing, which have been already discussed, municipalities participate in the Housing Plans' protected actions with regard to the priority development areas, integral rehabilitation areas, urban renewal areas, aid to shanty town eradication and promotion of accommodations for especially vulnerable groups or other specific groups on land belonging to municipal authorities[256].

They may also establish their own Local Housing Plans, according to the rules enacted by each Autonomous Community. These shall contain specific actions to develop depending on the municipality's own needs, encouraging the historic centres' rehabilitation and the integral regeneration of neighbourhoods inhabited by people with scarce resources to facilitate their social integration. Local Housing Plans shall be based on studies of housing demand in the municipality, which allow the population's needs to be identified[257].

3.5 Energy policy

- **To what extent do European, national and or local energy policies affect housing?**

At a European level, the objectives of energy savings that States need to reach have been established, and they would have to reach 20% of EU energy consumption in 2020[258]. Furthermore, a set of rules that intend to protect consumers concerning the

[255] For example, the Ministry of Environment and Housing of Catalonia has referred to the Prosecutor of the High Court of Justice of Catalonia to investigate the existence of criminal liability arising from the performance of the technicians of the Delegation of Tarragona, as their indications have revealed that officials granted the said certificates in exchange for money and without the ordinary inspection. See 'Expedientan a cinco funcionarios de la Generalitat por irregularidades al conceder cédulas de habitabilidad' *El Periódico,* 2 de agosto de 2010, <www.elperiodico.com/es/noticias/sociedad/20100802/expedientan-cinco-funcionarios-generalitat-por-irregularidades-conceder-cédulas-habitabilidad/416970.shtml>, 09 January 2013.

[256] According to the preamble of the PEVR 2009-2012.

[257] B. Bueno Miralles, *Poliedro de la vivienda*, 241-244.

[258] Article 1 Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJEU 14.11.2012 Nº L 315/1).

energy sector has also been agreed: electricity[259], natural gas[260], heating and hot water in dwellings and buildings[261]. Thus, Royal Decree Law 13/2012[262], which transposes these regulations, establishes a single regulatory authority in the sector, the National Commission of Energy, and, moreover, it defines the vulnerable consumer entitling him to benefit from discounts on electricity consumption (the so-called "social bonus"). In addition, European legislation also regulates labelling and the basic information to be supplied to the users concerning electrical appliances for domestic use, ovens, refrigerators, freezers, washing machines, dryers, dishwashers, air conditioning and TVs[263].

Especially in the field of energy, the use in buildings of energy coming from renewable sources has been promoted in order to limit greenhouse gas emissions, as well as to promote energy efficiency and to reduce pollution[264]. As will be covered in the second part of the questionnaire, the landlord or the seller is obliged to prove the energy efficiency of those dwellings and buildings to lease or to sell[265].

At a national level, article 63.1 of the PEVR 2009-2012 already recognised grants to subsidized housing developers if projects obtained an A, B or C energy rating[266]. Likewise, the PEFAV 2013-2016 establishes as eligible actions those conducive to reduce by 30% a block's energy demand. Some of these actions include the installation of solar panels to produce domestic hot water, the increase of thermal insulation, carpentry replacement and double glazing, implantation of air renewal systems with heat exchangers and the installation of mechanisms that favour water savings, as long as energy efficiency is proved (art. 19.3). Eligible blocks shall have at least 20 dwellings with a residential purpose[267], present serious structural or other kind of damages or be aimed entirely at renting for at least 10 years as of the time the assistance is received (art. 20). Furthermore, the elaboration of a report on energy efficiency and building conservation, signed by a qualified technician, is

[259] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (DOCE 14.8.2009 Nº L 211/55).
[260] Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJEU 14.8.2009 Nº L 211/94).
[261] Council Directive 1982/885/CEE of 10 December 1982 amending Directive 78/170/EEC on the performance of heat generators for space heating and the production of hot water in new or existing non-industrial buildings and on the insulation of heat and domestic hot-water distribution in new non-industrial buildings (OJEC 31.12.1982 Nº L 378/19).
[262] Real Decreto Ley 13/2012, de 30 de marzo de 2012, por el que se transponen directivas en materia de mercados interiores de electricidad y gas y en materia de comunicaciones electrónicas, y por el que se adoptan medidas para la corrección de las desviaciones por desajustes entre los costes e ingresos de los sectores eléctrico y gasista (BOE 31/03/2012 Nº 78).
[263] Regarding these standards' regulation, see *'European Directives Affecting Leases'*, of the third part of the questionnaire.
[264] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJEU 5.6.2009 Nº L 140/16), transposed by RDL 13/2012.
[265] See section 6.1 'Regulation on energy saving', of the secon part, *infra*.
[266] According to what is foreseen in the Decreto 47/2007, de 19 de enero, por el que se aprueba el procedimiento básico para la certificación de eficiencia energética de edificios de nueva construcción (BOE 31/01/2007 núm. 27).
[267] It is required that the 70% of the edificability is destined to residential purposes.

required. Consequently, a grant is requested both for the drafting of the report and for the above-mentioned protective actions[268].

Summary table 4

	National level	2nd level: Autonomous Communities	3rd level: Municipality
Policy aims	1. Inter-administrative cooperation and coordination. 2. Financing measures. 3. Rental and rehabilitation promotion. 4. Edification quality.	1. Housing Plan creation and definition: protective action qualification, or State Plan development. 2. Policy execution: public promotion and aid management.	1. Spatial planning. 2. Promotion and municipal aid management 3. Coordination between housing and social services. 4. Autonomous competences, management agreed by Convention.
Laws	1. Only basic regulation: - Economic planning. - Credit ordination. 2. And supplementary regulations.	Exclusive competence on housing: creation of housing laws and implementing regulation	Standards on spatial planning, housing promotion and management, and local taxation competences.
Instruments	1. Laws 2. Regulatory standards 3. PEFAV 2013-2016 4. Agreements between the State and the Autonomous Communities	1. Laws 2. Regulatory standards 3. Housing Plans 4. Agreements between the State and the Autonomous Communities	1. Orders 2. Local Housing Plans 3. Agreements-programmes between the Autonomous Community and the municipality

3.6 Subsidisation

- **Are, and if yes, to what extent, different types of housing subsidized in general (give overview)?**

The new State Housing Plan 2013-2016 subsidises dwellings for rented housing purposes, distinguishing between those leased for social rent and for rotation (it means that the eligibility requirements of the people receiving such subsidies are analysed from time to time; if they fail to comply with them, the dwelling is assigned to another household). And it also subsidises rehabilitation, regeneration and renovation of buildings. However, the Project does not disqualify housing with a public task for selling purposes, as the Autonomous Communities may voluntarily carry it out in the terms established in the fourth additional provision of the Plan. In this context, it can be understood that the Autonomous Communities and municipal entities may maintain subsidies for property developments for sale and rental with the right to buy.

- **Explain the different forms of subsidies for tenants, (certain) landlords and, if relevant, housing associations or similar entities acting as intermediaries**

[268] See section 3.6 on subsidies, *infra*.

(e.g. direct, by means of investment loans, tax privileges). Which level of government is competent to assign the subsidies? Is there a subjective right to certain subsidies or does the public administration have discretion in whom to assign the subsidy?

It must be taken into consideration that the State adopts a system of subsidies in the new PEFAV 2013-2016, which may be supplemented by the Autonomous Communities and Local Corporations, since they are competent to agree subsidies and aids according to their budgets. This aid scheme may be simultaneous or incompatible depending on the regulations governing such subsidies.

According to the State Plan 2013-2016, with regard to owners who want to lease their dwelling, they may request the following aids:

a) An aid may be received if dwellings under construction or rehabilitated are qualified as housing with a public task for tenancy purposes for a period of fifty years (art. 14). Administrations or public entities, non-profit entities and private companies with which the corresponding public administration constitutes a surface right for a period of 30 years may obtain such aid (art. 15). These housing developers may get a direct aid of 200€ per m2 of the housing built, with a limit of 20% of the edification cost and a maximum of 18,000 euros per dwelling; all this, regardless of the co-financing that may be provided by other public authorities (art. 16).

b) An aid may be applied for when it is aimed at improving the conservation and energy efficiency or ensuring the accessibility of the building (art. 19). A condominiums´ governing body may apply for this aid, as well as groupings of condominiums or unique owners of residential buildings that meet the requirements of article 20 (art. 21). The maximum amount eligible may neither exceed 12,000€ per dwelling and per 100 m2 of useful premises area nor exceed 30% of the total cost of the planned works, among other requirements (art. 22).

c) An aid may also be applied for to elaborate an evaluation report on the conditions of accessibility, energy efficiency and state of conservation of the buildings, before the end of the year 2014. The same previous aid beneficiaries may receive a direct subsidy, equivalent to a maximum amount of 50 euros for each of the dwellings in the building, and in no case can it exceed the amount of 500 euros, or the 50% of the report cost (art. 35).

d) Public or private entities that are awarded projects of regeneration or urban renewal may apply for aid to carry out works of building rehabilitation, urbanization and redevelopment of public spaces, and of buildings in replacement of demolished ones (art. 24 and 28). The maximum amount to subsidise cannot exceed 30% of the total budget, and there is a maximum of 12,000€ per rehabilitated home and 30,000€ for demolished housing substitution. Moreover, the part of the total subsidy that corresponds to temporary relocation may not exceed an average maximum amount per family unit to relocate of 4,000 euros per year, during the works and up to a maximum of 3 years (art. 29).

e) We should also take into account the privileges enjoyed by the SII and the FII, since they only pay 1% in Corporate Tax and are exempt from 95% of the Property Transfer Tax (ITP, *Impuesto de Transmisiones Patrimoniales*). Likewise, the SOCIMI

will benefit from an 85% social discount on Corporate Tax if the Flexibilization Measures in the Rental Sector Project are approved.

Regarding tenants:

a) They may apply for a rental aid, which remains subject to the presentation of the tenancy contract within thirty days of its formalisation if it was held before the contract disposal. Essential requirements are: the dwelling shall be intended for primary and permanent residence, family units shall have incomes below three times the IMPREM, and the rent shall not exceed 600€ per month (art. 10). An aid of up to 50% of the annuity that must be paid out for the rent of the primary residence shall be granted, with a maximum limit of 2,400€ per year and dwelling. These aids shall be paid monthly and shall be granted for a period of twelve months, extendable, at the interested party's request, up to a maximum of twice for the two separate periods of twelve months, or for the months which correspond until the deadline of 31st December 2017, as long as conditions indicated in article 10 are maintained (art. 11).

b) On the 31st December 2011, the Basic Emancipation Grant was suppressed for the year 2012[269]. It was a 210€ per month aid for young people between 22 and 30 years old with a regular source of income of six months before or after the request, which cannot exceed 22,000€ per annum. They must also be holders of a tenancy contract on a primary and permanent residence. A loan of 600€ to meet the contract deposit and 120€ for the guarantee constitution expenses may also be requested. This aid will still be received by young people who had already been recognised this right on the 31st December 2011, until its expiry after 4 years or until age 30, as long as they maintain the necessary requirements for obtaining it. However, from 15th July 2012 the amount has been reduced to 147€ per month[270].

- **Have certain subsidies been challenged on legal grounds (in particular: on the basis of competition law or budget law)?**

We should keep in mind that grants are conditional on the State budget, since article 2 of the PEFAV establishes that aid and grants will depend on budgetary availability.

Subsidies have been questioned on the basis of the breach of the principle of non-discrimination, when it benefits mostly certain groups, especially when it is considered that it is done in relation to nationality, benefiting for example nationals of Morocco or Romania, among others. In this regard, the European Court of Human Rights has determined that subsidies shall not incur discrimination when 'there is an objective and reasonable justification' in the differentiated treatment, seeking 'a legitimate aim' and 'there is a reasonable relation of proportionality between the means employed and the aim pursued'.[271]

- **Summarise these findings in tables as follows:**

Summary table 5

[269] Real Decreto-ley 20/2011, which repeals Real Decreto 1472/2007.
[270] According to art. 36.1 of the Real Decreto 20/2012, de 13 de julio, de medidas para garantizar la estabilidad presupuestaria y de fomento de la competitividad (BOE 14/07/2012 núm. 168).
[271] TEDH 11 September 2002 (Willis VS United Kingdom).

Subsidisation of landlord	Tenure type 1
Subsidy before start of contract (e.g. savings scheme)	1. Aid to qualify housing under construction or rehabilitation. 2. Aid to improve energy conservation or to guarantee the accessibility to the building. 3. Aid to elaborate the report on accessibility and energy efficiency conditions. 4. Aid to carry out joint rehabilitation works.
Subsidy at start of contract (e.g. grant)	
Subsidy during tenancy (e.g. lower-than market interest rate for investment loan, subsidised loan guarantee)	1. Aids established on points 2 and 3 of the previous section '*Subsidy before start of contract'.* 2. Tax rebates in IS and ITP for SII, FII, SOCIMI. 3. IRPF reductions of 60% for a primary residence and 100% when it is rented out to young people between 18 and 35 years old.[272]

Summary table 6

Subsidisation of tenant	Tenure type 1
Subsidy before start of contract (e.g. voucher allocated before finding a rental dwelling)	A rental aid may be requested, but the right is not recognised until the contract has entered into force.
Subsidy at start of contract (e.g. subsidy to move)	1. A 600€ loan to pay the deposit for the RBE housing changes.
Subsidy during tenancy (in e.g. housing allowances, rent regulation)	2. Rental aid for new applicants. 3. RBE for youngsters that had it recognised before 31-12-2011. 4. A 10.05% of IRPF deduction for rental housing.[273]

Summary table 7

Subsidisation of owner-occupier	Tenure type 1
Subsidy before purchase of the house (e.g. savings scheme)	PEFAV does not regulate purchase aid. However, the Autonomous Communities may approve them.
Subsidy at start of contract (e.g. grant)	1. Aid to improve energy conservation or to guarantee building accessibility. 2. Aid to draft the report on accessibility conditions and energy efficiency. 3. Aid to carry out joint rehabilitation works.
Subsidy during tenure (e.g. lower-than market interest rate for investment loan, subsidised loan guarantee,	1. IRPF deduction for primary residence investment, consisting of 7.05% of the amounts paid.[274] 2. Aid indicated in the previous section *'Subsidy at*

[272] See section 3.7 Taxation *'What taxes apply to the various types of tenure,' supra.*
[273] See Section 3.7 Taxation *'Is there any Subsidisation via the tax system?'*

housing allowances)	*start of contract'.*

3.7 Taxation

- **What taxes apply to the various types of tenure (ranging from ownership to rentals)? In particular:**
- **Tenants: Do tenants also pay taxes on their rental tenancies? If so, which ones?**

Tenants are required to satisfy the ITP when celebrating the tenancy contract, as it is considered a property transfer[275]. The landlord of the property is liable in a subsidiary manner if he receives the first rent without having requested the tax payment justification from the lessee[276]. The tax base shall be the total rent amount to pay during the term of the contract, and the tax liability will be determined in accordance with the rules of each Autonomous Community, or subsidiarily, the State tariff will be applied.[277]

- **Homeowners:**

o **Income tax of homeowners: is the value of occupying a house considered as a taxable income?**

In Spain, the occupation of the main residence by its owner is not subject to taxation. However, the second or subsequent dwelling that is not linked to an economic activity shall be regarded as imputed income. According to article 85.1 LIRPF, the property owner shall reflect in his/her income tax declaration, as an income received from returns on property investment, the amount resulting from applying:

- 2% on the cadastral value of the property, or 1.1% if this value has been updated.
- 1.1% of 50% of the purchase price if the cadastral value of the property is unknown.

In addition, homeowners are taxed for the mere acquisition of the property. The purchaser of a newly constructed dwelling, whether it is free or with a public protection, is subject to value added tax (IVA, *Impuesto sobre el Valor Añadido*), up to 4% of the priced reflected in the deed of sale until December 31, 2012[278]. From January 1, 2013, the general reduced rate of 10% applies instead[279]. Conversely, when talking about VPO, these have a reduced tax rate of 4%[280]. If it is a second-hand dwelling, it is taxed by the ITP on the rate that each Autonomous Community set according to their competences, or subsidiarily, on the general rate of 6%[281]. Document duties tax (AJD, *Actos Jurídicos Documentados*) shall also be paid for the

[274] Ibid.
[275] According to art. 7.1.b) LITPAJD. When the taxpayer is a company or a professional, their activity is subject to VAT, according to art. 7.5 LITPAJD.
[276] Arts. 9 Real Decreto Legislativo 1/1993 and 37 Real Decreto 828/1995.
[277] The state fee scale is regulated by art. 12 LITPAJD.
[278] As set out in the Disposición transitoria cuarta del Real Decreto-ley 9/2011, de 19 de agosto, modificada mediante el Real Decreto-ley 20/2011, de 30 de diciembre.
[279] Art. 91.uno.1.7 de la Ley 37/1992, de 28 de diciembre, del Impuesto sobre el Valor Añadido (LIVA) (BOE 29/12/1992 núm. 312).
[280] Art. 91.dos.1.6 LIVA.
[281] Arts. 7.1.a) and 11.1.a) LITPAJD.

constitution of a mortgage loan, paying tax at rates fixed by Autonomous Communities, and subsidiarily, at a 0.5%[282]. The VPO are exempt from paying tax for AJD, and with respect to the ITP, in the first transfer *inter vivos*[283].

The lessor of a dwelling is taxed for IRPF according to real estate yields obtained by leasing the dwelling[284]. From the gross income earned will be deducted the necessary expenses to obtain yield: interest on borrowed capital and other financing expenses for acquisition investments or property improvement, taxes and surcharges, rates, special contributions and levies, such as for example the Property Tax (IBI, *Impuesto de Bienes Inmuebles*), the garbage collection tax, sewage, etc., lease formalization costs and maintenance and repair costs. The resulting net yield will be reduced by 60% if the tenancy is intended for residence, and by 100% when the lessee is between 18 and 35 years old and receives income above the IMPREM[285].

It should be recalled that the taxes, rates and special contributions just mentioned shall be paid by the owner, unless otherwise agreed in the tenancy contract (art. 20.1 LAU).

- **Is the profit derived from the sale of a residential home taxed?**

In Spain, the conveyance of real estate, either for free or for a valuable consideration, will be subject to IRPF, as it is considered a capital gain. To calculate it, the difference between the values of acquisition and transmission of the dwelling is taken into account (art. 34.1 LIRPF). When the dwelling to be transferred has remained in the owner´s equity for more than one year, the rate may vary from the 21.25% to 27%, depending on each Autonomous Community.

However, if the dwelling is intended for the main residence of the taxpayer, the lien may be excluded provided that the gain is reinvested in another main residence. When the reinvested amount is less than the total of what is received in the transmission, only the proportional part of the obtained equity gain that corresponds to the reinvested amount will be excluded from taxation (art. 38 LIRPF).

- **Is there any Subsidisation via the tax system? If so, how is it organised? (for instance, tenants being able to deduct rent from taxable income; landlords being able to deduct special costs; homeowners being treated favourably via the tax system)**

Owners of dwellings acquired before January 1, 2013 may benefit from a deduction for primary housing investment for IRPF, deducting 7.5% of the amounts paid, during the period concerned, for the housing acquisition or rehabilitation, including the expenses incurred by the acquirer, interests, amortization and external financing costs. A maximum deductible base of 9,040€ per year has been set (art. 68.1.1 LIRPF).

[282] According to arts. 27.1 a), 28 and 31.2 LITPAJD.
[283] Art. 45.I.B.12.d) and c) LITPAJD, respectively.
[284] Art. 22 LIRPF.
[285] According to arts. 23.2.1 and 2 LIRPF.

Housing tenants may also benefit from the deduction in IRPF provided in article 68.7 LIRPF, when their tax base is less than 24,107.20 euros per annum. 10.05% of the amounts paid in the tax period for the renting of a primary residence may be deducted. The maximum base of this deduction is 9,040€ per year when the tax base is equal to or less than 17,707.20 euros. And when the tax base is between 17,707.20 and 24,107.20 euros per year, the maximum base for this deduction is 9,040 euros subtracting the result of multiplying by 1.4125 the difference between the tax base and 17,707.20 euros per year.

Additionally, the various tax measures adopted by the Autonomous Communities in the exercise of their competences must be taken into account.

- **In what way do tax subsidies influence the rental markets?**

Tenancy subsidies are an important instrument of housing policy to encourage, on the one hand, homeowners who are potential lessors, because the higher are the number of bonuses, the higher the lease yields are; and, on the other hand, they aim to encourage tenants, who until 2010 did not benefit from the same deductions as home buyers.

In addition, it also has effects in the AEAT collection. GESTHA's[286] study says that, in 2007, 89,766 submerged tenancies surfaced, reducing fraud by 3%, from 57.1% in 2006 to 54% in 2007, due to the tax reform adopted at the end of 2006 that entered into force in 2007. Similarly, that report states that there were 130,345 new rented dwelling declarants in 2008. According to the Treasury, this was due to two reasons: on the one hand, the 502,440 tenants who first availed of the deduction of 10.05% for the rent of the primary residence in 2008; and, on the other hand, the benefit obtained by homeowners with the reduction of 100% of rental income received without tax payment.

- **Is tax evasion a problem? If yes, does it affect the rental markets in any way?**

Tax evasion is a problem in Spain, since as we have seen previously, undeclared tenancies accounted for 55.38% of all leases in 2007, which means 2,926 million euros a year of submerged income that had not been included in the IRPF tax base[287], reducing considerably the State's public revenues. The undeclared rentals increased again in 2008 by about 1.3%, from 54% to 55.38%, since the number of submerged tenancies increased by 209.159 in comparison with the previous year, a fraud that represented more than 473 million euros that year.

Summary table 8

	Home-owner	Landlord of tenure type 1	Tenant of tenure type 1

[286] 'Cuarta edición del informe sobre los alquileres sumergidos en España' (Madrid: GESTHA, 2008).
[287] Ibid.

Taxation at point of acquisition	New construction: IVA: General income 10% - VPO 4%. Second-hand: ITP: 6% or variable VPO 0% (1st transfer) AJD: General income 0,5% - VPO: 0%	IRPF variable.	ITP variable depending on income paid and rates established by the Autonomous Communities. Tax transferred to Autonomous Communities.
Taxation during tenure	IBI, garbage collection tax, sewage and special contributions		May pay taxes, rates and special contributions if agreed in the contract.
Taxation at the end of occupancy			

4 Regulatory types of rental and intermediate tenures[288]

4.1 Classifications of different types of regulatory tenures

o **Which different regulatory types of tenure (different regulation about contracts and tenant security) do you classify within the rental sector? What are their shares in dwelling stock (compare summary table 1)?**

Within the tenancy sector we can distinguish rent at a market price, managed by the private sector, and rent at a reduced price in which some kind of public action is carried out. Within the tenancy at a reduced price we find VPO, together with other dwellings that benefit from another type of public promotion rental programme.

Housing with a public task stock for tenancy purposes represents a quota of 2%, while it is 10.1% in private sector housing. Within the latter, 9.3% of tenancy contracts are at market price, whilst 0.8% of them are below.

4.2 Regulatory types of tenures without a public task

o **Please describe the regulatory types in the rental sector in your country that do not have a public task. This category may be called private or market rental housing.[289]**

- **Different types of private regulatory rental types and equivalents:**

  - **Rental contracts**

As the Preamble of the LAU points out, it establishes a distinction between tenancies for residential purposes and those intended for non-residential purposes in order to grant protective measures to the lessee only when the tenancy is aimed at meeting housing needs of the individual and his family (art. 2.1 and 7 LAU). In this sense, despite the principle of freedom of will being maintained, it is limited as far as

[288] I.e. all types of tenure apart from full and unconditional ownership.
[289] Market rental housing means housing for which the rent price determines the conclusion of contracts and not some social rules of allocation based on need.

tenancies for residential purposes is concerned, with many compulsory rules regulated in Title II of the LAU.

The lease contract is governed by the rules of tenancies for residential purposes due to the purpose of the lease. Tenancy is for residential purposes when its purpose is to satisfy the primary need of permanent housing of the tenant, his/her spouse or descendants under his/her care. These tenancies are governed by the provisions of Title II, or failing this, by the will of the parties, and subsidiarily by the provisions of the CC. Nevertheless, from these tenancies we shall exclude the ones whose surface is greater than 300 square metres or in which the initial income calculated on a yearly basis exceeds 5.5 times the national minimum wage. These tenancies are governed by the will of the parties, or failing this, by provisions in Title II, and subsidiarily by the provisions of the CC (art. 4.2 LAU).

Conversely, when there is no purpose of satisfying the primary need of permanent housing of the tenant, the rules on tenancies for non-residential purposes apply, which give primacy to the freedom of will, that is to say, to the market rules. Article 4.3 LAU sets forth that they are governed by the will of the parties, or failing this, by provisions in Title III, and subsidiarily by the provisions of the CC.

The LAU does not regulate all tenancy contracts that may be created for a dwelling. Specifically, article 5 expressly excludes from the scope of this Act the following contracts:

a) The use of dwelling assigned to employees as a result of their job or position[290]. This lease is regulated according to article 26 of the Worker's Statute (ET, *Estatuto de los Trabajadores*)[291].
b) Military housing, whichever is their qualification and regime, will be governed by its specific legislation[292].
c) Tenancy contracts of dwellings aimed at agricultural, pecuniary or forestry exploitation[293].
d) University housing use expressly qualified as such by the University that assigns it to its enrolled students and its teaching or administration staff, which shall be governed by the special assignment clauses laid down in the University Statutes concerned, and subsidiarily, by the CC.

There are also other tenancy contracts that are excluded from the scope of application of LAU and shall be governed by specific legislation, or failing this, by common law. In this context, we can exclude from LAU contracts concerning subsidised homes[294], tenancies in tourist apartments[295], lodging[296] and estates destined for rural tourism[297].

[290] So this rule refers to porters, guards, employees, officers and civil servants.
[291] Real Decreto Legislativo 1/1995, de 24 de marzo, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (BOE 29/03/1995 núm. 75).
[292] It is regulated by the Ley 26/1999 de 9 de julio de medidas de apoyo a la movilidad geográfica de los miembros de las Fuerzas Armadas (BOE 10/07/1999 núm. 164).
[293] They will be regulated by the Ley 49/2003 de arrendamientos rústicos (BOE 27/11/2003 núm. 284) and subsidiarily by the CC.
[294] According to the first additional provision, housing with public task under the RLD 31/1978 is excluded, and the LAU will be only apply subsidiarily to the particular rules that regulate the contract and in default of the legislation of the autonomous communities.

Additionally, Catalonia regulates a contract of urban masoveries (*masovería urbana*)[298], which is defined in article 3.k of the LDVC as a contract whereby owners yield the use of their dwelling, for the agreed term, in exchange for its rehabilitation and maintenance by the assignees. This regulation helps to face the uncertainty about the subjection to the LAU of the *ad meliorandum* contracts[299]. In addition to this, the LMFFMAV regulates the "rehabilitation for rent", which allows the parties to agree the inclusion in the rent payment of the improvements or reforms agreed upon and carried out by the tenant.

- **Are there different intertemporal tenancy law regimes in general and systems of rent regulation in particular?**

Currently, the complexity existing regarding tenancy contract has not been suppressed, since there are still four legal regimes of urban lease coexisting. In this regard, LAU establishes a transitional regime, which keeps in force LAU of 1964 and articles 8 and 9 of the RDL 1985, although amendments are introduced. These are:

a) Contracts subjected to LAU 1964 concluded before May 9, 1985, with forced extension and an agreed and unalterable rent, except for the updates referred to in paragraph 11 of the second transitional provision of the LAU, according to the CPI. However, with the LAU 1994 the right of transfer *inter vivos* regulated in article 24 LAU 1964 is repealed, but it maintains the cases of unilateral withdrawal of the lessee and those where the dwelling is attributed because of separation, divorce or marriage annulment to the spouse or cohabitant, or a person with an analogous relationship, who has lived together with the lessee during the previous two years or has had children with him/her, in the terms referred to in articles 12 and 15 LAU. The

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[295] The regulated dwellings equipped with furniture, fixtures, equipment and services necessary for an immediate occupation of people in leisure or tourism, are excluded from the LAU, as they are regulated by the appropriate regional regulations regarding tourism activities. For instance, in Catalonia in the Decreto 159/2012, de 20 de noviembre, de establecimientos de alojamiento turístico y de viviendas de uso turístico (DOGC 05/12/2012 núm. 6268), in Andalusia in the Decreto 194/2010, de 20 de abril, de establecimientos de apartamentos turísticos (BOJA 11/05/2010 núm. 90), in Cantabria by the Decreto 82/2010, de 25 de noviembre, por el que se regulan los establecimientos de alojamiento turístico extrahotelero (BOC 09/12/2010 núm. 235) and in the Basque Country by Decreto 191/1997, de 29 de julio, por el que se regulan los apartamentos turísticos, las viviendas turísticas vacacionales, los alojamientos en habitaciones de casas particulares y las casas rurales (BOPV 05/09/1997 núm. 169).

[296] Accommodation, by which one pays a price for room and board, is excluded from tenancy legislation, according to SSTS 18 March 2009 (RJ 2009\1655) and 25 March 2011 (RJ 2011 \ 2229). The accommodation contract is not specifically regulated in the CC, but it refers to it in some isolated provisions, such as Arts. 1783 or 1922.

[297] It is governed by the regional rules where the real estate is located. For instance, in Andalusia by the Decreto 20/2002, de 29 de enero, Turismo en el Medio Rural y Turismo Activo (BOJA 02/02/2002 núm. 14), and in Aragón by the Decreto 69/97, de 27 mayo, por el que se aprueba el Reglamento sobre ordenación y regulación de los alojamientos turísticos denominados Viviendas de Turismo Rural (BOA 06/06/1997 núm. 64).

[298] It is regulated in the 5th Additional Provision of the 5 Housing Sector Plan Project of Catalonia of 2010.

[299] According to J.M., Martín Pérez, 'Determinación de la renta' en *Ley de arrendamientos urbanos, comentarios y jurisprudencia doce años después*, ed. E. Llamas Pombo (Madrid: La ley, 2007), 441, are those in which the principal duty owed by the tenant is to build buildings or improvements on the property, in which no cash rent is agreed or it is secondary because the parties have agreed that the rent consists of an improvement or transformation on the farm or estate that is the object of the contract.

right of subrogation *mortis causa* is also restricted, except for the spouse or cohabitant in the terms outlined above. In the absence of a spouse or cohabitant, they may be subrogated in this order: children with a disability equal to or greater than 65%, children under 25 years old, and failing all these mentioned above, the ascendants that were in charge of the deceased tenant and had lived with him more than three years. There is also set a limit of two *mortis causa* subrogations[300].

b) Contracts concluded according to LAU 1964 but after May 9, 1985, when RDL 1985 came into force. These are either short-term contracts with high rents, or contracts subjected to the forced extension when it is agreed upon. In the latter case, LAU 1964 is applied in the terms explained above for previous contracts, that is to say, withdrawal, annulment, separation and divorce and the authorisation of construction work related to disability are governed by articles 12, 15 and 24 of the LAU, without any possibility of an *inter vivos* transfer. The rent will be updated according to the terms of the contract. If there is no review clause, the rent, in principle, remains frozen[301].

c) Contracts concluded from 1 January 1995, when the LAU 1994 entered into force, are governed by the rules already explained. According to the Explanatory Memorandum, with this transitional regime the legislator intends to "combine maximum possible simplicity with a balanced treatment of the different situations in which the parties in conflict find themselves". However, it should be pointed out that the transitional regime is inequitable, since the maintenance of the previous regimes contributes to comparative injustice (as has happened before) because it tends to perpetuate certain rent situations that cause the denaturation of the right of private property enshrined in article 33.1 CE, according to MÉNDEZ SERRANO[302].

d) Tenancy contracts concluded since 6 June 2013 will be governed by the LAU, with the amendments introduced by Act 4/2013 that are summarised in Part II.[303]

o **Are there regulatory differences between professional/commercial and private landlords?**

When a tenancy contract is concluded with a commercial landlord[304], rules on consumers and users apply in favour of the tenant. These rules aim to protect tenants from possible abuses or unfair practices due to the dominant position that a regular professional has in the matter in contrast to a private owner.

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[300] According to paragraph 4 of the second transitional provision of the LAU.

[301] As set out by F. Ortega Sánchez, *Los derechos de los arrendatarios de fincas urbanas en la gestión del planeamiento urbanístico* (Murcia: Real Academia de Legislación y Jurisprudencia, 1995), 27-28, which considers that rent may be revised by the lessor according to the new law when due to the continous treatment of the contract a situation that is unfair for such lessor takes place, according to the principle of unjust enrichment and the clause "*rebus sic stantibus*".

[302] It happens, as set out by M.M. Méndez Serrano, *Los Fondos de Inversión Inmobiliaria,* 40, in contracts concluded before 1964 without a stabilization clause and in those concluded before 1956 and even 1946. For contracts signed under RDL 1985, these do not have significant importance since, due to its short duration, very few remain in force today.

[303] *Infra.*

[304] 'Se considera empresario a toda persona física o jurídica que actúa en el marco de su actividad empresarial o profesional, ya sea pública o privada', de acuerdo al artículo 4 del Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias (BOE 30/11/2007 núm. 287).

In this sense, the minimum standards of information to be supplied in housing rental apply. The information to provide is regulated in RD 515/1989[305], when the contract is made within the framework of an economic or professional activity.

▪ **Briefly: How is the financing of private and professional/commercial landlords typically arranged (e.g. own equity, mortgage based loan, personal loan, mix, other)**

With regard to the financing forms that professional landlords may use, we refer to what has been explained in subsection 1.4, '*How is the financing for the building of homes typically arranged?'.*

Additionally, it should be borne in mind that contributions from partners or shareholders by issuing shares in the company, and the revenues of the company or professional are the ordinary sources of funding for such professionals.

Corporations also finance their future investments through the securitization of their own assets, which may consist of loans and credit rights, including those derived from lease operations[306].

o **Apartments made available by employer under special conditions**

The use of dwellings assigned to employees due to their work or position is excluded from the scope of the LAU (art. 5). According to article 26 ET, the assignment of a dwelling is considered as a salary in kind to be received by the worker, since the wage comprises the totality of the economic consideration that corresponds to him/her. Since no special regulation on this subject is available, provided that the home in question is not subsidised housing, the tenancy contract shall be governed by common law, that is to say, by the CC.

o **Mix of private and commercial renting (e.g. the flat above the shop)**

In accordance with article 2 LAU tenancies for residential purposes must primarily satisfy the permanent housing need of the lessee. However, it is possible for the lessee to carry out an economic activity in the dwelling, but the housing need must always be "paramount" to be protected by LAU rules (to be considered a residential lease). To qualify whether the contract is a residential lease, both subjective (will of the parties) and objectives elements (scope of the business activity) must be taken into consideration[307].

- **Cooperatives**
- **Company law schemes**

[305] Real Decreto 515/1989, de 21 de abril, de Protección de los Consumidores en cuanto a la Información a Suministrar en la Compraventa y Arrendamiento de Viviendas (BOE 17/05/1989 núm. 117).
[306] According to art. 2 Real Decreto 926/1998.
[307] STS 12 June 1984 (RJ 1984\3234) and SAP Granada 9 September 2000 (AC 2000\2133).

With respect to these two types of tenures, see the response provided in subsection 1.4 *'Intermediate tenures'*[308], since as has been pointed out, they are not legal structures that are commonly used in our legal system in relation to leases. Thus, there is no statistical data on the matter.

- **Real rights of habitation**

The right of habitation is regulated in articles 523-529 CC. In addition, there are Autonomous Communities that have their own rules for it[309]. This right grants its holder the faculty to occupy the necessary parts for him/herself and for the members of his/her family of someone else's dwelling (art. 524 CC). It is a right that burdens part of the dwelling and it can be for a definite period of time or for life. Although it is established as a property right, there is no possibility to lease it or to transfer it (art. 525 CC). This figure is not widespread in our law, since its regulation basically has a welfare purpose and it does not seek a balance between the parties' rights and obligations, as a lease contract does.

- **Any other relevant type of tenure**

We have discussed them at the beginning of this section[310].

4.3 Regulatory types of tenures with a public task

o **Please describe the regulatory types in rental housing with a public task (typically non-profit or social housing allocated to need) such as**

Within the actions carried out by the public administrations we can differentiate between dwellings with a subsidised lease regime and those that, although belonging to the private market, benefit from any public programme of rental promotion.

Subsidised rental housing can come both from new constructions and rehabilitation. With respect to the types in question, different regimes coexist since Housing Plans are quadrennial. Therefore, they vary depending on the measures taken. We will refer to the regimes agreed in the 2013-2016 PEFAV and the PEVR 2009-2012, because the new regulation does not fix a change in the status for these already existing developments.

In the PEVR 2009-2012 we can distinguish four main modalities: tenancy with a minimum duration of 10 or 25 years; tenancy of 10 years with a right to buy; tenancy of 25 years for particularly vulnerable groups and other specific groups. Moreover, subsidised rental housing can be built on both private and public lands and in lands assigned through a right to build or an administrative concession (art. 22.2).

Regarding the new State Housing Plan 2013-2016, as has been pointed out, there are two types of subsidised dwellings on public-owned land in the subsidised rental housing programme (art. 13):

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[308] *Supra.*
[309] For instance, Catalonia regulates this in articles 562-9 to 562-11 of the Ley 5/2006, de 10 de mayo, en la que se regula el libro V del CCC (DOGC 24/05/2006 núm. 4640).
[310] See section 1.4, *'Different types of private regulatory rental types,' supra*.

a) Social rental housing in rotation is aimed at family units with an income of up to 1.2 times the IPREM. These leases will have a minimum of one and a maximum of three years of duration, as long as tenant's economic conditions remain constant (art. 17.3).

b) Subsidised rental housing, aimed at family units with an income of between 1.2 and 3 times the IPREM.

Additionally, it is provided that in any case 30% of social rental housing on offer must be reserved by local authorities or the public entity concerned, while there are requests to do so, to facilitate housing access to population sectors that are cared for by the social services of the Autonomous Communities, Local Corporations or non-governmental organisations and other non-profit private entities (art. 17.2).

Housing with a public task for tenancy purposes can be managed by the public administrations themselves, by private developers who have built them or by NGO's to which the administration of these dwellings has been transferred through an agreement.

Public administrations have adopted different legal forms to manage public policies and the public housing stock through the creation of Agencies[311], public companies[312] and municipal companies[313].

Regarding public programs aimed mainly at the private housing sector for tenancy purposes, these are managed by a Public Administration, a non-governmental organisation or a private non-profit entity, and are intended to fulfil a social function, providing housing access at affordable prices, that is to say, below market price. In this context, we should highlight the so-called *Bolsas de Vivienda* (Housing Pools), which offer guarantees to landlords in respect of rent collection, the state of the dwelling and legal defence in exchange for reductions in the housing price of between 20% and 30% with respect to the market price[314].

o **Specify for tenures with a public task:**

[311] For example, the Catalan Housing Agency, which is a public entity of the Generalitat de Catalunya with legal personality and its own equity to meet its objectives, in accordance with art. 1 of the Ley 13/2009, del 22 de juliol, de l'Agència de l'Habitatge de Catalunya (DOGC 28/07/2009 núm. 5430).

[312] For instance, The Valencian Institute of Housing SA, which is a commercial company owned by the administration, according to Art. 27 of the Decreto 118/1988, de 29 de julio del Consell de la Generalitat Valenciana (DOCV 09/08/1988 núm. 882).

[313] For example, the Municipal Housing and Land Company of the Madrid City Council, which is also a trading company constituted as a corporation with 100% municipal capital. <www.emvs.es>, 21 January 2013.

[314] In Catalonia the "Xarxa de Mediació per al Lloguer Social" is established in the PDVC 2009-2012. In the other Autonomous Communities and municipalities of provincial capitals we may find equivalent organisations, such as the programme "Zaragoza alquila" of the Aragon Government and managed by the Zaragoza city council through the Sociedad Municipal de Rehabilitación Urbana, according to the Decreto 60/2009, de 14 abril, por el que se regula el Plan aragonés para facilitar el acceso a la vivienda y fomentar la rehabilitación 2009-2012 (BOA 29/04/2009 núm. 80), or the "Plan Alquila" of the Autonomous Community of Madrid, according to the Orden 1/2008, de 15 de enero, por la que se establecen las medidas de fomento al alquiler de viviendas en la Comunidad de Madrid (BOCM 21/01/2008 núm. 17).

- **Selection procedure and criteria of eligibility for tenants**

To opt for a subsidized dwelling under the tenancy regime, the petitioner shall meet the eligibility requirements established for each development plan in the agreements between developers, the Autonomous Community, and where appropriate, the Local Corporation, according to its final qualification and the agreed protection regime, which can be used for specially protected vulnerable groups. However, as a general rule, conditions established by the Ministry of Development in the State Housing Plan and special conditions and the selection procedure determined by the Autonomous Community must be fulfilled[315].

Unlike what happened with the PEVR 2009-2012, which collected in its article 3.1 the general eligibility conditions, the PEFAV 2013-2016 refers, in terms of these conditions, to the autonomous legislation or the agreements signed between the Autonomous Community and the State. However, article 6 requires that beneficiaries have Spanish nationality or permanent and legal residence in Spain, and their income has to be calculated according to the general and savings tax base of the IRPF for the last period expired, if such income tax statement has been made. It also allows the weighing of the income with a single multiplier coefficient between 0.70 and 1 depending on the number of members of the family unit or other relevant socio-economic factors. Article 13 establishes the maximum income which tenants' family units shall have to opt to subsidised rental housing: being 1.2 times the IPREM for social rental housing in rotation and subsidised rental housing or up to 3 times the IPREM for the second category of subsidised rental housing. The Autonomous Communities may establish lower but not higher criteria than those limits.

Special conditions are determined by the Housing Plans of each Autonomous Community. Generally speaking, the requirements that are usually required are the following:

a) The applicant must not hold or have the full ownership of a property or a property right of use or enjoyment to social or free subsidised housing. However, there are some limitations set, like for example, if it is uninhabitable, if its use is not available for reasons beyond their control or if it is inadequate.
b) The dwelling shall be intended for primary and permanent residence[316].
c) The applicant must be registered at the time of the selection or convocation in the Subsidised Housing Applicants Registry of the Autonomous Community.

Regarding the selection process, each autonomous regulation sets its own requirements. For example, in Catalonia, according to the LDVC, dwellings built on public land or plots that should be used to develop subsidised housing shall be awarded according to the principles of concurrency, transparency and objectivity (article 101.1). It is, therefore, necessary to carry out a draw among the registered applicants who meet the requirements of the call[317]. However, for the rest of dwellings, a private developer is only required to meet the principles of transparency and objectivity, meaning that he/she may choose between accepting the general concurrency process or awarding housing freely, as long as the successful bidder is

[315] According to B. Bueno Miralles, *Poliedro de la vivienda*, 267.
[316] For instance art. 16.1 del PDVC 2009-2012.
[317] According to arts. 25.1 and 36 del Decreto 106/2009 del Registro de Solicitantes de Viviendas de Protección Oficial (DOGC 13/07/2009).

registered in the Official Protection Applicants Registry, meets the requirements for the specific development and the developer informs the Administration about the persons awarded the housing from the provided list of registered applicants (art. 103).

In addition, specific awarding processes have also been approved for public developers or for certain recipients. For example, the Autonomous Community of Madrid approved the Decree 19/2006, of 9 February, of the Governing Council, which regulates the housing awarding process of the Housing Institute of Madrid[318], and the Order 3766/2005, of 7 December, which regulates the Single List of Public Protected Housing Applicants for leases with a right to buy intended for young people and which also governs this selection procedure[319].

- **typical contractual arrangements, and regulatory interventions into rental contracts**

Article 10 of the State Housing Plan 2013-2016 acknowledges the importance of incorporating into tenancy contracts for housing purposes a clause of submission to an arbitration proceeding for any discrepancy that may arise in relation to the contract.

Regarding typical clauses, these will depend on autonomous regulations governing the contracts. For example in Catalonia, the LDVC sets the obligation to include a right to buy clause and a right of pre-emption in the Administration's favour, which will be included in tenancy contracts with a right to buy, since with these rights the Administration intends to reserve for itself the right to recover the property when the owner decides to pass it on to another purchaser (art. 87). Additionally, a clause will also be included requiring that the housing transfer be made known to the Administration (art. 89). It is also common that if the social housing owner is authorised to rent it, he/she may be required to have the Administration officially approve the lease, so that it can control that the requirements are met, mainly as regards eligibility and income.

The obligation to use the dwelling exclusively for the tenant's primary and permanent residence, prohibiting the realization of professional or business activities, as well as the assignment of the dwelling or subleasing are also typical clauses in tenancy contracts. It is also pointed out that the prohibitions and limitations arising from the regime of Protected Housing apply to the rented dwelling and accordingly, that the conditions of use will be those set forth in the final qualification, and the dwelling may not exceed the rental prices of the limits established.

- **Subsidisation possibilities (if clarification is needed based on the text before)**

According to their competence, the Autonomous Communities and Local Corporations may agree specific subsidies for the stock of housing with a public task.

- **from the perspective of prospective tenants: how do I proceed in order to get "housing with a public task"?**

[318] BOCM 22/02/2006 núm. 45.
[319] BOCM 07/12/2005 núm. 291.

Applicants need to go to the Housing Office of the place where they are registered and register in the Protected Housing Registry of their Autonomous Community. Additionally, they may join the Free Social Rental Housing Pool that the Local Corporation attached to their place of residence manages. Moreover, in Housing Offices they may be informed of existing developments, or it is even possible that they register for the VPO development that they are interested in. In addition, it must be taken into account that if we are talking about a person at risk of social exclusion, he/she will have to go to the social services department of the municipality of residence, and if he/she meets the requirements, may be entitled, with a favourable report from this department, to dwellings or accommodation for vulnerable groups. In these cases, it is also possible to address non-profit entities that manage this type of housing according to the agreements signed with Public Administrations.

o Draw up summary table 9 which should look as follows:

Private rental LAU 3 regimes coexist, With different rights and obligations: - LAU 64 - RDL 1985 - LAU 94	- Private owners mainly. - There are also public programmes of private rental promotion. - Private rental 12% approximately.
1) Rental Housing (Title II LAU) 2) Rental for different use (Title III LAU) 3) Rental excluded from LAU (Art. 5 LAU) 4) Tourist apartments, rural houses, lodging 5) Urban "Masoveries" (Catalonia): Autonomous Communities may regulate their own legal figures.	- Rentals for housing use are protected by imperative regulation. - Seasonal rentals and business premises (different use) are regulated by the will of the parties. - Excluded rentals are governed by their special legislation or/and CC.
Public rental 6) VPO 7) Public protection housing 8) Private rental promotion programmes	- Have a price below the market. - Their construction is subsidised. - Public rental 2% approximately.
Main types of public organisations: 1) Agencies 2) Public companies 3) Municipal companies	- Public housing is managed by the Administration, or by agreements between profit and non-profit entities. - Direct management by private non-profit entities is more effective and more efficient.

o For which of these types will you answer the questions in Part 2; which regulatory types are important in your country?

- 1) Urban lease (LAU)

5 Origins and development of tenancy law

- **What are the origins of national tenancy law and where was and is it laid down (civil code, special statute, case law)?**

The tenancy contract has a clear precedent: the Roman *locatio conductio*, a consensual and synallagmatic contract by virtue of which a person became bound to deliver to another the use of a thing for a price. In Roman law, the lease had a personal nature due to the application of the "*emptio tollit locatio*" rule (the sale extinguishes the lease), which enables the purchaser of the leased thing not to respect the existing lease contract (whether or not it was agreed for a definite period of time). In this case, the lessor had to compensate the lessee because of the alienation as long as the eviction took place during the lease term.[320]

During the *ius commune* period, the Roman law prevailed. Thus, the Code of *Las Siete Partidas*[321] regulated the "*emptio tollit locatio*" rule, but two exceptions were introduced: a) when the duty to respect the lease for the whole contract term had been imposed on the purchaser, both in case of either the sale of the right of ownership or the granting of a usufruct (the legacy was included as well); and b) when the lease had been agreed either for the lifetime of the lessee or for an indefinite period of time for the benefit of the lessee and his heirs[322]. In this way, both ordinary and long-term leases were distinguished. The latter was deemed to be the one exceeding ten years, by which the useful domain was transferred to the lessee unless otherwise agreed. In this way, some real efficacy was recognised to the lease, which was created by Roman law[323].

In Spain, Codes and Laws of the 19th century were influenced by liberal individualism. As a consequence, the regime of contractual freedom was implemented. This can be seen in the Decree of 8 June 1813, and especially in the Urban Leases Act of 9 April 1842. In the same sense, the Civil Code Drafts[324] followed the Roman law tradition, which conceived the lease as a contract subject to the parties' freedom. As a result, they hardly recognised limitations or privileges in favour of any of them.

With the approval of the Civil Code in 1889 (currently in force as subsidiary law after the LAU 1994 in its 2013 form), the principle of freedom of will, typical of contractual relationships, was accepted. Thus, the freedom for the parties to agree on the rent and the duration of the lease was implemented, although a tacit renewal was also introduced in article 1947 CC. Furthermore, the perpetuity of lease contracts was refused (art. 1543 CC and 1547 CC), and no reference to long-term contracts was made, which are entirely absent from the regulation. Definitely, the lease is

[320] As set out by R.M., Roca Sastre and L. Roca-Sastre Moncunill, *Derecho Hipotecario*, vol. III, (Barcelona: Bosch, 1979), 505-506.
[321] The code of *Las Siete Partidas* was drafted in Castile, during the reign of Alfonso X, with the aim of achieving a certain legal uniformity in a realm split into a multitude of jurisdictions. It was begun in 1256, but the work was not finished, according to most authors, until 1265.
[322] R.M. Roca Sastre y L. Roca-Sastre Moncunill, *Derecho Hipotecario*, 509.
[323] J. De los Mozos y de los Mozos, 'Introducción' en *Comentarios a la ley de arrendamientos rústicos*, ed. J. M. Caballero Lozano (Madrid: Dykinson, 2006), 25.
[324] In 1936 a draft of the Civil Code was approved, another in 1951, which was almost a copy, sometimes literal, of the French Civil Code of 1804, and between 1882 and 1888 a draft Civil Code was drawn up. However, the 1951 Draft will be taken as a basis for the interpretation of the Civil Code.

extinguished if the leased thing is transferred to a third party, and compensation is granted to the lessee. However, two exceptions were introduced to the "*emptio tollit locatio"* rule (i.e. the lease remains until the agreed expiry date even if the property is sold): 1) if the parties (eg. buyer and seller) have agreed so; or if the lease had been registered in the Property Registry (art. 1571 CC and art. 34 LH).

The liberal approach of the Civil Code gave rise to an imbalance between the legal position of lessor and tenant, because the latter is considered to be the weakest party of the contract. Thus, he does not have full freedom to conclude the contract and satisfy the urgent need to provide housing accommodation for himself and his family[325]. For this reason, urgent and transitional measures were required after World War I, which led to the approval of the first special legislation on urban leases that modified the principles of the Civil Code. Thus, the Royal Decree of 21 June 1920 was passed (LAU 1920), which imposed the forced extension of the contract and the freezing of rents, regardless of the IPC.[326]

This regime was extended successively and maintained during the Spanish II Republic (1931-1939) through the adoption of the Decree of 29 December 1931. With the Act of 31 December 1946, this regime became consolidated as a special right, its vocation of permanence being recognised. In the Act of 13th April 1955 and the LAU 1964, tenancy was also subjected to a mandatory succession regardless of whether or not the contract is under a renewal[327]. However, a maximum limit of two succession calls is expressly established, the same as in the *fideicommisum* substitution[328]. The lessor´s duty to respect the forced extension of the tenancy contract remained in force until 1 January 1995, when the LAU 1994 entered into force. However, an exception was made regarding those contracts concluded after 9 May 1985, unless otherwise agreed, because the RDL 1985 repealed the forced extension, but not retroactively. As a result, the tenancy relationship was perpetuated for the lessor and his successors, which has led to an exorbitant burden for the landowner for a long time[329]. However, the Constitutional Court[330] has considered that these limitations may be justified on the basis of the social function of property recognised in article 33.2 CE[331].

The LAU 1964 also established the principle of freedom of contract regarding the agreement on the rent amount, but only for contracts concluded after its entry into force (art. 95 LAU 1964). However, this system was inefficient in adjusting the rent to the reality of the market prices, since the basis of revaluation was applied on very devalued rents because of inflation, which had been practically frozen for 40 years

[325] X. O'Callaghan, *Comentarios a la ley de arrendamientos urbanos* (Madrid: Editoriales de Derecho Reunidas, 1995), 14.
[326] M.M. Méndez Serrano, *Los Fondos de Inversión Inmobiliaria*, 31-33.
[327] A. Roman Garcia, 'Arrendamientos Urbanos y régimen jurídico de la vivienda' en *Revista Crítica de Derecho Inmobiliario* 691 (2005): 1737-1739.
[328] As set out by M. De Páramo Argüelles, 'Arrendamientos urbanos de vivienda: evolución legislativa y jurisprudencial en relación a la protección del arrendador: su aplicación práctica' en *Revista de Derecho Vlex* 77 (2010): 2.
[329] According to M.M. Méndez Serrano, *Los Fondos de Inversión Inmobiliaria*, 32; A. Andrés Herrero, 'Los derechos y obligaciones de las partes' en *Ley de Arrendamientos Urbanos comentada, con jurisprudencia sistematizada y concordada* dir. J. A Xiol Ríos (Madrid: El Derecho Editores, 2010), 121 y J.A. Doral García de Pazos en Comentarios al Código Civil y Compilaciones forales, dir. M. Albaladejo, Vol. 7 (Madrid: Editorial de Derecho Reunidas, 2000), 359.
[330] According to STC 17 April 1994 (RTC 1994\89).
[331] In this sense, STS 29 May 2000 (RJ 2000\6551).

since the adoption of the LAU 1920[332]. The profitability of the tenancy was even more limited by the impossibility for the landlord to impose on the tenant both the increases in the service costs of the leased dwelling (art. 102-95 1964 LAU) and the conservation or repair works to carry out in the dwelling, in order to keep it in good conditions in order to meet the purpose for which it was leased (art. 108 1964 LAU).[333]

Due to the obvious imbalance between lessor and tenant rights, a change was demanded in the tenancy regulation in order to palliate the problem of shortage of rental housing. Thus, article 9 of the RDL 1985 abolished the forced extension in contracts concluded after 9 May 1985, but this measure did not affect the previous ones. Therefore, these leases remained for the term freely agreed then by the parties. However, the freezing of rents still remained for contracts concluded before 9 May 1985 until the approval of the LAU 1994. With this amendment, the supply of rental housing increased by 20% of the total rental housing stock[334]. However, the rental housing prices increased by 250% from 1985 to 1990[335]. Therefore, this regime, adopted to encourage housing supply, directly led to a rise in prices, the precariousness and the adoption of different regimes that placed the tenants in situations of comparative injustice. Thus, a conflictive environment arose in landlord-tenant relationships, which has led to an increase in litigation and unfair practices[336].

In this context, the current LAU 1994 was enacted, which aimed to find the balance between the rights and obligations of the parties in order to promote the rental market and to satisfy the right to decent housing regulated in article 47 CE.

- **Who was the political driving force? Was it based on a particular legal philosophy (e.g. socialism)? Is there a particular philosophy behind the rules (e.g. protection of the tenant's home as in Scandinavia vs. just a place to live as in most other countries).**

The LAU 1994 (considered to be pro-tenant) was adopted in the 5th consecutive legislature of the Spanish Socialist Worker's Party (PSOE, *Partido Socialista Obrero Español*), which, quite curiously, was governing also when the RDL 1985 (pro-landlord) was approved. The LAU 1964, which was enacted during Franco's dictatorship (1939-1975), had a more social character than the RDL 1985 and even than the LAU 1994,[337] basically because it was based on the ideological approaches of the social and political Catholicism that prevailed under his regime. In this sense, the regime aimed to answer the problem of housing shortage during the postwar era and to sought to influence society[338]. It should be remembered that the LAU 1964

[332] A. Viana Conde, *El arrendamiento urbano en España. Estudio de la responsabilidad del Estado* (Pamplona: Aranzadi, 1992), 30.
[333] It is applied to all lease contracts subsequent to 1 July 1964 and prior contracts when rent had increased in value according to article 96 LAU 1964.
[334] As set out in the prologue of E. Llamas Pombo, *Ley de arrendamientos urbanos: comentarios y jurisprudencia doce años después* (Madrid: La ley, 2007).
[335] F. Ortega Sánchez, *Los derechos de los arrendatarios de fincas urbanas*, 13.
[336] As set out in the prologue of E. Llamas Pombo, *Ley de arrendamientos urbanos*.
[337] See section 1.2, 'the historic evolution of the national housing situation and housing policies briefly', supra.
[338] As set out by J.M Gómez Herráez, *Ideologías e intereses sociales bajo el franquismo (1939-1975). El recurso al pasado* (Universitat Jaume I: Castelló, 2010), 50-52. Franco´s regime adopted the idea of social Catholicism defended by the Archbishopric, defending that the State shall intervene as arbitrator of interest, as aredistributor of income, as a promoter of services and as a guardian of the

recasts the Tenancy Laws of 22 December 1955, as it was regulated by the Decrees of 3 April 1956 and 11 June 1964.

On the other hand, the RDL 1985 was adopted at a historical moment in which the incentive of the Spanish economy prevailed through the adoption of rules aimed at moderating the Collective Agreements of workers, removing the obstacles to employment recruitment and encouraging the privatization of services. In terms of leases, a freedom of contract was given to the parties to grant more decision-making power to the landlord, thus stimulating the rental market as an economic activity.[339]

The Preamble of LAU 1994, the one currently in force, establishes two main objectives for the new Act. On the one hand, the search for a balance between the rights and obligations of landlord and tenant, in order to mitigate the inequalities caused by both the excessive protectionism of the LAU 1964 and the essentially economic vocation of the RDL 1985. And on the other hand, it aims to satisfy the right to decent and adequate housing for those in housing need (art. 47 CE). For this reason, a sharp distinction is made between residential tenancies and those tenancies for other purposes, in order to grant protection measures only when the purpose of the tenancy is the satisfaction of the housing need of the tenant and his family. Consequently, the protection of the home is safeguard, which is deemed to be the vital centre where the personal and family relationships of the individual are developed. This goes beyond the concept of home as just a place to take shelter, since the recognition of decent housing in a Welfare State shall provide the material conditions suitable for the full enjoyment of human life[340]. In this regard, it should be remembered that housing is an essential element for the development of the individual's fundamental rights, such as the rights to freedom (art. 9.2 CE)[341], privacy (art. 18.1 CE)[342], dignity and the free development of personality (art. 10.1 CE)[343.]

- **What were the principal reforms and their guiding ideas up to the present date?**

With reference to the reforms that have been made in terms of tenancy since the LAU 1994, the following ones must be pointed out:

A. With the adoption of the LEC 2000, articles 38, 39 and 40 LAU were repealed, so the procedural rules on court cases on urban tenancies were amended as of 8 January 2001. As a consequence, the ordinary procedure is the standard one, which includes any matter relating to urban tenancies (art. 249.6 LEC). However, civil claims regarding the non-payment of the rent or the expiration of the legal term shall be discussed through an oral proceeding, which is faster and less formalistic (art. 250.1º). The claim for eviction and the claim of due rents may be accumulated through an oral proceeding, provided that the amount claimed does not exceed three thousand euros (art. 250.2º).

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economic and social rights of the people. In this sense, it advocates the permanence of private property, assigning it a social function as an element that would make it come away from the liberal prism, and that would solve the existing problems of housing shortage either to meet religious duties or deal with overcrowding in rooms and caves of thousands of families.

[339] As set out in the preamble of RDL 1985.

[340] J. Jaria i Manzano, 'El derecho a una vivienda digna en el contexto social', 77.

[341] STS 27 November 2000, FJ. 4º (RJ 2000\9525).

[342] STEDH 16 November 2004 (TEDH 2004\68).

[343] In this sense, STS 7 November 1997 (RJ 1997\8348).

B. Act19/2009, in force since 24 December 2009, amends article 9.3 LAU 1994 extending the cases in which it is not obligatory for the landlord to accept a renewal of the lease.[344] Thus, the recovery of the leased dwelling may be possible not only in the event that the landlord should need it, but also if his relatives by consanguinity or adoption up to the first degree need the dwelling. Furthermore, the landlord may also recover the leased dwelling for the benefit of his/her spouse in the event of a final judgement on divorce or marriage annulment. The LEC is also amended with regard to the tenancy procedure in order to strength the landlord´s position. About this amendment, we should highlight some key points: a) it has expanded the scope of the oral proceeding to include rent claims, even if they are not accumulated to the eviction action and provided the lease relationship is maintained, whatever the amount claimed (art. 250.1 LEC); b) the eviction procedure is simplified through the reduction of deadlines and the elimination of non-substantial paperwork that could make the conclusion of the procedure longer; c) it is also established that if a specific address is not designated, the address of the leased dwelling is taken for all communications purposes. Thus, if these cannot be made effective at this address, the citation certificate may be attached to the notice board of the Judicial Office without having to carry out procedures for determination of the domicile as set out in article 156.1 LEC; d) the outstanding debt relief in whole or in part for the benefit of the tenant is also regulated (including the costs of the proceedings), in exchange for the duty of the tenant to leave the dwelling within the agreed period, not less than fifteen days (art. 437.3 LEC).

C. Act 39/2010, in force since 1 January 2011, amended article 36.6 LAU in order to include more public bodies exempted from providing a deposit, when the rent is funded from their own budget[345.] It also amends article 68 LIRPF, so the deduction is only applicable for residential tenancies for people with a taxable base below 24,107.20€; and article 23.2 LIRPF, as there is an increase from 50% to 60% of the net yield deduction for the rent. It also reduces the tenant age from 35 to 30 in order to apply the 100% deduction (arts. 67 and 69).[346]

D. Act 4/2013, on measures for the deregulation and promotion of the rental housing market, (LMFFMAV 2013, *Ley de medidas de flexibilización y foment del Mercado de alquiler de viviendas*), is the most significant amendment of the LAU 1994 and regulates measures so as to increase the flexibility of the contractual relationships between the parties, to strengthen the legal certainty, to provide more agility to the eviction process and to professionalize the market. This questionnaire is completed according to the new regulation introduced by this reform.

- **Human Rights:**

[344] For more information about tenancy renewal, see section 6.4 '*duration'* and 6.5 '*Notice by landlord', infra.*

[345] Article 145 of Act 13/1996, de 30 de diciembre, *de Medidas Fiscales, Administrativas y del Orden Social (*BOE 31 12 1996 núm. 315) already granted this exemption to State, Regional and Local Administrations, autonomous bodies and law entities, public and dependent ones. Thus, the Fourth Additional Provision of Act 39/2010 also grants it to the Mutual Funds for Accidents at Work and Occupational Illness associated to the Social Security, as well as their Centres and Joint Entities.

[346] See section 3.7 '*Taxation*', *supra.*

- **To what extent and in which fields was tenancy law since its origins influenced by fundamental rights enshrined in:**

o **the national constitution**

The right to housing was not recognised in Spain until 1978, when the Spanish Constitution was approved once democracy was re-established. The LAU 1994 was to be the first Act on tenancies that makes express reference to the protection of this right. In this sense, its preamble establishes that "the final purpose of the reform is to contribute to encouraging the urban leases market as a key element of housing policy, oriented by the constitutional mandate enshrined in article 47 concerning the recognition of the right of all Spaniards to enjoy decent and adequate housing".

o **international instruments, in particular the ECHR**

At a European level, the importance of housing is recognised in order to combat social exclusion and poverty, and is deemed to be, therefore, one of the key elements of the Welfare State. Thus, article 34.3 ECHR ensures the right of those citizens who do not have sufficient resources to get the housing aid that guarantees them a decent life. This right is provided with legal efficiency, because it is directly applicable to the States, being part of their legal system.[347] Nevertheless, it is the national legislator who has to determinate the required public and private measures for its performance[348]. In this sense, article 47 CE has a wider applicability than the ECHR, because it recognises housing as a social right which has to inform the Spanish legal system: it enables the public authorities to promote the necessary conditions and establish appropriate standards in order to make this right effective, and it works both as an interpretative criterion of legislation and as a mechanism of public authorities' control.[349]

- **Is there a constitutional (or similar) right to housing (droit au logement)?**

As has been mentioned before, the right to housing provided for in article 47 CE is deemed to be a programmatic principle and not a subjective right directly enforceable before Courts[350].

TABLE J LEGISLATIVE PERIODS, CHARACTERISTICS AND TYPES OF GOVERNMENT351

	1964	1985	1995	2013	Characteristics	Types of Government
LAU 1964					Freezing of rents and forced extension	Franco's dictatorship
RDL 1985					Freedom of will in duration and rent	Socialist

[347] According to art. 6.1 of the Lisbon Treaty (TUE), which grants the same legal value to the CDFUE of 2000, adopted on December 12, 2007 as the treaties, and article 96 CE.
[348] S. Nasarre Aznar, 'La insuficiencia de la normativa actual sobre acceso a la vivienda', 120 y 121.
[349] J. Jaria i Manzano, 'El derecho a una vivienda digna en el contexto social', 69.
[350] See section 3.1 *'What is the role of the constitutional framework of housing', supra.*
[351] Source: prepared by the authors. For more detail on the legislative periods see section 6.4 *'for limited in time contracts', infra.*

LAU 1994					Term of protection of 5 years	Socialist
LMFFMAV 2013 (last and most relevant reform of LAU 1994)					Term of protection of 3 years + registration in RP.	Centre-right

Key	
———	In force
– –	In force for contracts concluded before the new law.
·····	Transitorily provisions of the new law are applied to contracts concluded previously.

6 Tenancy regulation and its context

6.1 General introduction

- **As an introduction to your system, give a short overview over core principles and rules governing the field (e.g. basic requirements for conclusion, conditions for termination of contracts by the landlord, for rent increase etc.; social orientation of tenancy law in force; habitability (i.e. the dwellings legally capable of being leased)).**

The residential tenancy contract may be defined as a contract whereby one person (the landlord) transfers to another person (the tenant) the right to use and enjoy an inhabitable property, the main purpose of which is meeting the tenant´s need of permanent accommodation for a certain period of time and for a certain price (arts. 1543 CC and 1 and 2 LAU).[352]

The tenancy contract may be concluded in writing or orally (the former option is recommended) and shall compulsorily include: the contracting parties' identity, their will to be bound by the contract, the identification of the leased property and the initial rent amount (art. 37 LAU). If any of these elements is missing, the contract is not valid (art. 1261 CC). The conclusion of the contract takes place through the consent of the contracting parties, which is manifested by the coincidence between the offer and the acceptance over the thing and the cause that are to constitute the contract (art. 1262.1 CC).

The parties are free to agree on the duration of the contract. If no period is specified, the term shall be deemed to be for one year (art. 9.2 LAU). Furthermore, a minimum of three years extension is recognised to the tenant (art. 9.1 LAU), as long as art. 9.3 LAU is not applied. Once the first three years have been completed, the tenancy contract will be extended for one more year if none of the parties give notice of their intention to put and end to the contract (art. 10 LAU). If, upon expiration of this period, the tenant should remain in the enjoyment of the leased property for fifteen days with the landlord's acquiescence, the tenancy shall be deemed implicitly renewed for the period of one year, unless prior notice has been given by the landlord (arts. 1566 and 1581 CC).

[352] F.J García Gil, *El alquiler de la vivienda. Aspectos sustantivos, procesales y fiscales. Fomento del alquiler. Legislación comentada. Jurisprudencia. Formularios* (Madrid: Dijusa, 2008), 17.

The tenancy contract may be terminated either by the parties agreement, the expiration of the agreed period, the landlord's necessity to use the dwelling (art. 9.3 LAU), or by the parties' failure to meet their respective obligations laid down in article 27 LAU (for instance, works done without consent, the use of the dwelling for a purpose other than as a place of residence, the non-payment of the rent, deposit or other similar quantities, the loss of the property for reasons not attributable to the landlord or the declaration of ruin (art. 28 LAU).[353]

In order to be leased, the dwelling must be habitable (arts. 2.1, 21.1 and 26 LAU). Therefore, minimum requirements of habitability, healthiness and hygiene, sustainability, comfort, spatial dimensions, security, energy saving, quality, and so on laid down in the corresponding legislation must be met[354].

Proof of the social character of the tenancy contract is the mandatory nature of some rules of Title II of the LAU, specially article 6 LAU, which establishes the invalidity of any provision that modifies the rules of Title II to the tenant's detriment, except if these rules expressly allow it.

- **To what extent is current tenancy law state law or infra-national law (if legislative jurisdiction is divided: what is the allocation of competencies and for which subject matters)**

Autonomous Communities have the exclusive competence on housing (art. 148.1.13 CE). However, it must be taken into consideration that the State has competence to enact rules on urban leases on the basis of its exclusive competence in civil legislation, which includes the bases of contractual obligations (art. 149.1.8 CE). It is a common opinion among scholars that the term "legislation" is used in this expression in a material sense. Therefore, it covers not only the law in a formal way, but also executive regulations. [355]

Nevertheless, the same article 149.1.8 CE excludes from the State's exclusive competence the preservation, modification and development by the Self-governing Communities of their civil legislation, or special rights and traditional charters (*fueros*), whenever these exist. Accordingly, there are several Autonomous Communities that have assumed in their statutes the exclusive competence in civil legislation, which had to be in existence before the approval of the CE. However, according to the SSTC 28 September[356] and 16 November 1992[357], historical institutions may be regulated by Autonomous Communities even if they were not included in rules in force previously, as occurs with the historical leases of Valencia or the rural leases regime of Galicia. It allows the legislative reception or the

[353] The legal declaration of ruin is an administrative act that tends to prevent and avoid any danger posed by a building and it can be actual, imminent or future. The existence of a total deterioration of architectural or construction elements, which affect essential structural elements required, according to SSTS 20 November 1991 (RJ 1991\9152), 28 December 1983 (RJ 1983\6840) and 12 May 1978 (RJ 1978\2974).

[354] See section 3.4 *'¿Are there any means of control and regulation of the quality of private rented housing or is quality determined governed only by free market mechanisms?', supra.*

[355] J.M Busto Lago, 'Las competencias legislativas de la Comunidad Autónoma de Galicia en materia de derecho civil' en *Revista Xurídica Galega* 35 (2002): 14.

[356] RTC 1992\121.

[357] RTC 1992\182.

formalization of customs or local habits effectively in force in the territory. Therefore, the CE does not prevent the Autonomous Communities with their own civil legislation from enacting their own rules on urban leases.

For the time being, some specific aspects of urban leases have been regulated at a regional level, namely the lodging of the compulsory deposit regulated in article 36 LAU. Likewise, and by way of an example, the requirements of information and documentation to be supplied to consumers in a lease offer in Catalonia have been also regulated (arts. 61 and 66 of the LDVC). Furthermore, the Catalonian legal system has its own rules on condominium laid down in Chapter III of Title V of Act 5/2006, July 10th, which passed the fifth book of the Catalonian Civil Code regarding property rights[358], which includes some effects of condominium law onto leases.

- **Is the position of the tenant also considered as a real property right (and therefore also governed by property law) or (only) as a personal (obligatory) right?**

Following civil law tradition, the tenant´s position is deemed to be a personal right in the Spanish Civil Code, as the lease contract is regulated in Title VI of Book IV regulating the law of contracts and obligations. In this sense, the STS 18 March 1959, FJ. 3[359], establishes that "the immediate and direct relation between the person and the thing that characterize a property right does not take place in the tenancy contract with full autonomy, because the tenant needs the landlord's collaboration to make his right effective, as shown in paragraph three of article 1554 CC, which compels the landlord to maintain the tenant in the peaceful enjoyment of the lease for the whole term of the contract". As a consequence, the Civil Code establishes a cooperation structure between individuals, which is commonly found in obligatory rights. However, the tenant has possessory remedies to protect his right (446 CC y 250.4 LEC).[360]

However, due to the special protection needed for the tenancy in order to provide stability to the legal relationship, the Civil Code gives to the tenancy some proprietary effects, such as the *erga omnes* effects of registered leases (in the Land Registry), or the agreement between the parties by which a third party purchaser shall respect the tenant's position (art. 1549 CC)[361].

The LAU acknowledges more proprietary effects to the tenancy relationship in order to protect the tenant as a holder of the right to decent and adequate housing and to guarantee article 47 CE's mandate. Thus, the principle of the autonomy of will is limited for the benefit of the tenant, to whom the following faculties are given: a) a minimum period of contract duration, extensions and tacit renewal; b) *mortis causa* subrogation for specific relatives, and *inter vivos* subrogation for the spouse or partner or in case of separation, legal separation or divorce; c) opposability of the tenancy contract to third party acquirers when it is registered in the Property Registry; d) a right of pre-emption; and e) a rent review restriction unless otherwise agreed by the parties.

[358] BOE 22/06/2006 Nº 148.
[359] CENDOJ 28079110011959100093.
[360] See more in section 6.5 *'defects of the dwellings', infra.*
[361] See infra. about the special LAU protection and the proprietary effects.

There is a discussion among scholars about the impact of these faculties as far as the real or personal nature of the tenancy is concerned. The majority doctrine supports the idea of a right of a personal nature, but with certain proprietary effects.[362] In this sense, some rulings of the Supreme Court[363] have supported the personal character of the urban lease. Thus, doctrine[364] considers that the obligation of the third party acquirer of the leased property to respect the minimum five years compulsory extension[365] stems from the compulsory (by law) and forced subrogation in the landlord´s rights and duties. However, this effect does not modify the personal nature of the legal relationship.

Furthermore, registration is an external formality that cannot transform the right to a lease (the same takes place with the registration of disability rulings)[366]. Therefore, a part of the doctrine argues that the assimilation of the tenancy to a real right is a fiction created by the legislator with the sole purpose of providing stability to the tenant.[367]

- **To what extent is the legislation divided up into general private law and special statutes? To what extent are these rules mandatory and dispositive? Does the relationship between general and special rules work properly so as to create legal certainty?**

Urban leases[368] are governed by the general provisions of the Civil Code (arts. 1542 to 1582). However, as there is a special legislation (the LAU), these general provisions will only apply in subsidiary form, as far as both the general provisions of the Civil Code on tenancies and the general rules about obligations and contracts laid down in Book IV of the Civil Code are concerned.

Accordingly, the LAU establishes that the will of the parties shall be applied for residential tenancy contracts in the first place, according to what Title II of the LAU sets out. In this regard, Title II of the LAU, unlike Title III of the LAU, which governs tenancies for other purposes, provides for mandatory rules that undermine the principle of freedom of will, a general principle governing the law of contracts (art. 1255 CC). Therefore, this rule aims to meet article 47 CE's mandate by giving more stability and security to tenants. Consequently, the parties may make agreements different from those established in the tenancy legislation where permitted by law. When the special regulation (LAU) and the parties' agreement are not applied to the

[362] It is supported, for example, by A. Cossío Corral and C. Rubio Arcos, *Tratado de Arrendamientos*, T. I (Madrid: Rialp, 1949), 359, M. Moreno Mocholi, 'Sobre la naturaleza jurídica': 41 and ss.; R.M., Roca Sastre and L. Roca-Sastre Moncunill, *Derecho Hipotecario*, 517; M.M. Méndez Serrano, *Los Fondos de Inversión Inmobiliaria*, 75.

[363] It is provided in SSTS February 27th 1993 FJ. 2 (RJ 1993\1301), April 3rd 2009 FJ. 6 (RJ 2009\2806) and March 24th 2011 FJ. 2 (RJ 2011\3007).

[364] In this regard, A. Cossío Corral and C. Rubio Arcos, *Tratado de Arrendamientos*, 359, M. Moreno Mocholi, 'Sobre la naturaleza jurídica': 41 and ss., and R.M., Roca Sastre and L. Roca-Sastre Moncunill, *Derecho Hipotecario*, 514 and ss.

[365] Applied to contracts concluded between January 1st 1995 and June 5th 2013.

[366] M. Moreno Mocholi, 'Sobre la naturaleza jurídica': 41-43.

[367] M.M. Méndez Serrano, *Los Fondos de Inversión Inmobiliaria*, 75.

[368] An urban lease is one that rests on a residential building located either in the city or in the countryside. Instead, the rural lease is agreed when the estate is to allocate the agriculture, livestock and forestry, according to art. 1.1 of Ley 49/2003, de 26 de noviembre, de arrendamientos rústicos (BOE 27/11/2003 núm. 284).

tenancy contract, then the general provisions established in the CC apply subsidiarily, as takes place with tacit renewal (arts. 1566 and 1581 CC).

Additionally, the LAU does not regulate all of the aspects related to residential tenancies. For example, Royal Decree 297/1996 regulates its registration,[369] and the Royal Decree 515/1989 applies as far as the information to be supplied to consumers about tenancies is concerned.[370]

It is also worth remembering that the VPO[371] for tenancy purposes are excluded from the scope of the LAU when they are subjected to their own governing regulations.[372]

- **What is the court structure in tenancy law? Is there a special jurisdiction or is the ordinary one competent? What are the possibilities of appeal?**

a) Jurisdiction: urban leases do not have a special jurisdiction, as is the case of labour and commercial law. As a consequence, the ordinary civil jurisdiction has the exclusive competence (art. 22.1 LOPJ),[373] and the Courts of First Instance of the place where the property is located are the ones competent to rule on legal proceedings about leases in the first place (art. 45 LEC).[374] The possibility of modifying the functional competence by an express or implied submission to another Court is excluded (art. 52.1.7 LEC). Furthermore, Justice of the Peace courts are also competent in those cases where a claim for rents is below 90.15 € (art. 47 LEC).[375]

However, ten Courts of First Instance specialised in speeding up eviction proceedings were created in 2008. These Courts are not exclusively aimed at this objective, but they can give preference to their resolution.[376]

b) Appeals: from a civil law perspective, Provincial Courts from the place where the property is located are the ones competent to review judgements coming from the Courts of First Instance that have been appealed. If the judgements come from the Justice of the Peace courts, then the Courts of First Instance are the competent ones to rule on the appeals (art. 455 LEC).

If there is a breach of procedure, an extraordinary appeal may be submitted before the Court that has issued the judgement within 20 days of the date following day of

[369] Real Decreto 297/1996, de 23 de febrero, sobre inscripción en el Registro de la Propiedad de los contratos de arrendamientos urbanos (RDIRPCAU) (BOE 14/03/1996 núm. 64).
[370] Real Decreto 515/1989, de 21 de abril, sobre protección de los consumidores en cuanto a la información a suministrar en la compra-venta y arrendamiento de viviendas (BOE 17/05/1989 núm. 117).
[371] Public sector dwellings are those classified as such by the public administration. They must meet certain requirements: maximum m2, maximum price, minimum protection period, according to art. 77 LDVC.
[372] See section 4.2 '*Different types of private regulatory rental types and equivalents', supra.*
[373] Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (BOE 02/07/1985 núm. 157).
[374] It is also provided in paragraph five of LAU's Preamble.
[375] In accordance with A. Fuentes Lojo y J. Fuentes Lojo, *Novísima Suma de arrendamientos urbanos*, T. II (Barcelona: JM Bosch Editor, 2007), 1051.
[376] Approved by Real Decreto 159/2008, de 8 de febrero, por el se dispone la creación y constitución de 10 juzgados de primera instancia dentro de la programación para el año 2008 (BOE 09/02/2008 núm. 35), specifically they are created in Málaga, Las Palmas de Gran Canaria, Hospitalet de l'Infant, Valencia and six in Madrid.

the judgement notification (art. 470 LEC). This appeal can only be based on the breach of the rules on objective or functional jurisdiction and competence, the breach of the procedural rules governing the judgement, the breach of the legal rules governing the procedures and safeguards of the proceedings, where such breach gives rise to their nullity in accordance with the law or could have brought about a lack of proper defence, and the violation in the civil procedure of the fundamental rights recognised by article 24 CE (art. 469.1 LEC).[377]

The judgement ruled on may be appealed once again in cassation before the Supreme Court[378] in certain cases: when the amount of the matter at issue is above 600,000 € or when the procedure amount is under 600,000 € or it has been processed on the grounds of the subject, as long as, in both cases, appeal resolution has an interest of cassation,[379] or where they are issued to provide fundamental rights with the effective protection of the civil courts, apart from the fundamental rights recognised by article 24 CE (art. 477 LEC).

In the proceedings involving eviction, the defendant shall not be allowed to lodge any remedy of appeal, whether extraordinary on the grounds of breach of procedure, or of cassation, if, in their preparation, he fails to declare and to produce written evidence that he paid the rents due and those he is bound to pay in advance under the contract (art. 449.1 LEC).

Once the ordinary appeal procedure is exhausted, it is possible to appeal before the Constitutional Court when there is a violation of fundamental rights (art. 50 LTC).[380]

c) Protected housing: article 141 of Decree 2114/1968 lays down an administrative proceeding of eviction for VPO when a non-payment of the rent, serious damages to the property and serious or very serious infringement of VPO regulation take place, or because the dwelling is not used for the primary and permanent residence of the tenant (arts. 138 and 140).[381] Additionally, landlords must be one of those quoted in article 22. Among them, Councils, County Councils, municipal or provincial Patronages, National Union Delegation, Ministries or Chambers of Urban Property are included, as long as the procedure is carried out in accordance with the

[377] It has to be proved that procedure infringement or a breach of section 24 CE was reported just at the moment that it occurred: in second instance or if it occurred in first instance, it shall be proved that it was reported in first instance and reproduced before the second instance body. If the defect could be corrected it shall be credited that correction was called on in the precise moment and by the appropriate procedure. It is required to have exhausted legal means intended for the breach correction, without having taken the appropriate measures for that (art. 469.2 LEC).

[378] High Courts of Justice shall hold responsibility for dealing with appeals in cassation lodged against decisions of the civil courts located in the autonomous region, as long as the appeal is solely grounded on a breach of the rules of civil, jurisdictional or special law specific to the autonomous region, or jointly with other grounds, and where the relevant Statute of Autonomy sets forth such attribution (art. 478.1 LEC).

[379] It shall be deemed that an appeal has interest to set aside when the judgement subject to appeal contradicts the Supreme Court's jurisprudence or decides on points and issues about which contradictory jurisprudence from the Provincial Courts exists or where it applies rules that have been in force for less than five years, as long as, in the latter case, no jurisprudence from the Supreme Court should exist concerning previous rules of identical or similar content (art. 477.3 LEC).

[380] Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional (BOE 05/10/1979 núm. 239).

[381] As an example, STS 7 December 2006 (RJ 2007\378) understands that a claim for compensation stipulated in a penal clause of the lease contract corresponds to civil jurisdiction.

provisions laid down in the mentioned Regulation.[382] In the same sense, this faculty is recognised in favour of the Catalonian local entities according to article 166 of Decree 336/1988.[383] This submission to the contentious administrative jurisdiction is justified by the public service purpose that the dwelling fulfils. For the remaining issues, procedure shall be carried out according to what is established for in the civil jurisdiction.

In this regard, the STS 20 March 2000, FJ. 2,[384] establishes that "even when the final result of an administrative act is a private law contract, the Administration's will formation is submitted to rules with a legal-administrative nature, so, that control of the will formation process corresponds to the contentious administrative jurisdiction, in spite of the fact that the will results in a private law contract agreement". Consequently, even when a private contract is concluded, the preparation and awarding of the tenancy contract is submitted to administrative law and, therefore, disputes arising from these acts shall be resolved before its jurisdiction.

d) Arbitration: parties may agree in the contract to submit to an arbitration proceeding for any discrepancy that may arise, indicating the competent territorial Court for the purpose. If the arbitral award is not fulfilled, its enforcement by means of a legal process may be started (art. 517.2.2 LEC).

- **Are there regulatory law requirements influencing tenancy contracts**
- **E.g. a duty to register contracts; personal registration of tenants in Eastern European states (left over of soviet system)**

It has already been pointed out that there are legal requirements for tenancies, for instance the tenant´s duty to pay the ITP where the contract is concluded,[385] or the professional´s duty to supply certain information about the rented dwelling. Furthermore, the dwelling also needs to have a current certificate of habitability, and the landlord is obliged to give the tenant a copy of the energy efficiency certificate, as will be discussed later.

With reference to the registration of the tenancy contract, although the aim of the Property Registry is to register acts and contracts related to property ownership and real rights (art. 1 LH), article 2.5 LH allows the registration of the lease and sublease contracts and contract subrogation. Under this provision, the RDIRPCAU was enacted in order to establish the registration requirements. Among these requirements we should highlight the fact that only those tenancy contracts concluded since 1 January 1995 may be registered (art. 1).

Registration in the Land Registry is not compulsory. However, the legislator protects the tenancy contract by admitting its registration, which will produce *erga omnes* effects against third parties. Thus, publicity is given to those tenants that have not

[382] Thus, STS 20 December 1989 (RJ 1989\9492) annulled an administrative eviction resolution because the procedure regarded in the VPO Regulation was omitted, because the cause was not found to be among those established in the standards.
[383] Decreto 336/1988, de 17 de octubre, por el que se aprueba el Reglamento del patrimonio de los entes locales (DOCG 02/12/1988 núm. 1076).
[384] RJ 2000\3275. In the same sense, SSTS 29 December 1986 (RJ 1987\1572) and 23 January 1987 (RJ 1987\1978).
[385] See section 3.7 *'Do tenants also pay taxes on their rental tenancies?', supra.*

registered their rights previously and to those who do not have their title registered. Registration also provides legitimacy to the registered content (art. 38 LH).[386] Registering the lease requires the agreement of the parties, except if the obligation to register has been agreed in the contract. This requires that the contract be registered as a notary deed.

- **Regulatory law requirements on – new and/or old – habitable dwellings capable of being rented – e.g. on minimum size, number of bathrooms, other mandatory fittings, etc.**

As has already been pointed out, the technical rules of the Autonomous Communities lay down the habitability requirements that any dwelling shall meet to be occupied. Therefore, they are applicable to rented dwellings.[387] Thus, these shall be subject to certain habitability requirements depending on the year of construction, conversion or major rehabilitation of the dwelling.

By way of example, new construction or major rehabilitation dwellings subjected to the Catalonian Decree 141/2012 shall have a minimum net floor area of 36m2 (art. 3.1). Previously, a minimum of 40m2 was required. Furthermore, a maximum threshold of occupation is determined according to the number and dimension of the bedrooms, with a maximum of 2 people in dwellings without rooms and only with spaces for common use (art. 4). In this way, steps have been taken to avoid the overcrowding situations laid down in LDVC 2007 by providing local authorities with more effective mechanisms in order to fight against substandard housing.

- **Regulation on energy saving**

Directive 2002/91/EC of the European Parliament and of the Council, of 16 December 2002, on the energy performance of buildings[388] sets the obligation to make available to purchasers or users of the buildings an energy efficiency certificate which shall include objective information on the buildings' energy characteristics, in order to encourage the promotion of high energy-efficient buildings and investments in energy saving.

Currently, Spain has transposed Directive 2010/31/EU of the European Parliament and of the Council, of 19 May 2010, on the energy performance of buildings[389], by means of Royal Decree 235/2013, of 5 April, approving the basic procedure for the certification of the buildings' energy efficiency (from now on, RD 235/2013),[390] which repeals RD 47/2007.[391] This certification is required for tenancy and purchase contracts concluded since June 1st 2013 (First Transitory Provision RD 235/2013).

[386] As set out by M.M. Méndez Serrano, *Los Fondos de Inversión Inmobiliaria*, 86.
[387] See section 3.4 *'Are there any means of control and regulation of the quality of private rented housing or is quality determined governed only by free market mechanisms', supra.*
[388] (DOCE 04/01/2003 núm. L1/65).
[389] (DOCE 18/06/2010 núm. L153).
[390] (BOE 13/04/2013 núm. 89).
[391] Real Decreto 47/2007, que establece un procedimiento básico para la certificación de eficiencia energética de edificios de nueva construcción (BOE 31/01/2007 núm. 27), que daba cumplimiento a la Directiva 2002/91/CE.

Therefore, each new or used dwelling sold or leased in Spain must have this certificate,[392] which is a document that describes how effective a dwelling is in terms of energy consumption. It has a validity of 10 years and shall be included in each offer, promotion or advertising carried out in this regard (arts. 7, 8, 11.1 and 12.2 RD 235/2013). The owner of the dwelling, building or premises is responsible for obtaining and paying the cost of this certificate, and shall display it and give a copy to the tenant (art. 14 RD 235/2013).

6.2 The preparation and negotiation of tenancy contracts

Preliminary Note: We suggest that for each section (b through g) and each tenancy type some concluding remarks should be provided in a summary table about the rights and duties of tenant and landlord and the main characteristics (in telegram style).

Example of table for 6.2 Preparation and negotiation of tenancy contracts

	Main characteristic(s) of tenancy type 1 Private tenancy	Main characteristic(s) of tenancy type 2, etc. Public tenancy	Ranking from strongest to weakest regulation, if there is more than one tenancy type
Choice of tenant	- By means of advertisement, real estate agents or public bodies that manage private housing. - Request of at least Taxpayer No. and economic documentation which proves current income.	- Through protected housing applicants' Registry. - More requirements are often requested: minimum years of residence, order of registration, etc.	- In private tenancy more incomes are often required; but to obtain protected housing, more requirements are necessary, apart from the economic ones.
Ancillary duties	- A down payment equivalent to a month's rent is often requested.	- Waiver may involve imposition of penalties.	- There is normally an economic penalty in private housing, while in public housing there is a limit on access to another protected home during a fixed period of time.

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- **Freedom of contract**

o **Are there cases in which there is an obligation for a landlord to enter into a rental contract?**

a) By compulsory expropriation: Andalusia has recently passed Decree Law 6/2013[393], which regulates a compulsory expropriation procedure, for a maximum period of three years, of the use of dwellings of owners or mortgagors that are in eviction proceedings instigated by financial institutions, their real estate subsidiaries or asset management entities, as long as any of these three above-mentioned entities become the owner of a property foreclosed by itself, the former owner of

[392] With regard to civil consequences see section 7.2 '*energy saving', infra.*

[393] *Decreto-Ley 6/2013, de 9 de abril, de medidas para asegurar el cumplimiento de la Función Social de la Vivienda (BOJA 11/04/2013 núm. 69).*

which was a person in need (who becomes the beneficiary of that expropriated use of the property). The Decree's preamble justifies this measure on both the social function of property (art. 33.2 CE) and the right to decent housing (art. 47 CE). The beneficiaries of these measures shall meet certain requirements, among which we should highlight the following: a) the beneficiary of the expropriated use of the dwelling must have his primary and permanent residence in the foreclosed dwelling, being the only dwelling owned by him; b) the foreclosure proceeding must have started as a consequence of the non-payment of the mortgage loan granted so as to pay the dwelling price; c) the person's economic conditions need to have suffered major damage, which has led to an unexpected situation of indebtedness with regard to the conditions and circumstances existing when the mortgage loan was granted[394]; d) the whole family income shall not exceed three times the IPREM (6.390.13€ per year for 2013). The beneficiary shall be obliged to pay to the expropriating Administration an amount as a contribution to the payment of the fair price, which cannot exceed 25% of the income of the family unit living there, nor the amount of the fair price (Second Additional Provision).

As has already been pointed out, a similar provision to this one (the expropriation of the usufruct of empty and underused dwellings) was introduced into Catalonian law in 2007 in order to force the lease of underused dwellings, although this measure was repealed later on in 2012 without having been put into practice[395].

b) By rehabilitation: if the owner of an empty dwelling is awarded aid to rehabilitate it, he has the duty to allocate the dwelling to tenancy under a protected regime as long as it is not used for his primary and permanent residence or it is already leased. This is set out in article 35.3 of the Catalonian LDVC 2007. This protection is also foreseen for the whole Spain in PEFAV 2013-2016, where dwellings to be rehabilitated with public subsidies shall be allocated to tenancy at least for 10 years (art. 19.2. b).

- **Matching the parties**

o **How does the landlord normally proceed to find a tenant?**

Private owners mostly manage the tenancy housing stock in Spain[396]. Therefore, the most common ways to find tenants are: a) through reliable people who recommend acquaintances to landlord; b) through advertisements in newspapers, mainly regional ones; c) through Internet sites, such as www.fotocasa.es or www.idealista.com; d) through real estate intermediation agencies.

Usually, landlords turn to public bodies or groupings to intermediate in or manage their private dwellings. For example, intermediation services that Universities[397] or owners' associations offer, which are responsible for bringing landlords and tenants into contact. However, it is becoming more usual to entrust housing management to

[394] In this regard, the Decree understands that this damage has been produced when the effort that the mortgage charge represents for the household income has been multiplied by, at least, 1.5, and it represents more than one third of the household income.
[395] See section 3.3 *'Are there measures against vacancies?', supra.*
[396] See section 1.4 *'Which actors own these dwellings?', supra.*
[397] For example, the housing pool of Universidad Rovira i Virgili, available at: <www.urv.cat/serveis_universitaris/borsa_habitatge/index.html>, 21 March 2013.

the Local Housing Offices[398] or the Chambers of Urban Property,[399] due to the extra security that they add during the contract term, as well as thanks to the subscription of insurance policies that cover totally or partially the non-payment of rents, the damage to the property and even the legal defence for the resolution of conflicts arising from the rental relationship. In this regard, housing managed by public administrations is allocated to tenants through the protected housing applicants' Registry. Currently, financial institutions are also acting as regular landlords.

o **What checks on the personal and financial status are lawful and usual? In particular: May the landlord ask for a salary statement? May he resort to a credit reference agency and is doing so usual?**

As a general rule, the identification document of the future tenant is often requested before concluding a private tenancy contract (ID or NIE card), and also documentation that proves sufficient economic resources, such as the presentation of the employment contract and the last payslip, the last filed income tax return or a certificate from the pension or public provision perceived, depending on each case. In those cases in which requirements are not met, the landlord may request a personal guarantor who meets the requirements and who is usually jointly liable in case of default of the tenant in paying the rent and/or the granting of a banking guarantee (art. 36.5 LAU 1994 and art. 1822 CC).

In the case of public administrations or other housing pool management bodies, this information is often supplemented by the request for a certificate of the tenant's working life, as well as his family book, the historical registration certificate and documents that can prove vulnerable situations requiring special protection (eg. a judgement recognising a degree of disability, a large or single-parent family card, a judgement which recognises a situation of gender violence or that allows an eviction procedure, etc.).[400] In addition, it is also common to accept the presentation of a social report that certifies emergency situations, issued by the social services of the municipality where the person concerned resides.

o **How can information on the potential tenant be gathered lawfully? In particular: Are there blacklists of "bad tenants"? If yes, by whom are they compiled? Are they subject to legal limitations e.g. on data protections grounds?**

Housing applicants themselves shall provide the documentation mentioned above, according to the existing rules on protection of personal data, since the consent of the person concerned is necessary to transfer these data to third parties.[401]

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[398] See section 4.3 *'Regulatory types of tenures with a public task', supra.*

[399] For example, the ones located in Zaragoza, Madrid, Tarragona or Barcelona. See, for example, the housing pool of Chamber of Urban Property of Barcelona, available at: <www.cambrapropbcn.com/web_new/ES/borsa.asp>, 21 March 2013.

[400] Each Autonomous Community establishes the requirements and documentation to be filed in order to access the Protected Housing Applicants' Registry, as set out, for example, in section 18.1 of Decree 211/2008, de 4 de noviembre, del Gobierno de Aragón, por el que se aprueba el Reglamento del Registro de solicitantes de vivienda protegida y de adjudicación de viviendas de Aragón (BOA 14/11/2008 núm. 190).

[401] As set out in section 11.1 of the Ley Orgánica 15/1999, de 13 de diciembre, de Protección de Datos de Carácter Personal (LOPDCP) (BOE 14/12/1999 núm. 298).

The LMFFMAV 2013 creates, for the first time, a Registry of final judgements concerning non-payment of rents, to which final judgements and arbitral awards resolving the non-payment of rent shall be notified (art. 3 paragraphs 1, 2 and 3). According to this regulation, landlords who wish to arrange a tenancy contract may be able to access the mentioned Registry, once they have provided a proposal of this contract that will allow them to access only data related to tenants appearing in the proposal (art. 3.4). This Registry is under the protection of rules on personal data, set out in the LOPDCP (art. 3.6), so people included in the Registry may request the cancellation of the registration when, in the corresponding procedure, they have finally paid the debt for which they were condemned. Additionally, "bad tenants"' will be in the Registry a maximum of 6 years, after which the record will be automatically cancelled (art. 3.5). The functioning and organisation of the registry shall be regulated through the adoption of a Royal Decree (art. 3.1), which is currently (July 2013) under development.

o **What checks may and does the tenant carry out on the landlord (e.g. to avoid being trapped by a swindler landlord)**

The tenant may request a non-certified extract (*nota simple*) from the Land Register (art. 222.1 and 2 LH) in order to check whether the landlord has the capacity to contract, if he is the real owner, if the dwelling is already encumbered (with a mortgage, easement, etc.) or if there is a preventive annotation of attachment or a precautionary registry notation of a claim that could affect him during the term of the tenancy contract (art. 222.5 LH).

o **Services of estate agents *(please note that this section has been shifted here)***

▪ **What services are usually provided by estate agents?**

According to what has already been mentioned, real estate agents may provide advisory, management and mediation services in the tenancy field.[402]

The basic services that are most often requested of a real estate agent are advisory services and management, either by the landlord, who is looking for a tenant, or the tenant, to assistance in his/her search for a dwelling. However, real estate agents also provide advice regarding the preparation and conclusion of the contract and in relation to the rights and duties that correspond to the parties.

In addition to this, there are also real estate agents who are responsible for managing the tenancy contract during its full term, carrying out management tasks that are those of an administrator: management of rent collection, advice about the conservation and use of the dwelling, works to be carried out and other issues that may arise from the legal relationship. In this case, a mediation service between landlord and tenant is carried out aiming at bringing the parties' positions closer to find a solution to the controversies arising from the tenancy contract, with a more appropriate approach to legality, faster and with more discussion tools.

[402] See section 2.4 'W*hat is the role of estate agents?', supra*.

They also provide professional housing valuation services, issuing opinions concerning the market value of these dwellings.

- **To what extent are estate agents regulated? In particular: are there rules on how an agent should present a house, i.e. on the kind of information which needs to be given?**

Due to liberalization of the real estate agent's profession, this sector lacks a specific and complete regulation governing its exercise.[403]

At a national level, it is regulated by RD 1294/2007, which merely sets, regarding the exercise of the activity, the obligation to look after the interests of customers and to apply the legal system standards, especially those referring to the information to be supplied to consumers in the event of purchase or lease of a property (art. 9.a., c. and k). In this sense, they shall supply the information required by the consumers and users' regulation (RD 1/2007 and RD 515/1989) regarding the offering, publicity, promotion and conclusion of contracts, in the terms explained below.[404]

It is important to take into account the power of each Autonomous Community to enact its own regulation regarding real estate agents[405], and also each Professional College's own rules, which may standards for the behaviour considered ethically correct or incorrect through its Code of ethics.[406]

- **What is the usual commission they charge to the landlord and tenant? Are there legal limitations on the commission?**

Real estate agents' fees are not regulated. Usually, the fee is equivalent to a monthly rent payment when they provide basic intermediation services.

Otherwise, when real estate agents are in charge of managing the tenancy contract during the whole term, they perform management and mediation tasks. In this case, they usually charge a monthly fee to the landlord, who in many cases increases the cost of the tenancy because it is deducted from it periodically. Thus, the estate agent fees are accrued, unless otherwise agreed, from the moment that their activity is effective in order to formalise the contract, and even if the dwelling is not delivered eventually for reasons unrelated to the agent.[407] This entails the lack of remuneration of the pre-contractual and preliminary activities, unless there are specific provision in this regard.[408]

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[403] See section 2.4 '*What is the role of estate agents?', supra.*

[404] See section 6.2 *'Ancillary duties of both parties in the phase of contract preparation and negotiation', infra.*

[405] See section 2.4 *'What is the role of estate agents?', supra.*

[406] By way of example, one can consult the Code of Ethics for the College of Real Estate Agents of Barcelona. Available at: <http://www.apibcn.com/sobre_elcolegio_codigodeontologico.php>, 9 september 2013.

[407] In this sense, SSAP of Málaga on 3 December 2009 (JUR 2010\211210) and of Las Palmas on 18 October 2012 (JUR 2013\17989).

[408] Following the already mentioned doctrine in SSTS of 1 December 1986 (RJ 1986\189), 17 May 1990 (RJ 1990\3734) and 26 March 1991 (RJ 1991\2447).

By way of example, the guideline fee published by the Real Estate Property Agents in Catalonia for intermediation in a tenancy contract is a monthly rent payment for contracts above one year in duration.[409]

- **Ancillary duties of both parties in the phase of contract preparation and negotiation ("culpa in contrahendo" kind of situations)**

A draft or preliminary contract may be arranged in order to pre-arrange a particular dwelling to be leased. To be considered as such, the Supreme Court's jurisprudence[410] requires that this document shall contain the basic elements of a tenancy contract and all the requirements that the parties shall develop at a later time.

Usually, an earnest money agreement (*contrato de arras*) is concluded to reserve the dwelling, and the amount to be delivered is usually equivalent to a monthly rent payment. Under Spanish law, there are three types of earnest money agreements that the parties may negotiate according to their needs. If the parties do not specify any concrete modality, it means that a confirmatory deposit (*arras confirmatorias*) is the one chosen, and the quantity delivered is deemed to be an advance payment of the tenancy price.[411]

- Confirmatory deposit (*arras confirmatorias*): An amount is delivered as an advance payment of the tenancy price,[412] and its formalization is binding for both parties. In the event of non-performance, the other party may require the contract performance or its termination and compensation of damages caused by the non-performance (art. 1124 CC).

- Penalty deposit (*arras penales*): the amount paid in advance serves as a guarantee of the contract performance. If there is a breach of the contract by the party that has paid the deposit, it loses the amount paid, and the party whose expectations have been frustrated is entitled either to demand its performance, with the appropriate compensation for any damage caused, which should be proved, or to terminate the contract because the *arras* constitutes a penalty.[413]

- Deposit of earnest money (*Arras penitenciales*): these are the only ones that allow the parties to withdraw from the contract. If the party that does not perform the contract is the tenant, he loses the delivered deposit. Conversely, if it is the landlord who does not perform it, he is obliged to return the deposit delivered in duplicate to the tenant (art. 1454 CC). In order to apply this type of *arras*, it will be necessary for the the will of the parties to be specified in a clear and unmistakable manner,

[409] Available in: <www.apibcn.com/revistas/37/63.pdf>, 14 July 2013.
[410] SSTS 13 October 2005 (RJ 2005\7340), 16 July 2003 (RJ 2003\5144) and 8 February 2010 (RJ 2010\395).
[411] SSTS 2 December 1988 (RJ 1988\9287),9 May 1990 (RJ 1990\3693) and 20 February 1996 (RJ 1996\1261).
[412] STS 22 September 1999 (RJ 1999\7265) and SAP Asturias 8 May 2003 (JUR 2003\267743).
[413] In a case of non-compliance, the deposit may have to be returned doubled, but unlike with penitential deposits, only when the parties have agreed it**,** as set out in SSTS 26 December 1991 (RJ 1998\4034) and 19 May 1998 (RJ 1991\9601).

allowing them to withdraw from the contract. Otherwise, the rules on confirmatory deposits will be applied.[414]

In contracts concluded with the Public Administration, VPO mainly, tenants usually sign a document of acceptance of the awarding of the allocated dwelling, but it is not usual to request any *arras,* although they might be requested if the Administration deems it necessary. In the event of a tenant's withdrawal, penalties may be imposed. In Catalonia, for example, if an applicant withdraws from the allocation process or from the allocated dwelling, without a just cause, he is removed from the Registry and may not be able to register again for five years.[415]

According to article 1902 CC, preliminary dealings only entitle one to compensation. In addition, when the rental offer is from a business to a consumer, RDL 1/2007 shall be applied. It sets out, in a general manner, that all relevant pre-contractual information about the dwelling shall be provided to a consumer in clear and comprehensible manner and in writing, unless the consumer expressly states a waiver of such obligation[416]. This information includes the offeror's identification, the full price, the delivery date and the duration of the contract, the proceeding to terminate the contract, the right of withdrawal, the guarantees offered and the full address of the place to contact in order to file a claim or complaint (art. 60) and the period of the offer's validity and other essential aspects of the contract (art. 97).

However, the specific regulations on this subject are applied in order of preference. Firstly, the one adopted by each Autonomous Community, as for example the LDVC 2007 in Catalonia.[417] Failing this, RD 515/1989 shall be applied, which specifically establishes the information to be supplied for the dwelling lease. In this regard, apart from what is commented above, the following information shall be supplied to the tenant before the conclusion of the tenancy contract: a general map of the dwelling and its services' location, a detailed description of the property, materials used in construction, instructions on the use and conservation of facilities and the building's evacuation, and identifying data of the registration in the Property's Registry (art. 4).

The breach of any of these obligations shall lead to application of the penalty system regulated in articles 49 to 52 of RDL 1/2007 (art. 11 RD 515/1989 and 49.1h RDL 1/2007), which qualifies trespasses as minor, serious and very serious ones, with corresponding penalties for each type (art. 50 and 51 RDL 1/2007). Moreover, the consumer may claim compensation for the damages caused by a breach of such obligations (art. 128 RDL 1/2007).

6.3 Conclusion of tenancy contracts

Example of table for 6.3 Conclusion of tenancy contracts

	Main characteristic(s) of tenancy type 1 Urban tenancy	Main characteristic(s) of tenancy	Ranking from strongest to weakest regulation, if

[414] As set out in SSTS 12 July 1986 (RJ 1986\4504), 12 December 1991 (RJ 1991\8998) and 4 March 1996 (RJ 1996\1996).
[415] According to articles 96.1.C and 96.2 of the LDVC.
[416] As required in section 98.2 RDL 1/2007.
[417] See section 6.1 *'To what extent is current tenancy law state law or infra-national law?', supra.*

		type 2, etc.	there is more than one tenancy type
Requirements for valid conclusion	Capacity to contract and consent of the parties. Oral or written contract.		
Regulations limiting freedom of contract	Minimum contents: Identity of the parties, identification of the property and rent. Additional requirements when the contract is between a professional and a consumer. Mandatory regime Title II LAU: Clauses that injure tenants are void.		

- **Tenancy contracts**

- **distinguished from functionally similar arrangements (e.g. licence; real right of habitation; leihe, comodato)**

a) Tenancy contract for purposes other than residence: the residential tenancy contract, governed by Title II of the LAU 1994 (as mentioned above), differs from the tenancy contract for other purposes mainly in that the former protects the tenant during the first five years of the contract.[418]

b) Usufruct: both tenancy and usufruct are legal institutions that may be used to assign the use and the enjoyment of real estate for housing purposes. However, the main difference between them is that the latter is a real right, which means not only that it can be encumbered or alienated, but also that it has a vocation of permanence, since it is for life unless otherwise agreed. However, as has already been pointed out, the usufruct is not aimed at striking a balance between the rights and duties of the parties.[419]

c) Right of surface: it may be constituted on a dwelling. See in this sense the explanation in section 1.4 in the question 'Intermediate tenures'.

d) Emphyteusis: it is also important to distinguish between tenancy and emphyteusis. The latter takes place when one person, the annuitant, assigns in favour of the emphyteutic lessee the useful ownership of a property, and reserves for himself direct ownership thereof and the right to receive from the emphyteutic lessee an annual pension in recognition of such ownership (art. 1605 CC). In this case, the domain is divided on a perpetual basis. Conversely, in Catalonian civil law the full ownership is attributed to the emphyteutic lessee (art. 565-1 CCC). As a consequence, the doctrine considers that the annuitant is invested with a limited real right.[420] Although this legal institution would provide access to housing at an affordable cost, it is used mainly in the public sector. Therefore, its presence is not widespread between individuals. The main drawback of this legal institution is its perpetual or indefinite nature. Thus, an owner willing to get profits from his dwelling prefers to sell or rent it instead of losing his right of ownership in exchange for a

[418] See section 4.2 '*Rental contracts'*, *supra.*
[419] See a usufruct description in section 1.4 *'Intermediate tenures', supra.*
[420] As set out by P. Del Pozo Carrascosa, A. Vaquer Aloy, and E. Bosch Capdevila, *Derecho Civil de Cataluña. Derechos Reales* (Barcelona: Marcial Pons, 2009), 19.

fee.[421] Moreover, the annuitant is subjected to the exercise of the option to buy on the part of the emphyteutic lessee, which may be exercised when it best suits him upon payment of the agreed amount.[422]

e) Real rights of use and habitatio: both are regulated mainly by the title that creates them (eg. contract) and, subsidiarily, by the Civil Code (art. 523 CC) or by the regional legislation in this regard.[423] They may be constituted free of charge; inter vivos or mortis causa;[424] or for consideration in Catalonia[425] but only as part of the consideration in a sales contract under the Spanish Civil Code.[426] Nevertheless, they cannot be leased or transferred to another person nor be encumbered with a mortgage (art. 108.3 LH). However, in Catalonia, article 562-4.1 CCC establishes that both may be encumbered or alienated when the owner consents to it. Despite all this, there are court cases[427] that accept, on the basis of articles 523 and 1255 CC, that the parties may agree in the contract on a consideration and even on a right to assign.

The real right of habitatio entitles its holder to inhabit a dwelling partially. Dwellings for commercial purposes and spaces that do not meet the minimum habitability conditions fall beyond its scope (exception can be made with caravans)[428.] A welfare purpose is recognised to this institution because it meets the housing needs of the holder and his family[429.] For this reason, the legislator has conferred more protection on the holder of the right (habitacionista) than to the tenant, entitling the former with a direct and immediate power over the encumbered thing that is opposable *erga omnes* once registered in the Property Registry. Furthermore, it has the vocation of permanence, a characteristic associated with real rights. Owners prefer to formalize tenancies than real rights of habitatio, probably due to the greater protection of the holder of the real right, the apparent lack of consideration and the fact that it does not seek balance between the parties' rights and duties.[430]

f) Precarious possession and commodatum: these are two legal institutions that are difficult to distinguish from tenancy, as it may be seen in Table K. Tenancies are primarily distinguished from precarious possession and commodatum by the fact that the former needs a consideration, whilst the two latter ones are basically free of charge. Thus, although a charge or mode to be complied by the user under a

[421] According to H. Simón Moreno, *La armonización de los derechos reales en Europa*: tesis doctoral dir. S. Nasarre Aznar (Tarragona: Universitat Rovira i Virgili, 2011), 339.
[422] As described in S. Nasarre Aznar, 'La insuficiencia de la normativa actual sobre acceso a la vivienda', 11, 160-162.
[423] For example, in Catalonia they are governed by articles 562-1 et seq. of the Ley 5/2006, de 10 de mayo, en la que se regula el Libro V del Código Civil de Cataluña (DOGC 24/05/2006 núm. 4640).
[424] SSAP of Barcelona 17 September 2003 (AC 2003\1817) and 29 April 2008 (JUR 2008\170627).
[425] Although Book V of the Catalonian Civil Code does not contemplate it expressly, it sets forth that standards governing usufruct will be applied subsidiarily (article 562-1 CCC), which may be constituted for payment (article 561-3.1 CCC).
[426] SAP of Segovia 3 May 1999 (AC 1999\6247).
[427] SSAP of Madrid 22 February 1999 (AC 1999\3600) and of Cantabria 6 May 2003 (JUR 2004\5628).
[428] As set out by H. Simón Moreno, 'Propuestas de regulación para habitar parcialmente una vivienda,' en *El acceso a la vivienda en un contexto de crisis*, ed. S. Nasarre Aznar (Madrid: Edisofer, 2010), 236.
[429] L. Díez-Picazo y A.Gullon, *Sistema de Derecho Civil. Derechos reales en particular*. Vol. III, T. II (Madrid: Tecnos, 2012), 68.
[430] As set out by H. Simón Moreno, 'Propuestas de regulación para habitar parcialmente una vivienda,' 241-243.

precarious possession or a commodatum may concur, this shall be accessory to the main obligation, and it cannot be a consideration in exchange for use, because if it is considered so, it would be considered as a tenancy contract instead.[431] It should be taken into consideration that case law[432] has admitted that even when the property's occupation extends over time, normally ten years or a longer period, and it is not proven that there is a relationship or circumstance that serves to prove the possession in precarious (as may be the existence of emotional kinship ties, friendship or gratitude, which are deemed to be determinants of the liberality of the precarious), a presumption of consideration contrary to the precarious possession exists. Therefore, it cannot be considered in this case that a free of charge concession has been given, but an onerous one. As a consequence, it is actually a tenancy rather than a precarious possession, which gives greater security and certainty to the possessor.[433] Otherwise, unlike a tenancy (art. 8.2 LAU 1994) and a commodatum (art. 1741 CC), in both the precarious possession (arts. 451 and 452 CC) and the loan (art. 1753 CC) the collaboration of the assignor is not needed in order to enjoy the dwelling.

[431] As set out by O.V. Torralba Soriano, *El Modo en el Derecho Civil* (Madrid: Montecorvo, 1967), 113-115, there cannot bea nexus of interdependenceor reciprocity between the use provided in the commodatum or the precarious possession and the manner, that may lead to consider one as a consideration for the other, not being synallagmatic obligations.

[432] In this regard, SSTS 13 February 1961 (CENDOJ 28079110011961100086) and 19 July 1988 (RJ 1988\5994), SSAP of Vizcaya 16 June 2000, FJ. 2 (AC 2000\3353) and of Palencia 6 October 1999, FJ. 2 (AC 1999\7083).

[433] S. Nasarre Aznar, 'La insuficiencia de la normativa actual sobre acceso a la vivienda', 167.

TABLE K COMPARISION BETWEEN LEASE, CONSUMER LOAN, COMMODATUM AND PRECARIOUS[434]

	LEASE	CONSUMER LOAN	*COMMODATUM*	PRECARIOUS POSSESSION/TENANCY AT WILL	DISCUSSION
LEGAL NATURE	A consensual, synallagmatic, onerous and for a fixed-term contract, by which the use is transferred. It confers a personal right with certain proprietary effects.	The loan is a real and a fixed-term contract, which may be onerous or for free. A thing of the same kind and quality shall be returned (fungibles).	Real and fixed-term contract, by which the use is transferred, in essence for free. It admits a mode.	*De facto* possessory situation, in essence for free and indefinite. It admits a mode.	Free acts of friendship, courtesy or benevolence (*commodatum*, precarious possession), shall not have the same legal intensity as onerous contracts (lease, loan).
CONTENT OF THE RIGHT	The use of the dwelling is transferred and its enjoyment and sublease can be agreed. The tenant will receive the rent from the partial sublease of the dwelling (art. 8.2 LAU).	The ownership of the thing is transferred (art. 1753 CC).	The use of the dwelling is transferred, and its enjoyment may be agreed (art. 1741 CC).	The precarist has the right to use and enjoy the dwelling. He shall acquire the fruits if he is possessor in good-faith (arts. 451 and 452 CC).	As opposed to tenancy and *commodatum*, the borrower and the precarious holder do not need the collaboration of the assignor to enjoy the dwelling. They have an immediate right over it.
DURATION	The one agreed by the parties. An obligatory minimum extension of three years is imposed on the landlord (art. 9.1 LAU), unless a landlord's necessity is agreed in the contract (art. 9.3 LAU). The contract will be extended for 1 year unless the landlord denounces the contract (art. 10 LAU). Subsequently, the tenancy will be deemed implicitly renewed (arts. 1566 and 1581 CC).	Parties' freedom of contract (1.740 CC). In the absence of agreement, courts will decide (art. 1.128 CC).	Until the deadline or the agreed use, and if nothing has been agreed, it will be the duration of the use according to the customs. Exception: an urgent need of the lender under commodatum (art. 1749 CC). The agreed use shall be specific and clearly expressed, and not the general use typical of the thing according to its purpose[435]	The term is not agreed. The duration is until the owner claims the property, because he may do it at his will (art. 1.750 CC). The precarist can even become the owner through usucapio[436].	If the duration or the use is not agreed in the *commodatum*, and it cannot be established by custom, the lender under *commodatum* may claim the thing at his will because he has been possessing it in precarious possession. The precarious possession has an indefinite vocation, so it tends to satisfy permanent housing needs.
TRANSFERABILITY OF THE HOLDER'S RIGHT	- Authorisation by the landlord is needed in order to transfer it *inter vivos* (art. 8.1 LAU), except in a case of legal subrogation of the spouse or partner (arts. 12 and15 LAU). - A right of subrogation is granted to some family members living with him when the tenant dies, and according to the order established in art. 16 LAU.	- He may only transfer his debtor position with the creditor's consent (art. 1205 CC). - The debtor's heirs are liable for the due and payable debts, apart from the non-transmissible obligations (art. 1257 CC).	- The authorisation of the owner is needed in order to transfer the right *inter vivos* (arts. 1205 and 1741 CC) - He may transfer his right *mortis causa*, but not if it is a highly personal obligation (art. 1742 CC).	He may transmit the precarious possession to a third party *inter vivos* or *mortis causa*, with the tolerance of the property's owner. Any holder in good faith without title is precarious while the possessor of a better right does not claim the property.[437]	In the *mortis causa* transfer, the lender under *commodatum* has three advantages over the lessee: 1) He may assign its right to anyone, without the consent of another. 2) It is not compulsory that the heir has lived with him. 3) It is not compulsory for the notification requirement to enforce the right.

[434] Source: Own elaboration
[435] SSTS 30 April 2011 (RJ 2011/3724), 22 October 2009 (RJ 2009/5706) and 2 October 2008 (RJ 2008/5587).
[436] STS 13 October 2010 (RJ 2010\585).
[437] SSTS 21 October 1997 (RJ 1997\7178), 30 October 1985 (RJ 1985\5133).

	LEASE	CONSUMER LOAN	*COMMODATUM*	PRECARIOUS POSSESSION	DISCUSSION
REPAIRS OF THE HOLDER	- Authorisation is needed to carry out repairs, except when the tenant does not modify the configuration or decrease the stability or safety of the dwelling or accessories (art. 23.1 LAU). If the tenant breaches the obligation, the landlord may terminate the contract (art. 27.2.d LAU). - Possessor is only entitled to refund the conservation repairs that involve an imminent danger or a serious discomfort, with prior notification to the landlord.	After transmitting the ownership of the thing, he may carry out those that he considers appropriate. He is only obliged to return another thing of the same kind and quality (art. 1740 CC).	- He may perform the repairs required for the preservation of the thing. - The lender under commodatum may claim the payment of extraordinary expenses if he has previously communicated it to the borrower under *commodatum*, except when it could be so urgent that he cannot wait for the answer without risk (art. 1751 CC), and when they are not for his mere utility or convenience or a logical consequence of the use and enjoyment.[438]	- Arts. 453 and 454 CC do not require the precarious possessor to get authorisation to carry out repairs. - A right to be recovered for the useful and necessary expenses is recognised (art. 453 CC).	- The lack of definition of the term "configuration" of art. 23 LAU has given rise to conflicting case law and abusive behaviours because of the legal uncertainty of the parties on what the tenant may or may not do. -As opposed to the *commodatum* or the precarious possession, a refund right to the tenant for repairs performed is not regulated in the tenancy, except for conservation repairs for severe discomfort or imminent danger. -Housing conservation is not encouraged, and the tenant is not extrajudicially protected against the passivity of the landlord in the execution of the repairs.
CAUSES OF TERMINATION	1) Due to expiration of the term. 2) Due to the landlord´s need (art. 9.3 LAU). 3). Due to breach of obligations set in art. 27 LAU by the parties, for example execution of non-consent repairs and loss of use for permanent dwelling. 4) For loss not attributable to the landlord or declaration of ruin (art. 28 LAU).	Due to the causes of extinction of obligations (art. 1156 CC). The main cause is the fulfilment, i.e., when a thing of the same kind and quality is returned.	When the term or the agreed use has finished or because of urgent need of the borrower under commodatum (art. 1749 CC). Misuse of the thing is not established as a cause of termination.	When the real owner claims it to his will (art. 1.750 CC).	- The tenancy expires before the agreed term because of the loss of permanent use, and for temporary relocation of the occupants. Otherwise, it is not clear that the *commodatum* (free) has to be extinguished due to misuse. - The lack of certainty about the authority to carry out repairs and the possibility to terminate the contract discourage the execution of repairs by the lessee, which are normally to provide housing and improve its use.

[438] According to the SAP Valladolid 3 March 1995, FJ. 3. (AC 1995\465).

- **Specific tenancy contracts, e.g. contracts on furnished apartments; student apartments; contracts over room(s) only (e.g. student rooms); contracts over rooms or apartments located in the house in which the landlord lives himself as well. Please describe the legal specificities in these cases.**

a) Furnished dwellings: the current regulation on urban leases does not distinguish whether the dwelling is furnished or not. However, in practice, owners often ask for two months' rent or more as a deposit when it is a furnished dwelling, on the basis of article 36.5 LAU 1994. It allows the landlord to ask for additional guarantees besides one month's compulsory deposit.

b) Student housing: we must distinguish here between those that are qualified as University accommodation and those subjected to the LAU. The former is excluded from the LAU according to article 5.d LAU 1994, and dwellings are rented by the Universities themselves[439]. Therefore, they are not under the protective regime of the LAU 1994, but they are governed by the special clauses of assignment laid down in the University Statutes concerned, and failing this, by the Civil Code, which establishes a tenancy regime based on parties' freedom to contract. This allows parties to, for example, agree a contract duration that refers exclusively to an academic year or more years with rent increases not limited to the CPI. Conversely, the latter are subjected to Title II of the LAU when it is the student's primary and permanent residence, or to Title III, providing it has been agreed in the contract by the parties and the student has another dwelling, which constitutes his primary and permanent residence, usually the place where he lives with his family.[440]

c) Lease of rooms: it is outside the scope of the LAU 1994, since a tenancy contract subjected to this Act cannot be limited to a part of the leased dwelling,[441] that is, the tenant shall have the right to use the entire floor area of the dwelling under the LAU 1994.[442] In this regard, according to the SAP of Madrid 13 December 2006[443], the suitability requirement of the building is not met in the lease of rooms, nor the requirement that the primary purpose of the contract is to satisfy the need of permanent accommodation, because a room located inside a house lacks the minimum and essential services considered indispensable nowadays. It also points out that these requirements will only be met through the grant of a right to share the use (and not an exclusive use) of the other rooms of the dwelling, which are simultaneously used by the remaining occupants. Consequently, the lease of rooms is governed by the general provisions of the lease of things, according to article 1453 CC.[444] Conversely, the lease of rooms may be regulated by the LAU 1994 when the dwelling's tenant subleases it partially with the express consent of the landlord (art.

[439] See section 4.2 *'Rental contracts', supra.*

[440] According to STS 15 December 1999 (CENDOJ 28079110011999101298) "la calificación de arrendamiento de temporada no deriva del plazo concertado sino de la finalidad de la ocupación, ajena a la ocupación como residencia habitual del arrendatario, siendo ocasional y esporádica; de manera que el arrendamiento se hace en atención, no a la necesidad del arrendatario de establecer su vivienda, sino para ocuparla de una forma accidental y en épocas determinadas por razón de circunstancias distintas de la instalación de la residencia permanente y domicilio habitual". In this sense, the title III LAU shall apply, for example, if the students stay in the apartment during the week and come back home in the weekend.

[441] SAP Barcelona 18 May 2005 (JUR 2005\169610).

[442] SAP Madrid 13 December 2006 (JUR 2007\116895).

[443] RJ 2007\116895.

[444] As set out by. H. Simón Moreno, 'Propuestas de regulación para habitar parcialmente una vivienda,' 228-229.

8.2).[445] Lease of rooms, in accordance with the Civil Code, is less attractive for owners, essentially because it has a weaker legal protection in comparison with the contracts subjected to the LAU 1994.[446] In addition, although it is not expressly recognised, the landlord may share the property with a tenant that only rents a room. Therefore, the former may use the rest of the rooms of the dwelling, on the grounds of his right of ownership.[447]

If the owner has a dwelling separated from his home, he may lease it according to the LAU 1994, as long as it is a habitable building.[448]

- **Requirements for a valid conclusion of the contract**

- formal requirements

Consent on the object and price is enough for the valid conclusion of the tenancy contract. However, the legal relationship will not have full legal effects until the dwelling is delivered to the tenant, so the *traditio* is needed for the contract's consummation.[449] Therefore, the tenancy contract has been considered by the doctrine[450] as consensual because its conclusion depends on the parties' will, in such a way that the tenancy contract, in itself, does not transfer the enjoyment or the use of the dwelling, but only produces the obligation to transfer the use of the dwelling.[451]

The tenancy contract shall be concluded in writing or orally. Nevertheless, either party may compel the other to conclude the contract in writing (article 37 LAU 1994). It is not necessary, either, to convert the document into a public deed or to register it with the Property Registry. However, either party may compel the other to do so (art. 2.5 LH). To be valid, it is necessary that the parties have the general capacity to contract and that they give their consent.

- **is there a fee for the conclusion and how does it have to be paid? (e.g. "fee stamp" on the contract, etc)**

[445] As pointed out by J. Ruiz-Rico Ruiz-Moron, 'El contrato de arrendamientos urbanos' en *Curso de derecho civil III. Derechos reales y registro inmobiliario* dir. F.J. Sánchez Calero (Valencia: Tirant lo Blanch, 2004), 427-428, even though article 8.2 LAU 1994 expressly requires the consent to be in writing, tacit or oral consent will also be valid, because article 27.2.d LAU 1994 does not sanction a transfer consented to in a different way than the one provided for in article 8.1 LAU 1994

[446] H. Simón Moreno, 'Propuestas de regulación para habitar parcialmente una vivienda,' 238-240.

[447] This also happened in Catalonia for the real right of habitation in the repealed article 45 of the Ley 13/2000, de 20 de noviembre, de usufructo, uso y habitación (DOGC 30/11/2000 núm. 3277).

[448] See section 3.4 *'Are there any means of control and regulation of the quality of private rented housing or is quality determined governed only by free market mechanisms?', supra.*

[449] The contract is validly concluded if the parties reach an agreement, but if the dwelling is not handed over the tenant will not have the use of it, according to J. B., Vallet de Goytisolo, *Estudio sobre derecho de cosas, Temas generales*, Vol. I (Madrid: Montecorvo, 1986), 488.

[450] A. Macias Castillo, 'Arrendamiento de vivienda' en *Ley de arrendamientos urbanos, comentarios y jurisprudencia doce años después*, dir. E. Llamas Pombo (Madrid: La ley, 2007), 55; M. Clemente Meoro, 'Ámbito de aplicación de la ley' en *Arrendamientos Urbanos. Comentarios, Jurisprudencia y Formularios*, dir. F. Blasco Gascó, Tomo I (Valencia: Tirant lo Blanch, 2007), 33 and V. Guilarte Zapatero, 'Artículos 1 a 8' en *Comentarios a la ley de arrendamientos urbanos*, dir. X. O'Callaghan (Madrid: Editoriales de Derecho Reunidas, 1995), 44, among others.

[451] M. C. Luque Jiménez, *Responsabilidad contractual y extracontractual en los arrendamientos urbanos* (Valencia: Tirant Lo Blanch, 2008),130.

As has already been mentioned in the first part, residential tenancy contracts are subject to ITP.[452] In order to satisfy this tax, the tenant can conclude the tenancy contract on an "official contract form" on stamped paper, although this document, which is sold in tobacco shops, is not mandatory.[453]

- **registration requirements; legal consequences in the absence of registration**

Note: If relevant, please distinguish the various existing registers, e.g. land register, tax register, register of domicile.

a) Property Registry (*Registro de la Propiedad*): it is organised territorially; it depends on the Ministry of Justice and is aimed at registering acts and contracts related to property ownership and real rights (art. 1 LH). In order to register the tenancy contract (art. 2.5 LH), it has to have been formalised in a public deed (art. 3 RDIRPCAU). Additionally, according to the rule of law principle, registrars assess and register strictly the *right in rem* content of contracts, excluding personal, void, occulted or abusive agreements; and at the same time, they assess and require the compliance with civil, administrative and tax provisions applicable to the specific case in question (art. 18 LH). Moreover, notary, tax and registration fees shall be paid. However, a 25% reduction of notary and registration fees is established to register urban leases[454]. In addition to the expense of making a public deed in the presence of a notary, a registration fee of 102.36€ must be added for a rent of 900€ per month and five years of lease contract.[455] After the approval of LMFFMAV 2013, RD 297/1996 shall be amended in order to reduce the applicable notary and registration fees (Second Final Provision).

The registration of the tenancy contract in the Property Registry produces effects of good faith registration (art. 38 LH), meaning that tenancy contracts that are not duly registered in the Property Registry shall not prejudice third parties. Furthermore, third party purchasers of a dwelling meeting the requirements set out in article 34 LH cannot be affected by the existence of an unregistered tenancy.[456]

b) Administrative Registry of rent deposits (*Registro administrativo de depósito de fianzas*): each Autonomous Community may agree upon the creation of an administrative registry with the purpose of managing the compulsory rent deposit in tenancy contracts. The presentation of the tenancy contract may be required and its compliance with mandatory requirements, such as the presence of the cadastral reference of the property in the contract, may be verified. In Catalonia, this Registry is managed by the *Institut Català del Sòl*, which has a system that allows it to have adequate information about the rental housing stock situation in this region.[457]

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[452] See section 3.7 *'Do tenants also pay taxes on their rental tenancies?', supra.*

[453] For more details, Instituto Nacional de Consumo: <www.consumo-inc.gob.es/guiaCons/vivienda/arrendamiento/contrato.htm> , 05 April 2013.

[454] Applied according to article 8 of RDIRPCAU.

[455] According to Spanish Registrars website: <www.registradores.org/detalle_noticia.jsp?DS48.PROID=13023)>, 19 March 2013.

[456] For more details, see the following question, d) in '*does a change of the landlord through inheritance, sale or public action affect the position of the tenant?' See infra.*

[457] See section 6.4 'How *does the landlord have to manage the deposit?', infra.*

c) Registry of final judgements concerning the non-payment of rent (*Registro de sentencias firmes de impagos de rentas de alquiler*): as seen above, it allows landlords to check if prospective tenants appearing in the proposal of the tenancy contract have been sentenced for non-payment of rents in a final judgement or arbitration award (article 3 LMFFMAV 2013).[458]

d) Real estate cadaster Registry (*Registro del Catastro Inmobiliario*): this is an administrative Registry that depends on the Ministry of Finance, in which rustic and urban properties and properties with special characteristics are described (art. 1.1 RDL 1/2004),[459] to which a cadastral reference of identification and location is assigned (art. 3 RDL 1/2004). It is also used to gather cartographic information and to manage the real estate tax. Ownership, surface, and usufruct rights, as well as administrative concessions, shall be registered, but not urban leases (art. 9 RDL 1/2004).

e) Municipal Register of Inhabitants (*Padrón municipal de habitants*): it is an administrative registry containing the residents of a municipality (art. 16 LBRL). Registration is compulsory and it shall be done in the Registry where the person habitually lives (art. 15 LBRL). Thus, the tenant shall register by providing the residential tenancy contract in force. City Councils are in charge of its creation, maintenance, revision and custody, and the Spanish National Statistics Institute is responsible for coordinating all municipalities' registers, and also for carrying out appropriate verifications.

- **Restrictions on choice of tenant - antidiscrimination issues**

- **EU directives and national law on antidiscrimination**

Discriminatory conducts by landlords are widespread and are on the rise, basically because of their mistrust with respect to the misuse and deterioration of the dwelling, the neighbourhood problems and the real estate devaluation if the area is socially catalogued as an immigrant neighbourhood. This could lead them to refuse to rent to immigrants or, in other cases, to add a surcharge or to tighten the access conditions.[460]

Article 3.1.h of the Directive 2000/43/CE[461] includes housing among the goods offered to the public that are subject to the prohibition of discrimination. In this regard, a Draft on equal treatment and non-discrimination was presented in Spain,[462] article 20 of which establishes a prohibition for landlords to refuse a tenancy offer, to prevent its conclusion or to discriminate with respect to its content on grounds of birth, racial or ethnic origin, sex, religion, belief or opinion, age, disability, sexual orientation or identity, disease, or any other personal or social condition or circumstance (art. 2.1); but it was not eventually approved. However, the Directive

[458] For more details, see section 6.4 '*Are there blacklists of "bad tenants"?', supra.*
[459] Real Decreto Legislativo 1/2004, de 5 de marzo, por el que se aprueba el texto refundido de la Ley del Catastro Inmobiliario (BOE 08/03/2004 núm. 58).
[460] As contained in the *European Monitoring Centre on Racism and Xenophobia* report, on December 2005.
[461] Council Directive 2000/43/EC of June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (DOCE 19/07/2000 núm. L 180/22).
[462] Proposición de Ley relativa a la igualdad de trato y la no discriminación, presented by Grupo Parlamentario Socialista (DOCG 27/12/2011 núm. 2-1).

mentioned above was transposed by means of Act 62/2003,[463] whose article 29.1 prohibits the differentiation of treatment and discrimination in access to goods, including housing in a general manner, which makes the comprehension of the scope of this prohibition difficult.

Directive 2004/113/EC[464] also prohibits (art. 3) any differentiation of treatment between men and women in supplying goods and services to the public, except for the choice of the other party, provided that it is not on grounds of sex. The Directive establishes in ground 16 that differences in treatment may be accepted if they are justified by a legitimate purpose, such as the offer of accommodation made by a person in a part of that person's home, for privacy and decency reasons. In our opinion, this makes sense if we consider that there is a possibility, in a flat inhabited by women, that they do not want to live with men, because of the breach of their privacy that may arise sharing rooms such as the bathroom. 'Transactions concluded in a purely private context' are also excluded, 'such as, for example, renting a holiday dwelling to a member of the family, or renting a room in a private house'[465]. This Directive was transposed by Act 3/2007[466]. In its article 31, it establishes a positive discrimination in favour of women. It provides that housing access for women in need or at a risk of exclusion or when they have been victims of domestic violence will be promoted; especially when, in both cases, they have children in their exclusive care. This is done by giving a preferential character to single-parent families in charge of children and women who are victims of domestic violence in order to get aid to pay the rent, both at the State level (art. 6.4 and Annex I PEFAV 2013-2016) and the provision for the rent payment agreed in Catalonia in 2013.[467]

Furthermore, a prohibition on discrimination in access to housing on grounds of nationality is also established, including lists of dwellings, subsidies and tax advantages with respect to European citizens and their family[468], as well as to third country nationals who are long-term residents.[469] For example, Member State citizens and foreigners who are long-term residents in Spain are eligible for Spanish government aids regarding housing rental (article 2.a PEFAV) and also in the mentioned provision for rent payment of Catalonia (art. 7.a of the Resolution TES/1101/2013).

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[463] Ley 62/2003, de 30 de diciembre, de medidas fiscales, administrativas y del orden social (BOE 31/12/2003 núm. 313).

[464] Council Directive 2004/113/EC of 13 December 2004, implementing the principle of equal treatment between men and women in the access to and supply of goods and services (DOCE 21/12/2004 núm. L373/37).

[465] As set out in legal grounds 1.3 of the Opinion of the European Economic and Social Committee about the 'Proposal for a Council Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services' [COM(2003) 657 final - 2003/0265 (CNS)](2004/C 241/13).

[466] Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres (BOE 23/03/2007 núm. 71).

[467] Article 14.1 f. and g. of the Resolución TES/1101/2013, de 15 de mayo, por la que se hace pública la convocatoria para la concesión de prestaciones para el pago del alquiler para el año 2013 en Cataluña.

[468] In this regard, we have articles 9 and 10.3 of Regulation 38/64/CEE of the Council of 25 March 1964, on freedom of movement for workers within the Community (DOCE 17.04.1964) and Recommendation 65/379/EEC: Commission Recommendation of 7 July 1965 to the Member States on the housing of workers and their families moving within the Community (DOCE 27.07.1965 núm. L 137).

[469] According to article 11.1.f of Council Directive 2003/109/EC of November 2003 concerning the status of third-country nationals who are long term residents (DOCE 23/01/2004 núm. L 16/47).

Finally, we should highlight that case law has recognised, in specific cases, the existence of discrimination in housing access. For instance, when the exercise of legal subrogations in tenancies is denied to the non-marital partner (STC 13 October 1997[470] and 13 July 1998)[471] or to the same sex partner (STEDH 24 July 2003),[472] on the grounds that difference in treatment is discriminatory if no objective and reasonable justification is provided, i.e. if it does not pursue a legitimate aim or if there is not a reasonable relation of proportionality between the means employed and the aim pursued to get them. In addition, differences based upon sexual orientation require very important reasons to be justified.

Ultimately, the European legislator prohibits discrimination in housing access because it is essential for the citizens' ordinary life, and not having access to it is clearly a social exclusion.[473]

- **Limitations on freedom of contract through regulation**

- **mandatory provisions in rental contracts, in particular: mandatory minimum requirements of what needs to be stated in a tenancy contract**

The tenancy contract shall contain the identity of the contracting parties, the agreed term, the initial rent and the other clauses agreed by the parties (article 37 LAU).

Additionally, it should be taken into account that when a tenancy contract is concluded between a businessman and a consumer, the latter is entitled to receive attached to the contract the documents referred to in articles 4 to 6 of RD 515/1989, among which may be highlighted the following: Commercial Registry registration data of the seller or landlord; general plan of the dwelling location and of the dwelling itself; the description and layout of the supply networks and their guarantees, and a description of fire security measures in the immovable; dwelling description expressing the useful floor area, and general description of the building where it is located, the common areas and also the ancillary services; reference to the materials used in the dwelling construction, including thermal and acoustic insulation, and the building and common areas and ancillary services; instructions on the use and maintenance of facilities, identifying data of the immovable registration in the Property Registry or expression of not being registered there; and the form of payment. If these requirements are not met, the system of sanctions laid down in the legislation on consumers and users apply (art. 11 RD 515/1989 and art. 49 a 52 RDL 1/2007).

- **control of contractual terms (EU directive and national law); consequences of invalidity of contractual terms**

Article 6 LAU 1994 establishes that any contractual terms that modify rules on residential tenancies aimed at primary and permanent residence to the detriment of the lessee or sublessee are null and will be ignored, except for the cases expressly

[470] RTC 1997\167.
[471] RTC 1998\155.
[472] Caso Karner contra Austria (TEDH\2003\50).
[473] A. Aguilera Rull, Prohibición de discriminación y libertad de contratación en *Revista InDret* 1 (febrero 2009): 10.

mentioned in law. The amendment introduced in 2013 for contracts concluded since 6 June 2013 does not modify article 6 LAU 1994, but it should be taken into account that the amendment of article 4.2 LAU 1994 has given primacy to the parties' will. This has led to a reduction of *ius cogens* rules applicable to the tenancy contract, like for example, the compulsoriness of the right of pre-emption or the annual rent increase index that parties may agree upon.[474]

Consumer legislation is applicable to tenancy contracts when a businessman or professional intervenes as landlord.[475] In this sense, the inclusion of general terms and conditions into the tenancy contract is controlled, and they shall not be incorporated into the contract when the tenant has adhered to such conditions without having the real chance to know them fully at the time of the contract conclusion, and also when they have not been signed or are illegible, ambiguous, obscure and incomprehensible (art. 7 of Act 7/1998).[476] Additionally, any general conditions contradicting what mandatory or prohibitive provisions set to the detriment of the adherent shall be null and void by law (art. 8.1 of Act 7/1998).

In contracts concluded between a businessman and a consumer, any 'terms not individually negotiated and all those practices not expressly consented that, contrary to the requirement of good faith, cause, to the detriment of the consumer and user, a significant imbalance of the parties' rights and obligations arising from the contract' shall be deemed abusive and ignored (art. 82.1 RDL 1/2007). In this regard, articles 85 to 90 include a list of clauses that are deemed to be abusive, although it is not *numerus clausus* and the Courts have extended it in numerous cases. By way of example, in terms of lease, a contractual term imposing a compensation for withdrawal that is disproportionate in relation to the tenant's income and the contract's duration has been declared abusive, because it implies unjust enrichment[477]; as has any contractual term providing the waiver or limitation of legally recognised consumer rights, such as the assumption of the dwelling maintenance expenses, which corresponds to the landlord by law (art. 21.1 LAU 1994). [478]

According to STJCE 14 June 2012[479], judges may decide on the basis of article 6.1 of Directive 93/13/EC[480] not to apply the contractual term declared abusive so that it does not produce binding effects for consumers, but they cannot modify its content, or integrate or replace it. These clauses are annulled with no further integration required than to refer to the applicable law failing an agreement. Thus, the contract shall subsist, with no other amendment than the removal of the abusive clause, as long as the continuance of the contract is legally possible according to national law

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[474] *Infra.*

[475] See section 4.2 *'Are there regulatory differences between professional/commercial and private landlords?', supra.*

[476] Ley 7/1998, de 13 de abril, sobre Condiciones Generales de la Contratación (BOE 14/04/1998 núm. 89).

[477] SSTS 2 July 1984 (RJ 1984\3789), 15 December 2004 (RJ 2005\267) and SAP of Burgos 12 November 2010 (AC 2010\625).

[478] STS 14 June 1996 (RJ 1996/4769) and SAP de Barcelona 24 May 2007 (JUR 2007\295369).

[479] Case C-618/2010. Available at: <curia.europa.eu/juris/document/document.jsf?text=&docid=123843&pageIndex=0&doclang=es&mode=lst&dir=&occ=first&part=1&cid=876802#Footnote*>, 8 May 2013.

[480] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (DOCE 21/04/1993 núm. L095).

rules. According to Spanish Law, the contract is void in its entirety if remaining clauses 'determine an inequitable situation' in the parties' position. [481]

- **statutory pre-emption rights of the tenant**

Article 25.1 LAU 1994 granted the tenant a right of pre-emption,[482] which is characterised by its effectiveness against third parties since it is a right that can be exercised not only against the person to whom the owner has alienated the leased dwelling, but also to all subsequent purchasers of the same.[483] However, since 6 June 2013 it is admitted that the parties may agree in the lease contract to remove this right.

Thus, a right of pre-emption is granted to the tenant in order to acquire the rented dwelling with preference over another person under the same conditions, including the price, fixed in the transfer that has not taken place yet.[484] The owner of the leased dwelling is obliged to appropriately notify the tenant of the decision to sell the property with the essential conditions for the transfer, including the price. The tenant shall have thirty calendar days after the notification to exercise his right, and the effects of the notification will expire after one hundred and eighty days (art. 25.2 LAU 1994). Therefore, once this period has elapsed, the alienation may be registered in the Property Registry, with prior accreditation that the notice has been given (art. 25.5 LAU 1994).

A right of repurchase is also granted to the tenant. This right is subject to article 1518 CC, which establishes that the seller may not exercise the repurchase right without reimbursing the purchaser the sales price and, also, the contract expenses and any other lawful payment made pursuant to the sale and all necessary and useful expenses made for the thing sold. This right will expire after thirty days, counting from the day after the notification by the purchaser of the essential conditions of the sale-purchase performance, and the same shall provide the copy of the deed or document in which it was formalized (art. 24.3 LAU 1994). Consequently, while notifications required by law are not formalized, deadlines do not start to be counted.

Nevertheless, the rights of pre-emption and repurchase shall not be exercised either when the leased dwelling is sold together with the remaining dwellings or premises owned by the landlord that are part of the same property, or when all of a property's floors and premises are jointly sold by different owners to the same buyer. This exception shall not apply when the property has only one dwelling (art. 25. 7 LAU 1994).

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[481] According to A. Carrasco Perera, 'Las cláusulas abusivas se eliminan, sin más: no cabe reducirlas, moderarlas ni modificarlas', in *Revista CESCO de derecho de consumo* 3 (2012). Available in <cesco.revista.uclm.es/index.php/cesco/article/view/111/107>, 15 de abril de 2013.

[482] However, the repurchase granted to the co-owner of the home or the contractual repurchase registered in the Property Registry at the time of the conclusion of the lease contract will have preference over the lessee's right (art. 24.5 LAU).

[483] As provided for in article 1510 CC, "against any possessor whose right originates from the purchaser", set out by L. Diez-Picazo, *Fundamentos del derecho civil patrimonial*, Vol. III, (Navarra: Aranzadi, 2008), 120.

[484] If the sale of the dwelling is accompanied by accessories or objects that are inside the property, the tenant will have to exercise his right on the entire unit of goods that make up the dwelling (art. 24.6 LAU).

The repurchase right granted to the co-owner of the dwelling or the contractual repurchase right registered in the Property Registry at the time of the conclusion of the tenancy contract will have preference over the tenant's right of pre-emption (art. 24.5 LAU 1994).

For contracts concluded from 6 June 2013 on, the LMFFMAV 2013 allows the parties to agree to waive these rights in the contract, even during the minimum protection period of three years (art. 25.8 LAU 1994).

- **are there provisions to the effect that a mortgagor is not allowed to lease the dwelling (charged by the mortgage) or similar restrictions?**

It is common for financial institutions to include in the mortgage deed, on the one hand, a contractual term prohibiting or limiting the possibility of renting the mortgaged dwelling until the loan is fully repaid; and on the other hand, a contractual term on early maturity when the minimum income does not reach a specific amount.

However, the STS 16 December 2009[485] has declared as abusive a contractual term that establishes an absolute prohibition of renting the mortgaged dwelling, arguing that the credit entity that has granted the mortgage cannot impose on the mortgagor a commitment not to lease the mortgaged dwelling. In addition, it has also established that clauses that maintain the integrity of the mortgage security cannot be disproportionate.[486] In this regard, the Supreme Court has set that this clause is acceptable and will not be disproportionate if: 1) tenancy contracts are burdensome and harmful, which occurs when the rent is low or it is collected in advance; 2) the mortgage deed must include the scale used to determine that the rent for the tenancy contract that may be executed on the mortgaged dwelling is insufficient to cover the liabilities covered; 3) Clauses that may inhibit the faculty of renting the dwelling shall be limited to residential tenancies agreed for the minimum term of extension or less.

6.4 Contents of tenancy contracts

Example of table for 6.4 Contents of tenancy contracts

	Main characteristic(s) of tenancy type 1	Main characteristic(s) of tenancy type 2, etc.	Ranking from strongest to weakest regulation, if there is more than one tenancy type
Description of dwelling	It is compulsory to identify the property by its address and cadastral reference. The surface area is not mandatory		
Parties to the tenancy contract	Civil and contracting capacity of the parties. There is legal subrogation to the position of the lessee.		
Duration	Minimum three-year extension.		
Rent	Invariable for three years, except for IPC or agreement between parties. There is no control on initial prices.		
Deposit	Guarantees main obligations: rent and conservation.		
Utilities, repairs,	Conservation: owner		

[485] RJ 2010\702.
[486] In this sense, it follows the doctrine contained in RDGRN 1 January 1998 (RJ 1998\279).

etc.	Abnormal use (small repair works): tenant.		

- **Description of dwelling; indication of the habitable surface (and consequences in case of the provision of wrong data)**

The dwelling shall be identified in the tenancy contract. To do so, the landlord shall include (art. 40.1. d LCI)[487] the cadastral reference thereof (art. 38 LCI). However, the breach of this obligation will not stop notaries from authorising the tenancy contract, and nor will it affect the validity of the contract or prevent its registration in the Property Registry (art. 44.2. b and 44.3 LCI). In addition, it shall be understood that the identification of the property corresponds to the cadastral reference insofar as the location, denomination and surface area data match with those contained in the contract (art. 45.a LCI). The surface area indication is not mandatory, but if it is specified in the contract, the LCI allows a margin of error of 10% with respect to the information in the Cadaster (art. 45.b LCI). Moreover, there are Autonomous Communities that require the inclusion of the habitability certificate number in the contract, and even the attachment of such document (art. 66.2 LDVC). The information contained in the certificate, or in the final qualification for the VPO, is understood as enough to consider the property as identified (article 61.3 LDVC).

- **Allowed uses of the rented dwelling and their limits**

- **In particular: to what extent are mixed (residence/commercial) contracts lawful and usual (e.g. having a shop, a legal office or a doctor's studio in the dwelling).**

The LAU 1994 establishes that the primary purpose of residential tenancies is to satisfy the tenant´s need of permanent accommodation (art. 2.1). It means that this purpose shall be the primary one and shall unequivocally prevail over any other purpose of the tenant regarding the leased dwelling, which will be in any case secondary, accessory and subordinate to the primary purpose.[488]

To this end, it is necessary to be authorised in a generic way to dedicate the dwelling incidentally to other uses, if the person carrying out the activity belongs to the family of the tenant or his/her spouse and lives in the dwelling; otherwise there would be a non-consented sublease or a transfer of a part of it.[489] It must also be taken into account that if the property is no longer used for the primary purpose of accommodation, the tenancy loses the nature by virtue of which it was created and may be terminated according to article 27.2. f LAU 1994, regardless of the amount of time that has elapsed. [490]

- **Parties to a tenancy contract**

- Landlord: who can lawfully be a landlord?

[487] Real Decreto Legislativo 1/2004, de 5 de marzo, por el que se aprueba el texto refundido de la Ley del Catastro Inmobiliario (BOE 08/03/2004 núm. 58).

[488] According to SAP of Granada 9 September 2000 (AC 2000\2133) and V. Guilarte Zapatero, 'Artículos 1 a 8', 64.

[489] As set out by F.J. Garcia Gil, *El alquiler de la vivienda. Aspectos sustantivos, procesales y fiscales. Fomento del alquiler. Legislación comentada. Jurisprudencia. Formularios*, (Madrid:Dijusa, 2008), 19.

[490] SSAP of Granada 9 September 2000 (AC 2000\2133) and of Barcelona 20 February 2009 (JUR 2009\379675) and V. Guilarte Zapatero, 'Artículos 1 a 8', 65.

Any natural person with the capacity to both act, i.e. being more than 18 years old or being emancipated (arts. 314 and 315 CC) and to contract can legally be a landlord, as can any legal person legally constituted and represented.[491]

Other entities without legal personality, such as the owners' association when it is authorised by its statutes or by an agreement of the board of owners (art. 17.3 LPH) can also act as landlords.[492] The landlord shall have sufficient right to dispose of the leased dwelling,[493] as does the owner, the usufructuary (art. 480 LAU 1994), the holder of the right of surface or another person with an analogous right of enjoyment (art. 13.2 LAU 1994), or any person who represents the landlord by means of the granting of sufficient powers to contract on his behalf.

- does a change of the landlord through inheritance, sale or public action affect the position of the tenant?

Amendments introduced by LMFFMAV 2013 establish a publicity registration system and not a legal protection. Therefore, the tenancy contract will remain in existence after the termination of the landlord's right if it is registered in the Property Registry (art. 3 amends art. 7.2 LAU 1994).

In this sense, if during the tenancy contract the right of the landlord is resolved by the exercise of conventional redemption, the opening of a *fideicommisum* substitution, compulsory sale derived from a foreclosure or a judicial decision, or the right of an option to purchase, the tenancy shall terminate by law unless it has been registered in the Property Registry prior to the exercise of the mentioned rights. On the contrary, if the contract has been entered into the Property Registry, it will remain in force for the agreed duration (art. 13.1 LAU 1994).

The registration of the tenancy is required, even when the contracting party is a third party purchaser protected by article 34 LH, since the exception stated in the last paragraph of the former regulation of article 13 LAU 1994 has disappeared.

In the case of a tenancy on non-registered property, the tenancy may reach the three years if it has been concluded in good faith with the person who seems to be the owner, and this situation is attributable to the real owner (art. 9.4 LAU 1994).

Tenancies granted by usufructuaries and holders of a right of surface are also extinguished, as hitherto, when the right of the landlord terminates, and also those tenancies with a similar right of enjoyment on the dwelling (art. 13.2 LAU 1994).

Regarding the alienation of the leased dwelling, an acquirer who meets the requirements of article 34 LH (i.e. he is a *bona fide* purchaser,[494] has acquired for

[491] See STS 10 February 1986 (RJA 1986\520), 31 December 1991 (RJ 1991\9483) and 26 July 1999 (RJ 1999\6685).
[492] SAP of A Coruña 29 June 2006 (JUR 2006\249).
[493] Although the owner has no right to dispose of the property, the lease will be valid when the tenant has concluded in good faith with the person appearing for the owner under a state of affairs whose creation is attributable to the true owner (art. 7.4 LAU 1994).
[494] Good faith is understood as ignorance of that the same thing has been previously leased to another. However, the presumption of good faith is considered denatured when the unawareness or ignorance of reality is a consequence "of the negligence of the ignorant". It is set out in SSTS on 25

valuable consideration and has used a valid act from someone appears in the Registry as having faculties to transfer and, in turn, registers his right[495]) will only be subrogated in the landlord´s rights and obligations if the tenancy was registered before the dwelling transfer (art. 14.1 LAU 1994). Otherwise, if the tenancy is not registered in the Property Registry, paragraph one of article 1571 of the Civil Code shall apply, which stipulates that the purchaser of a leased real property shall be entitled to terminate the lease currently in force upon execution of the sale, save as otherwise agreed. In this case, the tenant may demand to be allowed to continue as a tenant for three months as of the time when the purchaser notifies truthfully his purpose, during which the tenant shall pay the rent and other amounts accrued to the acquirer. In addition, the tenant may demand that the seller compensate him for the damages caused to him (art. 8 amend art. 14.2 LAU 1994).

This regime is applicable to contracts concluded after June 6, 2013; previous contracts are still governed by the regime regulated in the LAU 1994. According to article 13.1 LAU 1994, the tenant remains protected during the first five years of the contract, and the tenancy shall not be terminated until this period has elapsed, even if the right of the landlord has been resolved by the exercise of conventional redemption, the opening of a *fideicommisum* substitution, the compulsory sale derived from a foreclosure or a judicial decision, or the right of an option to purchase. After the first five years, the tenancy contract shall terminate by law, unless it has been registered in the Property Registry prior to the exercise of the mentioned rights, since in this case the duration agreed in the rental contract shall be respected.

In the same sense, the acquirer of a leased dwelling shall respect the five-year term, even if the requirements of article 34 LH are met. Conversely, if the term agreed in the lease contract is more than five years, and the sale occurs within this period, the agreed period shall be respected, unless the requirements of article 34 LH are met. In this case, when the right of the landlord is extinguished, the tenant shall be compensated with an equivalent amount to a monthly rent payment in force for each remaining year of the contract. If the tenancy is registered in the Property Registry and there is no agreement between the parties to resolve the contract, the agreed duration shall be respected, since the third acquirer may not allege good faith in the acquisition, because he should have known that there was a tenancy, as it was registered in the Property Registry (art. 14 LAU 1994).

- **Tenant:**
- **Who can lawfully be a tenant?**

As has been mentioned above, the tenant shall have the capacities to act and to contract.

However, more requirements are required in order to be an eligible tenant for public housing. For example, article 14.b of the PEFAV 2013-2016 sets out that the income of the family unit cannot exceed three times the IPREM (3 x 6,390.13€ annually for

October 1999 (RJ 1999\7623), on 8 March 2001 (RJ 2001\13975) and 11 October 2006 (RJ 2006\6693).

[495] According to the Supreme Court case law that unifies the doctrine with regard to the precise requirements for the application of articles 34 of the Mortgages Act and 1,473 of the Civil Code, and that are set out by SSTS on 5 March 2007 (RJ 2007\723), 7 September 2007 (RJ 2007\5303) and 13 May 2011 (RJ 2011\3858).

2013), and article 69.6 LDVC establishes the compulsory prior registration in the Public Protected Housing Applicants Registry of Catalonia.

Furthermore, a tenant´s spouse who actually lives in the dwelling (not acting as a tenant) is also liable for the debt arising from the rent payment obligation of the tenancy contract when the dwelling is the family home, regardless of the marital economic regime in question (art. 1319 CC).[496] In this sense, to the debt arising from the tenancy of the family home is attributed the character of domestic debt for spouses married under the community of property regime (art. 1365 CC). Therefore, the landlord, when there is a breach of the tenancy contract, may claim against the goods held in common, the exclusive goods of the debtor spouse or the exclusive property of the other spouse (art. 1319 CC). The consent of the spouse shall also be necessary to transfer the dwelling to a third party, and the compensation that may arise under the tenancy title shall also be deemed to be held in common if the marital economic regime applicable to the spouses is that of the community of property.[497] However, the spouse's consent is not required to terminate the lease because she has a legal right of subrogation (art. 12 LAU 1994).

- **Which persons are allowed to move into an apartment together with the tenant (spouse, children etc)?**

The tenant can live within the dwelling with other people, regardless of the fact that there is only one holder of the tenancy contract acting as a tenant. The civil legislation does not establish a limitat on the number of people who may reside in the dwelling. Nevertheless, the administrative legislation sets the maximum number of people who can occupy a dwelling according to its characteristics by means of the procurement of either a certificate of habitability or a licence of first occupation.[498]

Article 43 LDVC establishes that the Administration may temporarily expropriate the use of overcrowded dwellings[499]. It can also impose sanctions on homeowners if they consented to the overcrowding situation once aware of that situation. In order to determine the existence of overcrowding, the declarations of both the homeowner and the technicians of the competent administration, the checks on the dwelling or the unjustified refusal to allow checks to be performed by the occupier, data in the inhabitants census and consumption of water, gas and electricity will be taken into consideration (art. 41.4 and 5 LDVC).

The LAU does not establish the overcrowding situation as a ground for terminating the contract, but the landlord may do it if annoying, unhealthy, noxious, dangerous or illegal activities are carried out by the occupants (art. 27.2. e LAU 1994), or if they wilfully damage the leased property (art. 27.2. d LAU 1994). In order to resolve the tenancy contract on grounds of overcrowding, the landlord could also allege an

[496] SAP of Cantabria 20 April 1999 (BDA 1999\753).

[497] As set out by: M. Cuevas Casas, *Tratado de Derecho de familia. Los regímenes económicos matrimoniales (I)*, Vol. III (Aranzadi, Navarra, 2011), 335-336.

[498] See section 6.1 *'Regulatory law requirements on - new and/or old - habitable dwellings capable of being rented', supra.*

[499] Overcrowded homes are those in which an excessive number of people are living, considering housing services and standards of surface area per person set in Catalonia as conditions of habitability. Coexistence units linked by ties of kinship are excluded, if excess occupation does not mean clear breaches of the enforceable conditions of health and hygiene or does not generate serious problems of coexistence with the surroundings (art. 3.e) LDVC).

abuse of right (art. 7.2 CC) if the tenant is performing an act in bad faith which is overstepping the exercise of his tenancy right, surpassing the ethical boundaries[500], and provided that it is not due to a legitimate reason[501] and does not obtain a benefit covered by the provision[502]. In this regard, the SAP of Valencia 29 December 2007[503] admitted the existence of the abuse of right because of the level of noise suffered by residents due to dogs living in a property, because the number of animals was excessive for the housing conditions.

- **Changes of parties: in case of divorce (and equivalents such as separation of non-married and same sex couples); apartments shared among students (in particular: may a student moving out be replaced by a motion of the other students); death of tenant**

a) Matrimonial crisis: The right of subrogation to the tenancy contract is granted to the tenant´s spouse in the event of separation, annulment or divorce, once established by a judgement or by agreement. As a consequence, the tenant´s spouse, if he/she has been awarded custody of any offspring, has the right to use the dwelling.[504] The spouse shall inform the landlord about that within the period of two months after the notification of the judgement, accompanying a copy of such judgement or the part of it that affects the use of the dwelling (art. 15 LAU 1994).

The tenancy is not terminated necessarily due to lack of notification to the landlord, given that the spouse does not continue to stay in the property as a tenant. As a matter of fact, there is no *ope legis* transfer of the tenancy, but it is a right based on the law itself, because the allocation of the family dwelling stems from article 96 CC.[505] However, with the approval of the LMFFMAV 2013, the legislator has opted for another solution for contracts concluded after 6 June 2013, since the spouse to whom the use of the leased dwelling has been attributed becomes the holder of the tenancy contract, in such a way that he/she assumes the rights and obligations arising thereof (art. 9 modifies art. 15 LAU 1994).

b) Tenant´s death: in the event that the tenant should die, certain family members who have lived with him may become subrogated, existing a priority among them in case of concurrency.[506] In order to make the subrogation effective, they must give written notification to the landlord of their willingness to continue the tenancy, providing the death certificate that evidences such death and the identity of the

[500] STS 24 April 1999 (Ref. Iustel §230477).
[501] STS 2 December 1994 (RA 9395).
[502] In this regard, SSTS 26 September 2012 (Ref. Iustel: §351637), 9 January 2012 (Ref. Iustel:§345591), 13 December 2011 **(**Ref. Iustel: §346058**)** and 1 February 2006 (Ref. Iustel: §247292).
[503] JUR 2007\235020.
[504] In the terms established in articles 90 and 96 CC.
[505] SSAP of Madrid 15 September 2005 (PROV 2005\219775), Barcelona 28 February 2005 (PROV 2005\117582), Baleares 29 February 2008 (PROV 2008\340017) and Cádiz 5 April 2011, FJ. 2 (AC 2011/1845).
[506] In the case of death of the tenant, the following may become subrogated, with degree of preference: spouse or affective cohabitant during at least 2 years or with offspring in common, descendant under authority or guardianship, or emotional cohabitant, descendants, ascendants, siblings or other people with a disability of 65% or more who were living with the deceased during the previous two years (art. 16.1 LAU). Therefore, cohabitation with the tenant is required in all cases, except for the spouse or cohabitant in similar relation of affection if offspring existed and for descendants under guardianship or custody of the lessee.

person subrogated, as well as the indication of the kinship with the deceased and offering, as the case may be, *prima facie* evidence that he/she meets the legal requirements for subrogation. If the landlord has not received notification within three months, the tenancy terminates, and the landlord may evict the occupants. In the event that several people want to take over the leased dwelling, they shall notify their resignation in a month, or they will be jointly and severally liable to pay the three monthly payments (art. 16.3 LAU 1994).

In this case, the law admits the possibility of denying the subrogation or to restrict it to the death of the tenant, but only in contracts of more than three years of duration and it shall only be effective once the first three years of the contract have elapsed (art. 16.4 LAU 1994). For contracts that entered into force prior to the new amendment, the term of protection is five years. The subrogation rights granted to the spouse are recognised for both homosexual couples and cohabitants.[507]

As in the case of withdrawal of the tenant (art. 12.3 LAU 1994),[508] in the event of the landlord's death, the extinction of the tenancy is recognised if the notification is not carried out within the time limits and in the established form. In practice, this makes it difficult to satisfy the right to housing of the persons who lived with the tenant. For this reason, part of the case law included the family home into the community of property, giving the co-ownership of the dwelling to the spouse, making it unnecessary to apply the legal subrogation provided for in article 16 LAU 1994.[509] However, the Supreme Court,[510] unifying case law in this regard, established that it is not possible to declare the subrogation if the spouse does not meet the requirements of article 16.3 LAU 1994, since the right of subrogation by cause of death is part of the content of the tenancy contract. And this contract, as a personal right, produces effects between the parties and their heirs. Therefore, the latter are not part of the community of property, because they are independent of the owner´s matrimonial property regime. As a result, the special regime provided for in the LAU shall be applied, since it takes precedence over the general regime, and therefore, in order to exercise the right of subrogation, the notification's time limits and forms provided in the LAU 1994 must be met.

c) Student housing: the LAU 1994 does not establish any right of subrogation in favour of other cohabitants. Therefore, in the case of a dwelling occupied by students, if they are not co-tenants they will not be able to stay in the dwelling when the tenant's right is terminated due to his death or withdrawal, as the tenancy will be terminated except otherwise agreed by the parties.

d) Cohabitant relationships of mutual assistance: In Catalonia, a right to continue in the leased dwelling for a fixed period is granted to those who maintain a relationship of cohabitation in the same primary residence. They may be two or more people

[507] Vid. *supra.*
[508] See section 6.6 '*Are there preconditions such as proposing another tenant to the landlord?', infra*.
[509] This approach has been maintained by a sector of the doctrine, based on the STC 31 October 1986 (RTC 1986\135), by virtue of which solidarity in the lease entails that when one spouse dies the other continues in its own right and not by subrogation. This is provided by SSAP of Barcelona 20 January 2009 (AC 2009\319), Murcia 23 February 2004 (PROV 2004\111958) and Pontevedra 5 May 2003 (PROV 2003\228771).
[510] Doctrine unified by STS 3 April 2009, FJ. 6 (RJ 2009\2806). Subsequently, also ruled on in this sense by SSTS 24 March 2011 (RJ 2011\3007), 9 July 2010 (RJ 2010\6031) and 10 March 2010 (RJ 2010\2335).

(maximum four), who freely, and without being a nuclear family, share, with the intention of having permanence and mutual assistance, common expenses or domestic work, or both (art. 240-1 Book II CCC).[511]

If the cohabitation is extinguished with all cohabitants being alive, the non-holders of the dwelling will have three months to abandon the leased dwelling (art. 240-6.1 CCC).

If the holder of the lease dies, survivors are entitled to subrogate themselves into the tenancy contract for the period of a year or for the remaining term to fulfil the contract if it is less than a year. Cohabitants shall notify the landlord of the death of the tenant within three months of the such death (art. 240-6.3 Book II CCC).

Members shall be persons of legal age, having a friendship or companionship, or a collateral family tie. Those persons with a direct line kinship, marriage or forming a stable non-marital partnership are excluded (art. 240-2 Book II CCC).

Relationships of cohabitation may be formalised by means of a public deed or may also be accredited by two years of cohabitation (art. 240-3 Book II CCC).

- **Subletting: Under what conditions is subletting allowed? Is subletting being abused, e.g. with the aim of circumventing the legal protection of tenants (when the tenant is offered not an ordinary lease contract but a sublease contract only)?**

Article 8.2 LAU 1994 admits the partial (not total) subletting of the dwelling as long as there is written consent by the landlord. Otherwise, the latter may put an end to the tenancy contract and the subletting contract will not be valid.

The subletting rent shall never be higher than the one paid by the tenant to the landlord. If it is higher the lease is null because it is harmful (art. 6 LAU 1994).[512] Also, the duration of the subletting contract shall depend on the duration of the main contract.

The subletting contract will be governed by the same rules as the tenancy contract (Title II LAU 1994), provided that its aim is also to meet the permanent need of housing accommodation. In order to avoid the application of the protecting rules of the LAU 1994 on subletting, a contract for the rental of rooms is usually drawn up, which is governed by the CC. This happens when a landlord concludes a contract by virtue of which each tenant has the right to partially occupy the dwelling, but in fact cohabitants enjoy the dwelling jointly in its totality, as may occur in the case of a marriage or of cohabitants with a similar emotional relationship. It is something that also happened in contracts concluded prior to the RDL 1985 RDL, with the purpose of avoiding the application of the forced extension of the tenancy contract.[513]

[511] Ley 25/2010, de 29 de julio, del libro Segundo del Código civil de Cataluña, relativo a la persona y a la familia (DOGC 05/08/2010 núm. 5686 y BOE 21/08/2010 núm. 203).
[512] According to F.J García Gil, *El alquiler de la vivienda. Aspectos sustantivos, procesales y fiscales. Fomento del alquiler. Legislación comentada. Jurisprudencia. Formularios, 58.*
[513] For further information see A. Fuentes Lojo and J. Fuentes Lojo, *Novísima Suma de arrendamientos urbanos* T. VI, 85.

- **Is it possible and if yes under what conditions, to conclude a contract with a multiplicity of tenants (e.g. group of students)?**

Yes, it is possible to conclude the tenancy contract with a multiplicity of tenants,[514] although the LAU 1994 does not set any situation where it is mandatory. It is usually performed when the landlord requires a greater guarantee of payment than a single-tenant can prove according to his income.

- **Duration of contract**

- **Open-ended vs. limited in time contracts**

The tenancy contract shall be for a certain time (art. 1543 CC). Therefore, any stipulation that submits the contract to indefinite extensions is null and void, since it violates the general notion of temporality and the prohibition to leave performance of contracts to the discretion of one of the contracting parties (art. 1256 CC).[515]

- **For limited in time contracts: is there a mandatory minimum or maximum duration?**

As has been previously mentioned,[516] four legal regimes of urban leases coexist:

a. For contracts concluded prior to 9 May 1985, the forced extension is currently limited to two subrogations, under the terms stipulated by the Second Transitory Provision of the LAU 1994.

b. For contracts concluded between 9 May 1985 and 31 December 1994, the duration shall be the one freely established by the parties, according to article 9 RDL 1985 (First Transitory Provision LAU 1994).

c. For contracts concluded from 1 January 1995 and until 5 June 2013, the LAU 1994 sets a minimum duration of five years (art. 9.1 LAU 1994).

d. For contracts concluded after 6 June 2013, the minimum extension is reduced to 3 years.

In the latter cases, that is to say, letters c and d, article 9.1 LAU 1994 establishes the parties' freedom of choice as far as the contract term is concerned. However, this freedom is only real when the contract exceeds the minimum contract term, due to the fact that a minimum contract duration is established over the one agreed or, failing this, over the one legally imposed in article 9.2 LAU 1994.[517] The extension system shall always be for full annual periods, regardless of the initial time agreed in the contract. Thus, when the duration is set for weeks or months, the tenant is entitled to five or three annual renewals plus the months or weeks agreed.[518]

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[514] A.L Rebolledo Varela, *Cuestiones prácticas actuales de arrendamientos urbanos: últimas tendencias jurisprudenciales* (Aranzadi: Pamplona, 2010), 3-4.

[515] This is reflected in the rulings of the Supreme Court in SSTS 27 June 1989 (RJ 1989\6967), 9 May 2005 (RJ 2005\3981) and 20 March 2013 (RJ 2013\3258).

[516] See section 4.2 'Are *there different intertemporal schemes of rent regulations?', supra*.

[517] M. R LLácer Matacàs, 'Artículo 9. Plazo mínimo' en *Ley de arrendamientos urbanos, comentarios y jurisprudencia doce años después*, dir. E. Llamas Pombo (Madrid: La ley, 2007), 147-149.

[518] This is reflected in the ruling of the SAP of Granada 17 December 2003 (JUR 2003\82583) and of Baleares 16 October 2000 (JUR 2001\23715).

When the tenancy is agreed for a time equal to or greater than the one provided for in article 9.1 LAU 1994, the term shall be fulfilled entirely. These contracts are outside the system of forced extensions and article 10 LAU 1994 is directly applied, which comes into operation when the contract has expired and no party has given notice of the intention to not renew it.[519]

- **Other agreements and legal regulations on duration and their validity: periodic tenancies ("chain contracts", i.e. several contracts limited in time among the same parties concluded one after the other); prolongation option; contracts for life etc.**

After the minimum period of three or five years (art. 9.1 LAU 1994), if there is no notice by any of the parties in a month, the tenancy contract shall be deemed to be annually extended for a year regarding contracts concluded after 6 June 2013 (art. 4 LMFFMAV 2013 amending art. 10 LAU 1994) or for three years regarding contracts arranged prior to that date (art. 10 LAU 1994). This period is also mandatory for the landlord, but optional for the tenant, who may withdraw from the contract in each annuity. Also the tenant will have to notify thirty days in advance.

Once these deadlines have elapsed, if, upon expiration of the contract, the lessee should remain in the enjoyment of the thing that is the subject of the lease for fifteen days with the lessor's acquiescence, the lease shall be deemed implicitly renewed according to article 1566 CC[520]. Consequently, the contract shall be considered as terminated and a new one would arise with a term equal to the one in force until that time, that is to say, for the same years, months or days as the previous ones. When the landlord wants to avoid the tacit renewal (*tácita reconducción*), he has merely to give notice of this intention to the tenant within fifteen days from the expiration of the last contract.[521]

The parties are allowed to subject the contract to a condition subsequent, when it refers to a future and certain fact and when it respects the minimum period of extension. In addition to this, a lifelong tenancy is accepted,[522] but if death occurs before the lapse of the minimum period, art. 16 LAU 1994 in relation to the subrogation of the deceased's family under the lease contract is applicable.[523]

- **Rent payment**

- **In general: freedom of contract vs. rent control**

[519] J. Estruch Estruch, 'Art. 9. Plazo mínimo', 149.
[520] It is applied to these contracts in accordance with article 4.2 LAU 1994. For contracts concluded from 9 May 1985, tacit renewal is limited to three years, except the the faculty of non-renewal referred to in article 9 of the LAU 1994 (section 1 First Transitory Provision LAU).
[521] J. Estruch Estruch, 'Art. 9. Plazo mínimo' en *Arrendamientos Urbanos. Comentarios, Jurisprudencia y Formularios*, dir. F. Blasco Gascó, Tomo I, (Valencia: Tirant lo Blanch, 2007), 152-153.
[522] As set out by SAP of Guipúzcoa on 3 October 2005 (CENDOJ 20069370022005100468), with respect to a lease that was agreed to terminate when the tenant died, without stating another term.
[523] As ruled on, in these sense, in SSTS on 3 November 1992 (RJ 1992\9190), on 30 June 1993 (RJ 1993\5341) and SAP of Navarra on 5 June 1996 (AC 1996\1367). It is also set out by V. Guilarte Zapatero, 'Duración, renta y otras cuestiones propias del arrendamiento urbano ante el eventual cambio de su sistema normativo. Arrendamientos Urbanos.' *Asociación de profesores de Derecho Civil* (1995): 50.

Article 17.1 LAU 1994 takes as a starting point the freedom of contract regarding the determination of the rent, although the rent shall not be modified until after the first three years of the contract for contracts concluded from 6 July of 2013 on and until the after first five years for contracts concluded between the 1 January 1995 and that date.

Also, since the last reform of 6-7-2010[524], the parties may freely agree on how (i.e. to which index the increase will be referenced) the rent is updated annually during the minimum extension period (3 years) annual updates of the tenancy (art. 18.1 LAU 1994). After this period, there is no legal constrain on how the rent should be periodically updated.

VPO shall adapt to the prices established by each Autonomous Community, or failing this, by the State, which will depend on the legal regime of housing protection, the area where housing is located and the square metres of the dwelling.[525]

- Rent control: how is it legally framed; when does it apply; who carries it out; what are the consequences when the parties agree on an excessive rent?

There is no legal limit in Spain regarding the initial rent amount that allows for the control of private rental prices and their affordability. Consequently, there is no body responsible for controlling rental prices and no consequences are established for landlords who fix excessive rental prices.

Conversely, there is a control over prices in the VPO regime.[526] Each Autonomous Community's Government is in charge of ensuring that prices fixed in their regulations are met. If users detect an irregularity, they shall claim before the Administration that has assigned the dwelling. If no answer is obtained, or it is negative, they may claim before the court an amendment of the clause that establishes a wrong price and the refund of the amount unduly satisfied with the corresponding interest.[527]

- Maturity (fixed payment date); consequences in case of delayed payment

The rent shall be paid monthly and the payment shall be made effective within the first seven days of the current month, unless otherwise agreed. Under no circumstances may the landlord require an advance payment of more than one monthly rent (art. 17.2 LAU 1994). Therefore, any agreement providing otherwise is void (art. 6 LAU 1994), such as, for example, the payment in advance of quarters or semesters, which, if agreed, would have to be made for periods of time already elapsed[528].

Case law has been erratic in determining when the delay in the rent payment is considered a mere delay and in what circumstances it is a real decisive breach,

[524] Before then and since 1994 it was compulsory to reference the rent to the CPI.
[525] See section 1.4 *'Are rental tenures with and without a public task distinguished?', supra.*
[526] As for example, established in the Royal Decree 3148/1978, governing certain VPO.
[527] This was reflected in the rulings of the SSTS on 14 May 2009 (RJ 1907\2004) and on 14 July 2010 (RJ 1984\2003).
[528] A. Fuentes Lojo y J. Fuentes Lojo, *Novísima Suma de arrendamientos urbanos,* Tomo I (Barcelona: JM Bosch Editor, 2007), 187-191.

which would lead to the contract termination according to article 27.2.a LAU 1994. One group of cases[529] consider that if the month which rent is considered unpaid has not elapsed yet, it shall be considered as a mere delay, since according to the Supreme Court doctrine[530] on the application of article 1124 CC, in order to exercise the right to terminate the contract for a breach there must be an unequivocal intention to preclude the completion, frustrating the economic aim of the contract and the legal expectations of the creditor. However, STS 24 July 2008[531], ruling on rent payment after the deadline once the eviction process has started, sets that non-payment of the rent, albeit only for a monthly rent, shall be sufficient reason for the landlord to put an end to the contract and prevent the enervation of the eviction action if this faculty has been already used. This doctrine directly affects the right to effective judicial protection and the right to a procedure without 'undue delay', since the landlord is not forced to bear the late payment of the rent.[532]

- May the tenant exercise set off and retention rights over the rent payment? (i.e. the tenant withholding the rent or parts of it when the landlord does not respect his contractual duties, e.g. does not repair a defect);

a) Set off: it can be total or partial when agreed between parties, and legal compensation will appear, under article 1195 CC, when both debts are principal obligations, of the same species and quantity, outstanding, due and payable (art. 1196 CC). In this regard, the rent due to the landlord by the tenant may be legally offset against rent due once the requirements are met, as for example, when he has paid expenses that should be borne by the landlord by law or contract.[533] Furthermore, the courts[534] consider that the rent payment may be used to offset the amount of the repair works carried out by the tenant, when these works should be borne by the landlord and the causes foreseen in article 21.3 LAU 1994 concur: prior notice to the landlord and urgency in repair works (because this provision sets the faculty to 'require the amount from the landlord immediately').[535] This compensation is also admitted in the SAP of the Balearic Islands 11 April 2006.[536] Without going in depth into the nature of the repair works, the decision considers as proved that there was an agreement in this sense because it was the operating mode between the parties, who have created "a 'de facto' situation against which the landlord cannot

[529] In this regard, SAP Barcelona 9 January 2002 (JUR 2002\86064) and Santa Cruz de Tenerife 31 May 1996 (AC 1996\952).
[530] STS 4 October 1996 (RJ 1996\7036) and 10 October 1997 (RJ 1997\7071).
[531] RJ 2008\4625. This was also reflected in the rulings of STS 20 October 2009 (RJ 2009\5694) and 22 November 2010 (RJ 2011\564).
[532] With regard to having to endure delays in the payment there is also contradictory case law, as one part of it understands that to repeatedly pay the rent after the deadline involves an implicit tolerance on the part of the landlord (SAP Salamanca 22 December 1999, CENDOJ 37274370011999100897). Conversely, another part of the case law considers that a modification in the payment involves a novation of the contract and this is never assumed and cannot be derived from mere deductions or conjectures. The willingness of novation shall be clear, as it involves a withdrawal of rights according to STS 7 July 1982 (RJ 1982\3407), on 20 November 1985 (RJ 1985\5620) and 2 June 1990 (RJ 1990\4724). In this sense, the simple fact that rent is paid sometimes late and others on time cannot cause a real novation.
[533] In this regard, SAP of Córdoba 20 June 2002 (AC 2002\1409).
[534] SSAP of Madrid 8 March 2004 (JUR 2004\249395), of Sevilla 27 February 2004 (JUR 2004\106266) and Ávila 23 February 2006 (JUR 2007\275350).
[535] A set out by I. González Pacanowska, 'Artículo 17. Determinación de la renta' en *Comentarios a la Ley de Arrendamientos Urbanos*, dir. R. Bercovitz Rodriguez-Cano (Navarra: Aranzadi, 2010), 460.
[536] JUR 2006\140034.

now go against, because with his own acts he has generated the confidence that repair costs would be discounted from the rents".

b) Right of retention: Regarding the right of retention that the tenant may exercise on the basis of the amounts owed by the landlord to him once the tenancy contract is concluded, article 453 CC grants this faculty generically to the possessor in good faith until the expenses arising from the action on the possessed thing are paid back, these being necessary or useful. Nevertheless, authors[537] have considered that the regulation of the right of retention is not unitary and it cannot be granted to more cases than those specifically contemplated by the Civil Code, as no analogy is possible. In fact, the Supreme Court case law[538] denies this right to the tenant when special legislation is applicable, which regulates the regime of expenses and works in the leased dwelling on a preferential basis. Accordingly, it considers that the retention on the basis of credits held by the tenant against the landlord, either useful or sumptuary, is not possible because they are excluded from article 1573 CC in relation to article 487 CC, or necessary ones, which are excluded from the remission (as STS on 14 November 2000[539] sets out), without prejudice to the right to claim the refundable expenses. However, with regard to the possibility of the parties agreeing this retention right on the immovable, pursuant to the principle of freedom of will provided in article 1255 CC, the SAP Cáceres 3 July 1989 establishes that it could be contemplated in the tenancy contract.[540]

In Catalonia, the right of retention on movable and immovable property has been regulated (art. 569-3 Book V CCC). In this sense, the repealed LGP[541] established retention on real estate only for the cases specifically referred to by other standards, like for example, in articles 237 and 238 CS[542] on *fideicommissum* (these correspond to current art. 426-48 Book V CCC). Consequently, the current regulation in the CCC grants this right on immovables in general terms, whenever the retainer is the property's possessor, as is the case of the tenant.[543] In our opinion, the urban lease meets the necessary requirements of the right of retention: a) there is a good faith possession over a good from a third-party that shall be returned; b) the type of debt to claim by the tenant is foreseen in article 569-4 CCC: it sets as a connatural obligation of the retention right the compensation of the useful expenses and of the necessary ones to maintain and manage the good; and article 21.1 LAU 1994 establishes that this is an obligation that corresponds to the landlord; and, moreover,

[537] I. Sabater Bayle, 'La facultad de retención posesoria' en *Revista Jurídica de Navarra* 13 (1992): 77-89, F.A., Sancho Rebudilla, *La facultad de retención posesoria. Estudios de Derecho Civil* (Pamplona: Universidad de Navarra, 1978), 360.
[538] SSTS on 23 May 1946 (RJ 1946\693), on 23 May 1951 (RJ 1959\1625), on 5 March 1959 (RJ 1959\1095) and on 14 November 2000 (RJ 2000\1069).
[539] RJ 2000\1069.
[540] As set out by A. Fernández Arévalo, 'El anàlisis de la aplicabilidad del denominado derecho de retención a supuestos de liquidación de arrendamientos de inmuebles. Comentario a la STS de 14 de noviembre de 2000' en *Revista Aranzadi de Derecho Patrimonial* 8 (2002): 196-197.
[541] Ley 22/1991, de 29 de noviembre, de garantías posesorias sobre cosa mueble (DOGC 16/12/1991 núm. 1530, BOE 09/01/1992 núm. 8).
[542] Ley 40/1991, de 30 de diciembre. Código de sucesiones por causa de muerte en el Derecho Civil de Cataluña. Vigente hasta el 1 de enero de 2009 (DOGC 21/01/1992 núm. 1544 y BOE 27/02/1992 núm. 50).
[543] P. Del Pozo Carrascosa, A. Vaquer Aloy y E. Bosch Capdevila, Derecho Civil de Cataluña. Derechos reales (Madrid: Marcial Pons, 2012), 468-469.

article 21.3 LAU 1994 gives to tenant the faculty to claim a refund when works are urgent to avoid imminent damage or serious discomfort.[544]

- May claims from rental agreements be assigned to third parties (i.e. may the landlord assign his rent claim to a bank?)

As has already been mentioned, the property's owner may transfer the leased dwelling to a third party and, in the cases where the tenancy contract is not terminated, the new acquirer shall be subrogated into the landlord´s rights and obligations (art. 14.1 LAU 1994). In addition to this, the landlord can also transfer his credit right (i.e. the right to get the rent) to a third party (art. 1526 CC) without the need for the debtor's consent, who shall satisfy the rent to the new holder of the transferred right once he knows him.[545] For example, the landlord may assign his rent claim to a bank. The landlord may also transfer his right of credit on future rents to a hedge fund, provided that it is a full transfer and it is concluded by means of a contract that proves unequivocally the transfer of the right.[546]

However, the tenant needs the landlord's consent in writing in order to transfer his right, the assignee being subrogated to the assignor's position before the landlord (art. 8.1 LAU 1994). Thus, article 27.2.d LAU 1994 punishes lack of consent, entitling the landlord to terminate the contract. However, even though article 8.1 LAU 1994 expressly requires the consent to be in writing, implicit or oral consent will also be valid, as article 27.2.d LAU 1994 does not punish the transfer consented to in a different way than the one provided for in article 8.1 LAU 1994.[547] Also, the tenant may assign his monetary claim without the landlord's permission (art. 1526 CC), for example a claim for compensation for maintenance works that should have been done by the landlord according 21.3 LAU 1994.

- May a rent payment be replaced by a performance in kind (e.g. reparation, renovation)? Does the tenant have a statutory right to this effect? Could a lien of the "tenant-contractor" create problems in that case? (a lien is a statutory right of a contractor to ensure his being paid for his performances, e.g. improvements to the house, e.g. § 648 BGB)

a) Rent in kind: the Civil Code and the LAU 1994 do not specify that the rent payment must be money. Therefore, from our point of view, an agreement to pay a consideration in kind is valid, even the realization of a *facere*, as for example works to improve the dwelling.[548]

Courts[549], on the basis of article 1543 CC, have traditionally admitted the provision of services as a price of the tenancy, as long as they have a pecuniary equivalent and the parties want to consider this obligation as consideration for the use of the

[544] According to requirements set out by A. E. Gudín Rodríguez Magariños, 'Ámbito material y límites del ejercicio del derecho de retención en la codificación civil de Cataluña' en *Revista InDret* 4/2012 (octubre 2012): 11-17.
[545] As set out in SSTS 9 July 1993 (RJ 1993\6001), 15 July 2002 (RJ 2002\7178) and 12 December 2002 (RJ 2003\305).
[546] According to article 2.1.b of the Real Decreto 926/1998.
[547] J. Ruiz-Rico Ruiz-Moron, 'El contrato de arrendamientos urbanos', 427-428.
[548] L. Diez-Picazo, Sistema de derecho civil, Vol. II (Madrid: Tecnos, 2005), 332.
[549] SSTS on 22 May 1963 (CENDOJ 28079110011963100196) and on 10 October 1970 (CENDOJ 28079110011970100645).

thing.[550] However, STS 26 January 1987[551] denies the existence of a certain price in the transfer of the use of the dwelling in return for the provision of services to the assignor, consisting of assistance and care.[552]

Case law[553] has also ruled on leases *ad meliorandum,* by virtue of which the execution of works or improvements may be deducted from the rent.[554] The STS 3 April 1984[555] qualified them as "atypical contracts" that fell outside the LAU 1964. The main argument was that the application of the forced extension included in the LAU 1964 "seriously violated the equivalence of provisions by allowing the tenant to continue in the dwelling for a service which was agreed considering that it had only a complementary character". However, this argument does not fit with the new 1994 legislation, which only sets short terms of minimum duration and which has led us to consider that no impediment exists to subjecting tenancies in which tenant's consideration relates in part to housing works or improvements to the LAU 1994.[556]

b) Rehabilitation for rent (*rehabilitación por renta*): this issue has been recently resolved with the approval of the LMFFMAV 2013, which specifically includes the "rehabilitation for rent" system (art.17.5 LAU 1994). This measure allows the contracting parties to quantify and to pay the rent not in money but on the basis of the calculations of an agreed rehabilitation of the dwelling, for which the tenant is responsible. Therefore, rehabilitation for rent in Spain is a legal possibility, but the agreement of the parties is necessary for its application. Catalonia also regulates the contract of "urban masoveria" (*masoveria urbana*), which has a similar purpose.[557]

c) Renovation credit (*crédito refaccionario*). However, an issue can arise if the rent is paid through reparations. Firstly, there has to be a contract establishing an agreement to carry out maintenance and repair works in exchange for a price, that is, the landlord waives the collection of the rent in money in exchange for the renovation works to be carried out by the tenant (eg. the above explained "rehabilitation for rent"). Secondly, there are two cases in which the so-called 'renovation credit' may take place in the leased dwelling:[558] a) if the tenant breaches his obligation of paying the price of the works and repairs commissioned by him to a third party, and he has been enjoying the property's use, a right of preferential credit may arise in favour of that third party (eg. masons, architect, etc.), which encumbers the landlord's renewed property; b) when the tenant carries out the all the rehabilitation works by himself and

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[550] In the same sense, A. Fuentes Lojo y J. Fuentes Lojo, *Novísima Suma de arrendamientos urbanos*, Tomo VI (Barcelona: JM Bosch Editor, 2007), 62.
[551] RJ 1987\354.
[552] In this case, the Supreme Court considers that there is no lease, as the provision of the service does not have sufficient entity to be considered as a consideration for the housing use. In this case, we could talk about a modal *commodatum,* that is to say, submitted to a burden or encumbrance.
[553] SSTS 3 April 1984 (RJ 1984\1923) and 26 March 1979 (RJ 1979\1189).
[554] According to J.A Martin Pérez, 'Determinación de la renta' en *Ley de arrendamientos urbanos, comentarios y jurisprudencia doce años después*, dir. E. Llamas Pombo (Madrid: La ley, 2007), 441.
[555] RJ 1984\1923.
[556] I. Gonzalez Pacanowska, 'Determinación de la renta' en *Comentarios a la Ley de Arrendamientos Urbanos*, dir. R. Bercovitz Rodriguez-Cano, (Pamplona: Aranzadi, 1995), 376-377.
[557] See section 4.2 '*Rental Contracts'*, *supra*.
[558] As set out by E. Cordero Lobato, *El privilegio del crédito refaccionario* (Madrid: Tecnos, 1995), 88-89, the essential cause of the construction privilege is the result of improvement produced in the good, which shall correspond to what is agreed, without the need for the parties' willingness to submit to such a credit in the event that when works are finished, the other party does not comply with his obligation.

the landlord terminates the contract before the agreed term (for example, exercising the faculty set in article 9.3 LAU 1994) and recovers the dwelling, some kind of claim should arise in favour of the tenant, maybe even a "renovation credit".[559] In fact, the Supreme Court has accepted a broad concept of construction credit, considering, as set in STS 21 July 2000, FJ. 2[560], that it is not "limited in its origin, as traditional doctrine used to understand, to a money loan earmarked for the construction or repair of a building, but concerning all credit causally linked with repair, construction or improvement of goods". According to article 1923.3 CC, this credit gives its holder a right to preferential realization on the real estate built or improved, as well as on the materials used, as a guarantee for the repayment of the advance funded. However, they are conditional on their prior registration or annotation in the Property Registry.

- **Does the landlord have a lien on the tenant's (movable) property in the house (Vermieterpfandrecht as in § 562 BGB, which functions as a guarantee for the payment of the rent by the tenant)? If yes, what is the scope of this right? How is it enforced?**

The special legislation on tenancy does not recognise any legal right (either automatic or compulsory) such as this. However, from our point of view it would be possible to have an agreement between the parties allowing the landlord to retain the tenant's furniture inside the dwelling at the termination of the contract, as a security for the payment of the due rent amounts according to article 464 CC.[561] The parties would then have to agree on the scope of this right in the tenancy contract, taking into account that there are some legal limits in relation to the personal assets of any debtor that can never be seized (eg. his/her clothes).

- **Clauses on rent increase**

- Open-ended vs. limited in time contracts

Contracts concluded before 9 May 1985 were subject to the freezing of rents. For this reason, paragraph D of the Second Transitory Provision of the LAU 1994 establishes updating rules in order to adapt the rental prices to the market, according to the CPI. However, these updates are limited according to the current income of the tenant. Therefore, maximum update percentages are established, as may be seen in table L.

We must also distinguish contracts concluded from 1 January 1995 to 5 June 2013, which are subject to the LAU 1994. In these, the rent may only be increased annually according to the CPI during the first five years of the contract (art. 18.1 LAU 1994). On the contrary, the parties may freely agree the rent update from the sixth year on, although in the absence of an agreement it will be updated according to what is stated in the first paragraph (art. 18.2 LAU 1994). Finally, in those contracts subject to the LMFFMAV 2013 the parties are able to agree the annual update of the rent during the whole term, and only when there is no agreement will the update take place according to the CPI.

[559] See SSTS 21 May 1987 (RJ 1987\3552), 5 July 1990 (RJ 1990\5778) and 9 July 1993 (RJ 1993\6001).
[560] RJ 2000\5499.
[561] And also according to E. Gómez Calle, 'El derecho de retención sobre bienes muebles' en *Revista InDret* 4/2011 (octubre 2011): 14-15.

TABLE L RULES ABOUT RENTS AND UPDATES[562]

	01/07/1964	09/05/1985	01/01/1995	06/07/2013
LAU 1964				
RDL 1985				
LAU 1994				
LMFFMAV 2013				

Key	
	Freezing of the rents, except sumptuary housing (art. 6 LAU 1964), they were revalued between a 1.25% and 4% depending on the date of the contract conclusion (art. 96 LAU 1964).
	Updated rent = Initial annual rent X CPI month preceding date of update % CPI month preceding date of the contract (max. period 10 years or 5 years for incomes = or > 5,5 NMW). Limit: updated rent shall be lower than 12% of cadastral value of 1994 (case of revision after 1989) or than 24% of cadastral value in other cases. Exception: Only increase CPI for UC with incomes > 2,5 to 3,5 NMW (Second Transitory Provision section D. 11 LAU 1994).
	Freedom of will with respect to rent and updates (art. 9 RDL 1985). If no update is agreed, LAU 1994 applies, which freezes the rents agreed subsequent to 11 May 1956 (art. 96.3 LAU 1964).
	The previous regime is maintained (First Transitory Provision LAU 1994).
	Freedom of will to agree the rent (art. 17 LAU 1994). Invariability during five years, except for the annual update according to the CPI for the last twelve months. Freedom of will to agree the update from the sixth year (art. 18 LAU 1994).
	Freedom of will to agree the rent and updates. If no update is agreed: invariability of the rent for three years, except for the annual update according to the CPI for the last twelve months (art. 17 and 18 LAU 1994).

- **Automatic increase clauses (e.g. 3% per year)**

Following the CPI system, the rent may be updated on a yearly basis, by applying to the rent of the previous annuity the percentage determined by the General National Index of the System of Consumer Price Index for the period of twelve months immediately previous to the date of each update, taking as a starting point for the first update the month that corresponds to the last index that was published on the date of the contract conclusion, and in the successive ones, the one that corresponds to the last one applied (art. 18.1 LAU 1994)

Article 18.1 LAU 1994, applicable to contracts concluded from 1 January 1995 to 5 June 2013, is aimed at establishing a maximum update threshold during the first five years of the contract, but it may be possible to agree on other index or update

[562] Source: prepared by the authors.

systems as long as they are not harmful to the tenant,[563] or to take the initial rent as a basis for updating, and not the previous one. However, after the adoption of the LMFFMAV 2013, the submission to any index may be agreed by the parties, even if it is more damaging to the tenant and regardless of the agreement during the first three years of the contract.

- Index-oriented increase clauses

According to statistics published by the INE, by way of example, the CPI that should be applied in the respective annual variations is the one indicated in the following table:

Table M Consumer price index. Base 2011 = 100. General index. National[564]

Period			Variation %
Mar-12	to	Mar-13	2.4
Feb-12	to	Feb-13	2.8
Jan-12	to	Jan-13	2.7
Dec-11	to	Dec-12	2.9
Nov-11	to	Nov-12	2.9
Oct-11	to	Oct-12	3.5

It must be also taken into account that European legislation harmonises the consumer price index, including the rent, its services, the maintenance and repair of the dwelling.[565]

- **Utilities**

- **Describe the usual kinds of utilities (e.g. basic utilities like the supply of water, gas and electricity vs. additional utilities, i.e. services such as waste collection) and their legal regulation.**

Parties may agree on who has to pay the general expenses for the proper maintenance of the dwelling, with some limitations (art. 20.1 LAU 1994).

- **Responsibility and distribution among the parties:**

- **Does the landlord or the tenant have to conclude the utilities contracts?**

In Spain, the landlord and the tenant can conclude the utilities contracts.

[563] The problem posed by these agreements is that it will not be possible to know *a priori* whether the agreed update system is more burdensome for the tenant than the revision according to the CPI, because of its variability.
[564] Source: INE. Available at: <www.ine.es/ss/Satellite?c=Page&cid=1254735905116&pagename=ProductosYServicios%2FPYSLayout&L=0&p=1254735893337>, 26 April 2013.
[565] According to Commission Regulation (EC) No 1749/1999 of 23 July 1999 amending Regulation (EC) No 2214/96, concerning the sub-indices of the harmonized indices of consumer prices.

Article 20.3 LAU 1994 establishes that the tenant shall pay the expenses for the housing services that can be identified using meters, such as water, electricity and gas, in all cases. However, there is no impediment for the landlord to include these services within the price of the housing, and therefore, be borne by him, unless this agreement harms the tenant (art. 6 LAU 1994).

With reference to the rest of the overhead costs, such as services, taxes, charges and responsibilities of the dwelling or its accessories that cannot individualised, they shall be paid by the landlord unless otherwise agreed (art. 20.1 LAU 1994). The necessary expenses for the proper maintenance of the dwelling will be calculated according to the share of participation in the community of owners, or if not constituted, according to the square metres of the dwelling.

Therefore, the obligation of the tenant to pay those expenses may be agreed, but it shall be in written form and it shall set the annual amount of these expenses to the date of the contract.[566]

- **Which utilities may be charged from the tenant?**

Therefore, the parties can agree on the obligation of the tenant to take over both the individual expenses necessary for the proper maintenance of the dwelling (water, electricity, gas) and those which are not individual, mainly: contribution to the condominium expenses, rubbish collection fees and IBI (art. 20.3 LAU).

- **What is the standing practice?**

In Spain it is common to apply what the law establishes (art. 20 LAU), if the parties have not agreed otherwise. That is, the tenant pays the individual expenses (water, electricity, gas) and the landlord pays the non-individual expenses (contribution to the condominium expenses, rubbish collection fees and IBI). However, in a context of falling rent prices, the tenants have also usually paid the non-individual expenses since 2007.

- How may the increase of prices for utilities be carried out lawfully?

The expenses that can be individualised shall be paid according to the consumption made by the tenant and the price established by the supplier companies at any time, since they may be passed on to him without legal limitations (art. 20.3 LAU).[567]

- Is a disruption of supply by the external provider or the landlord possible, in particular if the tenant does not pay the rent?

When the disruption of supplies is attributable to the landlord and tenants are still residing in the dwelling, a complaint may be lodged by the latter for an offence of

[566] However, this agreement will not affect the responsibilities for the satisfaction of such costs before the Administration. For example, the owner or holder of the real right, as the case may be, is responsible for tax to the satisfaction of the IBI (art. 63 LRHL).
[567] According to SAP of Madrid on 2 November 2011 (JUR 2011\35907) the consumption of the services according to the individual electricity meter of the housing must be paid.

coercion,[568] which is specifically regulated in article 172.1.3 CP if the exerted coercion is aimed at preventing the legitimate enjoyment of the dwelling.

Thus, the Supreme Court has confirmed the coercion when supply of water (STS 18 October 1999)[569] and electricity (STS 24 February 2000)[570] has been interrupted for a cause not attributable to the tenant, that is, because the landlord either has interrupted the supply or has not paid the bill when he should have done so under the contract. Another similar case of offence of coercion takes place when the supply company proceeds to cut the supply because the installations or conditions of the dwelling are not met because of the landlord's actions or omissions, since the breach of the landlord's maintenance obligation impedes the enjoyment of the dwelling (SJP No. 28 of Barcelona on 7 February 2012).[571] Landlords shall be punished by a prison term of six months to three years or by a fine of 12 to 24 months, depending on the gravity of the coercion and the means used. This is true even if the tenant does not pay rent monthly.

Both criminal and civil law stipulate that the main obligation of the landlord, to maintain the house in the required conditions for an adequate use, is breached in the event of an interruption in the supply of utilities for reasons attributable to the landlord (for example, by cutting off the supply or not meeting the repair obligations required by the utilities companies for maintenance, art. 21.1 LAU 1994). In this case, the tenant may request the performance of the obligation to repair and to restore the utilities or termination of the tenancy contract on grounds of de facto disturbance activities (art. 27.3. a or b LAU 1994), with the corresponding compensation for the damages caused in both cases (art. 27.1 LAU 1994 and art. 1124 CC).[572]

On the other hand, if the supply disruption is attributable to the tenant, such as for example, if he has to pay bills to utilities companies and fails to do so, he will not be able to make any claims of the owner either for the supply disruption, or regarding the non-habitable state of the dwelling because of a lack of water, electricity or gas[573]. Conversely, the landlord may terminate the tenancy contract on the grounds of non-payment of the amounts due for utilities or of other services, such as payment of the IBI, since the Supreme Court case law[574] has considered them as amounts similar to rent (art. 27.2. LAU 1994).

- **Deposit:**

- What is the legal concept (e.g. is the deposit an advance rent payment or a guarantee deposit to cover future claims of the landlord)?

[568] Coercion consists in the realization of personal violence, which can be physical, mental or on things to prevent a third party doing something that is not forbidden or to compel another to do what they do not want to, always against the freedom of the obligated party and without legitimacy to do so', according to SSTS of 18 July 2002 (RJ 2002\1367) and of 14 July 2006 (RJ 2006\798).
[569] RJ 1999\7609.
[570] RJ 2000\348.
[571] ARP 2012\221. In this sense, SJP no.. 9 Barcelona 29 June 2012 (ARP 2012\546).
[572] According to STS on 6 May 1998 (RJ 1998\3703) and SAP A Coruña 31 March 2007 (JUR 2007\35070).
[573] SAP Cáceres 18 July 2007 (JUR 2007\299425).
[574] STS on 25 September 2008 (RJ 2008\5568) and on 26 September 2008 (RJ 2008\5578).

The purpose of the deposit is to ensure the performance of the contract and especially the rent payment, as well the damages caused to the dwelling or premises at the time of the contract termination.[575] The landlord´s duty to give it back when provisions are met suggests that it is a guarantee, which is much more in line with the provisions in articles 1863 and 1866 CC regarding the pledge than the ones dedicated to the deposit itself.[576]

- What is the usual and lawful amount of a deposit?

In residential tenancies, the tenant must deliver to the landlord a sum equivalent to one monthly rent in cash (deposit) as soon as the lease contract has been arranged (art. 36.1 LAU 1994). Otherwise, the landlord may request the termination of the tenancy (art. 27.2 b. LAU 1994).

During the first three years of the contract, the deposit cannot be updated, but at each extension of the contract the parties may require an increase or a reduction of the deposit to make it equivalent to the updated/new rent (art. 36.2 LAU 1994). When the duration exceeds three years, the update will be governed by what has been agreed between the parties, and in the absence of such agreement, it shall be presumed that the same terms established for the updating of the rent apply for the deposit (art. 36.3 LAU 1994). In addition to the deposit, the parties may agree an additional guarantee in order to secure the performance of the tenant´s obligations arising from the contract (art. 36.5 LAU 1994).

- How does the landlord have to manage the deposit (e.g. special account; interests owed to the tenant?)

The lodging deposit is managed by each Autonomous Community, which will set its own regulation according to the Third Additional Provision of the LAU 1994. In Catalonia, for example, the landlord shall lodge the deposit in the *Institut Català del Sòl*[577] using the official model, which may be obtained in the financial institutions associated with the same, in the Chambers of Urban Property or in the *Institut* itself. The final step is the registration of the tenancy contract in the administrative registry managed by this institution.[578]

At the termination of the tenancy, the landlord will request the return of the deposit, which shall be transferred to the bank account number held by and indicated by the same, within 21 days from the request (art. 13.3 DRF). The landlord shall return the deposit or the resulting amount after deducting from it, if necessary, the damages or outstanding expenses caused by the tenant. He has a month to return it to the tenant starting from the date of delivery of the keys. From this moment on, the amount that should be given back accrues legal interest on money in favour of the tenant (art. 36.4 LAU 1994).

[575] SAP of the Balearic Islands on 30 December 2012 (JUR 2012\28339).
[576] As set out by J. Ataz López, 'Fianza. Artículo 36' en *Comentarios a la Ley de Arrendamientos Urbanos*, dir. R. Bercovitz Rodriguez-Cano (Navarra: Aranzadi, 2010), 925.
[577] Available at: <www20.gencat.cat/portal/site/incasol>, 25 July 2013.
[578] According to article 5.1 of the Decreto 147/1997, de 10 de junio, por el que se regula el Registro de fianzas de los contratos de alquiler de fincas urbanas y el depósito de fianzas (DRF) (DOGC 19/06/1997 núm. 2416).

Regarding the fruits that the delivered deposit in cash could have generated during the lease contract, the LAU 1994 sets that the deposit will not yield interest while the tenancy contract is in force. The deposit is a compulsory duty according to article 36.4 LAU 1994. Therefore, its specific regulation will be preferably applied, and failing this, the deposit regulation of the CC would be applicable (art. 1782 CC). Consequently, it seems that the LAU has overruled for urban leases the general deposit regulation that establishes that the depositary is entitled to the fruits generated by the deposit during its custody (arts. 1770 and 1724 CC).

- What are the allowed uses of the deposit by the landlord?

As has been already pointed out, the deposit is used for securing the performance of the tenant's two main obligations: to pay the rent and to keep the property in good conditions.[579] Specifically, the landlord may use the deposit to the satisfaction of the following obligations, when at the time of the termination of the tenancy contract these have not been performed by the tenant:[580]

- The obligation to pay the rent and the quantities that are assumed by or correspond to the tenant (arts. 1555.1 CC and 17 and 20 LAU 1994), such as water, electricity and gas, if they were contracted by the landlord himself,[581] or the payment of the IBI if it had been agreed.
- The obligation to compensate the landlord for damages or impairments produced in the leased dwelling, either due to non-diligent or inappropriate use of the same (art. 1555.2 CC), or due to not having acted with due diligence in the assessment of facts or damages requiring an urgent reparation or an immediate communication to the landlord (arts. 20 LAU 1994 and 1559 and 1563 CC), whether attributable to the tenant's conduct or to the conduct of the persons for whom the tenant is liable (arts. 21 LAU 1994 and 1564 CC).582
- The appropriate compensation for the breach of the obligation to return the possession of the dwelling at the end of the contract (art. 1561 CC).

Once the tenancy contract has been terminated and the possession of the dwelling has been handed over to the landlord,[583] the parties will check the damages in the dwelling. Subsequently, the landlord shall request the return of the deposit from the competent Administration and, once received, he will proceed to settle the balance between the parties, deducting from the deposit the corresponding amount according to what is stated in the previous paragraph.[584]

In this regard, it should be taken into account that the tenant cannot offset the payment of the last month's rent with the deposit, since it is intended for other purposes, such as the payment of damages, which could not be accomplished

[579] According to art. 2 of the Decreto de 11 de marzo de 1949 por el que se modifica el de 26 de octubre de 1939 sobre fianzas de arrendamientos (BOE 30/03/1949 núm. 89), derogado por la LAU.
[580] C. Gómez de la Escalera, 'Las fianzas arrendaticias y su depósito obligatorio en las Comunidades Autónomas (Estudio del art. 36 y D.A. 3ª de la LAU 29/1994)', en *Revista SEPIN* (Madrid, 1998): 30.
[581] Because if they are on behalf of the tenant, the lessor is no longer liable to meet the outstanding debt of the tenant, so he may not withhold the deposit for this reason, as set out by J. Ataz López, 'Fianza. Artículo 36', 936.
[582] In this sense, damage caused by ordinary use or the passage of time shall not be deducted, as set out in SAP of Palma de Mallorca 12 May 2000 (JUR 2000\79).
[583] SAP of Madrid 30 May 1997 (JUR 1997\788).
[584] SAP of Valencia 15 May 2000 (JUR 2000\92).

because these will be appreciated once the landlord has the possession of the dwelling. However, if there is no damage in the dwelling or no amount is owed for other items, the refund of the deposit would be offset with the non-payment of this last month, since as has already been mentioned, the deposit may also be used for covering the unpaid rent.[585]

- **Repairs**

- Who is responsible for what kinds of maintenance works and repairs? What kind of repairs or works may lawfully be assigned to the other party (especially the tenant)

Article 21.1 LAU 1994 imposes on the landlord the obligation to make all the necessary repairs for the maintenance of the house in the required conditions for an adequate use, because these repairs are needed to keep the dwelling in the conditions of habitability needed to meet the use agreed in the contract,[586] including the damage resulting from the passage of time, normal wear and tear and the proper agreed use.[587]

The law exonerates the landlord from the maintenance obligation in three cases: when the damage is attributable to the tenant or to those who live with him (art. 1563 and 1564 CC and art. 21.1 LAU 1994); when the dwelling is destroyed for reasons not attributable to the landlord, in which case the tenancy is extinguished (art. 28 LAU 1994); and for small repairs of small scope and economic cost arising from the ordinary use of the dwelling, which shall be borne by the tenant (art. 21.4 LAU 1994).[588]

The tenant is obliged to use the thing according to the standard of due diligence (that of a good family man) and to return the property as he received it from the landlord, although he is not liable for the deterioration of the thing by due to simple use and when there is no fault on his part. Article 1563 CC establishes a *iuris tantum*

[585] According to SAP of Madrid 21 January 2013 (JUR 2013\65862) and 21 January 2013 (JUR 2013\73246)

[586] Thus, case law has attributed the responsibility to the landlord, for defects or structural damage (SAP of Barcelona 27 October 2011, JUR 2011\82216), in electrical installations, gas and water (SAP of Madrid 5 November 2009 FJ.1, JUR 2010\38292) or water heaters (SAP of Madrid 26 December 2009, JUR 2009\159830 FJ. 3), damp, pavement, tiles which move (SAP of Lleida 23 April 1999, AC 1999\4415 FJ. 2), extermination of a plague of rats and rodents, when it affects health or safety (SAP of Pontevedra 12 September 2011, JUR 2011\347147 FJ. 2), defective air-conditioning (SAP of Barcelona 14 February 2008, JUR 2008\130576 FJ.2). Also those caused by unforeseeable circumstances or force majeure (SAP of Lleida 23 April 1999, AC 1999\4415 FJ. 2).

[587] Like for example, regarding the degradation of chipboard kitchen countertops, stains on the couch (SAP Murcia 10 June 2011, JUR 2011\266401), small scratches on the walls and a little dirt (SAP Zaragoza 26 November 2010, FJ. 1, AC 2010/2367 FJ 2).

[588] Small repairs are current expenditures that are not indispensable in order for the home to continue to meet its condition of habitability or its purpose of serving the agreed use. They are also called minor works because they do not affect the structure or alter the configuration, so they do not need permission from the lessor. For example, the repair of taps or blinds, toilet cisterns (SAP of Lleida 23 April 1999, AC 1999\4415 FJ. 2), maintenance of the boiler and domestic appliances, which includes cleaning of filters, replacement of parts or other elements (SAP of Madrid 26 December 2009, JUR 2011\159830 FJ. 2).

presumption of culpability of the tenant, who shall prove that the deterioration occurred with no fault on his part.[589]

The landlord is required to maintain an active attitude towards the needs of the dwelling during the lifetime of the contract[590], including repairs that are not under his direct responsibility, such as for example, those in a condominium.[591] The tenant is only enabled to make urgent repairs in order to avoid imminent damage or serious discomfort, with prior communication of his intention to the landlord (art. 21.3 LAU 1994); he may also request the necessary amount from the landlord immediately. He may also make the necessary works needed in order to adapt the dwelling to the requirements of a disabled person (art. 24 LAU 1994).[592]

Therefore, for all other cases, the tenant, in the event of passivity or opposition of the landlord regarding the works, can only go to the courts requesting the termination of the contract and the compensation for damages caused (arts. 27.3. to LAU 1994 and 1556 CC); or, alternatively, the enforcement of the necessary repairs, which the landlord is obliged to carry out at his (the landlord) own expense and a compensation for the damage caused by the landlord's negligent conduct (arts. 1556 and 1098 CC). This has two drawbacks: a need to follow a previous judicial procedure and the delay in carrying out the repairs.[593]

Although, in principle, the tenant may not carry out the necessary repairs, the jurisprudence[594] has determined that the mere maintenance works and necessary repairs that tend to keep the property in good conditions for the intended purpose, cannot affect the configuration and structure of the leased object. According to article 23 LAU 1994, the tenant is entitled to carry out works, by himself and without the landlord´s consent, if they do not modify the configuration of the dwelling or its accessories, nor cause a decrease in the stability or safety thereof. However, this faculty of the tenant, provided in article 23 LAU 1994, does not include the right to recover the amount paid for the maintenance works. Moreover, as established by article 23 LAU 1994, he may do these works at his own risk, without the consent of the landlord and without right to compensation.[595]

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[589]Therefore, he only answers for any abnormal use of the housing, (SAP of Zaragoza 30 July 2008, FJ. 2, JUR 2008\175818). Such as, for example, the repair of a heater when there has been a proper maintenance by the owner (SAP of Valencia 15 February 2003, JUR 2003\141413). It is necessary to check for dirt, abnormal scratches on the walls, because he will be liable for cleaning when the degree of dirtiness implies his not having performed regularl cleaning (SAP of Zaragoza 26 November 2010, FJ. 2, AC 2010\2367 FJ. 2), predictable and avoidable fire (STS 12 February 2001, FJ. 3, RJ 2001\850). In addition, there is an *iuris tantum* presumption that the dwelling was received by the tenant in good condition, unless there is mention of the state of the property before renting it (art. 1562 CC). The presentation of an invoice for painting and filler work in the hall is not sufficient evidence for damage to be charged to the tenant - it is considered work to get the house into condition for its next rental, which is borne the lessor (SAP of Zaragoza 26 November 2010, FJ. 2, AC 2010\2367).

[590] SAP of Barcelona 16 February 2007 (JUR 2007\217502).

[591] SAP of Asturias 19 November 2010, FJ. 2 (AC 2010\2323).

[592] This condition can be met by the tenant, his/her spouse or the person with whom he/she lives permanently in a similar personal relationship, regardless of their sexual orientation, and also the family members who live with him/her. In addition, it is necessary to make a written communication to the lessor.

[593] Albadalejo García, M., Derecho Civil, Tomo II, Vol. 2º, (Barcelona: J.M Bosch, 1994), 165.

[594] According to SSTS 30 January 1991 (RJ 1991\519), on 31 December 1993 (RJ 1993\9919) and SAP of Madrid 23 February 1995 (AC 1995\847).

[595] J.M Lete del Río, 'Artículos 21 a 25' en *Comentarios a la ley de arrendamientos urbanos*, dir. X. O'Callaghan (Madrid: Editoriales de Derecho Reunidas, 1995), 274.

- **Connections of the contract to third parties**

- Rights of tenants in relation to a mortgagee (before and after foreclosure)

a) Before the start of a mortgage foreclosure: article 661.1 LEC provides that once the existence and the identity of the occupiers of the property other than the enforced debtor has been noted, they shall be notified by the court of the existence of the enforcement, granting them a time limit of ten days to submit to the Court the titles justifying their situation. Additionally, the tenant is also entitled to be heard in the procedure, since it is an interested party thereof. In the announcement of the auction it will be expressed that the dwelling is occupied. Apart from that, the enforcement creditor may request the Court to declare, prior to announcing the auction, that the occupiers do not have the right to remain within the property (art. 661.2 LEC). In addition, the tenant, as he is informed about the enforcement, may take part in the auction as a bidder, by virtue of his right of preferential acquisition, which has already been mentioned above.[596]

b) After the foreclosure: if the lease contract remains registered in the Property Registry, the tenant is entitled to continue in the leased dwelling. In this case, the new landlord will have to communicate the subjective novation of the lease contract to the tenant. Conversely, the tenancy will terminate if the contract was not registered in the Property Registry prior to the extinguishment of the landlord's right (art. 13 LAU 1994).[597]

It should be taken into consideration that tenancy contracts terminated by foreclosure are not automatically extinguished, despite the provisions of the 17th rule in article 131 LH. Once the dwelling is assigned, if the tenant does not voluntarily leave the dwelling, the winning bidder of the auction will have to instigate the eviction due to the extinction of the lease term (art. 39.3 LAU 1994).[598]

6.5 Implementation of tenancy contracts

Example of table for 6.5 Implementation of tenancy contracts

	Main characteristic(s) of tenancy type 1 Private market	Main characteristic(s) of tenancy type 2, etc. VPO	Ranking from strongest to weakest regulation, if there is more than one tenancy type
Breaches prior to handover	No indication of the date of housing handover. Delay in delivering, if the date is essential, frustrates the contract aim or when landlord's fault, willful		

[596] See section 6.3 *'statutory pre-emption rights of the tenant', supra.*

[597] For more details, see section 6.4 *'does a change of the landlord through inheritance, sale or public action affect the position of the tenant?', supra.*

[598] According to M.I. Poveda Bernal, ejecución hipotecaria y extinción de los arrendamientos. Nuevas perspectivas y consideraciones críticas en *Revista Crítica de Derecho Inmobiliario nº 652* (mayo-junio 1999).

	misconduct or negligence is involved.		
Breaches after handover	For hidden defects, dispossession and for de jure or de facto disturbance by the landlord.		
Rent increases	Agreement between parties is allowed. Failing this, annual update according to CPI.	CPI annual revision, except for VPO subjected to RD 31/1978: biennial revision 50% IPCV.	VPO have an update that is more favourable to tenant
Changes to the dwelling	No need for authorisation, only when it does not modify the housing configuration. Never when it alters its safety or stability.		
Use of the dwelling	Annoying, unhealthy, noxious, and illegal activities are forbidden.		

- **Disruptions of performance (in particular "breach of contract") prior to the handover of the dwelling**

- **In the sphere of the landlord:**

- **Delayed completion of dwelling**

Under the tenancy contract, the landlord shall deliver the thing in a condition to serve the use to which it has been destined (art. 1554.1 CC), and shall, prior to the conclusion of the contract, remove all obstacles preventing the handover of the possession allowing that use. If the handover is not undertaken within the agreed period, and certain requirements are met,[599] the tenant may refuse to pay the rent by virtue of the *exceptio non adimpleti contractu*, and he may also request the termination of the contract with the appropriate compensation for damages (STS 28 February 1902[600] and SAP of Cadiz 1 July 1998).[601]

Additionally, as provided for in article 5.5 of RD 515/1989, if either the dwelling or the common areas or accessory elements are not fully built, the date of handover and the construction phase that the building is in at any time shall be clearly specified in the lease contract. The breach of this obligation may be reported to the competent authority of the respective Autonomous Community, which may punish the developer.

However, courts have determined that a delay in the handover of a dwelling under construction does not always lead to a contractual breach, since this delay may not be considered as a reason for terminating the contract when the term has not been

[599] See below.
[600] As set out by A. Fuentes Lojo and J. Fuentes Lojo, *Novísima Suma de arrendamientos urbanos*, T. VI (Barcelona: JM Bosch Editor, 2007), 138-139.
[601] AC 1998\1592.

configured as essential. In this case, the purpose of the contract is not frustrated and the late performance is still useful and suitable for the satisfaction of the party´s interests, without prejudice to the application of case law concerning negligent acts attributable to the landlord (April 11, 2013 STS FJ. 3).[602]

Consequently, it is necessary a study matters on a case-by-case basis depending on the clause that fixes the handover term, taking into account if it is set as an essential element of the contract or even as a cause for the termination thereof[603], and also bearing in mind the developer´s behaviour, taking into account its diligence in carrying out the construction to meet the deadline, if the circumstances causing the delay could have been avoided or if the delay was caused due to force majeure.[604] In this regard, the SAP of León 15 May 2008[605] establishes that even when the fault is provided for in article 1101 CC as criteria for non-performance, neither the good faith of the property developer nor the ignorance of any deficiencies constitute a cause that excludes a negligent delay, because the good faith and fault are autonomous concepts that do not have to interact, and ignorance of one's own defects does not exempt one from negligence. In this regard, a term establishing purely indicative deadlines subjected to the will of the businessman is considered abusive (art. 85.1 RDL 12007), but clauses that subordinate the handover of the dwelling on the stipulated date to objective and unpredictable circumstances are considered valid. However, in order to include this circumstance, it shall be a fact outside the scope of control of the developer's activity.

In short, a delay in the housing handover - outside the case where the handover time has been agreed with an essential and non-extendable character - constitutes a case of defective compliance, the consequence of which is, in principle, the obligation of the developer to compensate the injured party for those damages caused as a result of the delay.

- Refusal of handover by landlord (in particular: case of "double lease" in which the landlord has concluded two valid contracts with different tenants).

Firstly, it should be remembered that the first tenant to register the tenancy contract in the Property Registry is protected by the good faith of the Register (arts. 32 and 34 LH) and by the effects of the principle of priority with respect to other tenants who have not registered their contract prior to the property transfer.[606]

It must also be taken into account, as part of the court decisions have pointed out,[607] that article 1473 CC, which regulates the double sale, does not have a correct location in the Civil Code. Thus, it is rather a rule related to the general problems

[602] RJ 2013\3490. This will occur when a developer or landlord are involved, negligently, in the late delivery of the home.
[603] About the term see STS on 18 May 2012 (RJ 2012\6358).
[604] About the requirements set by case law regarding proper acts see SAP of A Coruña 11 July 2011 (AC 2011\318), which summarises the Supreme Court case law on this issue.
[605] CENDOJ24089370012008100196.
[606] As set out by M.M., Manzano Fernández, 'La inscripción de los contratos de arrendamiento en la nueva Ley de Arrendamientos Urbanos' *Revista Crítica de Derecho Inmobiliario*, 637, noviembre-diciembre 1996:2133-2134.
[607] G. Garcia Cantero, 'Artículo 1473 CC. El Contrato de compraventa' en *Comentarios al Código civil y Compilaciones Forales,* Tomo XIX, ed. M. Albadalejo y S. Diez Alabart (Madrid: VLex, 1995). Disponible en: <vlex.com/compilation/230845>, 25 July 2013.

involved in contracts (not only contracts of sale), and for this reason it should be located among the general provisions thereof. If this article can be considered applicable to leases, the Civil Code comes to the same solution that we mentioned initially: 1st - the tenant who first registered the contract with the Registry would prevail; 2nd - in the absence of registration, the preference will be for the tenant who in good faith is the first in possessing the leased dwelling; 3rd - failing this, the use of the dwelling shall belong to the person who presents a contract with a prior date, provided that he has acted in good faith (art. 1473 CC).

The prospective tenant that is not granted the use of the property, of course, has a claim for damages against the misbehaving landlord that has leased his dwelling twice.

- Refusal of clearing and handover by previous tenant

Firstly, a delay in the handover of the dwelling will mean a breach of the tenancy if the term has been established as essential in the contract. In principle, the conclusion of a tenancy contract for a home that is intended to be effectively occupied by the tenant and/or his family to live in grants some degree of substantiality to the the idea that the term was essential due to the immediate need of the dwelling to live in. Additionally, if the tenant has to rent another dwelling, he shall not be able to withdraw from the contract until six months have elapsed since it was formalised, preventing the occupation of the dwelling which is in arrears until this term is completed (art. 11 LAU 1994), causing him to suffer numerous expenses and damages.

As has already been mentioned, the landlord shall not be liable if he proves that the delay is caused by unpredictable and unavoidable events (force majeure) or that, even if predictable, they were inevitable (unforeseeable circumstances).

The landlord has the obligation to handover a dwelling that serves the agreed use and shall act with due diligence to ensure that the dwelling is in the correct state for this purpose (art. 21.1 LAU 1994 and art. 1554.2 CC). Therefore, the dwelling should be checked prior to concluding a new tenancy contract, making sure that it is empty and in a correct state of repair for the next tenancy. In other words, the late handover of the dwelling could have been avoided if the landlord would have made the appropriate checks before concluding the tenancy contract setting such an early access date. Consequently, in this case, there would be a breach of his obligation and the tenant may request the termination of the tenancy contract and compensation for the damage suffered on the basis of article 1101 CC.

- **Public law impediments to handover to the tenant**

As seen above, clauses that subordinate the housing handover on the stipulated date to objective and unpredictable circumstances are valid, such as the granting of administrative authorisations, e.g. the habitability certificate or the licence of first occupation (STS 19 July 2002).[608] However, in order to admit the late handover without this leading to a contractual breach, the delay must not be attributable to the landlord. Among the delays that would be attributable to the landlord would be: a

[608] RJ 2002\9097.

delay in the application for obtaining those certificates, undue delay in carrying out the works required for adoption or to conceal from the tenant the real state of disrepair of the property (STS 3 June 2007).[609]

- **In the sphere of the tenant: refusal of the new tenant to take possession of the house**

In Spain, tenancy is a consensual contract. Therefore, if the tenant wants to withdraw from the contract according to the new LAU amendment, he shall wait until the first six months of the contract have elapsed, provided that he informs the landlord at least thirty days in advance. When the withdrawal takes place, the parties may have agreed in the contract on compensation in favour of the landlord with an amount equivalent to a monthly payment of rent in force for each year of the contract remaining to be fulfilled. Terms below a year's time will lead to the proportional part of the compensation (art. 11 LAU). Moreover, the tenant's insolvency cannot be argued as grounds for terminating the tenancy contract.

- **Disruptions of performance (in particular "breach of contract") after the handover of the dwelling**

- **Defects of the dwelling**

- **Notion of defects: is there a general definition?**

According to article 1484 CC, hidden defects are those that the thing has if they render it unsuitable for the use for which it is intended, or if they reduce such use in such a way that, if the purchaser had known them, he would not have acquired it or would have given a lower price for it.

Article 1553 CC allows the application of this article to the lease. However, these provisions are applied strictly in this area, due to the fact that the lease is subject to the lessor's obligation to perform during the lease any repairs required to preserve it in a condition to serve for the use for which it is intended (art. 1554.2 CC). And it is difficult to distinguish when the lessor is under an obligation to repair according to article 1554.2 CC or when the tenant may claim hidden defects, since the obligation referred to in article 1554.2 CC fits perfectly into the definition of which may be considered hidden defects.[610]

The necessary requirements to be met in order to claim hidden or redhibitory defects, the onus of proving which rests with the tenant, are the following:

1) The encumbrance must be hidden, i.e., it cannot be apparent, or appear in the contract, or to be known by the tenant when concluding the contract; because otherwise he would have had the possibility of not leasing the dwelling or to demand to pay less rent.[611] Furthermore it is assumed that the state of the dwelling on delivery as per the contract is correct, unless proven otherwise (art.1562 CC). For this reason, when entering the dwelling the tenant should check that apparently everything works well.

[609] RJ 2007\12886.
[610] A. Fuentes Lojo y J. Fuentes Lojo, *Novísima Suma de arrendamientos urbanos*, T. I 134.
[611] SSTS on 28 February 1997 (RJ 1997\1322) and on 24 February 2006 (RJ 2006\1563).

2) The defect on the property can be either a defect or imperfection or an alteration of the quality or qualities of the thing or any of its components, provided that it diminishes the usefulness of the thing regarding the use agreed in the contract, or failing this, its usual use, or from among the usual uses, the one inferred from the objective circumstances of the business. [612]

3) The defect must exist at the time of the contract conclusion.[613]

4) Seriousness of the defect: the CC adopts a subjective criterion: the effect is redhibitory when the purchaser would not have acquired the thing if he had known this defect, or would have given a lower price for it. However, doctrine postulates the use of an objective criterion, using as weighting criterion what an ideal-objective average purchaser would have done.[614]

If there is no hidden defects, to determine who is responsible for a defect in the dwelling, we must refer to article 21 LAU 1994 about reparations.[615]

- **Examples: is there exposure to noise e.g. from a building site in front of the house or are noisy neighbours a defect? damages caused by a party or third persons? Occupation by third parties?**

a) Noise: the Explanatory Memorandum of the Community of Madrid's Act 37/2003, of 17 November, on noise, makes express reference to non-compliance with the objectives of sound quality in inner spaces. This may give rise to the obligation to respond for hidden defects of the dwelling.

According to the SAP of Badajoz 13 February 1997, F.J. 3[616], the defects in question must be those that are generally intrinsic to the thing, i.e., closely related to the thing itself. It is very complex then to admit the possibility that defects or inconveniences coming from third parties, may be considered as defects. In this sense, the SAP ruled on the noise produced by a neighbouring nightclub. However, the mentioned judgement leaves open the possibility that there exist cases where the tenant can prove the fulfilment of the necessary requirements in order to determine the existence of hidden defects. In this regard, the construction of the adjacent building shall exist before the conclusion of the tenancy contract, so if the tenant would have had the average required diligence visiting the dwelling prior to the contract conclusion, it can hardly be considered as an unknown defect to him, as he has observed the existence of construction works.

b) Damages caused by one of the parties or by third parties:

As mentioned above, the existence of a hidden defect requires that the tenant not be responsible for having caused it, and it shall be unknown to him and exist prior to the conclusion of the tenancy contract. In this case, the tenant may demand that the landlord repair the damage to the home, caused either by the landlord or by a third party, provided that the necessary requirements to demand a remedy are met.

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[612] As set out by SSTS on 3 March 2000 (RJ 2000\1308) and on 6 November 2006 (RJ 2006\6720).
[613] SSTS on 4 October 1989 (RJ 1989\ 6882) and on 15 November 1991 (RJ 1991\9800).
[614] F. Peña López, 'Comentario al artículo 1484 del CC' *Revista Aranzadi* (enero 2009). BIB 2009\8041.
[615] See section 6.4 *'repairs', supra.*
[616] AC 1997\346.

Also, the tenant shall be liable for damages caused by him or by anyone who lives in the dwelling with him (arts. 1563 and 1564 CC and art. 21.1 LAU 1994) and is also liable for those small repairs arising from the use of the dwelling (art. 21.1 LAU 1994). The landlord shall repair the damage by virtue of his obligation to maintain the dwelling in order to serve the agreed use (arts. 1554.2 and art. 21 LAU 1994 CC).[617]

c) Occupation by third parties: with regard to occupation by third parties, it may be considered as a dispossession when the tenant is deprived of all or a part of the leased dwelling by a final judgement and pursuant to a right over the property prior to the tenancy (art. 1475 CC).[618] In this case, article 1553 CC says that the provisions contained in the title regulating the sale and purchase, concerning warranties, shall apply to the lease contract (arts 1475 to 1483 CC). This is related to the obligation imposed on the landlord to ensure the tenant's peaceful enjoyment of the tenancy for the entire period of the contract (art. 1554.3 CC).

Article 1559.1 CC establishes that the tenant is obliged to make the owner aware, within as brief a period as possible, of any usurpation or harmful development performed or openly prepared by another in respect of the thing subject to the lease. However, it is clear that any occupations by third parties, as in the case of hidden defects, are circumstances that must be resolved by the landlord.

Finally, we must differentiate expropriation, which is always based on a prior right recognised in a final judgement, from other forms of dispossession, such as non-compliance according to the principle ´the sale extinguishes the lease' (art. 1571 CC), [619] which after the amendment of the LAU 1994 in 2013 is again applied in the voluntary disposal when the tenancy has not been registered in the Property Registry (art. 14 LAU 1994), since, in this case, the sale is performed after the tenancy contract.

- **Discuss the possible legal consequences: rent reduction; damages; "right to cure" (to repair the defect by the landlord); reparation of damages by tenant; possessory actions (in case of occupation by third parties) what are the relationships between different remedies; what are the prescription periods for these remedies?**

a) Hidden defects: according to article 1.486 CC the tenant may opt for:[620]

1) Redhibitory action: the purchaser may choose in the first place to withdraw from the contract, being reimbursed for any expenses he has paid. If the seller was aware of the hidden defects or flaws of the thing sold and did not represent them to the purchaser, the latter shall have the same option, and shall further be compensated for any damages if he should choose rescission.[621]

2) The actio *quanti minoris*: it consists of a reduction of the price in a proportional amount, pursuant to expert opinion.

[617] See section 6.4 *'repairs', supra.*
[618] R. Durán Rivacoba, *Evicción y saneamiento* (Navarra: Aranzadi, 2002), 85-86.
[619] R. Durán Rivacoba, *Evicción y saneamiento*, 88.
[620] These remedies are for sales contract, also allows application to tenancy contracts (art. 1553 CC).
[621] A. Montserrat Valero, 'Saneamiento por gravámenes ocultos' en *Revista Aranzadi Doctrinal* no. 4/2012.

According to article 1490 CC these actions shall be extinguished after six months, as of the time of delivery of the dwelling.

b) Illegal occupation by third parties: the tenant may claim possession of the leased dwelling, when it is occupied by third parties, by means of the action of retain and recover regulated in article 250.4 LEC, which shall be processed by an oral proceeding because of a dispossession or a disturbance in the enjoyment of his possession. The injunctions of retain and recover are the procedural instrument for the legal protection of the possession, which protect all holders irrespective of the right that they may have to the property or to the final possession, and this finds its support in article 446 CC. This action may be brought exclusively in order to recover possession of the thing.[622] It expires in one year after the act of disturbance or dispossession (art. 439.1 LEC).

c) Legal occupation by third parties: the tenant may request the termination of the tenancy contract together with compensation for damages for *de facto or in jure* perturbation caused by the landlord in the dwelling (art. 27.2. b LAU 1994). Additionally, as the warranty against dispossession may be applied, the tenant may claim the following from the landlord: 1 - restitution of the price, which according to article 1553.2 CC, being a temporary lease and its price being according to the term, the warranty compensation shall be calculated on the basis of the remaining term, once the dispossession has prevented the enjoyment of the dwelling.[623] 2 - The fruits or returns, if he is compelled to deliver them to the party who won the trial; 3 - Court costs of the proceedings that gave rise to dispossession and, as the case may be, court costs of the proceedings initiated against the debtor on account of the warranty; 4 - Contract expenses, if paid by the tenant, for example, drawing up a public deed; 5 - Damages and interest and voluntary or purely recreational or decorative expenses, if the lease was in bad faith (art. 1478 CC).

For one year counting from the conclusion of the tenancy contract, the tenant may exercise the action for rescission, or request compensation. After the lapse of one year, he may only claim compensation within an equal period, counting from the day on which he discovered the encumbrance (art. 1483 CC).

- **Entering the premises and related issues**

- **Under what conditions may the landlord enter the premises?**

The tenancy agreement governed by Title II LAU 1994 implies the transfer of the use of the dwelling, which thereby becomes, to all intents and purposes, the tenant's residence, which is protected by article 18 CE[624].

In this sense, article 18.1 CE guarantees the right to honour and to personal and family privacy. And article 18.2 CE foresees that one's home is inviolable, stating that

[622] As set out by P. Cremades García, 'Los nuevos interdictos posesorios a propósito de la Ley 1/2000 de 7 de Enero' en *Revista de Noticias Jurídicas* (diciembre 2003). Available in: <noticias.juridicas.com/articulos/45-Derecho%20Civil/200312-585515191010333220.html>, 2 July 2013.
[623] R. Durán Rivacoba, *Evicción y saneamiento*, 82.
[624] SAP Tarragona on 29 January 2002 (JUR 2002\160163).

"no entry or search may be made without the consent of the householder or a legal warrant, except in cases of flagrante delicto". Consequently, as of the moment of the delivery of the keys to the tenant, the landlord shall not be able to enter into the dwelling without the tenant's permission or a court order, even if the tenant is residing unduly. The entry into the dwelling by the landlord may imply a crime of housebreaking specifically punishable under article 202 CP with imprisonment of six months to two years.
However, article 21.3 LAU 1994 sets out that the tenant shall notify the landlord of the need for conservation works, and for that purpose the tenant shall provide direct verification of works to the landlord or to the appointed technician. In the same sense, article 22.1 LAU 1994 entitled the landlord to carry out improvement works that cannot be reasonably deferred. Nevertheless, the landlord shall notify the tenant in advance in order to enter into the rented dwelling, and the latter shall allow this access (art. 18.2 CE).[625] Thus, if the tenant does not allow the landlord's access in order to check the state of the dwelling, in the case of works mentioned above, the only possible solution is to obtain a judicial warrant. Moreover, the tenant is not committing a coercion misdemeanour by refusing the landlord entry.[626] When there is an emergency, and the landlord cannot reach the tenant, it would be better for him to call the police or the fire brigade in order to gain access to the dwelling.

- **Is the landlord allowed to keep a set of keys to the rented apartment?**

It is not prohibited in Spain for the landlord to have a set of keys to the rented dwelling. However, he shall not make use of them unilaterally to enter into the rented dwelling, since this would require the tenant's consent or a judicial warrant (art. 18.2 CE).

- **Can the landlord legally lock a tenant out of the rented premises, e.g. for not paying rent?**

As mentioned above, in order to enter the rented dwelling during the tenancy contract term, the landlord needs the tenant's consent. Therefore, he cannot do it unilaterally. In the event that the lease contract is terminated, there must be evidence that the tenant has abandoned the dwelling, for example by signing a contract termination agreement and handing over the keys. Otherwise, the landlord shall request the tenant´s eviction from the court and wait for the same to occur, so as to proceed to enter the dwelling.

If these conditions are not met and the landlord decides to change the lock of the rented dwelling without the proper legal cover and with the intention of preventing access to the dwelling, he may be guilty of coercion, either as a crime (art. 172.1 CP)[627] or as a misdemeanour (art. 620.1 CP),[628] depending on the seriousness of the facts and the violence used.[629]

[625] SAP Barcelona on 18 May 2006 (JUR 2006\260032).
[626] As set out by SAP Madrid on 5 July 2012 (JUR 2012\271793).
[627] SAP Zaragoza on 24 February 2009 (JUR 2009\188174).
[628] SAP Las Palmas on 2 January 2009 (JUR 2009\159590), which states: 'Changing locks constitutes a criminal offence, generally being understood as a misdemeanour rather than a crime, understanding violence as a force on the will or as a confrontation with the freedom of action of another person, using material force on things.
[629] L. Lafont Nicuesa, 'Comentario al nuevo delito de acoso inmobiliario' en *Revista Actualidad Jurídica Aranzadi* no 804/2010 (BIB 2010\2134).

It is also possible for the landlord to commit a crime of housebreaking (art. 202 CP); in fact, a forced entry is a qualified variety of coercion under the Spanish system. To consider that the crime of housebreaking has been committed, there needs to be a specific intention to violate the legal right to home inviolability, which according to case law will not take place when the purpose of the change of locks is intended solely to repossess the house (ie. to exercise a right without using the legal means established to do so) and not to violate the tenant's dwelling.[630]

- **Rent regulation (in particular implementation of rent increases by the landlord)**

- **Ordinary rent increases to compensate inflation/ increase gains**

The annual update of the rent, if nothing to the contrary is agreed in the contract, will take place according to the increase of the CPI, even during the first three years of the contract. However, it is not possible to agree in the contract on the automatic update of the rent,[631] although any notification made by means of a note on the receipt of the previous monthly payment is considered to be valid (art. 18.3 LAU 1994). Neither is it possible to have a retroactive claim for any updates not made in a timely manner, because legislation only gives the landlord the right to require the updated rent starting on the month after the notification is made (art. 18.3 LAU 1994).

- **Is a rent increase after renovation measures, e.g. upgrading the energy performance of the house, or similar lawful and dealt with in a special procedure?**

When the tenancy contract is extinguished because of the completion of the forced minimum extension, the landlord may increase the rent freely through the agreement of a new contract. However, after the adoption of the LMFFMAV 2013, the parties may agree any kind of annual rent increase during the term of tenancy contracts concluded after 6 June 2013. If the parties do not notify the termination of the tenancy contract after the third year, the contract will be extended for another year (art. 10 LAU 1994), and if the tenant continues in the housing for 15 days with the landlord´s acquiescence, the tenancy contract shall be deemed implicitly renewed (arts. 1566 and 1581 CC).[632] During these periods of extension the rent may be increased according to what has been agreed by parties, and if they have not agreed anything, the rent will be increased annually according to the CPI (art. 18 LAU 1994).

The possibility of increasing the rent when the landlord makes improvements during the lease term is also foreseen, such as for example if there is an improvement in the flat's energy efficiency[633]. Once the first three years of the tenancy contract have elapsed, the landlord may increase the annual rent in the amount resulting from applying to the capital invested in the improvement the legal monetary interest rate at

[630] SAP Ávila on 31 Jenuary 1997 (ARP 1997\876).
[631] As ruled on in SSTS on 5 March 2009 (RJ 2009\1630), on 23 June 1986 (RJ 3791\1986) and on 19 June 1985 (RJ 3298\1985).
[632] For more details, see section 6.4 *'Other agreements on duration and their validity: chain contracts', supra.*
[633] See section 6.5 *'Maintenance measures and improvements, in particular upgrading the energy performance of the house by the landlord', infra.*

the time of the completion of the works, increased by three points, as long as it does not exceed an increase of twenty per cent of the current rent at that time. In order to calculate the capital invested, public subsidies obtained for the realisation of the work shall be discounted (art. 19 LAU 1994).

- **Rent increases in "houses with public task"**

The revision of the VPO rents, whichever the legislation applied, may be done annually according to the percentage changes of the CPI (third paragraph of the First Additional Provision LAU 1994).

However, this article excludes from its application the VPO under RDL 31/1978 regime, which have a biennial revision of up to 50% of the change experimented in that period by the subgroup 3.1 'Houses for rent', published by the INE. Therefore, in this case, tenancy contracts for both VPO private promotions (art. 12 RD 3148/1978) and VPO public promotions (art. 53 RD 3148/1978) are not updated as in other cases according to the CPI. However, the rent will be updated annually according to the general CPI, as in the LAU 1994, in the case of a private promotion of VPO that comes from second and subsequent transmissions that are governed by previous regimes to the RD 31/1978, or if the first transmissions were carried out after the entry into force of the RD 31/1978, when dwellings were destined previously to tenancy or were occupied by those who developed them.[634]

- **Procedure to be followed for rent increases**

For the calculation of the increase, the system explained above will be applied.[635] The updated rent shall be payable by the tenant starting from the month following written notification by the interested party to the other party, stating the percentage alteration applied and accompanying, if required by the tenant, a certification of the National Statistics Institute, or making reference to the Official Gazette where it has been published (art. 18.3 LAU 1994).

o **Is there some orientation for the market rent; if yes, how is the market rent measured/calculated (e.g. statistical devices such as a Mietspiegel)**

In order to determine the market prices of the rents, three indices may be taken into account: the housing prices valued by the appraisal bodies, prices established by estate agencies on the web (for example, www.idealista.com or www.fotocasa.es), and the prices of the existing tenancy contracts[636]. This latter system is the one that can provide more real data. It is used, for example, by the *Institut Català del Sòl*, which calculates the prices of the market from the deposits[637].

- **Possible objections of the tenant against the rent increase**

[634] Article 3.2 of the Real Decreto 727/1993, de 14 de mayo, por el que se regulan los precios de venta, en segundas y posteriores transmisiones, de las viviendas acogidas a los distintos regímenes de protección oficial de promoción privada, así como las rentas de dichas viviendas y su revisión (BOE 01/06/1993 núm. 130).

[635] See section '*Automatic increase clauses (e.g. 3% per year)*', *supra*.

[636] For more details, see <www.lne.es/finanzas-personales/2013/04/17/calculan-precios-pisos/1398856.html>, 16 May 2013.

[637] See 'INDESCAT: Anuario Estadístico de Catalunya' in <www.idescat.cat/pub/?id=aec&n=731>, 16 May 2013.

For contracts concluded before the entry into force of the LMFFMAV 2013 and with a term below five years, any provision that established higher increase in the rent than the CPI was considered null, according to article 6 LAU 1994.

Additionally, any landlord who has not increased the rent annually cannot do it retroactively, i.e., when he increases it, he may take into account the increase experienced by the CPI during the whole years since the last update, but in no case may he request the amounts that have not been increased in the manner and period established in article 18 LAU 1994 (art. 18.3 LAU 1994).

Compared to the rest of the expenses, it is established for contracts concluded between 1 January 1995 and 5 June 2013 that during the first five years of the contract duration, the amount that tenant shall pay, for the concept referred to in the previous section, except for taxes, may only be increased annually, and never at a rate more than double that by which rent can be increased, in accordance with article 18.1 (art. 20.2 LAU 1994). With the approval of the 2013 LMFFMAV, this period is reduced from five to three years (art. 14 LAU 1994).

- **Alterations and improvements by the tenant**

▪ **Is the tenant allowed to make (objective) improvements to the dwelling (e.g. putting in new tiles)?**

The tenant shall not carry out works that imply a modification of the configuration of the dwelling or its accessories without the written consent of the landlord, and under no circumstances can he carry out works that lead to a decrease in the stability or safety of the dwelling (art. 23.1 LAU 1994). Therefore, *a sensu contrario*, the tenant may carry out works without asking for the landlord's permission, as long as the configuration, stability or security of the dwelling are not altered, such as maintenance works.

Legislation does not foresee what the configuration of the dwelling means. Therefore, this complex and legal concept has been defined by case law. In this sense, the SAP Murcia 5 April 2000[638] reaffirms the jurisprudence already consolidated by the Supreme Court[639], which understands that housing works modifying the configuration of the dwelling are those that, according to the circumstances of each concrete case, constitute an essential and non-accidental change in the dwelling, redistributing its space or structure or changing its initial appearance involving fixed and attached housing or accessory works.

Thus, works involving a change in the internal distribution or an extension of the dwelling in any sense are considered works that alter the configuration of the dwelling, with the exception of those allowing for a subsequent return to its original condition, provided that the living space is necessary for the fulfilment of the intended use and it is integrated in its necessary adequacy (STS 19 October 1994)[640]. For example, the following have been considered alterations to the configuration of the

[638] JUR 2000\190393.
[639] See SSTS 9 May 1960 (RJ 1960\1721), 22 October 1960 (RJ 1960\3182), 30 September 1964 (RJ 1964\4102) and 27 December 1993 (RJ 1993\10151)
[640] RJ 1994\7490.

dwelling: the suppression of partition walls (SAP of Barcelona 26 February 2009),[641] the removal of interior walls (SAP of the Balearic Islands 5 May 2005),[642] the suppression of a wooden ladder attached to a wall (STS 26 December 1974),[643] the opening of doors and closing of windows (STS 5 April 1991)[644] and the installation of a false ceiling suspended by slabs on the first floor (SAP of Madrid 28 December 1992)[645].

In some cases, this has given rise to contradictory sentences; for example,the installation of air conditioning in a dwelling is considered in some cases as works that affect the configuration and, in other cases, it is not.[646] This situation has caused legal uncertainty among tenants and has given rise to excessive or abusive conduct, both by landlords and by tenants, because they do not know the scope of the term configuration in order to know the works that they may or may not carry out to adapt the dwelling to their needs.

It should be taken into account that in the event of performing works that modify the configuration of the dwelling without written permission[647] from the landlord or works that cause a decrease in the stability or safety thereof, the landlord is entitled to terminate the contract (art. 27.2. d LAU 1994)[648].

A lack of certainty about the authorisation to carry out works and the possibility of being evicted if they do so, discourages the performance of the same, when they are usually performed by tenants with the intention of preparing the dwelling and adapting it for a better use.

- **Must, and if yes under what conditions, improvements of the dwelling by the tenant be compensated by the landlord?**

[641] RJ 2009\386928.
[642] RJ 2005\126665.
[643] RJ 1974\4938.
[644] RJ 1991\2642.
[645] RJ 1992\1228.
[646] SAP of Barcelona 14 February 2008 (JUR 2008\130576 FJ.2) attributes responsibility to the lessor because the air conditioning was faulty, while SAP of Barcelona 14 January 2008 (JUR 2008107481) considers that the tenant must answer for it because it was delivered in good condition by the lessor and the tenant is in charge to maintain the appliance.
[647] Although written the consent of the lessor is required to carry out the works as per article 23.1 LAU 1994, courts have admitted a tacit consent in certain cases, in such a way that the right to terminate the contract has not been recognised for the lessor. It is contemplated, for example, in SAP of Malaga on 28 November 2000 (RJ 2001110127): in order to talk about tacit consent and to integrate it into the own acts framework, it is required that from acts carried out by the lessor arises his willingness to allow works, in a clear and unequivocal way.
[648] On the contrary, the termination of the contract is not contemplated, because they have not been considered as works affecting the configuration of the property, for example: placement of partitions without their being embedded in the structure and thus easily removable (STS on 11 October 1967, RJ 1967\3931), the construction of wooden partitions not attached to the wall and easily separable (STS on 6 February 1975 (RJ 1975\413), the replacement of pavements as a work of maintenance and conservation (STS on 12 March 1992 RJ 1992\2174), and repair and replacement works of necessary elements in the bathroom, such as baths and sanitary appliances (STS 20 April 1995, RJ 1993\3103). In this sense, SAP of Madrid 29 September 2006 (JUR 2006268397), with respect to doors, floors, stairs or bathroom replacements, and for their mobile and easily reversible character, the installation of partitions in order to divide rooms, the installation of heating and smoke extraction pipes if they do not alter the external or internal disposition of parameters or space.

When works that are not allowed by the landlord are carried out,[649] the landlord, without prejudice to the right to terminate the tenancy contract, may choose between making the works his own without compensation to the tenant[650] or requesting the return of the dwelling to its previous state (art. 23.2 LAU 1994). Therefore, even though the tenancy is a lucrative business for the landlord, the legislator does not allow the tenant, once the works are finished, to claim for compensation for them on grounds of the use that landlord will make of them, unless otherwise agreed by the parties or in cases of maintenance works which may cause imminent harm or serious discomfort according to article 21.3 LAU 1994.[651]

- **Is the tenant allowed to make other changes to the dwelling?**

o **In particular, changes needed to accommodate a handicap (e.g. building an elevator; ensuring access for wheelchairs etc)?**

The tenant may, with prior written notification to the landlord, carry out works or actions inside the dwelling that are necessary to use it properly and according to the disability or age above seventy years old of the tenant or his/her spouse, or of the person permanently cohabiting with him/her in similar a relationship of affectivity regardless of their sexual orientation, or of members of their families living permanently with him/her, provided that such works do not affect common elements or common building services and do not cause a decrease in the stability or security of the property (art. 24.1 LAU 1994). However, the tenant shall be obliged, at the end of the contract, to return the dwelling to its previous state, if the landlord requires it (art. 24.2 LAU 1994).

o **fixing antennas, including parabolic antennas**

The tenant may install an antenna in his dwelling without the need of the landlord's consent, since it does not imply a modification of the configuration of the dwelling.[652] However, if it is placed on the façade, he will require the agreement of the condominium's management body since it is a common element. In many cases, municipal ordinances prohibit the installation of antennas on the buildings' façades, in such a way that they may be visible from the street.[653] In these cases, and if they may not be placed inside the balcony, antennas will have to be placed on the roof of the building. As the roof is a common element, the tenant shall request permission from the condominium's management body. However, this management body cannot deny the right of the tenant to install it if the requirements of article 9 of the RDL

[649] In order to claim the termination, it is necessary that the works carried out by the tenant modify the configuration of the housing or its accessories, or that they cause a decrease in the stability or safety thereof, because otherwise, they will not be considered as unauthorised works, because article 23.1 LAU 1994 does not require the consent of the lessor to carry them out.

[650] As set out by F. A., Rordriguez Morata, 'Obras de mejora' en *Comentarios a la Ley de Arrendamientos Urbanos*, dir R. Bercovitz Rodriguez-Cano (Pamplona: Aranzadi, 1995), 41, unless otherwise agreed, if works are paid by the tenant, they will be for the benefit of the lessor, except if the tenant is able to remove them without the dwelling suffering any loss or damage (art. 1573 and 487 CC).

[651] *Supra.*

[652] SAP of Asturias 10 October 2005 (JUR 2005\236289).

[653] As provided for, for example, in articles 6.2 and 3.a of the Ordenanza municipal de Málaga reguladora de las condiciones urbanísticas de instalación de equipos de radiocomunicación (BOP 27/09/02). Available at: <urbanismo.malaga.eu/portal/seccion_0007?pageNum=2>, 26 July 2013.

1/98[654] are met. Nevertheless, the owners' community may decide by agreement in the owners' meeting as regards these requirements and the best place to install it. Before an unjustified refusal of the owners' board, the covenant is judicially reviewable and the neighbour can request the judge's the recognition of the right to install the antenna (art. 17.4 LPH).[655]

- **Maintenance measures and improvements, in particular upgrading the energy performance of the house by the landlord**

- **What does the tenant have to tolerate?**

With regard to maintenance works that the landlord intends to carry out in the dwelling, the tenant is obliged to bear these if they cannot reasonably be put off until the tenancy termination, even if they are a cause of great annoyance or if, during these, the tenant is deprived of a part of the dwelling (art. 21.2 LAU 1994).

With respect to improvement works, the tenant shall also bear these if it is not reasonably possible to put them off until the termination of the tenancy (art. 22.1 LAU 1994). The improvement works are those aimed at improving the conditions of habitability of the dwelling, which already meets the conditions to serve the agreed use. Therefore, these works cause an increase in value of the thing to which they are incorporated, or a permanent increase of its utility or productive capacity.[656] For example, when the landlord upgrades the energy performance of the dwelling. Therefore, it is very unlikely that they cannot be deferred until completion of the contract because they are not necessary works, except if they are imposed by agreement of the owners' community or other competent authority and affect the leased dwelling.[657]

- **Which procedures must be followed**

With regard to maintenance works, the tenant shall inform the landlord about the need for such repairs in the shortest possible time, facilitating direct verification, by himself or by the designated experts, of the state of the dwelling. At all times, and with prior communication to the landlord, the tenant may carry out any works which are urgent to prevent imminent harm or serious discomfort, and demand the amount immediately from the landlord (art. 21.3 LAU 1994). If works last more than twenty days, the rent shall be reduced in proportion to the part of the dwelling that the tenant is deprived of (art. 21.2 LAU 1994).

A landlord willing to perform improvement works that cannot be reasonably postponed, shall notify the tenant in writing, at least three months in advance, about its nature, start, duration and predictable cost. During the period of one month from the notification, the tenant may withdraw from the contract, except if works do not affect the leased dwelling or affect it in an irrelevant way. The lease will terminate within the period of two months from the withdrawal, during which works shall not be

[654] Real Decreto Ley 1/1998, de 27 de febrero, sobre infraestructuras comunes en los edificios para el acceso a los servicios de telecomunicación (BOE 28/02/1998 núm. 51).
[655] Ley 49/1960, de 21 de julio, de Propiedad Horizontal (BOE 23/07/1960 núm. 176).
[656] As set out by E. Llamas Pombo, *Ley de arrendamientos urbanos,* 553.
[657] For more details, J. M., Fínez Ratón, 'Comentario al art. 22 LAU' en *Comentario a la ley de arrendamientos urbanos*, ed. F. Pantaleón Prieto (Madrid: Civitas, 1995), 267.

started (art. 22.2 LAU 1994). The tenant who bears the works will be entitled to a reduction of the rent in proportion to the part of the dwelling that he is deprived of, as well as a compensation for expenses causes by the works (art. 22.3 LAU 1994).
Additionally, when the execution of maintenance works or works agreed by a competent authority make the leased dwelling uninhabitable, the tenant may choose to suspend the contract or withdraw from it, without any compensation. The suspension of the contract will mean a freeze on the term of the contract and the suspension of the obligation of the rent payment, until works are finished (art. 26 LAU 1994).

- **Uses of the dwelling**

▪ **Keeping animals; smells; receiving guests; prostitution and commercial uses (e.g. converting one room into a medical clinic); removing an internal wall; fixing pamphlets outside.**

Article 27.2.e LAU 1994 gives the landlord the right to terminate the tenancy contract when annoying, unhealthy, noxious, dangerous or illegal activities are carried out within the dwelling premises. The qualification thereof may be governed by regulations, as well as by Autonomous Communities' standards or by municipal ordinances. In any case, to determine when any one of the above events occur, the judge shall examine each particular case, since it depends on the identity of the fact and the evidence that is proved by the parties.[658] However, SAP of Barcelona 8 February 2005[659] establishes the requirements and criteria for its determination:

1. The activity shall happen within the dwelling, not outside it.
2. The qualification of an activity as uncomfortable or annoying cannot be done *a priori* according to the general characteristics thereof, but according to how it takes place the specific case in question, in relation to the principles that govern neighbourhood relations and the prohibition of the abuse of rights (article 7.2 CC).[660]
3. The activity must exceed and disturb the usual and normal regime or status in social relations, in a way that clearly involves danger and discomfort.
4. Full, compelling and conclusive proof is required, because of the seriousness of the sanction.[661]

In this regard, the keeping of animals in the dwelling can be prohibited in the contract if the parties sign a specific agreement and, if it is not, it shall be proved that the animal causes discomfort, insalubrity or danger to the building where they live. The reception of guests is not forbidden provided that it cannot be proved that it is a prolonged stay and may lead to overcrowding[662] or also that it may cause discomfort to residents, unhealthy conditions, etc. The tenancy termination with the appropriate compensation for damages is accepted by the Courts in cases of activities that are harmful and annoying to the neighbours, because of the smell or dirt in the leased

[658] According to A. Fuentes Lojo y J. Fuentes Lojo, *Novísima Suma de arrendamientos urbanos*, T. apéndice (Barcelona: JM Bosch Editor, 2007), 133-136.
[659] JUR 2005\67738.
[660] See STS on 20 March 1989 (RJ 1989\2187). In the same sense, SAP Madrid on 19 September 2011 (AC 2011\2312).
[661] SSTS on 18 May 1994 (RJ 1994\4090) and on 13 May 1995 (RJ 1995\4234).
[662] See section 6.4 *'Which persons are allowed to move in an apartment together with the tenant?', supra.*

dwelling.[663] The contract has also been terminated because of illegal activities, when a prostitution business has been proved to exist,[664] or when the property has been used for a different activity than the one agreed in the contract.[665]

When these prohibited activities take place, the landlord may request the termination of the contract(art. 27.2.e LAU 1994). The termination of the contract between tenant and landlord may also be requested by the condominium's management body according to article 7.2 LPH, and in Catalonia according to article 553-40.2 Book V CCC.

- **Is there an obligation of the tenant to live in the dwelling? Are there specificities for holiday homes?**

As has already been mentioned, there is an obligation for the tenant to live in the leased dwelling, or, if not him, his/her spouse or partner not separated *de facto* or *de jure* or his/her or their dependent children instead (art. 7 LAU 1994), because otherwise the landlord can terminate the contract (art. 27.2.f LAU 1994).[666]

As regards holiday homes, as has already been explained,[667] they shall be governed by each Autonomous Community's regulations, or failing this, by Title III of the LAU that regulates tenancies for other purposes. Such dwellings do not require the obligation of permanence, since that is not the purpose of this type of tenancy, which is governed first and foremost by the parties' freedom of will. Therefore, the specificities that landlord and tenant consider convenient may be agreed.

- **Video surveillance of the building**

- **Is the surveillance of certain parts (e.g. corridors) of the building lawful and usual?**

The installation of video surveillance cameras in buildings to protect the safety of the residents is common; especially when there have been incidents such as theft or damages to the property.

However, a problem arises here if it is considered that these means employed for the control and safety of buildings may affect the right to a person's self-image or violate their right to privacy, according to 1/1982 Act (LPDH) [668] .

According to article 2.2 LPDH, there is no illegitimate interference when its usage is legally authorised or the interested party has provided his consent.

It is necessary to establish whether the installation of cameras in a building takes place in a condominium regime or if the building is not subject to this regime.

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[663] SSAP Navarra on 17 October 2001 (AC 2002\340) and Oviedo on 19 September 2001 (JUR 2001\316234).
[664] SSAP Zaragoza on 3 February 2000 (JUR 2000\270942).
[665] SAP Murcia on 2 June 2006 (JUR 2006\96720).
[666] See '*Which persons are allowed to move in an apartment together with the tenant (spouse, children etc)?'*, *supra*.
[667] See section 1.4 *'Rental contracts', supra.*
[668] Ley Orgànica 1/1982 de 5 de mayo , de Protección Civil del Derecho al honor, a la intimidad personal y familiar y a la Propia Imagen (BOE 14/05/1982 núm. 115).

In the first case, the installation of surveillance cameras requires the adoption of an agreement by 3/5 parts of the community of owners. If the necessary quorum is reached, all owners are obliged to pay. According to STS on July 2, 2004[669], when the agreement has been adopted by the community of owners, it cannot be considered that there is an illegitimate interference in the right to self-image of the owners by their mere appearance in images, since there is the coverage of the community agreement that gives consent to do so.

Conversely, when a neighbour installs surveillance cameras in his dwelling that record the coming and going of other neighbours, without their consent and without legal agreement, it is up to the judge to determine the existence of unlawful interference, in accordance with article 2.1 LPDH. Therefore, it has to be considered whether the installation of the cameras meets the rules of proportionality according to the intended purpose, and if this latter could be obtained in other ways.[670]
According to the Constitutional Court case law[671], in order to check if a restrictive measure of a fundamental right is proportional or not, three requirements shall be met:

1. Judgement of suitability: If the measure is likely to achieve the proposed objective.
2. Judgement of necessity: If it is necessary, in the sense that there is not another more moderated measure for the purpose pursued with the same effectiveness.
3. Judgement of proportionality: If the measure is adjusted or balanced, that is, if more advantages or benefits than damages to other rights or values in conflict derives from it.

The STS of December 10, 2010[672] understands that the fact of seeing someone going in and out of his/her home affects the private sphere, although it might not be possible to determine who he/she is. On the contrary, the STS of 2 July 2004[673], following the Constitutional Court case law[674], understands that it shall not be considered an interference in people's private life to record their comings and going from a dwelling, provided that this is done in public areas and that images are not reproduced or published, but serve exclusively for the intended purpose of surveillance and security.

6.6 Termination of tenancy contracts

Example of table for 6.6 Termination of tenancy contracts

	Main characteristic(s) of tenancy type 1	Main characteristic(s) of tenancy	Ranking from strongest to weakest

[669] EDJ 2004/82483. In the same way, SAP Valencia on 17 May 2003 (EDJ 2003/126631).
[670] V. Magro Servet, 'Sobre la viabilidad legal de la instalación de cámaras de vigilancia en las comunidades de propietarios', *Boletín Propiedad Horizontal* de 1 de marzo de 2013.
[671] SSTC on 16 June 1982 (RTC 1982\36), on 8 May 1995 (RTC 1995\66) and on 7 November 2007 (RTC 2007\236).
[672] EDJ 2010/284761.
[673] EDJ 2004/82483. In the same vein, SSTS on 13 March 1989 (EDJ 1989/10101) and on 22 December 2000 (EDJ 2000/44284).
[674] SSTC on 22 April 2002 (EDJ 2002/11229) and on 6 May 2002 (EDJ 2002/15827).

		type 2, etc.	regulation, if there is more than one tenancy type
Mutual termination	- By agreement (art. 1255 CC)		
Notice by tenant	A) Withdrawal from the tenancy contract (art. 11 LAU 1994). - Withdrawal on the grounds of non-compliance with the habitability conditions (art. 26 LAU 1994) - Withdrawal on the grounds of improvement works (art. 22.2 LAU 1994). - Termination due to the tenant's death (art. 16 LAU 1994). - Termination due to breach of contract by the landlord (art. 27.3 LAU 1994).		
Notice by landlord	• Ordinary termination: end of the contractual term (art. 9.1 LAU 1994). • Extraordinary termination: - Landlord´s or his relatives' need (art. 9.3 LAU 1994). - Termination of the landlord´s right (art. 13 LAU 1994). - Transfer of the rented dwelling (art. 14 LAU 1994). - Breach of contract by the tenant (art. 27.2 LAU 1994).		
Other reasons for termination	- Loss of the property without landlord´s responsibility (art. 28.a LAU 1994) - Declaration of ruin (art. 28.b LAU 1994).		

- **Mutual termination agreements**

The parties may, at any time, agree the termination of the tenancy contract on the basis of the principle of freedom of will regulated in art. 1255 CC *("mutuo disenso").*

- **Notice by the tenant**

- **Periods and deadlines to be respected**

The tenant may withdraw from the tenancy contract either at the end of each annuity or at the end of the contractual term by giving notice to the landlord at least 30 days in advance (art. 9.1 LAU 1994).

If none of the parties give notice of their intention to put an end to the contract thirty days in advance[675] of the end of either the contractual term or the first three years, the contract shall be renewed for the period of one more year (art. 10.1 LAU 1994).

If, upon expiration of this period, the tenant continues to enjoy the leased dwelling during the following fifteen days with the landlord's acquiescence, the tenancy

[675] According to art. 6 LAU agreements that reduce or eliminate advance notice periods for the benefit of the tenant will be licit, but it also establishes the invalidity of any provision that increases it. M.R Llácer Matacás, 'Artículo 9. Plazo mínimo',155.

contract shall be deemed implicitly renewed (art. 1566 CC). If any party wants to put an end to the tacit renewal, it must communicate this intention to the other party, at least fifteen days in advance of the end of the last contract.[676]

- **May the tenant terminate the agreement before the agreed date of termination (in case of contracts limited in time); if yes: does the landlord then have a right to compensation (or is he allowed to impose sanctions such as penalty payments)?**

A) Withdrawal from the tenancy contract

Tenancy contracts concluded after the 6th of June 2013.

With the enactment of the LMFFMAV 2013, the tenant is entitled to withdraw from the tenancy contract once a minimum period of six months has elapsed since its conclusion, by giving notice of his intention to the landlord at least thirty days in advance.

The parties may agree that, in the event of withdrawal, the tenant shall compensate the landlord with an amount equivalent to a monthly rent payment for each remaining year of the tenancy contract. Terms below a year will lead to proportional compensation (art. 11 LAU 1994). This article works as a limitation, so the parties are not able to agree a higher compensation. According to article 6 LAU, this agreement would be void due to the fact that it could be detrimental to the tenant´s interests, but a lower compensation may be agreed. However, the new law softens what was established in art. 56 LAU 1964: a compulsory compensation on the part of the tenant (now it has to be agreed in the contract). Consequently, it seems that the landlord would not be entitled to any compensation if it has not been agreed in the contract, only to an amount equivalent to a monthly rent payment if prior notice has not been given properly in advance. The non-payment of this compensation will entitle the landlord with a claim that shall not affect the termination of the contract, since the law does not regulate the moment when the payment must be made.[677]

In this regard, the obligation to live in the dwelling at least six months, and even the possibility to agree, in this case, compensation in favour of the landlord, may represent a barrier to the free movement of persons regulated in article 13 of the Universal Declaration of Human Rights of 1948 and against EU law.[678] Thus, the tenant´s rights to move freely and to choose residence are limited, taking into consideration that the tenant may, for example, be obliged to move to another city or even to another Member State due to work or family reasons. In this case, he must keep two dwellings until the minimum of six months required by law is reached. In addition to the cost of compensation for withdrawing, the tenant´s freedom of movement may be limited, as a worker, if he cannot face the cost of these two dwellings, as well as the freedom of establishment and free provision of services

[676] See section 6.4 *'Other agreements on duration and their validity: "chain contracts"; prolongation option; contracts for life etc', supra.*

[677] E. Serrano Alonso, 'Artículo 11. Desistimiento del contrato',130.

[678] As pointed out in STJCE 2 February 1989 (TJCE 1989\86) (case 186/87, *Cowan),* 28 June 1984 (case 180/83, *Moser) and* 7 February 1979 (case 115/78, *Knoors)*, the freedom of movement of persons is required to exercise other economic freedoms, such as the freedom to provide services, freedom of establishment or the free movement of workers.

depending on the case, since the cost he has to face may hinder the movement of the worker to another Member State.

Tenancy contracts concluded between 1st of January 1995 and 5th of June 2013

The LAU 1994 only allows the tenant to withdraw from tenancy contracts with a minimum duration of five years, once this term has been concluded, by giving notice to the landlord two months in advance[679] (former art. 11 LAU 1994).

Although the law does not recognise the tenant´s right of withdrawal during the first five years of the tenancy contract, the relevant issue in contracts with a shorter duration (in which the tenant is only allowed to waive the contract extensions) is to determine the legal consequences of the tenant´s unilateral withdrawal within that period of five years without observing the notice periods needed in order for the landlord to impose the contractual extension. Once again, the case law is contradictory with reference to these consequences.[680]

There are judgements considering that the landlord shall be compensated, unless otherwise agreed, because it is not allowed to leave the conclusion of the contract to the discretion of one of the parties. This compensation includes either the rent of the whole contractual period or the rent accrued until the moment the landlord leases the dwelling again.[681] Others have applied by analogy the compensation laid down in article 11 LAU provided for contracts of more than five years.[682] In other cases, it has been considered that there is a breach of article 1124 CC, which does not lead to an automatic compensation equivalent to the whole rent of the remaining contractual term, but to the right to claim those damages effectively produced and certified by the landlord.[683] There are also judgements stating that the tenant may terminate the contract without any compensation.[684]

Nevertheless, there is a general trend in case law according to which it is not possible to demand of the tenant both the compulsory performance of the tenancy contract and the forced continuity in the dwelling, which would lead to disproportionate economic consequences for him. Thus, the TS case law[685] points out that this issue shall be resolved according to the circumstances of each particular case, and also that effective damages must be proved by the landlord. These damages cannot be automatically considered equivalent to the rent due from the remaining contract term. As has already been pointed out, the new regulation of the LMFFMAV 2013 resolves this jurisprudential conflict by recognising the right to

[679] As set out in STS 4 March 2009 (RJ 2009\2383), which considers it a contractual breach, unless the parties agree the unilateral withdrawal of the tenant, which would not contravene article 1256 CC.
[680] According to the compendium of case law collected in A.L Rebolledo Varela, *Cuestiones prácticas actuales de arrendamientos urbanos: últimas tendencias jurisprudenciales*, 5 - 7. The same subject was discussed by the SAP Tarragona 26 April 2011 (AC 2011\1306), collecting the four positions adopted by the lower case law. In the same sense, SAP Tarragona 9 November 2011 (AC 2011\123).
[681] SSAP Albacete 25 May 2007 (JUR 2007\277350), Madrid 25 October 2007 (JUR 2008\40866), Alicante 17 May 2006 (JUR 2006\ 260085), Murcia 15 September 2006 (JUR 2006\287135).
[682] SAP Ávila 16 February 1998 (AC 1998\3651).
[683] SSAP Valencia 18 April 2006 (JUR 2006\272770), Jaén 29 January 1999 (AC 1999\132), and Cantabria 22 February 1999 (AC 1999\ 285).
[684] SAP Badajoz 22 March 1999 (AC 1999\ 3924).
[685] As set out by STS 2 October 2008 (RJ 2008\5586). In the same sense, SSTS 3 February 2006 (RJ 2006\823), 7 June 2006 (RJ 2006\ 3529), 30 October 2007 (RJ 2007\8262), 12 June 2008 (RJ 2008\4249) and 22 May 2008 (RJ 2008\3164).

withdraw from the tenancy contract for the benefit of the tenant, once a minimum period of six months has elapsed, by giving notice of his intention at least thirty days in advance (art. 11 LAU 1994).

It is possible to agree compensation for the benefit of the landlord in the explained terms, in tenancy contracts governed either by the previous or the current versions of the LAU 1994. However, this compensation could lead to an unjust enrichment on the part of the landlord if he does not prove the damage actually caused to him by the tenant´s withdrawal, for instance due to the period that the dwelling has been empty or the expenses that have arisen in order to lease it again. According to some jurisprudence,[686] the landlord should not receive more than what he is entitled to, for instance if the dwelling is rented immediately or in fewer months than those that the tenant must pay as compensation for withdrawing from the contract.

B) Withdrawal on the grounds of non-compliance of the habitability conditions

The tenant may opt either to suspend or to withdraw from the tenancy contract when the execution of maintenance works makes the rented dwelling uninhabitable (art. 26 LAU 1994). The requirements that must be meet for this purpose are the following:[687]

1. They must be maintenance works (art. 21 LAU 1994) and to put them off until the termination of the tenancy contract should not be reasonably possible. However, the competent authority can determine whether they are maintenance, improvement or sumptuary works.
2. The execution of the works should impede the habitability of the leased dwelling, which means that it cannot be used as such; i.e. during its execution the proper use of the dwelling becomes impossible, and therefore the tenant is required to leave the dwelling.[688]
3. The impossibility of using the dwelling must be temporary. If it were permanent, it would lead to the termination of the contract by law according to article 28 LAU 1994.
4. The tenant shall inform the landlord about his intention to suspend or to withdraw from the tenancy contract, although the LAU 1994 does not set a term for that purpose. Nevertheless, there are authors[689] that understand that, according to the principle of good faith in the exercise of rights and obligations, article 22.2 LAU 1994 could be applied by analogy. This article establishes that the landlord shall communicate the realisation of the works to the tenant at least three months in advance of their execution, and the tenant may withdraw from the tenancy contract within a month from the landlord´s notice.

[686] SSAP Albacete 25 May 2007 (JUR 2007\277350), Madrid 25 October 2007 (JUR 2008\40866), Alicante 17 May 2006 (JUR 2006\ 260085), Murcia 15 September 2006 (JUR 2006\287135).
[687] As set out by SAP Tarragona 23 April 2001 (CENDOJ 43148370032001100648).
[688] A. Fuentes Lojo y J. Fuentes Lojo, *Novísima Suma de arrendamientos urbanos*, T. I, 295- 296. In the same sense SSAP Cádiz 18 September 2002 (JUR 2003\70193) and Baleares 9 November 1998 (CENDOJ 07040370031998100520).
[689] M.E. Clemente Meoro, 'Comentario al artículo 26' en *Comentarios a la nueva ley de arrendamientos urbanos* ed. R.M Valpuesta Fernández (Valencia: Tirant lo Blanch, 1994), 240 y A. Fuentes Lojo y J. Fuentes Lojo, *Novísima Suma de arrendamientos urbanos*, T. I, 296.

The tenant is not entitled to compensation (art. 26 LAU 1994), unless it is demonstrated that this situation has been reached due to a passive or negligent attitude on the part of the landlord.[690]

C) Withdrawal on the grounds of improvement works

The tenant may withdraw from the tenancy contract when the landlord gives notice to him of the execution of improvement works,[691] except if these works do not affect the rented property or affect it in an insignificant way[692]. The tenant will be able to withdraw from the tenancy contract during the period of one month after the landlord´s notice. The tenancy contract shall terminate within the period of two months since the exercise of the right of withdrawal, during which the works shall not be started (art. 22. 2 LAU 1994).

Although the LAU 1994 does not establish formal requirements for the withdrawal, it is recommended to do it in writing and through any mean that allows the tenant to evidence the notice in a reliable manner.[693]

There is contradictory doctrine[694] about whether it is possible to claim compensation for damages arising from the withdrawal. The doctrine supporting compensation considers that compensation should include all costs that the tenant actually incurred, including transport and removal costs and those arising from renting another dwelling, if this is justified.[695]

D) Termination due to the tenant's death

The tenancy contract terminates if the landlord has not received, within three months since the tenant´s death, a written notice of his death, a certificate attesting this fact and the identity of the person(s) entitled to subrogate into the tenancy contract, according to article 16.1 LAU 1994.[696] The latter shall indicate his relationship with the deceased tenant and offer, if appropriate, evidence that he meets the legal requirements (art. 16.3 LAU 1994).

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[690] SSAP Barcelona 19 March 2004 (CENDOJ 08019370042004100093) Badajoz 17 February 2006 (CENDOJ 06015370022006100061).

[691] See section 6.5 'Alterations of the dwelling by the landlord', supra.

[692] Therefore, the tenant may not withdraw freely,but rather the improvement works must be urgent and impede him from using an important part of the dwelling, according to D. V. Magro Servet, 'Praxis sobre la obligación del arrendador de conservación de la vivienda arrendada' en *Boletín de Contratación Inmobiliaria de El Derecho*, 01 de septiembre de 2010. Available at: <www.elderecho.com/civil/Praxis-obligacion-arrendador-conservacion arrendada_11_232180001.html>, 7 de octubre de 2013.

[693] E. Torrelles Torrea, 'Artículo 22 obras de mejora' en *Ley de arrendamientos urbanos, comentarios y jurisprudencia doce años después*, dir. E. Llamas Pombo (Madrid: La ley, 2007), 557 y J.M. Lete del Río, 'Comentario al art. 22 LAU' en Comentarios a la Ley de Arrendamientos Urbanos ed. Xavier O'Challaghan (Madrid: Edersa, 1995), 285.

[694] In favour, J.M. Fernández Hierro, 'Comentarios al art. 22 LAU' en *LAU: Comentario articulado* (Granada: Comares, 2004), 170 y J.M. Fínez Ratón, 'Comentarios al art. 22 LAU, en *Comentario a la Ley de Arrendamientos Urbanos,* ed. F. Pantaleón Prieto (Madrid: Civitas, 1995), 270. Against, F. Rodriguez Morata, Régimen de las obras y mejoras en la Ley de Arrendamientos Urbanos de 1994' Vol. III (Pamplona, Aranzadi, 1995) y L. Martín Contreras, *Ley de arrendamientos urbanos. Con las reformas de la Ley 22/2003, 23/2003 y de la LO 19/2003* (Barcelona: Bosch, 2004), 247.

[695] E. Torrelles Torrea, 'Artículo 22 obras de mejora', 285.

[696] For more information about subrogation, see 2.d in second part of questionnaire, *'Subletting', supra.*

Those who may take over the leased dwelling will be jointly and severally liable to pay the abovementioned three monthly rent payments, unless they notify their waiver of their right of subrogation within a month of the tenant´s death. If the landlord receives, on time and in the proper manner, several notifications, whose senders argue their status as beneficiaries of the subrogation, the landlord may regard them as joint debtors for the tenant's obligations while they hold their subrogation claim (art. 16.3 LAU 1994).

In contracts with a term of more than three years, the law admits the possibility of agreeing either the refusal of the subrogation in the event of the tenant's death, if it takes place within the first three years of the contract, or the termination of the tenancy contract once the first three years of the contract have elapsed, if the death occurred before (art. 16.4 LAU 1994).

E) Termination due to breach of contract by the landlord (art. 27.3 LAU 1994).

a. Due to not carrying out maintenance works, as required in article 21 LAU. The landlord has the legal duty to make all necessary repairs in order to keep the dwelling in conditions of habitability and to make the use agreed in the tenancy contract for the benefit of the tenant possible. [697] The tenant shall notify the landlord of the need to carry out the works. If the latter does not perform them[698], it is deemed to be a contractual breach, and therefore the tenant may terminate the contract and claim compensation.[699]

b. On the grounds of *de facto* or *in jure* disturbances made by the landlord to the tenant, as far as the use of the dwelling is concerned. The landlord shall ensure the tenant's peaceful enjoyment of the dwelling for the whole contract period (art. 1554.3 CC). Therefore, the landlord shall be liable for *de facto* disturbances, i.e. those that inhibit or interfere with the use and enjoyment of the dwelling,[700] for instance any works that suppress or obstruct the access to the dwelling or the suppression of services or facilities that the dwelling previously had;[701] and also for *in jure* disturbances, for example those that make it difficult to obtain the habitability certificate or the claims exercised by third parties with the aim of being recognised as owners or holders of a property right on the dwelling, provided in both cases (*de facto* or *in jure* disturbances) that the disruptive actions were attributable to the landlord because they have been carried out either by him or by a third party under his instructions. Real estate mobbing actions may be included within the scope of this rule as well. The tenant may request the termination of the tenancy contract and

[697] See more 2.d in second part of questionnaire, *'Who is responsible for what kinds of maintenance works and repairs?', supra.*
[698] When the landlord does not attend within a reasonable time. The law requires that he act with the diligence of a good father, which is required of the average man (art. 1554.2 Y 1902 CC), according to L. Diez-Picazo, *Fundamentos del derecho civil patrimonial*, Vol. II (Madrid: Civitas, 1993), 96-97.
[699] SSAP Madrid 7 February 2000 (AC 2000\3136), Baleares 27 november 2000 (JUR 2001\63262) and Albacete 11 March 2002 (AC 2002\722).
[700] SAP Córdoba, 7 April 2003, FJ.3 (CENDOJ 14021370022003100 1309).
[701] SAP Barcelona 30 January 2002 (JUR 2002\111833).

appropriate compensation, which may include moral damages[702] arising from pressure actions by the landlord trying to force him to leave the property.[703]

c. Due to breach of a main obligation, under article 1124 CC. Article 27.1 LAU 1994 allows each contracting party to terminate the contract if any of them breaches a main obligation. For instance, if the landlord does not pay the tenant the urgent repair costs. According to art. 21.3 LAU 1994, the tenant shall have the right either to offset the credit or to terminate the tenancy contract on the basis of the action laid down in article 1124 CC (art. 27.1 LAU).[704]

- **Are there preconditions such as proposing another tenant to the landlord?**

The LAU does not establish any special condition, but only the need to respect the duration and notice explained previously.

- **Notice by the landlord**

- **Ordinary vs. extraordinary notice in open-ended or time-limited contracts; if such a distinction exists: definition of ordinary vs. extraordinary (= normally related to fundamental breaches of the contract, e.g. in cases of massive rent arrears or strong antisocial behaviour)**

A) Ordinary termination: end of the contractual term

The ordinary termination of the tenancy contract by the landlord takes place at the end of the term established in the tenancy contract (art. 9.1 LAU 1994). Conversely, the tenancy contract may be terminated, if a longer period has not been agreed, once the first three years have been completed, for contracts concluded since the 6th of June 2013, and once the first five years have been completed for those concluded between the 1st of January 1995 and the 5th of June 2013. In order to avoid the contract extension for another year, the landlord has to give notice of the termination to the tenant at least thirty days in advance (art. 10 LAU 1994).

In addition, according to what has been explained in the previous section,[705] the contract can also be terminated by the landlord at the end of the annual extension regulated in article 10 LAU 1994 concerning contracts concluded since the 6th of June 2013, and at the end of the three year extension for contracts concluded between the 1st of January 1995 and the 5th of June 2013. To do so, article 1566 CC sets out that the landlord must express his intention of not renewing the contract fifteen days in advance of the end of the mentioned extensions.

B) Extraordinary termination

1. Landlord´s or his relatives' need

[702] SSTS 12 June 1997 (RJ 1997\4770), 27 January 1998 (RJ 1998\551) and 5 October 1998 (RJ 1998\8367).
[703] As set out by M.D. Gramunt Fombuena 'Art. 27 Incumplimiento de obligaciones' en *Ley de arrendamientos urbanos, comentarios y jurisprudencia doce años después*, dir. E. Llamas Pombo (Madrid: La ley, 2007), 715-717.
[704] M.D. Gramunt Fombuena 'Art. 27 Incumplimiento de obligaciones', 715.
[705] *'Notice by the tenant: Periods and deadlines to be respected', supra.*

The landlord may terminate the tenancy contract before either the agreed term or the one set out in article 9.1 LAU 1994 (3 years) when the first year of the contract has elapsed, provided that he informs the tenant of the need to recover the dwelling for his personal residence or that of his relatives in the first degree of consanguinity or by adoption, or for his spouse in the event of final judgement concerning separation, divorce or marriage annulment. The notice to the tenant must be carried out at least two months in advance of the time the dwelling is needed (art. 9.3 LAU 1994).

If the landlord or his relatives have not occupied the dwelling within three months of the termination of the contract, or, where appropriate, since the effective housing eviction, the tenant may choose between two options within the period of thirty days: 1) to be restored in the use and enjoyment of the property for a new maximum period of three years, with full respect for the contractual conditions at the time of the termination, as well as to be compensated for the expenses caused by the eviction until the reoccupation; or 2) to be compensated with an amount equivalent to a monthly rent payment for each remaining year of the tenancy contract up to three years, unless the occupation took place due to force majeure (art. 9.3 LAU).

Consequently, while it is not required to have previously agreed this condition in tenancies contracts concluded after the 6th of June 2013, it is required to introduce the possibility of an early termination in writing for those contracts concluded between the 1st of January 1995 and the 5th of June 2013.

However, it could be considered that the wording of article 9.3 LAU has regulatory gaps, since the obligation of the landlord to maintain the occupation of the dwelling during a determined period is not set out, so he is not prevented from transferring the dwelling after the initial occupation.[706]

An essential element for the effectiveness of this article is the evidence of the existence of the landlord's need at the time of the request for the termination of the contract. However, case law does not have a unitary opinion on that point.[707]

2. Due to the resolution of the Landlord's right[708]

For contracts concluded since the 6th of June 2013, the tenancy contract shall terminate when the landlord´s right is resolved due to the exercise of a pre-emption right, the opening of a trust created in will, the forced alienation of the dwelling derived from either a foreclosure or a court ruling, or the exercise of an option to purchase. The termination will take place as long as the contract has not been

[706] As explained in F. Oliva Blázquez, 'La necesidad del arrendador a la luz de la Jurisprudencia menor más reciente' en *Arrendamientos Urbanos: Doctrina y Jurisprudencia* (Pamplona: Thomson Aranzadi, 2007), 374.

[707] On the one hand, the SAP of Las Palmas of 15th June 1996 (AC 1996\1159) considered that there is no evidence required either at the time of the contract conclusion, which seems logical, or when the tenant's eviction is requested; without prejudice to the right recognised when the owner does not occupy the housing in three months. On the other hand, the SAP of Madrid of 12 July 2005 (PROV 2005\191204) dismissed the claim for contract termination because the tenant proved that the landlord owned another home that was suitable for occupation.

[708] For more information see section 6.4 *'does a change of the landlord through inheritance, sale or public action affect the position of the tenant?', supra.*

registered in the Land Registry prior to the rights that have led to the resolution of the landlord's right (art. 13.1 LAU 1994).

With reference to tenancy contracts concluded between the 1st of January 1995 and the 5th of June 2013, these shall terminate only when the first five years of the contract have elapsed (regardless of whether the lease is registered). If the lease contract has a longer duration than five years, the lease contract can be terminated in advance due to those events, unless it has been registered in the Land Registry before the rights determining the resolution of the landlord's right, in which case the whole duration agreed in the contract shall be respected (former art. 13.1 LAU 1994).

Tenancy contracts concluded by the holder of the right of usufruct (*usufructuario*), the holder of the right to build (*superficiario*) or by other possible holders of similar enjoyment rights on the dwelling are also terminated when the landlord´s right (usufruct, right to build, etc.) is resolved (art.13.2 LAU 1994).

3. Disposal of the leased dwelling[709]

For contracts concluded since the 6th June 2013, if the landlord disposes of the rented property and the tenancy contract is not registered in the Land Registry, the new acquirer is entitled to demand the termination of the tenancy contract, unless otherwise agreed in the sale contract, according to article 1571.1 CC. In this case, the tenant may demand to be allowed to stay in the dwelling for three months after the notification by the purchaser of his intentions. During these months, the tenant must pay the rent and the other amounts accrued to the buyer. Additionally, the tenant may claim compensation from the seller for the damages arising from the termination of the tenancy contract (art. 8 amends art. 14.2 LAU 1994). If the lease is registered, the buyer must respect it.

Conversely, if the tenancy contract was concluded between the 1st of January 1995 and the 5th of June 2013, the new acquirer of the leased dwelling shall respect the five-year term of the contract, even if requirements set out in article 34 LH are met.[710] But if the period agreed in the tenancy contract is more than five years, and the purchase takes place once these five years have been completed, the period agreed shall be respected unless the purchaser meets the requirements laid down in article 34 LH. In this case, the tenant shall be compensated by an amount equivalent to a monthly rent payment for each remaining year of the contract, because his right is resolved. If the tenancy contract is registered in the Land Registry and there is no agreement between the parties to terminate the contract, the period agreed must be respected, since the third acquirer cannot allege good faith because he should have known about the existence of the tenancy contract, as it is registered in the Land Registry (former art. 14 LAU 1994).

The Land Registry provides information on the parties to the lease, on its duration, substitutions, assignments and subleases (art. 2.5 LH).

4. Breach of contract by the tenant (art. 27.2 LAU 1994)

[709] See more in section 6.4 *'does a change of the landlord through inheritance, sale or public action affect the position of the tenant?', supra.*

[710] To see more details about these requirements, see section 6.4 'does a change of the landlord through inheritance, sale or public action affect the position of the tenant?'. supra.

The landlord may request the termination of the tenancy contract and a proper compensation for damages, where appropriate, in the following cases:

a. Lack of rent payment or, where appropriate, of any other amount that the tenant has undertaken or is obligated to pay.[711]
b. Non-payment of the deposit or its update.[712]
c. The sublease or the transfer of the dwelling without prior permission.[713]
d. Damages caused intentionally to the dwelling by the tenant or by works carried out by him without the landlord's consent, where necessary.[714]
e. When annoying, unhealthy, noxious, dangerous or illegal activities take place in the dwelling.[715]
f. When the dwelling is no longer primarily destined to satisfy the permanent housing need of the tenant or whoever is actually occupying it in accordance with article 7 LAU 1994.[716]

- **Statutory restrictions on notice:**

- **for specific types of dwellings, e.g. public dwellings; rental dwellings recently converted into condominiums (if there exists a special form of protection in this case as in German law) etc.**

A. Sale of the dwelling

When the landlord notifies the sale of the leased dwelling, the tenant has thirty days to exercise his right of pre-emption or first-refusal by means of the prescriptive notification. The tenant will not be able to exercise these rights either when the leased dwelling is sold together with the other dwellings or premises owned by the landlord that are part of the same building, or when all the flats and premises in the property are sold jointly by different owners to the same purchaser, unless there exists only one dwelling in the property (art. 25.7 LAU 1994).

B. Compliance with VPO standards

Concerning public tenancy contracts concluded according to LAU, what has been set out above will be applicable (Additional Provision Eight of LAU 1994).

Although VPO governed by RDL 31/1978 have a special regime (Additional Provision Six), neither this law nor the regulations governing it establish other causes of termination of the tenancy contract. However, it is established that the content of the tenancy contract shall be fixed by the Ministry of Public Works and Housing Planning (*Ministerio de Obras Públicas y Urbanismo*), which can set the standards it deems

[711] Concerning what would be considered non-compliance or a mere delay see section 6.4 '*Maturity (fixed payment date); consequences in case of delayed payment', supra.*
[712] See section 6.4 *'deposit', supra.*
[713] See more in section 6.4 *'subletting'* and *'restrictions on'*, *supra.*
[714] See section 6.4 *'repairs', supra.*
[715] The landlord needs to warn the tenant first, and if the tenant does not stop such activities, the landlord can claim in court. See more section 6.4 'use of the dwelling: Keeping animals; smells; receiving guests; prostitution and commercial uses (e.g. converting one room in a medical clinic); removing an internal wall; fixing pamphlets outside.', supra.
[716] See section 6.4 *'residence contracts and mixed (residence/commercial) contracts', supra.*

appropriate. Moreover, this enables the contracting parties to agree on the terms they consider appropriate regarding those aspects not covered by the Ministry (art. 13 RD 3148/1978).

In the same sense, the Autonomous Communities may lay down the regulations that they consider appropriate for such purpose (Additional Provision Seven LAU 1994).

The lack of occupation of the dwelling in the established time in, for example, Catalonia is three months (art. 16.5 PDVC), and the lack of use of the dwelling as the main and permanent residence of the tenant, are also causes for termination of tenancy contracts in VPO. Therefore, it is not permitted to either sublease the dwelling or transfer the same without prior consent (art. 16.1 PDVC or art. 2.2 Decree 39/2008[717]). The Administration will start the corresponding administrative procedure when it detects an abnormal use of the dwelling (art. 41.3 LDVC). For example, in the Basque Country more than 22,000 protected dwellings were monitored in 2007, of which 2,525 possible frauds were detected, 262 sanctions with an average amount of 2,238 euros were imposed and 37 protected dwellings were recovered.[718]

- **in favour of certain tenants (old, ill, at risk of homelessness)**

A. Convivial relationships of mutual aid

As has been previously said, members of convivial relationships of mutual assistance are entitled in Catalonia to remain in the leased dwelling during a fixed term. For example, if the coexistence is extinguished when all cohabitants are alive, the ones that are not owners of the dwelling have three months to leave the leased dwelling (art. 240-6.1 CCC). And if the holder of the tenancy contract dies, survivors are entitled to subrogate themselves in the contract for one year or for the remaining contract term if it is less than a year. Cohabitants shall notify their intention to the landlord within three months of the tenant's death (art. 240-6.3 Book II CCC).[719]

B. Eviction of vulnerable groups

As a precautionary measure, the ECHR suspended the eviction of 16 families who were occupying one of the SAREB's buildings in Salt, which had been vacant for three years, through the decision of 15th October 2013[720]. The Court required the Spanish Government to rule, before the 24th of October 2013, on the measures to be implemented by local authorities in order to prevent the violation of article 3 (prohibition of inhuman or degrading treatment) and 8 (right to respect for private and family life, including the inviolability of the home) of the European Convention of Human Rights, especially in relation to minors, and in particular the measures on housing and social assistance. Currently, the ECHR has lifted the precautionary measures and the first instance criminal court (*Juzgado de Instrucción*) number 3 of Gerona shall be the competent one to rule on this issue. However, the ECHR has

[717] Decreto 39/2008, de 4 de marzo, sobre régimen jurídico de viviendas de protección pública y medidas financieras en materia de vivienda y suelo en el País Vasco (BOPV 28/03/2008 núm. 2008059).
[718] Available at: <www.consumer.es/web/es/vivienda/comunidades_vecinos_y_legislacion/2008/05/02/176560.php>, 22 November 2013.
[719] See section 6.4 *'Changes of parties', supra.*
[720] Claim No. 62688/13.

committed itself to resolve by a judgement the occupation of the Salt building; although it has not done it yet (December 2013). The ECHR recognises that the passivity of competent housing authorities before the eviction of vulnerable groups, especially when minors are involved, means a violation of human rights. This recognition forces Administrations to ensure the necessary means in order to meet the housing needs of those people evicted in Spain.

In the same way, the ECHR judgement of 9th October 2007[721] also states that the competent housing authority violates article 8 of the Convention when a person who is in need and does not have sufficient resources to access housing is evicted from a dwelling with a public task, without ensuring that he has another one to stay in. Moreover, it requires that the eviction must respond to a public interest proportionate with the aim pursued. Regarding the case dealt with, it also sets out the Administrative obligation to provide adequate housing for the family evicted from housing with a public task.

As will be seen below,[722] the law empowers the judge to temporarily suspend the eviction of those occupants of a dwelling who use it as their main residence due to causes of need (art. 704.1 LEC).

- **for certain periods**

Tenancy contracts arranged prior the 9th of May 1985 were compulsorily subject to forced extension. However, the Second Transitional Provision of current LAU limits third parties' subrogation in the contract.

In particular, three cases must be distinguished:

1. If the tenant dies after the 1st of January 1995, the following persons may subrogate themselves in the tenancy contract:

- The tenant's spouse, meaning that the contract shall terminate upon his death, unless at such time he had offspring living with him. In the latter case, offspring will subrogate themselves in the contract for a two-year period or until they reach the age of twenty-five years old, whichever is later.
- The tenant's offspring that have lived with him two years before his death. The tenancy contract will terminate after two years or the date on which they turn twenty-five, whichever is later.
- If within the ten years following the entry into force of the Law the subrogation takes place in favour of any offspring over sixty-five years old or who receives public pension or permanent disability benefits, the contract shall terminate upon the death of the subrogated offspring.

2. If the person who has been subrogated in the position of the tenant dies after the 1st of January 1995, the following persons may subrogate:

- The spouse, meaning that the tenancy contract will terminate upon his/her death.
- The tenant's offspring who reside in the leased dwelling and have lived with

[721] Case Stankova vs Slovakia (JUR 2007\298821).
[722] See more in this section, *'in particular claims for extension of the contract or for granting of a period of grace under substantive or procedural law', infra.*

the former during the two years before his/her death. The contract shall terminate after two years or when offspring turn twenty-five, whichever is later.[723]

3. If the two subrogations permitted by the 1964 Act have taken place before the 1st of January 1995, when the person occupying the dwelling due to second subrogation dies, no more subrogations are allowed.

- **after sale including public auction ("emptio non tollit locatum"), or inheritance of the dwelling**

What happens with the leased dwelling once the landlord's right is resolved or if he decides to alienate it has been already explained in the second and third points of this same question *'notice by the landlord'*.

In the event of the landlord's death, it is relevant to determine whether he is the holder of the right of usufruct (*usufructuario*) or the full owner of the rented property. In the first case, the tenancy contract is extinguished (art. 13.2 LAU 1994). In the second case, the tenancy contract continues under the same terms and with the same conditions. The landlord´s heirs shall become the new landlord, so a subjective novation of the tenancy contract takes place (art. 1203.3 and 1212 CC). Although the law is silent on this matter, it is advisable for the new landlord to notify the tenant of the previous landlord's death, as well as his own identity and his address for the purposes of enabling all communications that may arise from the tenancy relationship.

- **Requirement of giving valid reasons for notice: admissible reasons**

As has been mentioned above, unless the contract is terminated due to the fact that either the contract term or the minimum term of the contract as per article 9.1 LAU has elapsed, the landlord is only entitled to terminate the tenancy contract for the reasons legally established, and he shall notify the tenant of their application. These include, for example, the need to recover the leased dwelling to use it as a permanent residence for him or his relatives in the first degree of consanguinity or by adoption, or for his spouse in the event of final judgement concerning separation, divorce or marriage annulment (art. 9.3 LAU 1994). In the same vein, the landlord shall terminate the contract due to the breach of obligations only when one of the grounds listed in article 27.2 LAU takes place, such as the non-payment of rent, deposit or its update, etc.

- **Objections by the tenant**

In the same way, if the tenant considers that the reasons alleged by the landlord to terminate the tenancy contract are not valid or are not true, the former may oppose the contract resolution, communicating this intention to the landlord. In the event of a conflict, the courts shall decide if the causes alleged are met. This would include, for example, establishing whether the landlord or his relatives are really in need of permanent housing (art. 9.3 LAU 1994) or whether the improvement works can be reasonably deferred until the termination of the tenancy contract if the tenant does

[723] In this case what has been established in the point above concerning the subrogation of an offspring over 65 years old or who is a beneficiary of the public benefits mentioned also applies.

not want to either withdraw from the contract or tolerate the works (art. 22 LAU 1994).

However, the LAU does not establish any general objections that the tenant may make when the landlord seeks the termination of the contract. Such an objection could be for example, with regard to the vulnerability of his family or his economic situation, in such a way that if the contract was terminated, the tenant would find himself in such a state of social exclusion that he would not be able to reside elsewhere, either in a rented dwelling or with relatives obliged to maintain him.[724] The fact that no objection of this kind exists, together with the difficulty of getting social housing in Spain hinders satisfaction of the right to adequate and decent housing (art. 47 CE) for citizens in our country.

The other possible objections by the tenant take place within the procedure.[725]

- **Does the tenancy have "prolongation rights", i.e. the statutory right to stay for an additional period of time (outside the execution procedure)?**

- **Challenging the notice before court (or similar bodies)**

Notices concerning contract termination shall observe deadlines and formal requirements established by law in order to take effect. Although there are cases in which the LAU 1994 does not regulate the formal requirements of these notices, for example in the event of the tenant´s withdrawal (art. 11 LAU 1994), it is recommended to do it in writing and through means that make it possible for the tenant to prove to a sufficient degree that the notice has been carried out, especially for proving it in court.[726] A burofax with certification of contents or notarial communication are normally the means accepted as reliable notification, since the full or literal content of the communication and the identity of the sender, the recipient and the result of delivery are accredited. Nevertheless, there is case law[727] that has accepted electronic communication with digital certification issued by a specialised company on the basis of article 162 LEC.

In this sense, if the party does not carry out the perceptive notification of its intention not to renew the tenancy contract once the term ends, at least thirty days in advance, the contract is extended for one further year (art. 10.1 LAU 1994).[728]

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[724] As set out by ECHR in judgement of 9th October 2007(JUR 2007\298821), social exclusion situation that implies not having enough resources to secure accommodation can lead to the violation of the right to private and family life and home, established in article 8 of the Human Rights Convention, when it involves eviction from one's current dwelling by authorities, without providing him another one, provided that eviction is not based on public interest and is proportional to the aim pursued.

[725] See *'in particular claims for extension of the contract or for granting of a period of grace under substantive or procedural law', infra.*

[726] E. Torrelles Torrea, 'Artículo 22 obras de mejora' en *Ley de arrendamientos urbanos, comentarios y jurisprudencia doce años después*, dir. E. Llamas Pombo (Madrid: La ley, 2007), 557 and J.M. Lete del Río, 'Comentario al art. 22 LAU' en Comentarios a la Ley de Arrendamientos Urbanos ed. Xavier O'Challaghan (Madrid: Edersa, 1995), 285.

[727] STS of 21 March 2013 (CENDOJ 28079110012013200915).

[728] See more in section *'Periods and deadlines to be respected', supra.*

- **in particular, claims for extension of the contract or for granting of a period of grace under substantive or procedural law**

A. Extension of the occupation before eviction

Article 704.1 LEC provides that an occupant of a main residence whose possession is to be handed over may ask for a one month extension on the grounds of need. If this need is proved, the judge shall allow the tenant to stay in the leased dwelling for a month. However, there are some cases in which case law[729] has suspended the eviction proceeding for a longer period, basically when it is evidenced that there are minors living in the dwelling who are at risk of becoming homeless. The measure is based on the higher interest of children set out in Organic Law 1/1996, of 15th January, concerning the protection of minors.[730] This measure is completed with a request to social services of the municipality where the family lives, so as to report the measures envisaged to guarantee the right of minors to decent and adequate housing.

B. Tenant´s action of enervation

Enervation is the faculty of either the tenant or any other person acting on his behalf and for his benefit to prevent eviction, either by paying or depositing the amounts claimed in the lawsuit and also those owed at the time of the payment, always before the hearing.[731] Enervation takes effect even against the landlord's will, allowing the tenant to continue with the tenancy contract on the same terms and with the same conditions. There are two assumptions in which enervation is not possible: when another enervation has been carried out before the eviction, except that payment was not made due to reasons attributable to the landlord; or when the payment has been unequivocally requested of the tenant thirty days in advance, and he has not paid it (art. 22.4 LEC).

C. Convivial relationships of mutual assistance

In Catalonia, when there are convivial relationships of mutual assistance and the tenancy contract is terminated, the tenants are allowed to stay in the leased dwelling for a certain period.[732]

- **Termination for other reasons**

- Termination as a result of execution proceedings against the landlord (in particular: repossession for default of mortgage payment).

The termination of the tenancy contract due to foreclosure has been already mentioned in the second point of the section 'notice by landlord'.

[729] For example, in SJPI of Madrid on 6th March 2013 (CENDOJ 28079420392013200001), the judge decides to suspend the eviction of a mother with three minor children agreed in an eviction procedure for non-payment, not for a month but until the completion of the school year, which means a four-month period in this case.
[730] BOE 17/01/1996 Nº 15.
[731] S. San Cristóbal Reales*, Manual de derecho de la construcción* (Madrid: La Ley, 2008), 625.
[732] 'in favour of certain tenants', *supra.*

- Termination as a result of urban renewal or expropriation of the landlord, in particular:

Article 28 LAU 1994 establishes that the tenancy contract shall be terminated automatically in the following cases:

a. Loss of the leased dwelling due to reasons not imputable to the landlord.

This case includes those instances in which the dwelling is lost either physically (e.g. because of an incident) or due to legal reasons, e.g. compulsory expropriation by the Administration.[733] In these cases, where rented dwellings are expropriated, the Administration or the expropriating entity will make the corresponding compensation effective (previously fixed by the Expropriation Jury); in order to determine the amount, the rules of the tenancy legislation (art. 44 LEF) are taken into account.[734]

b. Final declaration of ruin established by the competent authority

The competent authority shall declare termination on grounds of ruin in an administrative procedure, and the statement must be a final one. The notion of ruin does not require its current existence, but a more or less imminent and predictable danger[735] must be appreciated in the assessment carried out in the corresponding technical reports.[736]

The ruin of the leased dwelling may arise due to a lack of maintenance or repair works by the landlord.[737] Nevertheless, the tenant cannot request the repairs needed before the civil courts when the landlord has already asked for the administrative declaration of ruin. In this case, the tenant can only go later to a civil procedure in order to claim compensation for damages arising from the breach of the landlord's maintenance obligation, set out in article 21 LAU 1994, since article 28.b) LAU 1994 provides for the extinguishment of the tenancy contract.[738]

- What are the rights of tenants in urban renewal? What are the rules for rehousing in case of demolition of rental dwellings? Are tenants interested parties in public decision-making on real estate in case of urban renewal?

[733] D. Lozano Romeral and J. de Fuentes Bardají, *Todo sobre la nueva Ley de Arrendamientos Urbanos* (Barcelona: Praxis, 1994), 197 and A. Fuentes Lojo and J. Fuentes Lojo, *Novísima Suma de arrendamientos urbanos*, T. I, 345.
[734] Ley de 16 de diciembre de 1954, de Expropiación Forzosa (BOE 17/12/1954 núm. 351).
[735] STS of 14 July 1983 (RJ 1983\4055).
[736] F.J García Gil, *El alquiler de la vivienda. Aspectos sustantivos, procesales y fiscales. Fomento del alquiler. Legislación comentada. Jurisprudencia. Formularios,* 311.
[737] STS of 16 December 1985 (RJ 1985\6537).
[738] As set out in STS of 17 May 1984 (CENDOJ 28079110011984100377) and in SAP of Asturias of 10 May 2001 (AC 1526\2001).

1. Urban renewal: the following are allowed to carry out urban renewal works (art. 15.1 8/2013 Act[739]): - Public Administration
- Rehabilitation agents
- Landlords
- Holders of property rights
- Tenants[740]

In a rented property: the tenant is considered as a stakeholder in the administrative procedure (arts. 31.1.b 30/1992 Act and 11.1 LS)
And has the following rights:

1) To be informed about the agreements 2) To receive resolutions 3) To consult and allege in the public hearing

- Procedure without compulsory expropriation. Tenant's rights:

- Right to a temporary accommodation + right of return once the works are finished until the end of the tenancy contract (art. 14.2 Act 8/2013).
- Right to be notified about the inclusion of the dwelling in the urban renewal works (art. 14.4 Act 8/2013).
- Right to take part in the hearing or public information process: entitled to ask for or to withdraw relocation, and he is entitled to be compensated if pre-existing rights are extinguished (art. 14.4 and 18.6 Act 8/2013).

- Procedure with compulsory expropriation. Tenant's rights: he has the right either to be relocated in a housing with a public task with an appropriate surface for his needs, or to receive a pecuniary compensation (art. 14.1.a Act 8/2013)

2. Maintenance or improvement works:

- Maintenance: the tenant is entitled to a reduction of the rent that is proportional to the reduction of the dwelling use from the twentieth day of the works execution (art. 21.2 LAU 1994).
- Improvement: if the works cannot be deferred until the end of the contract, the rent may be reduced and the tenant may be compensated for works' expenses. And if these works significantly affect the dwelling, the tenant may either suspend or withdraw from the tenancy contract (art. 22 LAU 1994).
- Uninhabitable dwelling: the tenant may terminate the contract and claim compensation for the damage caused (art. 26 LAU 1994).

3. Administrative procedure of declaration of ruin: the tenant is a stakeholder in the proceeding (art.31.1.b 30/1992 Act), but the tenancy contract is terminated (art. 28.b LAU 1994).

[739] Ley 8/2013, de 26 de junio, de rehabilitación, regeneración y renovación urbanas (BOE 27/06/2013 núm. 153).
[740] The tenant has the faculty to carry out the works and to subsequently remain in the leased dwelling when a tenancy contract is concluded for a certain period in exchange for the tenant meeting all or any of the following expenses: taxes, fees, contributions for the condominium or co-operative expenses, conservation expenses and also rehabilitation, regeneration and urban renewal works (art. 17 8/2013 Act).

6.7 Enforcing tenancy contracts

Example of table for 6.7 Enforcing tenancy contracts

	Main characteristic(s) of tenancy type 1 Urban tenancy	Main characteristic(s) of tenancy type 2, etc. VPO	Ranking from strongest to weakest regulation, if there is more than one tenancy type
Eviction procedure	Civil court proceeding: (small claims procedure or oral trial) when LAU is applied	Administrative proceeding: VPO when Decree 2114/1968 is applied	
Protection from eviction	Civil court proceeding: limited opposition: enervation or payment	Administrative proceeding: freedom of allegations	
Effects of bankruptcy	Declaration of bankruptcy does not affect the validity of the contract		

- **Eviction procedure: conditions, competent courts, main procedural steps and objections**

Firstly, it is important to distinguish between the notarial procedure of termination of tenancy contracts for non-payment, eviction through civil court proceedings and the administrative eviction procedure.

I. Notarial procedure in order to terminate tenancy contracts due to non-payment

With the approval of the LMFFMAV 2013, it is possible to terminate the tenancy contract due to non-payment through a notarial (non-judicial) procedure, as long as the lease is registered in the Land Registry and it has been stated in the contract not only that it could be terminated in case of non-payment of the rent but also that the property would be returned immediately to the landlord.
In this case, the landlord is entitled to terminate the tenancy contract once he has carried out a judicial or notarial requirement to the tenant at the address designated to this effect in the Registry, urging him to pay or comply with the requirement, and the tenant either has not replied to the requirement in the ten following working days or has answered accepting the decision of termination.
According to article 517.2.4º LEC, this title of “unanswered/accepted notarial requirement” is directly enforceable, so the landlord is allowed to apply for the tenant´s eviction before the courts as the lease is considered as terminated. In addition, the title provided in the registration procedure, together with a copy of the requirement certificate, will be sufficient title for the cancellation of the tenancy contract from the Land Registry (art. 27.4 LAU 1994).

II. Eviction through a civil court proceeding

A. Types of procedures

1. Ordinary proceeding: this is the most appropriate one to deal with any kind of conflict between the parties, unless the aim is the termination of the tenancy contract (art. 249.1.6 LEC). For example, it is suitable for dealing with the interpretation of a contract term, or whether or not it is possible or to defer the execution of the improvement works until the termination of the tenancy contract.

2. Oral trial: this shall be used to deal with the tenant's eviction, due to non-payment (in addition, there exists the possibility of using this procedure to also claim the rent due, regardless of the amount) or due to the termination of the tenancy term (art. 250.1.1 LEC). This procedure is easier and faster than the ordinary one. Additionally, as will be pointed out, with the amendment introduced by Act 37/2011 several procedural advantages in the eviction procedure for non-payment of the rent have been introduced.[741] According to the question raised, this is the proceeding that it is going to be developed below.

3. Small claims procedure: amounts owed concerning the tenancy contract may be claimed through the procedure regulated in articles 812 et seq. LEC.

B. Competent courts

The competent courts to hear the eviction procedure are the courts of first instance of the place where the dwelling is located (art. 45 LEC).[742] The judgement of eviction may only be appealed before the Court of Appeal of the province where the dwelling is located. If the tenant wants to appeal, he must consign in the lawsuit or pay the landlord all the amounts claimed in first place.

In proceedings involving evictions, the defendant shall not be allowed to lodge any appeal, whether on the grounds of breach of procedure or of cassation, if, in their preparation, he fails to declare and to produce written evidence that he paid the rents due and those he is bound to pay in advance under the contract (art. 449.1 LEC). Moreover, during the proceeding, the tenant shall prove to be up-to-date in the payment of rents becoming due (art. 449.2 LEC). Once the ordinary appeal channel has been exhausted, it is possible to appeal before the Constitutional Court if fundamental rights have been violated (LTC).[743] Unless the requirements to invoke an extraordinary appeal on the grounds of breach of procedure, a cassation appeal or an appeal before the Constitutional Court are met, the judgement of eviction can only be appealed before the Provincial Court of the place where the property is located (art. 455 LEC).[744]

C. Conditions and objections

- The capacity to bring an eviction proceeding (art. 250.1.1 LEC) corresponds to the landlord, who will have to prove his right over the dwelling, whether it is the right

[741] Trial hearing will only be held if the tenant appears in court within ten days from the demand notification to contest it. Otherwise, the eviction will be carried out (art. 440.3 LEC).
[742] It is also set out in the fifth paragraph of the LAU preamble.
[743] Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional (BOE 05/10/1979 núm. 239).
[744] For more information about competent courts and admissible appeals, see section 6.1 *'What is the court structure in tenancy law? Is there a special jurisdiction or is the ordinary one competent? What are the possibilities of appeal?', supra.*

to ownership or a right of a similar nature, such as a usufruct, by means of a public deed or the registration in the Land Registry.

- The landlord shall be represented in court by a solicitor and by a court representative (*procurador*) when the amount claimed is greater than two thousand euros (art. 23.2.1 LEC), or, if no amount is claimed, for example in an eviction due to the expiration of the contract term.[745]

- The landlord shall submit a concise claim indicating the identification and circumstances of the claimant and the defendant and the address or addresses where they can be summoned and specifying the claim with clarity and precision (art. 437.1 LEC): termination of the tenancy contract and the payment of both the amounts owed and the amounts accrued until the recovery of the dwelling.

- The landlord shall prove the existence of a tenancy contract between the tenant and him.

- The landlord must indicate the circumstances that may or may not allow or the eviction's enervation in order for the claim to be valid and admitted by the judicial body (art. 439.3 LEC).

- The claimant may announce in the said claim that he undertakes to condone all or part of the debt of the tenant and the costs, indicating the exact amount, conditioned upon the voluntary abandonment of the property within the time limit specified by the landlord, which shall not be less than fifteen days as of the day on which notice of the claim was served (art. 437.3 LEC).

- The claim may also include a request to admit the application for enforcement of the eviction on the date and at the time to be specified by the Court for the purposes set forth in article 549.3 LEC (art. 437.3 LEC). Thus, once the corresponding judgement for execution is issued, an application for enforcement is not needed, and it is not necessary either to wait for the twenty-day term to elapse to enforce the eviction (art. 548 LEC).

- In the case of an eviction lawsuit for rent due, it is only necessary for one monthly rent payment to be owed in order to be able to file a claim.[746]

[745] SAP of Málaga of 10 November 2004 (CENDOJ 29067370042004100807) and APP of Vizcaya of 10 April 2008 (CENDOJ 48020370032008200045).
[746] As set out in SSTS of 24 July 2008 (RJ 2008\4625) and of 19 December 2009 (RJ 2009\23).

D. Main steps of the proceeding (arts. 437 et seq. LEC)

Interposition of the concise (art. 437 LEC) or ordinary (art. 399 LEC) claim: combined actions of eviction and claim of rents.[747]

↓

Order of the judicial secretary:[748] set date and time for the judicial hearing and for the eviction. The tenant has 10 days either to object or to vacate the dwelling and pay (art. 440.3 LEC). Tenant's actions:

1. He remains passive → Order of the judicial secretary concerning eviction[749] → request for its enforcement (art. 549.3 LEC)

2. He leaves the dwelling: 1) Without debt cancellation and handover of keys (art. 400.3 LEC) → Order revoking the eviction, except if the claimant request to draw up a record of the dwelling's condition

↓

Request for enforcement for the claimed amount

2) Debt forgiveness (art. 21.3 LEC) → To vacate the dwelling in 15 days, if not, eviction order

↓

Request for its enforcement

3. Enervation (payment): 1) No objection of the claimant: Order terminating the proceeding

2) Claimant's objection: Judicial hearing (art.443 LEC) → Judge gives judgement → Cancels the eviction / Permits the eviction

4. Opposition to the claim: 1) Defendant does not appear: Eviction judgement (5 days) and eviction (30 days) → Request for its enforcement

↓

Judicial hearing (art. 440.3 LEC)

2) Defendant appears: Judgement (Allegations and evidences) → Accepts the opposition: leaves eviction without effects / Dismisses the opposition: Eviction[750] → Request for its enforcement

[747] Tenant shall prove he does not owe the amount claimed, since the procedural doctrine of "exhaustive facts" is applied: whoever alleges them must prove them (SSTS of 11 July 1991 (RJ 1991\5341), of 12 January 2001 (RJ 2001\3) and SAP of Granada of 18 January 2008 (AC 2008\1845)).

[748] According to the power of legal secretary set out in article 7.b of the Real Decreto 1608/2005, de 30 de diciembre, por el que se aprueba el Reglamento Orgánico del Cuerpo de Secretarios Judiciales (BOE 20/01/06 núm. 17). The Judge must give judgement in the case of opposition of either the lessor or the tenant (art. 440.3 LEC)

[749] Costs will be imposed on the defendant and the amounts due will include rents accrued subsequent to the claim and until the delivery of the actual possession of the property, taking as the basis for the settlement of future rents, the amount of the last monthly payment claimed in the demand.

[750] The landlord and/or solicitor (*procurador*) must attend the eviction event. They will receive the keys and thus the possession of the real estate. A locksmith could be also needed if keys are not available. In the launching, legal commission may request police aid for caution, in order to prevent possible incidents (art.703.1 LEC).

III. Administrative eviction procedure

It is important to remember that there is also an administrative eviction proceeding that is exclusive for VPO homes rented from specific agents in Decree 2114/1968.[751]

However, this nation-wide regulation only applies in the absence of regional regulations, due to the exclusive competence of Autonomous Communities in housing (art. 148.1.13 CE).[752] In addition to this, there are regional regulations setting out the administrative power of eviction, such as the Galician Housing Act 8/2012, of 29th of June (arts. 81 to 85), the Canaries Housing Act 2/2003, of 30th of January (arts. 68 to 72)[753], and the LVC of Catalonia (arts. 105 and 106), as well as Decree 336/1988 concerning Regulations on the assets of local bodies in Catalonia (arts. 152 to 166).

Nevertheless, the particularity of the State regulation mentioned above is that it refers specifically to VPO evictions, while regional regulations establish a general eviction procedure either for the compulsory expropriation of the dwelling or for the eviction of tenants or occupants of housing with a public task.[754]

Additionally, it must be taken into account that these administrative regulations shall apply provided that the tenancy contract is not subject to LAU, since in this case eviction will be governed by civil proceedings as explained above.[755]

A. Conditions and objections

1. Rented VPO must be owned by some of the agents regulated in article 22 of Decree 2114/1968: City Councils, Provincial Councils, municipal or provincial Patronages, Ministries, as well as new official developers that are to be added in the future in relation to article 22 (art. 141 Decree 2114/1968).

2. Eviction can only be processed when one of the causes regulated in article 138 of Decree 2114/1968 applies:

a. Non-payment of the rents agreed in the tenancy contract, or of the amounts that the assignee is obliged to pay in the deferred access to the property and of complementary fees derived from services, common expenses.
b. The occupation of the dwelling without a legal title to do so.
c. Termination of the employment relationship between tenant and landlord, when this relationship is the cause of the housing occupation.[756]

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[751] See section 6.1 *'What is the court structure in tenancy law? Is there a special jurisdiction or is the ordinary one competent? What are the possibilities of appeal?', supra.*
[752] See more in section 3.2 *'Which levels of government are involved in housing policy (national, regional, local); what are they called; how many are there of each?', supra.*
[753] BOE 06/03/2003 Nº 56.
[754] In the State regulations, to carry out compulsory expropriations or eviction of public housing occupants, the proceeding set out in articles 58 to 60 of the Ley 33/2003, de 3 de noviembre, del Patrimonio de las Administraciones Públicas (BOE 04/11/2003 núm. 264) will be followed, according to article 41.1.d. of the same Act.
[755] J.L. Ibarra Sánchez, 'Desahucio administrativo en materia de viviendas de protección oficial' en *LA TOGA (Revista Online del Ilustre Colegio de Abogados de Sevilla)* núm. 151 noviembre/diciembre de 2004: 3.
[756] Nevertheless, if the employment relationship is terminated on the grounds of the tenant's death or physical disability, both him and relatives living with him have a non-extendable six-month period to

d. Serious damages either in the property or in the buildings, facilities and complementary services caused by the tenant, the occupants or their family.
e. Serious or very serious infringement of the valid legal or regulatory requirements on VPO.
f. Failure to use the dwelling as a main and permanent residence by the beneficiary or lessee.
g. Sub-lease or total or partial transfer of the housing.

3. An administrative file shall be previously processed according to the procedure set out in Decree 2114/1968.

B. Competent entities

Entities owning VPO are the ones competent to start the administrative process and to evict tenants (art. 141 Decree 2114/1968). Although article 142 of Decree 2114/1968 grants the National Direction of the Housing Institute (*Dirección Nacional del Instituto de la Vivienda*) the power to decide about the acceptance of a VPO administrative eviction, this body was suppressed in 1980 with the enactment of Royal Decree-law 12/1980, of 26 of September, in order to promote the State actions on housing and land.[757] For this reason, the STS of 1st of April 1974[758] acknowledges the competence of local entities to terminate tenancy contracts concerning housing they own, in the same cases and manner set forth for the National Housing Institute, as provided for in art. 125 (135 currently) of Royal Decree 1372/1986, of 13th of June, which approves the Regulation on local entities' property,[759] and article 166 of Decree 336/1988 in Catalonia.[760]

vacate the housing, except where death or permanent and absolute disability have been caused by a work-related accident. In this case, the rental relationship will persist as long as the widow or the disabled person lives, or until children reach adulthood; the owner company has the power to replace the occupied home with another one in the same town and with a similar surface area and rent.

[757] BOE 03/10/1980 Nº 238.

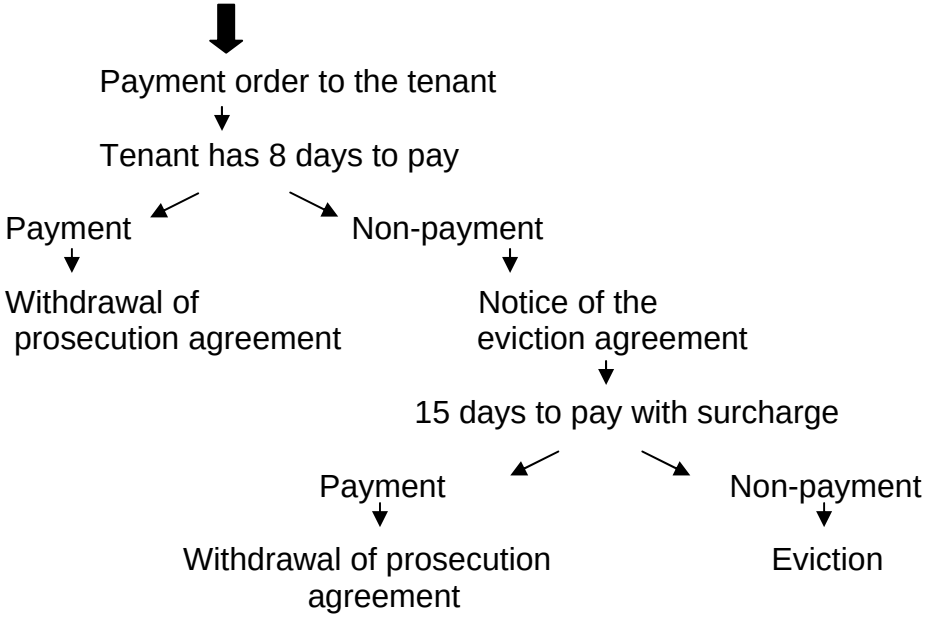
[758] RJ 1974/1752.

[759] BOE 07/07/1986.

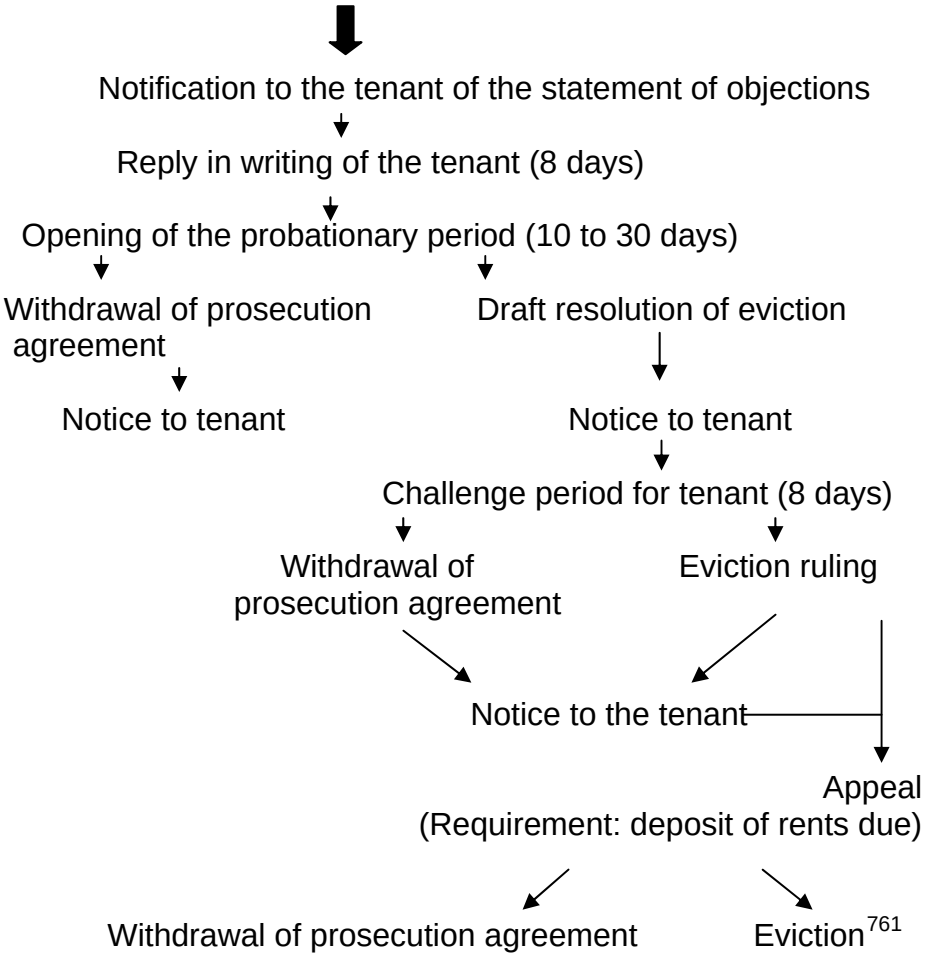
[760] M.A. Ruiz López, *La potestad del desahucio administrativo* (Madrid: Instituto Nacional de Administración Pública, 2012), 696.

C. Steps of the proceedings (art. 142 Decree 2114/1968)

1. Eviction proceeding for non-payment



2. Proceeding for other causes of termination



[761] The same body that has processed the administrative file carries out the eviction (art. 144 Decree 2114/1968).

- **Rules on protection ("social defences") from eviction**

I. Civil proceeding of eviction

According to article 440.3 LEC, the tenant's opposition remedies in the eviction procedure are *numerus clausus*:

- To claim and prove the payment of the rents due through presentation of bank or manual receipts.

- To claim and prove that the enervation is applicable, if rent payments have not been enervated before the eviction, or when the collection of rents has not been possible due to reasons attributable to the landlord (art. 439.3 LEC).

Nevertheless, when there is a combined eviction procedure for a non-payment claim and for the claim for the rents or equivalent amounts due (art. 438.3 LEC), case law[762] has also admitted the possibility for the tenant to object to the claim for rents or similar amounts due alleging credit compensation,[763] on the basis of art. 438.2 LEC, provided that it is notified to the claimant at least five days prior to the hearing.

In order to do so, requirements set out in articles 1195 and 1196 CC shall be met. Therefore, the compensable credit must be due, liquidated and payable.[764]

In this sense, the claimant's credit may be declared total or partially extinguished, with the subsequent acquittal of all or part of the amounts owed to the landlord.

In order to claim the credit compensation, the previous deposit of the rents due is not required, as takes place in the case of alleging the payment made, because following art. 440.3 LEC, it is only necessary if the tenant asks for the eviction enervation. Nor is it necessary for the compensable credit to be in an enforceable deed.[765]

In the eviction proceeding, it is possible for the defendant to ask for an eviction suspension when a cause of need is accredited, as seen above.[766]

II. Administrative procedure of eviction

As has been mentioned, there is no limitation as far as the allegations that the tenant can raise for his defence in the administrative eviction procedure are concerned. Therefore, he may allege that it is not the procedure to be followed because the contract is governed by the LAU, or that the proceeding established in Decree

[762] SSAP of Cádiz of 22 May 2003 (JUR 2003/189187), of Santa Cruz de Tenerife of 27 of April 2007 (JUR 2007\170645), of Palma de Mallorca of 9 of December 2010 (CENDOJ 07040370052010100441) and of Cádiz of 16 of April 2013 (JUR 2013\221029).
[763] SAP of La Rioja of 7 of April 2003 (EDJ 2003/37763).
[764] As set out by SAP of Valencia of 21 of April 2004 (EDJ 2004/210468).
[765] SAP of La Coruña of 27 of September 2010 (JUR 2010\374575).
[766] See section 6.5 *'Does the tenancy have "prolongation rights", i.e. the statutory right to stay for an additional period of time (outside the execution procedure)?', supra.*

2114/1968 has not been followed (art. 143), or any other reason that demonstrate that causes listed in article 138 of the abovementioned Decree are not applicable.

- **May rules on the bankruptcy of consumers influence the enforcement of tenancy contracts?**

With reference to the question of what happens with the tenancy contract in the context of a bankruptcy proceeding, several situations must be taken into consideration:

1. The tenant falls into bankruptcy

As in other contracts, the declaration opening the insolvency proceeding affects neither the validity of the tenancy contract (art. 61.2 LC[767]), nor the obligation of the insolvent party to pay the rent.[768] Nevertheless, if the tenant stops paying the rent, it is important to see if the dwelling is exclusively used as family home or, in addition and according to the contract, if it is also the place where the tenant carries out his business or professional activity.

A. The leased dwelling is only the family residence of the tenant

The law entitles the landlord to ask for the termination of the tenancy contract if the tenant-insolvent party does not comply with his duty to pay the rent once he has fallen into bankruptcy, even if unpaid rents were prior to this moment (art. 62.1 and 2 LC). The judge shall decide considering the interests of the insolvency proceedings (art. 62.3 LC). However, it is relevant, in order to decide about the termination of the tenancy contract, that the dwelling not be related to the economic activity of the insolvent party.[769] In this case, the amounts due before the declaration opening the insolvency proceeding shall be satisfied according to what is established in the creditors´ agreement, or to what results from the winding-up of the insolvent party. Conversely, amounts to be paid after the declaration shall be considered as "claims against the insolvent estate", and they shall be paid in a preferential way by charging this estate as long as there are enough assets to pay (art. 62.4 and 84.6 LC). Moreover, it must be taken into consideration that neither the insolvency administrators nor the judge can demand the return of the deposit at the termination of the tenancy contract in order to be incorporated into the aggregate assets, while there are rents still to be paid by the tenant to the landlord.[770]

B. The leased dwelling is also related to the tenant´s business activity

The law allows the judge to deny the termination of the tenancy contract and to maintain it if he considers that its validity is necessary for the continuity of the business.[771] In this case, the rental income shall be charged to the aggregate assets of the insolvent party, i.e. the landlord shall not be included in the creditors' list and

[767] Ley 22/2003, de 9 de julio, Concursal (BOE 10/07/2003 núm. 164).
[768] SAP of Valencia of 15 of September 2003 (JUR 2003\269517).
[769] A. Ribó, 'Cómo afecta el concurso de acreedores a los contratos de tracto sucesivo? en *Togas 83 - La Vanguardia*, 25 de julio de 2008.
[770] As set out in SAP of Barcelona of 11 of December 2007 (AC 2007\1038).
[771] A. Ribó, 'Cómo afecta el concurso de acreedores a los contratos de tracto sucesivo?

will not depend on what is established in the creditors` agreement with the other creditors or on the company's winding-up (art. 84.6 LC).

C. Operative rules in both cases

The insolvency administrators may stop eviction proceedings demanded prior to insolvency proceedings being declared open, even though an earlier enervation had been carried out. Furthermore, if the eviction has been already handed down, they may rehabilitate the life of the contract up to the very moment of effectively evicting the debtor. In both cases, all the rents and items pending must be paid by the state, as well as the possible procedural costs arising up to that moment (art. 70 LC). These powers are admitted when the leased dwelling is either related to the business or professional activity of the insolvent debtor or is used exclusively as family residence.[772]

The Commercial Courts have the exclusive competence on this matter, so it must be understood that both incidents of credit recognition should be brought before that Court, communicating such circumstances (art. 8.1 LC), provided that the eviction proceeding has not been started before the insolvency proceeding.[773] It must be taken into account that in accordance with article 43.1 LC, the insolvency administrators may ask the Court for assistance for the conservation of the estate.

Nevertheless, it may happen that the eviction procedure had already started prior to the time of the insolvency proceedings being declared open. In this case, in accordance with article 51.1 LC and taking into account the amendments introduced by Act 38/2011[774], it is established that all proceedings accumulated to the insolvency one shall be governed 'through the procedural formalities by which the claim was being substantiated'. Therefore, in this case, the civil proceeding will substantiate the eviction claim. If it upholds the landlord´s claims, the termination of the tenancy contract shall be declared due to the non-payment of the tenant´s rents.[775]

2. The landlord falls into bankruptcy

On the assumption that it is the landlord who declares himself bankrupt, different premises can be considered, i.e. it is possible that the leased dwelling is encumbered with an in rem guarantee (usually a mortgage).

A. The leased dwelling is encumbered with an in rem guarantee (mortgage)

It must be distinguished if the landlord is a company aimed at real estate rental or if he is simply an individual that has a leased dwelling but does not exercise a real estate business activity.

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[772] I. Herbosa, 'La acción de desahucio por impago de rentas en situación de concurso del arrendatario', en *Anuario de Derecho Concursal num. 29/2013* (BIB 2013\535).
[773] *Supra.*
[774] Ley 38/2011, de 10 de octubre, de reforma de la Ley 22/2003, de 9 de julio, Concursal (BOE 11/10/2011 núm. 245).
[775] I. Herbosa, 'La acción de desahucio por impago de rentas en situación de concurso del arrendatario'.

a. The leased dwelling is not assigned to a business activity

In this case, as the dwelling is not assigned to the professional or business activity of the insolvent landlord, the foreclosure cannot be stopped even if the landlord enters into an insolvency proceeding because the claim for the unpaid mortgage payments is deemed to be a claim with special preference, according to article 90.1.1 LC. Therefore, the financial institution (the creditor) will be able either to continue or to start the foreclosure in a separate procedure (art 56 LC).[776]

Moreover, if the tenancy contract is concluded after the 6th of June 2013, it will terminate if it has not been registered in the Land Registry prior to the rights that have led to the resolution of the landlord's right (art. 13.1 LAU 1994). For contracts concluded between the 1st of January 1995 and the 5th of June 2013, the tenancy contract shall terminate at least when the first five years of the contract have elapsed, unless it is registered in the Land Registry prior to the rights that have led to the resolution of the landlord's right, in which case the agreed term on the tenancy contract shall be respected (former art. 13.1 LAU 1994).[777]

b. The leased dwelling is assigned to the business activity of the insolvent debtor

When the leased dwelling is assigned to the business or professional activity of the insolvent debtor, article 56.1 and 2 LC set out that enforcement of in rem guarantees will remain suspended until one of the following situations takes place: either the adoption of a creditor's agreement, the content of which shall not affect the exercise of that right; or the lapse of a year from the declaration opening the insolvency proceeding without the winding-up phase having commenced. As a consequence, while those requirements are not met, the singular enforcement of the creditors with these in rem guarantees will remain suspended.[778]

However, in the event that enforcement actions of in rem guarantees have already commenced, these shall be suspended 'as from the declaration of insolvency, whether final or not, being recorded in the relevant proceedings, even though the announcements of auction of the asset or right may have already been published' (art. 56.2 LC). Only in the event that the judge declares that the assets or rights are not assigned to, or are not necessary for the continuity of the professional or business activity of the debtor, the suspension of enforcement may be raised in order to continue with the same.[779]

B. The leased dwelling is not encumbered with an in rem guarantee

As has been seen above, the declaration opening the insolvency proceeding does not involve the loss of validity of the tenancy contract (art. 61.2 LC). The rents paid

[776] E.M. BELTRÁN SÁNCHEZ, 'El concurso de acreedores del consumidor' en *Endeudamiento del consumidor e insolvencia familiar*, ed. M. Cuena Casas y J.L. Colino Mediavilla (Navarra: Aranzadi, 2009),135.
[777] See 6.5 '*Notice by landlord'*, section B.2, *supra.*
[778] About this, see A. Carrasco Perera, *Los derechos de garantía en la Ley Concursal* (Aranzadi: Navarra, 2009), 125-134.
[779] This question has been clarified in article 43 of Act 38/2011.

by the tenant shall become part of the aggregate assets of the insolvency proceeding (art. 76.1 LC), and therefore, they shall be included in the inventory of the debtor´s aggregate assets (art. 75.2.1º and 82 LC).

However, it would be possible to dispose of the leased dwelling in the interest of the insolvency proceeding, as long as the law allows it. Article 43.2 LC sets out that until judicial approval of the composition is obtained or winding-up is commenced, goods and rights forming the state may be disposed of or encumbered without the Court's approval. Nevertheless, an exception is the acts of disposal of assets that are not necessary for the continuity of the activity when offers concur that substantially match the value they have been assigned in the inventory.[780] The insolvency administrators shall immediately notify the insolvency Court of the offer received and the justification of the non-necessary status of the assets. The offer presented shall be approved within ten days if a higher offer is not presented (art. 43.3.2 LC).

In the event that it is decided to dispose of the leased dwelling, the standards of LAU 1994 shall be contemplated to determine the consequences on the validity of the contract.

For contracts concluded after the 6th of June 2013, if it is decided to dispose of the leased dwelling and the tenancy contract is registered in the Land Registry, the tenant is entitled to remain in the dwelling until the end of the agreed term; in the absence of such agreement, the term shall be three years (art. 14.1 and 9.1 LAU 1994). Conversely, if the contract is not registered in the Land Registry, the new acquirer is entitled to put an end to the tenancy contract, unless otherwise agreed in the sale, in accordance with article 1571.1 CC (art. 14.2 LAU 1994). Pursuant to article 34 LH, the new acquirer shall act in good faith, that is to say, he should not know the existence of the tenancy contract before the conclusion of the sale. Otherwise, he will subrogate himself in the rights and duties of the landlord, and the tenancy contract will remain in force until the end of the agreed term.[781]

On the other hand, if the tenancy contract is concluded between the 1st of January 1995 and the 5th of June 2013, the new acquirer of the leased dwelling shall respect the five-year term of the contract, even if the requirements established in article 34 LH are met, and whether or not the contract is registered in the Land Registry. However, if the term agreed in the tenancy contract is more than five years, and the sale takes place once these five years have elapsed, the agreed term shall be respected, unless requirements in article 34 LH[782] are met. If the tenancy is registered in the Land Registry and there is no agreement between the parties concerning the contract termination, the term agreed shall be respected, because the third party/acquirer cannot allege good faith in the purchase, as he should have

[780] It will be understood that the matching is substantial when, in the case of real estate, the difference is less than 10% and there is no higher offer.
[781] In accordance with the referral provided in article 14 LAU 1994 to article 1571.1 CC, which, in turn, refers to the LH.
[782] For more details about these requirements see section 6.4 *'does a change of the landlord through inheritance, sale or public action affect the position of the tenant?', supra.*

known that there was a tenancy due to its registration in the Property Registry (former art. 14 LAU 1994).[783]

6.8 Tenancy law and procedure "in action"

Preliminary notice: To the extent that scientific sources are lacking, reporters are welcome to use any evidence (also newspaper articles, online sources, private interviews or even their own experience and opinion) in this section.

The practical role of private rented housing can only be realistically assessed when the practical functioning of the legal system in this field ("tenancy law in action") is taken into account:

- **What is the legal status and what are the roles, tasks and responsibilities of associations of landlords and tenants?**

As has been pointed out in the first part of the questionnaire[784], in Spain there are Urban Property Chambers (*Cámaras de la Propiedad Urbana*) and also different types of both owners and tenants associations.

A. Urban Property Chambers (*Cámaras de la Propiedad Urbana*)

The Urban Property Chambers arose at the beginning of the 20th century, with the main objective of defending, protecting and promoting the general interests of urban property. They were public law corporations and, therefore, they depended on the Government. However, according to both Act 66/1997[785] and the STC 17 January 2002,[786] which established the constitutionality of Royal Decree Law 8/1994[4] that eliminated the nature of public law corporations of the Urban Property Chambers, they may only be established as associations. Therefore, Autonomous Communities that had already taken competences in this matter still keep their faculty to provide urban homeowners associations with the legal regime they deem appropriate, with the only limitation being that this regime may not be that of public law corporations.

Therefore, they may continue performing the social functions for which they were created and also those delegated by the Administration. In this sense and in general terms, some Autonomous Communities have empowered them with the management of rent deposits, the administrative registration of tenancy contracts, as well as with the possibility of conflict resolution through arbitration or collaboration with the administration of justice in matters of judicial auctions.[787] They have also

[783] For more information about the disposal of the leased dwelling and the compensations, where appropriate, see section 6.4 *'does a change of the landlord through inheritance, sale or public action affect the position of the tenant?' and section 6.5.B.3 'Termination of tenancy contracts: notice by the landlord', supra.*

[784] See section 1.5 *'Are there lobby groups or umbrella groups active in any of the tenure types? If so, how are they called, how many members, etc.?', supra.*

[785] Ley 66/1997, de 30 de diciembre, de Medidas Fiscales, Administrativas y de Orden Social (BOE 31/12/1997 (BOE 313).

[786] RTC 2002\11.

[787] According to Ley 5/2006, de 16 de junio, de Cámaras de la Propiedad Urbana de Castilla y León y su Consejo General (BOE 11/07/2006 núm. 164), and Decreto 240/1990, de 4 de septiembre, que

been empowered with disclosure and informational duties of new regulations, such as the agreement between the *Generalitat de Catalunya* and the Urban Property Chambers of Catalonia regarding the technical inspections of buildings (ITE).[788] They are also a consultative body of the public administration in plans, projects, actions and provisions affecting the general interests of urban property.[789] Furthermore, they undertake a task of general information and service for the benefit of the citizenship, which includes:

1. Encouraging actions of housing promotion, like for example, VPO, dwellings for young people or tenancy law.
2. Reporting regularly about the real estate sector in their field of activity.
3. Spreading and promoting cultural activities related to housing.
4. Offering an information service to the citizenship, for example, about the tenants' and landlords' rights and obligations or by providing standard tenancy or sale contracts.

In addition to this, the Urban Property Chambers, which tend to be regional or provincial, are part of organisations on a higher geographic scale: for example, the General Council of Urban Property Chambers of Catalonia (*Consejo General de Cámaras de la Propiedad Urbana de Cataluña*), the Community of Valencia, Madrid or Castilla la Mancha, among others; and the Confederation of Urban Property Chambers and Urban Homeowner's Associations throughout Spain. Initiatives are proposed to the Government through these entities, which develop urban property. They are bodies consulted for the realisation of regulations, plans of implementation and the development of housing policies.[790]

B. Other owners' associations

In addition, owners' associations, which also include the Urban Property Chambers, may be municipal, regional, provincial or nation-wide. They are non-profit-making bodies that have the function of representing and advising their members, which may be homeowners or owners of garages, warehouses, etc. as well as condominiums. Partners pay a periodical fee in exchange for certain information, advice or mediation services. Here are, in general, the services that may be offered by owners' associations:

1. Receive information periodically through newsletters or the holding of meetings and conferences about the new legislation or case law (tenancy, homeowners` association, tax measures, etc.), news about the real estate market, insurances, specific offers, company promotions, professionals, etc.
2. Legal advice on housing, for example on tenancy and condominium for the resolution of conflicts. And also legal advice to provide standard contracts, (such as

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aprueba el Reglamento de las Cámaras de la Propiedad Urbana de Catalunya (DOGC 29/10/1990 núm. 1360).

[788] See website of the Urban Property Chamber of Tarragona. Available: <www.cambrapropietat.org/web2.0/node/182>, 19 de octubre de 2013.

[789] As set out by the website of the Urban Property Chamber of Terrassa and its Region. Availabe at: <www.cambrapropietat.com/index.php/qui-som/informacio-corporativa>, 20 October 2013.

[790] See more information section 1.5 '*Are there lobby groups or umbrella groups active in any of the tenure types? If so, how are they called, how many members, etc.?', supra.*

tenancy ones), for IBI increases, rubbish collection fees, administrative sanctions, etc.
3. They offer reduced rates or discounts for insurances, legal defence or multi-risk for rented dwellings or condominiums, as well as for professional services: solicitors, architects, engineers, maintenance staff or building repairs, etc.
4. They have the opportunity to start collective claims before courts and administration.

According to the Statistical Yearbook of the Ministry of the Interior (*Ministerio del Interior*), there were seventy-eight owners' associations operating in Spain in 2012.[791] The Confederation of Urban Property Chambers and Urban Owners' Associations consist of twenty-one organisations from different Autonomous Communities, which have more than 160,000 homeowners associated to different Chambers and Associations.[792] Some of these associations are: the Spanish Association of Properties Owners (*Asociación española de Propietarios de Inmuebles*)[793], the Association for the Defence of Urban Property of Madrid (*Asociación para la defensa de la propiedad urbana*)[794], the Chamber of Urban Property of Barcelona [795] and Chamber of Urban Property of Tarragona.[796]

C. Tenants' associations

In Spain there are far fewer tenants' associations than owners' ones. Their size and budget are smaller and they have fewer partners. In this sense, no statistics have been found allowing a successful comparison. However, it has been publicly denounced, for example, that there is a lack of resources for the Official Chamber of Neighbours and Tenants of Madrid, which is an association with 2,500 members consisting of specialist lawyers in urban tenancies who advise tenants with few resources who face problems related to their status as tenants: irregular rent increases, evictions, records of ruin, mobbing, etc.[797]

Due to the effects of the economic recession in 2007 and the housing problems in Spain, the organisations that try to help tenants with the payment of the rent have increased[798]. We should highlight among these the "Stop desahucios"[799] movement, linked to the "Movement of Victims of the Mortgage" (*Plataforma de afectados por la Hipoteca*, PAH), which offers information and legal advice about the evictions. Its aim is to paralyse both tenancy evictions and mortgage foreclosure procedures in order to avoid the loss of the dwelling of people with few resources, even including actions like mobilizations in dwellings on the day of the eviction. The "Plataforma de Afectados por la Hipoteca" claims to have stopped 802 evictions (tenancy +

[791] Available at: <www.interior.gob.es/file/63/63661/63661.pdf>, 20 October 2013.
[792] For more, <www.tupropiedadurbana.com>, 20 October 2013.
[793] Available at: <www.registrodeinquilinos.com/contenido/asociacion-espanola-de-propietarios-de-inmuebles>, 20 October 2013.
[794] Available at: <www.promadrid.org/index-1.html>, 20 October 2013.
[795] Available at: <www.cpubcn.com/es>, 20 October 2013.
[796] Available at: <www.cambrapropietat.org/web2.0>, 20 October 2013.
[797] Please see P. De Llano, 'Todo por los inquilinos' in El País, 2 November 2010. Available at: <elpais.com/diario/2010/11/02/madrid/1288700659_850215.html>, 21 October 2013.
[798] See more ONG'S in section 1.4 '*Which actors own these dwellings (private persons, profit or non-profit organizations, etc.)?', supra.*
[799] Available at: <www.stopdesahucios.es>, 21 October 2013.

mortgage evictions) and it has rehoused 712 people through the PAH Social Project.[800]

Some of the tenants associations are, for example, the "Owners and Tenants Association of Aragon, Consumers and Users" (*Asociación de Arrendatarios e Inquilinos de Aragón, Consumidores y Usuarios*),[801] the "Tenants' Association in Catalonia",[802] the "Tenants' Association in La Coruña"[803] and "The Tenants' association of Burgos and its Province".[804]

The main services offered to their members are:

1. To provide information about housing, through talks, periodic bulletins, brochures, etc.
2. To provide legal advice about tenancy, consumer protection, evictions, mobbing, coexistence or neighbourhood problems and to solve the problems arising with owners. They also provide standard tenancy contracts.
3. To provide information and discounts for taking out multi-risk insurances for leased dwellings as well as professional services: solicitors, plumbers, renovations companies, etc.
4. To elaborate studies on the rental market and disseminate the results.
5. To offer mediation services between tenants and landlords.

The "Consumers and Users Organisation" (*Organización de Consumidores y Usuarios*), which aims to protect the consumers' interests and rights in general, is normally consulted by the Administration in relation to the approval of law projects and provisions aiming to protect the tenants' interests.[805]

- **What is the role of standard contracts prepared by associations or other actors?**

Both landlords' and tenants' associations offer standard tenancy contracts to their members. In addition, there are different models that are accessible to all users, which are provided by the Urban Property Chambers and other associations, public administrations, internet portals of real estate agencies, such as, "Idealista",[806] or by practical books of forms as well, such as, specialized ones about tenancies.[807]

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[800] See <afectadosporlahipoteca.com>, 21 de octubre.

[801] Reviews in: <otal.aragob.es/cgi-bin/dirc2/BRSCGI?CMD=VERDOC&BASE=DIRC&DOCN=000000017>, 21 de octubre de 2013.

[802] Reviews in: <www.gentereal.com/lugares/asociaciondeinquilinosdecataluna/208970>, 21 de octubre de 2013.

[803] Reviews in: <www.paxinasgalegas.es/asociacion-de-inquilinos-de-la-coru%C3%B1a-178042em_31ay_2341ep.html>, 21 de octubre de 2013.

[804] Reviews in: <www.paginasamarillas.es/fichas/ig/asociacion-de-inquilinos-de-burgos-y-provincia_015218415_000000001.html>.

[805] See more section 1.5 '*Are there lobby groups or umbrella groups active in any of the tenure types? If so, how are they called, how many members, etc.?', supra.*

[806] Form available at: <http://www.idealista.com/news/archivo/2013/06/06/0627317-nuevo-modelo-de-contrato-de-alquiler-de-una-vivienda-tras-los-cambios-en-la-ley-de-arrendamientos>, 22 de octubre de 2013.

[807] See J.A. Mora Alarcón y J.V. Rojo Arnau, *Formularios sobre arrendamientos urbanos* (Valencia: Tirant lo blanch, 2010).

All these standard contracts are usually subject to the legal provisions of the LAU 1994. They include, specifically: the identification of the parties and the dwelling, the term and legal extensions, the rent and its update, the form of payment (with current account number), the responsibility for conservation and use, the improvement works and the causes of breach of contract.

It must be emphasized that standard contract provided by the owners' associations, like for example, the Spanish Association of Property Owners (*Asociación española de propietarios de inmuebles*)[808], establishes the tenant´s obligation to pay all the expenses, included the IBI and the condominium ones. In addition to this, it foresees those situations that may involve a dispute between the parties, for example, it states that any reports and complaints by the neighbours' association will be taken into account to determine the termination of contract due to irritating, harmful or illegal activities (clause V). It also provides that the tenant may carry out acts relating to the use of the dwelling, such as the modification of light or television fixtures, hanging pictures or shelves, lamps, painting walls, etc, without this affecting the return of the deposit (clause VII). Although the law recognises these faculties, it clarifies many of the situations that give rise to disputes between landlord and tenant.
And finally, the public administration normally provides models of standard contracts, subject to the provisions of the law.[809]

- **How are tenancy law disputes carried out? Is tenancy law often enforced before courts by landlords and tenants and/or are - voluntary or compulsory - mechanisms of conciliation, mediation or alternative dispute resolution used?**

In Spain, courts are the most used mechanism to solve disputes. In order to decongest their amount of work, ADR mechanisms are being promoted in Spain, such as the conciliation, mediation and arbitration systems. For example, the Spanish Arbitration Court (*Corte Española de Arbitraje*) registered in 2012 an increase of 12% in arbitration proceedings, and the Arbitration Court of the Madrid Chamber (*Tribunal Arbitral de la Cámara de Madrid*) an increase of 15%.[810] However, both the Autonomous Communities and the State have carried out this task in a very sectorial way: conciliation, mainly in the labour area; mediation for family matters; and arbitration for financial contracts.[811]

With reference to tenancies, arbitration has been promoted very recently through the 2013-2016 PEVR, which states the importance of including a clause of submission to arbitration in cases of conflict into the lease contract; and through the LMFFMAV 2013, which expressly establishes this possibility for all tenancy contracts (art. 4.5

[808] Form available at: <www.registrodeinquilinos.com/media/Modelo%20de%20contrato.pdf>, 22 de octubre de 2013.
[809] See the form offered at Portal de Vivienda de la Comunidad de Madrid: <www.madrid.org/cs/Satellite?c=PVIV_Generico_FA&cid=1142483836579&pagename=PortalVivienda%2FPVIV_Generico_FA%2FPVIV_pintarGenerico>, 22 de octubre de 2013.
[810] According to C.Larrakoetxea, E.Porta, V. Sosa, E. Sereno, R. Daniel y J. Alfonso, **'**El arbitraje en España registró un incremento medio del 15%' en *El economista*, el 11 de junio de 2013.
[811] In 2012, 30% of the arbitrations of the Arbitration Court of Barcelona dealt with the contracting of financial products and 17% with commercial operations. Avaialble at: <tab.es/index.php?option=com_content&view=category&layout=blog&id=9&Itemid=20&lang=es>, 20 October 2013.

LAU 1994). However, only 180 arbitration proceedings on all topics were processed in the Arbitration Court of Madrid in 2012 and 71 in the Arbitration Court of Barcelona, only 3% of which were dealing with tenancy issues.[812]

The main drawback is that, once the arbitration award has been handed down, the Courts are the competent authority to implement it if it is not voluntarily performed, despite its binding nature. According to data provided by the Arbitration Court of Barcelona, 58% of the arbitration awards were enforced voluntarily in 2012, 11% had to be implemented by Courts, 21% have been appealed before Courts of Appeal and are still pending, and 5% have not been implemented yet. However, a growing number of tenancy contracts include a clause of submission to arbitration given that the resolution of arbitration proceedings (6.9 months) is slightly faster than resolution through a judicial process (7.3 months).[813] However, the arbitration courts are far from the volume of the Courts of Justice, since in 2012 and only in the province of Barcelona they dealt with 3,619 judgements related to tenancies and with 7,764 tenancy evictions.[814]

According to art. 4.5 LAU 1994, it is possible to agree within the tenancy contract on submission to mediation before starting the judicial process for those disputes that may be resolved through this ADR system. This is entirely in the same line of reasoning as the mediation regulation, by which mediation is established as a completely voluntary process (art. 6.1 Act 5/2012[815]). With the enactment of Act 5/2012, which also transposes Directive 2008/52/CE[816] about ADR on cross-border disputes, a unitary regulation in the field of mediation is created, although it does not refer expressly to urban tenancies. In this matter, it would be necessary to encourage the mediation process for the resolution of disputes prior to the judicial process. Even the Courts of Justice provide mediation services, although in Spain, excluding family arbitration courts, there are currently only four in civil matters: Barcelona, Madrid, Toledo and Navarra.[817] Mediation services are usually provided by private legal services[818] or by some public administrations.[819]

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[812] Statistics of the Arbitration Court of Barcelona 2012. Available at: <tab.es/index.php?option=com_content&view=category&layout=blog&id=9&Itemid=20&lang=es>, 20 October 2013.

[813] Statistics of the Consejo del Poder Judicial: la justicia dato a dato en 2009. Available at: <www.google.es/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDAQFjAA&url=http%3A%2F%2Fwww.poderjudicial.es%2Fstfls%2Fcgpj%2FInstancias%2FFicheros%2FLaJusticiaDatoADato2009.pdf&ei=9CplUtWTLvSy7AaWr4HgBw&usg=AFQjCNH7lwHx7kz1BAIOFzAT_4ctNkcinA&sig2=DVyB6pSwnph0g9s_DAKsFQ&bvm=bv.54934254,d.ZGU>, 21 October 2013.

[814] According to the statistics on urban tenancies, year 2012, INE. Available at: <www.ine.es/jaxi/menu.do?type=pcaxis&path=/t18/p464/a2012/&file=pcaxis>, 20 de octubre de 2013.

[815] Act 5/2012 on mediation in civil and commercial matters (BOE 07/07/2012 no. 162).

[816] Directive 2008/52/CE of the Parliament and the Council, of 21 May 2008, about certain aspects of mediation in civil and commecial matters (OJEU 24/05/2008 no. L136/3).

[817] The Courts of Justice have included encouraging mediation in the Modernisation Plan for Justice (*Plan de Modernización de la Justicia*). Available at: <www.poderjudicial.es/cgpj/es/Temas/Mediacion>, 20 October 2012.

[818] Like for example, the Centre for Conciliation, Mediation and Arbitration in Valencia (*Centro de Conciliación, Mediación y Arbitraje de Valencia*). Available at: <www.centrodeconciliacionmediacionyarbitraje.es/Servicios/Arrendamientos-urbanos.html>, 20 October 2012.

[819] For example, that provided by Alicante City Council through the Office of counselling and mediation in mortgage conflicts and housing leases (*Oficina de asesoramiento y mediación en conflictos hipotecarios y de arrendamientos de viviendas*). See

Nevertheless, article 2.2. b and d of Act 5/2012 excludes from the scope of mediation conflicts with the Administration and those relating to consumers. In our opinion, this is a problem, bearing in mind that tenants who have a dwelling owned by the administration or by a professional may not benefit from this provision, excluding contracts signed with SOCIMI, financial institutions, etc. However, because the new (introduced by Act 4/2013) article 4.5 LAU 1994 establishes that mediation can be used in any urban leases conflict without distinction, it can be considered as *lex specialis* and subsequent to Act 5/2012, it may be understood that mediation will be applicable also to cases involving consumers and the Public Administration.

Other practical problems that arise with ADR are the mistrust of both citizens and most of the authors on the effectiveness of these procedures and their cost. They consider that, possibly, the parties will have to go to the courts afterwards. However, part of the doctrine discouraged its application when there is an unbalanced power between the parties, because agreements are born from the will of the parties and may involve unfair agreements.[820] Therefore, it is important for the mediator to have enough legal knowledge for the resolution of disputes and to enforce the consumer protection rules. It should be noted that in 85% or 90% of the arbitral proceedings, the parties chose arbitration by law and not by equity.[821] In the training field, as an example, the URV Foundation delivers a Postgraduate Program in mediation and conflict management that aims to train professionals in the field of mediation, with special emphasis on housing-related matters.[822] Furthermore, in our opinion the creation of free mediation services should be encouraged through the Administration.

- **Do procedures work well and without unreasonable delays? What is the average length of procedures? Are there peculiarities for the execution of tenancy law judgements (e.g. suspensions of, or delays for, eviction)?**

In Spain, there is a general delay in the resolutions of the courts of Justice. The average duration of the judicial proceedings in civil matters resolved by courts of First Instance was 7.3 months in 2009.[823] With regard to the 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 resolution.

<www.alicante.es/redir.php?apartado=vivienda&pagina=media_conflic_vivienda.html&titulo=Mediaci%F3n%20conflictos%20vivienda%20-%20Vivienda%20/%20Ayuntamiento%20de%20Alicante>, 20 October 2012. Or the Servicio de Mediación Intrajudicial , which depends on the Administration of Justice of Euskadi, see <www.justizia.net/mediacion-intrajudicial>, 20 October 2013.

[820] V. Magro, C. Hernández y J.P. Cuellar, Mediación penal. Una visión práctica desde dentro hacia fuera (Alicante: Editorial Club Universitario, 2011), 45.

[821] According to the Arbitration Court of Barcelona 2012, 90% of the processes. Available at: <tab.es/index.php?option=com_content&view=category&layout=blog&id=9&Itemid=20&lang=es>, 20 October 2013. According to the Arbitration Court of Madrid, 85% of the processes in 2012. Available at: <www.arbitramadrid.com/web/corte/estadisticas-de-la-corte>, 20 October 2013.

[822] Available at: Fundació Universitat Rovira i Virgili website: <www.fundacio.urv.cat/diploma_de_especializacion_en_mediacion/of_es/CAS/EMDA-M1-2013-1>, 10 December 2013.

[823] Statistics of the General Council of the Judiciary: *la justicia dato a dato en 2009*, *supra.*

There is no current reliable data on the average length of the eviction process in particular, but it might be up to a year.[824] It should be taken into account that the total number of evictions during the second half of 2013 resolved in courts of First Instance was 18,077, of which 36.23% were due to mortgage foreclosures, 58.23% due to urban tenancies and 5.54% attributable to other causes.[825]

In addition to this, it should be pointed out that it is possible to extend the tenant's stay in the dwelling by a month following the eviction (art. 704 LEC) or for a longer term if the court considers that it is necessary to suspend the eviction.[826] Also the organisation "Stop desahucios" has managed to temporarily halt some evictions through mobilisations in the affected property itself.[827]

- **Are there problems of fairness and justice? Are there problems of access to courts, especially for tenants? What is the situation concerning legal fees, legal aid and insurance against legal costs?**

In our opinion, the main problem in this field is that the Administration does not have sufficient housing with a public task for rental purposes in popular areas with affordable prices for evicted people. As a consequence, once the eviction has taken place, there are many housing claimants whose essential needs might not be covered.
Moreover, the legislation does not provide people at risk of residential exclusion with measures to defend themselves within the eviction proceeding on the grounds of this cause. They are entitled to defend themselves only on the grounds of either payment or enervation (art. 440.3 LEC).
In addition to this, the evicted person must have paid the rent due and that which he is bound to pay in advance under the contract if he wants to lodge any remedy of appeal against the decree ordering the eviction (art. 449.1 LEC). Because of this, the possibility of claiming is difficult for those people with limited resources.

To this economic barrier, a court fee should be added since 2012[828] in order to be able to start either a tenancy or an eviction procedure,[829] which further increases the process expenses. The claimant shall pay the judicial fee. He may be either the

[824] The spokeswoman of the civil law section of the Barcelona Bar Association, Marta Legarreta, says that it is an uncertain term that can oscillate between four months and an indefinite period, depending on the court in which the eviction action is done. Even so, she sets the average at a year. Digital interview in La Vanguardia. Available in:
<www.lavanguardia.com/participacion/20130131/54364245331/marta-legarreta-plazo-medio-desahucio-un-ano.html>, 21 October 2013.
[825] Avaliable in the General Council of the Judiciary website <www.poderjudicial.es>, 6 november 2013.
[826] See section 6.5 *'Does the tenancy have "prolongation rights", i.e. the statutory right to stay for an additional period of time (outside the execution procedure)?', supra.*
[827] See section 6.8 'What is the legal status and what are the roles, tasks and responsibilities of associations of landlords and tenants?', supra.
[828] Regulated in the Ley 10/2012, de 20 de noviembre, por la que se regulan determinadas tasas en el ámbito de la Administración de Justicia y del Instituto Nacional de Toxicología y Ciencias Forenses (BOE 21/11/2012 núm. 280). And Real Decreto-Ley 3/2013, de 22 de febrero, por el que se modifica el régimen de las tasas en el ámbito de la Administración de Justicia y el sistema de asistencia jurídica gratuita (BOE 23/02/2013 núm. 47).
[829] Art. 2.a Act 10/2012.

landlord (eg. in the eviction process) or the tenant, if he brings a civil action in an urban tenancy process (eg. to claim the amount of maintenance works carried out according to article 21.3 LAU 1994). However, they are exempt from having to pay the judicial fee if they claim less than two thousand euros either in the oral trial or in the small claims procedure (art. 4.1.e Act 10/2012), when public legal aid is obtained (art. 4.2. Act 10/2012) or when a cause of subjective exemption takes place (art. 4.2 Act 10/2012). It must be taken into account that once all the claims of the claimant have been accepted, the proceedings' costs will be imposed on the defendant, according to articles 440.3 and 437.3 LEC, which may include the judicial fee (241.1.7 LEC). In addition, he shall also pay the corresponding judicial fee when either a remedy of appeal or an appeal in cassation is lodged.[830]

For instance, in order to start an ordinary trial concerning tenancy issues (arts. 249.1.6 LEC and 7 Act 10/2012), a fixed fee of 300€ shall be paid, plus a variable fee: when the applicant is a natural person, 0.1% of one year's rent will be applied (art. 251.9 LEC), with a limit of 2000€. For small procedures for rent claims (arts. 812 and 814 LEC) a fixed amount of 100€ will be paid, and in an eviction process either for non-payment or the expiry of the term (arts. 2 and 250.1.1 LEC) the fixed amount of 150€ shall be satisfied, and a variable fee for individuals of 0.1% of one year's rent (art. 7 law 10/2012).[831]

In civil jurisdiction, the costs and expenses of the proceedings may include (art. 241.1 LEC):

1. The lawyer's and court representative's (*procurador*) fees, if they are compulsory. However, the court clerk will reduce the amount of the fees of the professionals hired by the winning party, which may not exceed one-third of the amount of the process (art. 245.2 and 394.3 LEC).
2. The fees incurred in hiring specialists, such as experts.
3. Copies, certifications, notes, affidavits and other documents that have been requested of public registers, unless the Court requests them directly, in which case they shall be free.
4. Duties charged by notaries.
5. The publication of announcements or edicts that have to be published during the procedure.
6. The payment of compensation to witnesses who had claimed the same, and other expenses arising from the examination of the case.

The taking out of insurance policies is more and more common in order to cover the costs that may be incurred by the landlord in the management of the tenancy contract. Prices of policies can range between 80 and €200 yearly approximately, depending on the insurance coverage. It is possible that they only include legal defence for legal claims, and may also cover the partial or total amount of the due rent, and even acts of vandalism that may be committed by the tenant in the dwelling.[832]

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[830] According to Additional Disposition 15 LOPJ.

[831] When the applicant is a legal entity, in order to calculate the variable fee, 0.5% (from 0 to 1.000.000€) will be applied, and 0.25% for the remaining amount, with a limit of 10,000€.

[832] For example, the insurance provided by ARAG. Available at: <asesoriaseguros.net/Defensa%20Juridica%20Arrendador.html>, 24 October 2013.

- **How about legal certainty in tenancy law? (e.g.: are there contradicting statutes, is there secondary literature usually accessible to lawyers etc?)**

The main problem, as far as the legal certainty is concerned, is the coexistence of four legal regimes in the field of urban tenancies (1964, 1985, 1994, 2013). As a result, as has already been pointed out, the solutions to conflicts in many cases depend on when the tenancy agreement was concluded.[833] Therefore, the adoption of different regimes may place tenants in situations of comparative injustice, causing confusion. This situation has contributed to create a panorama of conflict in legal tenancy relationships that has increased litigation rates and unfair practices.[834]

Case law is important for tenancies because it determines the practical application of undefined legal concepts established by law, like for example the scope of the home's configuration, so as to determine either the works that the tenant may perform (art. 23 LAU 1994),[835] or the repairs that each party must make for the maintenance of the dwelling (art. 21 LAU 1994).[836]

The case law is accessible to lawyers through paid databases, such as Westlaw (www.westlaw.es), Tirant On line (www.tirantonline.com), Datadiar (www.datadiar.com) or Sepín (www.sepin.es*)*. Free search engines for jurisprudence may also be found, such as the one offered by the General Council of the Judiciary (www.poderjudicial.es).

- **Are there "swindler problems" on the rental market (e.g. flats fraudulently advertised on the internet as rental offers by swindlers to whom the flats do not belong)?**

The National Police Agency,[837] the Security Office for the Internet User[838] and FACUA[839] have warned about the increasing number of scams on the Internet aimed at people who are looking for dwellings for tenancy purposes.
To do so, dwellings for rent at affordable prices in downtown areas are offered on popular Internet sites, for example www.fotocasa.es or www.idealista.com. The typical features of the scam are: the landlord resides abroad, the money for the deposit is required prior to and in exchange for the subsequent sending of the keys of the dwelling to the tenant, and the visit to the dwelling before paying the price is not

[833] See section 6.4 *'For limited in time contracts', supra.*
[834] E. Llamas Pombo, Prólogo en *Ley de arrendamientos urbanos, comentarios y jurisprudencia doce años después*.
[835] See more 2.d in second part of questionnaire, *'Alterations and improvements by the tenant', supra.*
[836] See 2.d in second part of questionnaire, *'Who is responsible for what kinds of maintenance works and repairs?', supra.*
[837] As set out in 'La estafa del alquiler perfecto' in ABC, 18 June 2012. Available at: <www.abc.es/20120618/comunidad-galicia/abcp-estafa-alquiler-perfecto-20120618.html>, 29 October 2013.
[838] See <www.osi.es/es/actualidad/blog/2013/04/10/fraudes-online-ii-estafas-en-el-alquiler-de-viviendas>, 29 October 2013.
[839] Nongovernmental nonprofit organisation whose purpose is to protect consumers. See <www.facua.org/es/noticia.php?Id=4477>, 29 October 2013.

allowed. In addition, scams increase 20% during the summer compared to the rest of the year, as scams are extended to holiday dwellings.[840]

Scams targeting immigrants are also common, since it is a collective that has more difficulty in renting a dwelling. In this sense, tenancy contracts are formalised with third parties who do not know that the dwelling does not belong to the person who appears in the contract as the landlord. In many cases, they consist of dwellings already leased that are assigned to the victim of the scam without the real owner's consent, the victim then occupying the dwelling. The real owners of the dwelling subsequently evict them as soon as they are aware of the assignment (art. 27.c LAU 1994). In other situations, however, the victim does not even get to occupy the dwelling, which is only used to show it to him and to receive the amount of the deposit. Subsequent to the conclusion of the contract, when tenants come to the dwelling, the keys do not match and they cannot enter the property.[841]

- **Are there areas of "non-enforcement" of tenancy law (such as legal provisions having become obsolete in practice)?**

There are cases in which the case law or doctrine has had to clarify the applicability of certain tenancy rules, even contradicting the wording of the articles concerned. In this regard, the following must be highlighted:

a. Article 8 LAU 1994 sets forth that the tenant cannot transfer the lease or cannot sublease the property without the written consent of the landlord. However, the tacit or oral consent should be valid, due to the fact that, according to article 27.2.d LAU, the tenancy cannot terminate when it can be proven that the transfer or the sublease was done with the landlord's consent, regardless of the form given to that consent.[842]

b. For contracts agreed between 1 January 1995 and 5 June 2013, article 11 LAU 1994 only grants the tenant the right to withdraw from tenancy contracts with a duration of more than five years. However, the case law[843] has admitted that the tenant may withdraw before that time, but compensation is due to the landlord[844].

c. For contracts agreed between 1 January 1995 and 5 June 2013, article 15 LAU 1994 imposed the obligation to inform the landlord about the spouse's right to subrogate himself/herself in the tenancy contract in the event of separation, annulment or divorce when this is provided by a judgement or agreement. However,

[840] According to Antena 3 TV news on 22 August 2013. Available in: <www.antena3.com/noticias/economia/estafas-alquiler-aumentan-verano_2013082200200.html>, 29 October 2013.

[841] Several arrests have been made by the police due to this type of fraud. For example, 'Dos detenidos por estafar a inmigrantes con falsos contratos de alquiler' in *El País*, 20 September 2007. Available at: <elpais.com/diario/2007/09/20/madrid/1190287460_850215.html>, 10 December 2013.

[842] J. Ruiz-Rico Ruiz-Moron, 'El contrato de arrendamientos urbanos', 427- 428.

[843] SSTS of 2 October 2008 (RJ 2008\5586), 4 March 2009 (RJ 2009\2383), SSAP Tarragona 26 April 2011 (AC 2011\1306) and SAP Tarragona 9 November 2011 (AC 2011\123).

[844] See section 6.6 . In section A about the termination *'May the tenant terminate the agreement before the agreed date of termination (in case of contracts limited in time)', supra.*

the case law[845] established that the tenancy contract does not terminate due to the lack of this notification.[846]

As has already been pointed out, with the entry into force of the 2013 LMFFMAV, the last two assumptions mentioned have changed, and now they are adapted to the case law. In the former one, the Act establishes the possibility of withdrawing once the first six months from the conclusion of the tenancy contract have elapsed, although the landlord must be compensated (art. 11 LAU 1994). In the latter case, the spouse is recognised as the tenant if the use of the dwelling has been attributed to him/her (art. 15.1 LAU 1994).

- **What are the 10-20 most serious problems in tenancy law and its enforcement?**

1. The rental market is limited, since it only represents between 12% and 16% of the total housing stock, when nowadays and since 2007 the demand for rental housing is increasing because of those people in need of housing who are unable or unwilling to access housing through the homeownership type of tenure.[847] However, 13.7% of the dwelling stock remains empty in Spain[848] and those empty dwellings are primarily aimed at segments of middle and upper middle class demand, which does not coincide with the needs of the rental housing applicants who usually have limited economic resources. In such a way that, having empty dwellings in the market, there is an unsatisfied demand from a collective that is not eligible to occupy them.[849]

2. The market is not affordable, because those with the lowest income have difficulty paying the current market prices. The average price of a dwelling (€560)[850] is similar to the guaranteed minimum wage of a worker for the year 2013 (645€)[851], which means, at the end of the day, the allocation of more than 85% of the monthly income of a tenant to the payment of the tenancy (far beyond the recommended 30%). In addition, there is not enough social housing to meet the needs of those with low income.[852] As stated in the Eurostat youth report 2009[853], young people are the most disadvantaged sector of demand. Spain is the second country in Europe in which young people becomes independent later from the family unit because they cannot access housing at an affordable cost.

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[845] SSAP Madrid 15 September 2005 (PROV 2005\219775), Barcelona 28 February 2005 (PROV 2005\117582), Baleares 29 February 2008 (PROV 2008\340017) Cádiz 5 April 2011, FJ. 2 (AC 2011/1845).

[846] See more in section 6.4 'Changes of parties', supra.

[847] See section 1.3 *'Current situation', supra.*

[848] According to provisional data provided by Census on Housing (*Censo de Vivienda*) 2011, in Spain there are 3.443.365 empty dwellings, which represents 13.7% of the total stock.

[849] As set out by M. Pareja-Eastaway y T. Sánchez.Martínez, *Mercado de vivienda en España*, 42-43.

[850] For a 80 m2 dwelling, because the average price per m2 is 6.96€ according to FOTOCASA: Informe sobre el precio de la vivienda a octubre de 2013. Available in <www.fotocasa.es/indice-alquiler-inmobiliario__fotocasa.aspx>,11 December 2013.

[851] According to Real Decreto 1717/2012, de 28 de diciembre, por el que se fija el salario mínimo interprofesional para 2013 (BOE 31/12/2012 núm. 314).

[852] See section 2.2 *'Issues of price and affordability', supra.*

[853] Youth in Europe' (Eurostat, 2009), 31 <epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-78-09-920/EN/KS-78-09-920-EN.PDF.>, 11 December 2013.

3. It is a non-transparent market. In Spain more than 50% of leased dwellings are not declared to the treasury.[854] In addition, there is no compulsory administrative register allowing for the control of the existing tenancies or ensuring that tenancies are adapted to the law and do not contain unfair terms. However, with the 2013 LMFFMAV, a register of final decisions on unpaid rents ("register of defaulters") has been created (art. 3 Act 4/2013) and is currently under development.[855]

4. The state of repair of housing stock is one of the main problems that impede the rental of empty dwellings, being an aspect that affects homes in different ways. First, the deterioration that may occur during the tenancy because of a misuse is one of the main concerns for landlords, which in some cases means that dwellings remain closed. Second, the difficulties in judicially claiming rents also affect the status of leased dwellings, since the owner does not have the expected resources to maintain the dwelling in good conditions. In addition, the low prices of the dwellings governed by LAU 1964, despite the updates provided by the LAU 1994, discourage homeowners from rehabilitating them in order to keep them in good conditions, aggravating their deterioration.

5. In Spain there is a binomial between homeownership and tenancy as far as housing access is concerned, which poses problems when it comes to satisfying people's right to decent and adequate housing (art. 47 CE), especially for those who do not have sufficient resources to buy a dwelling or do not want to make the economic effort that it entails. In Catalonia, intermediate tenures are about to be regulated (shared ownership and temporal ownership), which are intended to be more flexible schemes granting more availability and stability in housing, while they are economically more affordable for users.[856]

6. In the LAU there coexist four different legal schemes to be applied depending on the date of conclusion of the contract. This situation has led to legal uncertainty, since it is difficult to know the legislation that governs the tenancy contract. And it has created a picture of conflict in tenancy relationships that has increased the litigation rates and unfair practices.[857]

7. Urban tenancy is regulated as a personal right, in which the tenant needs the landlord's collaboration in order to stay in the peaceful enjoyment of the dwelling. The tenant does not have a direct and immediate power over the thing, and it does not entitle him to alienate his right without the owner's consent or to burden it (i.e. sublease), unlike what is possible with the leasehold in common law jurisdictions. Therefore, his right to dispose and take action is limited, and for this reason it is not fully considered as a real alternative to homeownership.[858]

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[854] See more in section 1.5 *'Are there important black market or otherwise irregular phenomena and practices on the housing market (especially the rental market)?', supra.*

[855] See more in section 6.4 '*How can information on the potential tenant be gathered lawfully?', supra.*

[856] See section 1.4 *'Intermediate tenures', supra.*

[857] See section 6.4 'For limited in time contracts' and section 2.h 'How about legal certainty in tenancy law?' in the second part of questionnaire, supra.

[858] See section 6.1 *'Is the position of the tenant also considered as a real property right (and therefore also governed by property law) or (only) as a personal (obligatory) right?', supra.*

8. With the entering into force of the LMFFMAV 2013, the tenant´s stability in the dwelling decreases: the protection period is reduced from five to three years (art. 9.1) and the parties may freely agree on how the rent is updated (art. 18 LAU 1994) without establishing any indexing system that both limits the maximum rent and ensures the affordability of rental prices[859]. It is also possible to give up the right of pre-emption of tenants (art. 24 LAU 1994). The registration in the Land Registry is required to keep the protection period if the alienation of the property or the resolution of the right of the landlord takes place, with the corresponding economic cost (art. 13-14 LAU 1994) and a decrease in protection of those most vulnerable (eg. immigrants).

9. A differentiation of treatment is established with regard to tenants who conclude a tenancy contract with the owner and those who have contracted with either a holder of a right of usufruct, a holder of a right of surface or similar enjoyment rights (art. 13.2 LAU 1994). Thus, with the resolution of the landlord's limited right (usufructuaries or holders of a right of surface) the tenancy shall terminate, even if the tenant does not know in advance the time of extinction of his right, or even when there is no negligence on his part. This ignorance of the time of extinction also occurs in the trust of will or when the dwelling is encumbered with a mortgage, since it could be enforced at any time. Nevertheless, in these cases the tenancy shall remain if it is registered in the Land Registry, and for contracts agreed prior to 6 June 2013 the minimum of five-year extension should be respected.

10. Article 9.3 LAU regulates the faculty of the landlord to terminate the tenancy contract before the end of the renewal period because of his need to use the dwelling, or the need of his relatives by consanguinity or adoption up to the first degree to use the dwelling. The landlord has three months to occupy the dwelling, but on the other hand, the minimum time within which the landlord has to occupy the dwelling is not established, which can involve a fraudulent use, by transferring the dwelling immediately after his occupation.

11. It is not appropriate that the breach of the notification requirement prevents the subrogation for those who have this right recognised in articles 12 and 16 LAU 1994, for cases of the tenant´s withdrawal or death, because a formal requirement is put ahead of their housing need. In addition, in cases of subrogation by annulment, separation and divorce, this effect has been surmounted by recognising the ownership of the spouse or partner, provided that the right of use on the dwelling exceeds the term of the tenancy, but it has remained in place for the rest of cases.[860]

12. The eviction processes can last more than one year if they are assigned to a court with a high workload. Therefore, they cannot meet the stipulated deadlines and the simplifications made are not effective to reduce the duration of processes.[861]

13. The opposition causes exercisable by the tenant, enervation or payment (art. 440.3 LEC) can put him, sometimes, in situations of vulnerability and inequality, since

[859] See more in section 6.4 *'Rent payment', supra.*
[860] See section 6.4 '*Subletting', supra.*
[861] *'Do procedures work well and without unreasonable delays?' Supra.*

he cannot discuss, for example, a breach of the landlord´s obligations related to the dwelling's maintenance.[862]

14. The LAU 1994 allows the parties to submit to alternative dispute resolution processes, in particular, arbitration and mediation (art. 4.5 LAU 1994). However, according to the current regulation on mediation, its application when a consumer or the administration intervenes is questionable. If they are excluded, its scope of application is substantially reduced.[863]

- **What kind of tenancy-related issues are currently debated in public and/or in politics?**

The legislative amendments on housing have shown the problems that public authorities have discussed and raised in the Parliament. In this sense, the main concern has been to find a more flexible scheme that creates a different balance between the rights and obligations of the parties to the one established in 1994 by the LAU. To achieve that, the LMFFMAV 2013 was adopted, which regulates, on the one hand, more options for the parties (eg. rehabilitation for rent, mediation, register of professional defaulters) but, on the other hand, less rights for tenants (eg. shorter protection period, lack of compulsory indexation of rent renewal, etc.). These measures might contribute to the professionalisation of the tenancy market, which is aligned wit the zero taxation reform for the SOCIMI by the end of 2012.

Thus, the majority of the adopted measures aim to protect the landlord's interests in order to foster the rental sector. However, the reduction of the forced extension term, the possibility for the landlord of freely increasing the rent through an update agreement in the contract or the possibility of giving up the right to pre-emption, are measures that probably, and from our point of view, are not going to achieve the intended purpose, if we take into account that they do not provide stability and certainty to the tenant, and they do not facilitate access to decent and adequate housing.

For this reason, the main concerns raised publicly about the tenant are to promote his stability and to get tenancies at affordable prices. On the other hand, for the landlord it is essential to improve the efficiency of the eviction process and to get aid for rehabilitation or measures that may provide a better maintenance of the dwelling.

In this sense, the inefficiency of the eviction process and the courts' workload concern the legislative and public opinion. For this reason, the procedure legislation has been reformed to reduce deadlines and simplify the process.[864] However, to achieve the intended purpose, it is essential to reduce the courts' workload. With this intention, mediation and arbitration are introduced in the LAU 1994 through the LMFFMAV 2013. In this sense, it is necessary to encourage the use of these ADR mechanisms, establishing cheaper and agile procedures that are resolute, fair and affordable for the parties.

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[862] *'Rules on protection ("social defences") from eviction', supra.*
[863] *'How are tenancy law disputes carried out?', supra.*
[864] See section 5 *'What were the principal reforms and their guiding ideas up to the present date?', supra.*

7 Analysing the effects of EU law and policies on national tenancy policies and law

7.1 EU policies and legislation affecting national housing policies

The EU has no direct competence on housing, but Member States are responsible for regulating and implementing housing policies. However, EU commitments in this field are more and more common. The EU has adhered to the commitments set out in the II Conference on the Human Settlements Habitat, held from the 3rd to the 14th of June 1996 in Istanbul, under the heading 'an adequate housing for all', and it intends to move the proposals raised in the meeting to the European context: to provide security of tenure, to promote the right to decent housing, to ensure equal opportunities concerning access to land ownership and to credit access, and to encourage access to basic services.[865]

In this sense, the influence of European legislation in State policies is associated with cross-cutting aspects, as will be seen below in section 7.2, since housing is not only a right to be ensured but also a core element in the development of other fundamental and human rights.[866]

Initially, housing was present in the European regulations on tax harmonisation, which tried to unify the different national views of the notion of social housing in such a way that it could be incorporated into the same list with basic services and goods, which deserved a lower tax rate (tax incentives). And it was also present in the legislation on competition in the Community market.[867]

Currently, the strategies and guidelines of the EU have greater impact into two fields related to housing policy:

a) Social exclusion: in the fight against spatial segregation, inclusion of the special needs of specific social groups (immigrants, seniors, young people or the disabled) or the participation procedures in the management of housing as a means of social integration.

b) And in urban policies, from a sustainable and environmental point of view, giving priority to care for the environment and the existing city against an excessive growth. There is a special interest in the integrated rehabilitation of neighbourhoods[868] and in the improvement of the energy efficiency of buildings.

7.2 EU policies and legislation affecting national tenancy laws

7.1 and 7.2 are supposed to include:

[865] As set out in R. Rodriguez Alonso, 'La política de vivienda en España desde la perspectiva de otros modelos Europeos', 2.
[866] R. Rodriguez Alonso, 'La política de vivienda en España en el contexto europeo,'134.
[867] OBSERVATORIO VASCO DE LA VIVIENDA: Informe sobre la política de vivienda y las cooperativas de vivienda en Europa (June 2012), 6.
[868] R. Rodriguez Alonso, 'La política de vivienda en España en el contexto europeo,'134.

- **EU social policy against poverty and social exclusion**

EU competence in the social sphere is based on Title X of the consolidated version of the Treaty on the functioning of the European Union (TFEU).[869] However, it was at the Lisbon European Council, in March 2000, where a strategy was undertaken concerning the fight against poverty in the framework of sustainable economic development, job creation and social cohesion. Although competence in housing policies corresponds to the Member States, social housing is provided for in the Green Paper on services of general interest.

Social housing is a basic service that plays a preventive and social cohesion role, which facilitates social inclusion and ensures the fulfilment of fundamental rights. Social housing must allow housing access to people of low income.[870] Thus, article 34.3 ECHR grants a right to citizens who do not have enough resources to get housing aid that would guarantee them a decent life. However, Member States are in charge of implementing the public policies to ensure its compliance.[871]

In this sense, article 26 EAC also establishes that the right to housing shall be ensured for those people with insufficient economic resources. But currently, with less than 2% of social rental housing in Spain[872] and 21% of the Spanish population living on the poverty threshold, these demands can hardly be fulfilled.[873] However, there are various public programmes aiming at encouraging social housing for those groups who are most in need. These programmes include, for example, housing in rotation (art. 14 PEFAV 2013-2016), the '*Pla de Xoc*'[874] (Emergency Plan), which aims to rent 3,264 protected dwellings managed by the Catalonian government (*Generalitat de Catalunya*) which are currently empty, and in this same autonomous community, the 'social inclusion housing and accommodations programme' (art. 88 to 93 PDVC 2009-2012), which aims to transfer social housing for rental purposes to local entities so that they can serve social emergency situations.

The 'Leipzig Charter on Sustainable European Cities' of 2007 highlights the importance of housing stock renewal as an element for enhancing the residents' quality of life and social cohesion and inclusion in cities, thus contributing to the stability of the neighbourhoods.[875] In this regard, the European Social Fund (ESF) established for the period 2007-2013 funding for several social actions focused mainly on reducing disparity between cities and neighbourhoods and between different social groups (young people, women, immigrants, ethnic minorities) and on

[869] OJEU 30/03/2010 Nº C 83/49.
[870] E. M Juan Toset, *La política de vivienda en Europa. Consideraciones desde la perspectiva de los Servicios Sociales de interés general* Vol. 25-2 (Cuadernos de Trabajo Social, 2012), 452-453.
[871] See section 5 *'To what extent was tenancy law since its origins influenced by fundamental rights enshrined in the national constitution and/or international instruments, in particular the ECHR?', supra.*
[872] 'Housing Statistics in the European Union. Income and Living Conditions', (Eurostat, 2010).
[873] See section 3.4 '*Are the different types of housing regarded as contributing to specific "socio-urban" phenomena, e.g. ghettoization and gentrification', supra.*
[874] Available at: <www.gencat.cat/especial/plaxochabitatge/ca/index.html>, 7 November 2013.
[875] E. M Juan Toset, La política de vivienda en Europa. Consideraciones desde la perspective de los Servicios Sociales de interés general, 453.

achieving job creation, improving construction sector training and redirecting it to the rehabilitation of the social housing stock in the most deprived urban areas.[876]

This focus on a social approach in housing policy was reinforced in 2010, because it was the year of the fight against poverty in Europe. Strategy 2020 of the EU sets as a target to reduce by 20 million the number of people at risk of poverty. The European Parliament agreed in April 2010 the eligibility criteria of the Structural Funds for housing expenses in slums that are to apply to all the Member States. And, additionally, Member States enacted in 2010 the Toledo Declaration, highlighting Integrated Urban Regeneration as a strategic instrument to achieve a smarter, more sustainable and socially more inclusive urban model. For this reason, in the 2014-2020 programming period, the European Commission proposes the establishment of a Common Strategic Framework aimed at allowing a better combination of different Structural Funds to maximise the impact of EU investments. The concept of urban area that is going to be used for the implementation of the Structural Funds will be wide, ranging from the smallest neighbourhood or district to broader functional areas such as city-regions or metropolitan areas that include rural surroundings. In order to develop these strategies, each Member State shall allocate at least 5% of the FEDER resources by means of the Integrated Territorial Investment (ITI) to urban regeneration of cities chosen by each Member State, and this budget shall be directly managed by the cities.[877]

The main problem concerning empty housing in Spain is their poor condition. Urban rehabilitation, regeneration and renewal aid have been approved in the PEFAV 2013-2016 in order to deal with the problem of public housing stock degradation, and it will be co-financed with the FEDER operational programmes (art. 5.2 PEFAV 2013-2016).

- **consumer law and policy**

The EU's concern about creating a single consumer protection framework in Europe is reflected in the review and transformation process of the different consumer Directives. Directive 93/13/EEC[878] sets the cases where there are unfair terms in contracts concluded with consumers. It was transposed in Spain through Act 7/1998, of 13th April, concerning general terms and conditions of business, which defines and lists the terms that might be considered unfair through an amendment of the General Law for the protection of consumers and users (first additional provision of Act 7/1998).[879] There are quite a lot of standards on consumer protection, both at the State and at the European level. It must be taken into account that, in Spain, RD 5151/1989 is in force, which specifically governs the information that must be supplied to consumers in tenancy and purchase housing contracts. It shall also need

[876] OBSERVATORIO VASCO DE LA VIVIENDA: Informe sobre la política de vivienda y las cooperativas de vivienda en Europa (junio 2012), 8.
[877] OBSERVATORIO VASCO DE LA VIVIENDA: Informe sobre la política de vivienda y las cooperativas de vivienda en Europa (junio 2012), 12-20.
[878] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJEC 21.04.1993 No. L 095).
[879] See section 6.3 *'control of contractual terms', supra.*

to be compatible with the fine points introduced by RDL 1/2007, and with the regional regulations in this field, which apply preferably over the State regulations.[880]

Directive 2011/83/EU[881] has been recently enacted, on consumer rights, amending Directive 93/13/EEC, on unfair terms in consumer contracts, and Directive 1999/44/EC[882]. Furthermore, it repeals Directive 85/577/EEC[883], on the protection of the consumer with regard to contracts negotiated away from business premises, and Directive 97/7/EC[884], on the protection of consumers with regard to remote contracts, incorporating such legislation to the new regulation. Spain has not transposed Directive 2011/83/EU yet, but it is under parliamentary consideration through the Law Project to amend RDL 1/2007[885], which will incorporate the amendments brought by the aforementioned Directive. These amendments will not affect housing contracts, but only contracts concluded with real estate agents or those involving premises.

There is, in addition, other European legislation which has been transposed into the Spanish legal system recently. This is the case of Directive 2008/48/EU, on credit agreements for consumers,[886] transposed by Act 16/2011[887]; and the case of Directive 2008/122/EU, on the protection of consumers with regard to certain aspects of timeshares, long-term holiday products, resale and exchange contracts,[888] which was transposed by Royal Decree-Law 8/2012.[889]

There are also other recent initiatives at EU level, such as the proposal for a Directive on credit agreements relating to residential property[890], which aims, first of all, to ensure that consumers, lenders and credit intermediaries benefit from an efficient and competitive single market with a high level of protection. This will boost consumer confidence, consumers' mobility and cross-border activity of lenders and credit intermediaries, as well as fair competition; and at the same time the fundamental rights enshrined in the ECHR will be respected, in particular the right to

[880] See more in section 6.2 *'Ancillary duties of both parties in the phase of contract preparation and negotiation'* and 6.3 *'Limitations on freedom of contract through regulation'*, in the second part of the questionnaire', *supra.*

[881] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (OJEU 22.11.2011 No. L 304/64).

[882] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJEC 07.07.1999 No. L 171/12).

[883] Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in contracts negotiated away from business premises (OJEC 31.12.1985 No. L 372)

[884] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in remote contracts (OJEC 04.06.1997 No. L 144)

[885] Law Project of RD Legislative 1/2007 amendment, of 16 of November, *Texto Refundido de la Ley General para la Defensa de Consumidores y Usuarios* (BOCG 25/10/13 núm. 71-1).

[886] Directive 2008/48/EC of the European Parliament and of the Council, of 23 April 2008, on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJEU 22.05.2008 No. L133/66).

[887] Act 16/2011, of 24 June 2011, *de contratos de crédito al consumo* (BOE 25/06/2011 Nº 151).

[888] Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers with regard to certain aspects of timeshares, long-term holiday products, resale and exchange contracts (OJEU 03.02.2009 No. L 33/10).

[889] Royal Decree-law 8/2012, of 16 March 2012, *de contratos de aprovechamiento por turno de bienes de uso turístico, de adquisición de productos vacacionales de larga duración, de reventa y de intercambio* (BOE 17/03/2012 Nº 66).

[890] Proposal for a Directive of the European Parliament and of the Council, of 31 March 2011, on credit agreements relating to residential property (COM (2011) 142 end).

personal data protection. The second aim is to promote financial stability, ensuring a responsible functioning of the mortgage credit markets.

Furthermore, the Community action for consumers' policy programme (2007-2013) must be pointed out, which aims to ensure a high level of consumer protection in all Member States, specifically improving consultation and representation of the consumer interests, and ensuring the current implementation of consumer protection rules, in particular by strengthening cooperation in the implementation of the legislation, information, education and avenues of appeal.[891]

It is also important to highlight the recent judgement of the European Union Court of Justice of 14th March 2013,[892] which considers abusive any judicial process that involves the loss of housing by a consumer when the latter cannot allege the existence of unfair terms in mortgage contracts.[893] Numerous foreclosures in Spain have been halted on the basis of this ruling. And it should be pointed out that the eviction proceeding, like foreclosure, is a summary proceeding in which opposition causes are *numerus clausus* (enervation or payment) and the inclusion of unfair terms in the contract cannot be alleged. So, in our view, it could also involve a breach of the aforementioned Directive 93/13/EEC.

Act 1/2013, of 14th of May, concerning measures to strengthen the protection of mortgagors, debt restructuring and social rental[894], is enacted in order to adapt Spanish legislation to the judgement of the European Union Court of Justice of 14th March 2013. This Act amends art. 561.1.3 LEC, setting out that in the foreclosure procedure the judge may remove a clause that sets abusive interest rates, preventing the creditor from claiming any amount for that concept, or declaring the foreclosure inadmissible. Courts are opting for removing the unfair clause and proceeding with the foreclosure. However, there are disagreements about whether it is possible to modulate/moderate unfair terms relating to interest for late payment by applying the maximum of three times the legal interest established in article 114 LH, amended by the new law, or if on the other hand it is not possible, and thus, interest for late payment must not be charged. This latter option seems to be the most appropriate one according to judgements of the European Union Court of Justice of 14th June 2012 [895] and of 30th May 2013.[896]

With regard to urban tenancies, the case law of the Spanish Supreme Court[897] provides that the deposit in a tenancy contract cannot be considered an unfair term only because the amount is high. To talk about an unfair term, the deposit needs to

[891] Decision No. 1926/2006/EC of the European Parliament and of the Council, of 18 December 2006, establishing a programme of Community action in the field of consumer policy (2007-2013). (OJEC 30.12.2006 No. L 404)
[892] TJCE 2013/89.
[893] However, the Spanish Constitutional Court declared that in the mortgage proceeding the right of defence was guaranteed, and an exception of unconstitutionality on arts. 579, 695 and 698 LEC was refused, explaining that the lack of procedural contradiction in that proceeding did not cause defencelessness, because there could be a declaratory trial later (ATC of 19 July 2011, RTC 2011\113).
[894] BOE 15.05.2013 Nº 116.
[895] TJCE 2012\143.
[896] TJCE 2013\145.
[897] SSTS of 31 January 1998 (RJ 1998\121) and of 20 November 1996 (RJ 1996\8371).

be disproportionate in relation to the risk assumed or the clause needs to lack clarity or simplicity in the wording so that it turns out to be unclear or confusing in its content.[898]

- **competition and state aid law**

The European Commission, by means of the competition law, monitors that aid provided by the Member States is compatible with the common market. In this sense, aid affecting trade between Member States and aid that in any way distorts or threatens to distort competition by favouring certain undertakings or productions will be considered incompatible with the common market (art. 107 TFEU).[899]

For this reason, apart from the exceptions expressly provided for in EU law, Member States have the obligation to inform the European Commission about draft schemes approving or amending public aid. Moreover, to proceed with the aid implementation, States shall wait until obtaining the European Commission's authorisation. If it is declared that aid infringes Community competition law, it shall be amended or removed by the State. If this State does not comply with this decision within the stated period, the Commission or any other interested State may appeal to the Court of Justice (art. 108 TFEU).

In this regard, it could be wondered if aid granted to the financial sector, both in Spain and in the EU, has affected the EU internal market, distorting competition in the sector. However, representatives of the National Competition Commission have justified such aid by considering it an exceptional measure in the monitoring of public aid approved as a response to the systemic risk that a possible collapse of the financial system would entail for the European economies. Furthermore, these measures are considered to be temporary and reversible. Moreover, aid shall be accompanied by obligations and commitments to be assumed by financial institutions which receive aid so that, once the economic situation becomes stable again and the exceptional situation ends, balance in markets can be restored.[900]

In the housing sector, there are cases in which a Member State has granted a State aid to certain developers or builders and the European Commission has considered that it distorts the internal market and favours certain undertakings. For example, aid granted by the Basque Government to the building contractor Demesa. In this particular case, Demesa benefited from a free occupation of a land for the construction of real estate (between February and October 1997), a non-refundable grant of 25% of the investment made (2,958,900,000 pesetas, about €17.8 million) granted by the Basque Government, 45% tax credit in the corporate tax granted by the Regional Government of Álava, and a 25% to 99% reduction in the tax base of the corporate tax. The European Commission found that this aid distorted competition and trade between Member States and favoured a particular producer. It also declared article 26 of the Provincial law of Álava 24/1996, of 5th July, on

[898] In this same sense, there is the SAP of Madrid of 9 May 2003 (JUR 2003\254506).
[899] References made to articles 107 and 108 TFEU correspond to former articles 87 and 88 TEC.
[900] L. Berenguer Giménez, 'El derecho de la competencia en un marco de crisis global', *Revista de la Facultad de Ciencias Sociales y Jurídicas núm. 6-2010* (Marzo 2010): 10. VLEX-214369241.

corporate tax[901], incompatible with the common market. The judgement of the Court of first instance of the European Union of 6th March 2002[902] annulled part of the Community Decision, upholding it for the rest, as the price paid by Demesa was considered to be the market price and because the Commission did not sufficiently prove the advantage allegedly received.[903]

It must be taken into account that the Directorate-General for Competition recognised social housing in 2005 as an economic service of general interest in cases where State legislation contemplates it. In these cases, State aid to providers of social housing is, in principle, considered compatible with the Community regulation on competition.[904]

In this regard, Decision 2005/842/EC, of 28th November 2005, of the European Commission treats differently State aid granted to housing associations when it is aimed at social housing than when, on the contrary, it is intended for free-market housing. In this sense, the advantage given to social housing providers is justified by the public task they perform, and it is, therefore, not contrary to the competition Law. However, it may be contrary to this Law when aid or guarantees granted by the State to these providers is destined for free-market housing. Accordingly, the Commission gives a definition of what is considered as social housing, so as to not consider the granting of aid a market distortion to the detriment of the other providers of the State. This notion involves 'social housing for disadvantaged groups or socially excluded groups who are unable to find housing on the open market owing to solvency limitations'. For this reason, the Decision of the European Commission of 15th December 2009[905] sets out the conditions in which housing associations in the Netherlands can be granted State aid (in this case there are different levels of guarantee, such as WSW and CFV, or discounted land) without contravening European legislation on competition. Thus, the Decision states that in the Netherlands, each year, 90% of housing available must be allocated to households with an annual gross income below 34,229€.

- **tax law**

Fiscal stability in the EU has been achieved due to convergence criteria set out in the Maastricht Treaty, and it is guaranteed by the Stability and Growth Pact adopted in Amsterdam in June 1997.

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[901] This decision was appealed by the Regional Government of Álava (issue T-127/99), by the Basque Government and «Gasteizko Industria Lurra, S.A.» (issue T-129/99), and by Demesa (issue T-148/99) before the Court of first instance of the European Union. Subsequently, this judgement was appealed by both the Regional Government of Álava and by Demesa before the European Union Court of Justice (issues C-183/02-P and C-187/02-P, respectively), who dismissed the appeals by Judgement of 11th November 2004 (TJCE 2004\326).

[902] TJCE 2002\92. Other judgements ruled on this same case and on the same day: judgements TJCE 2002\93 and TJCE 2002\94.

[903] J. I. Moreno Fernández, 'La autonomía de las regiones y el derecho comunitario: los beneficios fiscales autonómicos como potenciales «ayudas de estado» contrarias al mercado común' en *Estudios en homenaje al Profesor Pérez de Ayala* (Junio 2008): 50-52. VLEX-38907641.

[904] OBSERVATORIO VASCO DE LA VIVIENDA: Informe sobre la política de vivienda y las cooperativas de vivienda en Europa (junio 2012), 6.

[905] C(2009)9963 final.

One of the first areas through which EU legislation affected housing policies was the European regulation on fiscal harmonisation. It fixed a single reduced VAT rate for housing sales, which evidenced the relevance of having a harmonised definition of social housing for all the Member States. To do that, the heads of State and Government adopted, by common agreement, the following social housing definition: 'supply, construction, renewal and modification of housing provided as part of social policies'. This definition was aimed at bringing together the different national views on the social housing concept in such a way that it was included in the same list as basic services and goods, which deserve a lower tax rate.[906]

In this sense, for the purchase of new housing and its annexes (up to two car park spaces included in the same deed of acquisition) a super reduced VAT rate of 4% is set by the fourth transitional provision of Royal Decree-Law 9/2011, since its entry into force and until the 31st of December of 2011, and Royal Decree-Law 20/2012[907] extended this benefit, in its fifth final provision, until the 31st of December of 2012.

Nevertheless, RDL 20/2012 removes this super reduced rate for the acquisition of a main residence from the 1st of January of 2013 and on, when acquisitions of new housing began to be taxed at a 10% VAT rate (art. 91.1.7º LIRPF). The explanatory memorandum of RDL 20/2012 sets out that "fiscal adjustment measures are essential at this time as a reinforcement of those already included in the latest update of the Stability and Growth Programme 2012-2015 in order to ensure that Spain strictly meets its fiscal commitments under the excessive deficit procedure established by the European Union. The tax amendment provided by Spain in the Stability and Growth Programme 2012-2015 derived from the ECOFIN meeting of the last 10th of July".

In this regard, tax relief in personal income tax for the purchase of a main residence, which had been useful in a year of specially weak demand for home ownership, was also removed as of 1st of January 2013. From an overall perspective, these measures comply with most of the specific recommendations made by the European Council to Spain in June and they are complemented with the European Semester, according to the explanatory memorandum of RDL 20/2012. The deduction for investment in a main residence has been eliminated by Act 16/2012, of 27 of December, adopting different tax measures aimed at consolidation of public finances and at promoting economic activity.[908]

It should be taken into account that home purchases have been significantly affected by tax evasion, as recognised in Act 36/2006, of 29th of November, concerning measures to prevent tax fraud.[909] It was usual in Spain, especially during the real estate boom (1997-2007), to set a selling price, in the public deed of sale, that was lower than the one actually paid by the purchaser. The main reason was to reduce

[906] OBSERVATORIO VASCO DE LA VIVIENDA: Informe sobre la política de vivienda y las cooperativas de vivienda en Europa (junio 2012), 6.
[907] Real Decreto-ley 20/2012, de 13 de julio, de medidas para garantizar la estabilidad presupuestaria y de fomento de la competitividad (BOE 14/07/2012 núm. 168).
[908] BOE 28.12.2012 Nº 312. About the current taxation on housing, see section 3.7 *'Taxation'*, *supra*.
[909] BOE 30.11.2006 Nº 286

the payment of taxes and fees. Furthermore, this 'malpractice' was even carried out inside notarial offices.[910]

Within the scope of policies aimed at promoting home rental, Spain also amended the taxation on leasing through Act 39/2010, of 22nd of December, on the General State Budget for 2011,[911] which amends article 68.7 LIRPF, boosting the deductions for the rental of main residences. Thus, tenants with a tax base below €24,107.20 per annum are allowed to deduct 10.05% of the amounts paid for the rent of their main residence.[912] This tax advantage would probably bring to surface rents that were submerged up to that point (55% of tenancies are currently not declared to the State Tax Administration Agency).[913]

- **energy saving rules**

EU policies on energy have aimed at promoting energy security and at combating climate change. In order to do so, the EU aims to achieve compliance with some targets that allow for a significant reduction of the emission of greenhouse gases, an increase of the use of renewable energy and energy efficiency by 2020.

In this sense, the EU has implemented action plans like the policy of energy efficiency in buildings,[914] providing that by 2020 all buildings constructed should have negligible power consumption. Moreover, it has set out standards for consumer protection in the energy sector, and social policies have been adopted aimed at achieving access to electricity and gas at affordable prices for the most disadvantaged or groups at risk of exclusion, by means of social bonds.[915]

Directive 2002/91/EC on the energy performance of buildings already included help lines to share experiences on how to improve building renovation methods, more efficient building materials, eco-efficient renovation and incorporation of renewable energy to the buildings. Apart from subsidies from the Structural Funds of the EU 2014-2020, other alternative financing sources are earmarked for this. The European Regional Development Fund ERDF enables Member States to cofinance local, regional and national programmes aimed at disadvantaged groups living in housing that requires an improvement of insulation conditions, the installation of solar panels and the replacing of old boilers. Additionally, the Jessica programme was created by the European Commission and developed in collaboration with the European Investment Bank (EIB) and the Council of Europe Development Bank (CEB) for the creation of specific loans to directly finance urban development programmes aimed at the improvement of energy performance in the Member States.[916]

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[910] 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', *in press*.
[911] BOE 23.12.2010 Nº 311
[912] Regarding deductions for the rental of main residences, see section 3.7 *'Taxation'*, *supra*.
[913] See more in section 1.5 *'Are there important black market or otherwise irregular phenomena and practices on the housing market (especially the rental market)?', supra.*
[914] See section 6.1*'Regulation on energy saving',* of the second part, *supra.*
[915] See more in section 3.5 *'Energy policy', supra.*
[916] OBSERVATORIO VASCO DE LA VIVIENDA: Informe sobre la política de vivienda y las cooperativas de vivienda en Europa (junio 2012), 9-11.

Several European directives have been transposed in Spain in order to achieve the proposed objectives and try to benefit from the actions eligible for support to promote buildings' renovation and the improvement of their energy performance. Accordingly, PEFAV 2013-2016 approves public subsidies for those who carry out rehabilitation, regeneration and urban renewal works in their homes or buildings, and to improve their energy performance.[917]

According to article 4 of Directive 2012/27/EU, Member States shall submit national action plans for energy performance every three years. Plans will be established by which actions and mechanisms to achieve the EU aims are set, like for example, the minimum target of 9% energy savings by 2016. By 2020, primary energy savings must be 20%. As a consequence of this obligation, the Ministry of Industry, Tourism and Trade, in collaboration with the IDEA, has developed the Energy Saving and Efficiency Action Plan 2011-2020.[918] According to the Plan, in terms of primary energy, savings achieved in 2010 imply reaching 71.5% of the saving proposed by the previous Action Plan for the 2012, when there still remains two years for its completion. This political strategy is reinforced with the National Action Plan for Renewable Energy (PANER - *Plan de Acción Nacional de Energías Renovables*) 2011-2020, which has also been sent to the European Commission to comply with Directive 2009/28/EC of the European Parliament and of the Council, of 23rd April 2009, on the promotion of the use of energy from renewable sources.[919] Both Plans are the key to facilitate the achievement of a more efficient and sustainable energy model.[920]

Regarding the penalty system derived from the energy performance certificate, Act 8/2013 sets fines of 300€ to 6,000€ for any infringements that may be committed, eg. for falsifying information on the energy performance certificate issuance or registration, or to advertise in the sale or rent an energy performance qualification that is not supported by a valid certificate duly registered (third and fourth additional provision).

In addition, civil consequences for the breach of these duties may arise. This could lead to the annulment of the tenancy contract if it is proven that the consent of the tenant was flawed (misrepresentation or willful misconduct). For example, if the latter provides evidence that the home does not have the energy qualification promised by the lessor, creating false expectations for the tenant, who would not have rented the home if he had been aware of such fact.[921] The tenant may also require forced compliance, i.e., to compel the landlord to get the promised energy qualification (art. 1124 CC). Alternatively, this could entail defective performance of the tenancy contract if hidden defects are proven to exist (art. 1484 and 1553 CC), which could lead to the tenant's withdrawal, with the corresponding compensation for damages if

[917] See section 6.1 *'Regulation on energy saving'*, of the second part, *supra.*
[918] It includes an annex with the quantification of energy savings obtained in 2010 in comparison with 2004 and 2007, in accordance with the methodological recommendations on measurement and verification of savings from the European Commission.
[919] OJEU 05.06.09 No. L 140.
[920] Institute for Energy Diversification and Saving (IDEA - *Instituto para la Diversificación y Ahorro de Energía*): Analysis of energy consumption in the residential sector in Spain: SECH-SPAHOUSEC Project (July 2011), 7.
[921] According to SSTS of 9 May 1996 (CENDOJ 28079110011996102173) and of 3 June 2003 (CENDOJ 28079110012003102170).

the lessor's bad faith is proven, or to a rent reduction in proportion to the defect proven by means of an expert report (art. 1486 CC).[922]

- **private international law including international procedural law**

When the conflict is about possession, ownership or other rights over real estate, including tenancy, that is located in Spain, international judicial competence will be subject to the exclusive jurisdiction of the Spanish courts (art. 22.1 RBI[923] and art. 22.1 LOPJ).[924] Nevertheless, for tenancy contracts involving real estate for a particular use, which in Spain is considered for non-housing use because its maximum duration is six consecutive months, the courts of the Member State in which the defendant is domiciled will have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State (art. 22.1 RBI).

If the parties have not chosen the law applicable to contracts for the sale of goods or for the provision of services, this shall be determined according to the country where the seller or the service provider has his habitual residence. Contracts relating to real estate shall be governed by the law of the country where the property is located, except in cases of temporary and private tenancies for a period of six consecutive months at a maximum. In these cases, the contract shall be governed by the law of the country where the landlord has his habitual residence, as long as it is the same place where the tenant has his habitual residence (art. 4.1.c and d RRI[925] and art. 10.1 CC). Contracts for the sale of goods by auction shall be governed by the law of the country where the auction takes place (art. 4.1.g RRI).

Consequently, when there is a foreign element in the contractual relationship, Spanish law will be applicable if it is agreed by the parties, or failing this, when the real estate that is the subject of the dispute is situated in Spain[926] or when it is auctioned in our country. For tenancy contracts for a particular and private use of a maximum duration of six months, Spanish law will apply when landlord and tenant have their residence in Spain.

In the event that none or several of the above rules apply to a contract, it will be governed by the law of the country in which the seller or the service provider has his

[922] See section 6.5 *'Defects of the dwelling', supra.*
[923] Council Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (OJEC 16.01.2001 No. L 12) (RRI).
[924] In this sense, there is the judgement of the Court of Justice of the EU of 3 October 2013 (TJCE 2013\305).
[925] Regulation No. 593/2008 of the European Parliament and of the Council, of 17 June 2008, on the law applicable to contractual obligations (OJEU 04.07/.2008 No. L 177) (RRI).
[926] As set out by STS of 19 June 2011 (RJ 2012\28008), which highlights "that the choice of the good's location as a connecting point offers a number of advantages, since it allows one to match legal location with the material and physical location of the goods, it brings to light the State's interest in monitoring the creation, transfer and modification of rights in rem over goods situated in its territory and it is the expression in Private International Law of the safeguarding of the security of legal transactions".

habitual residence. However, if the contract is more closely linked with a country other than the one suggested by the rules, the law of that country shall apply. This same principle shall be followed when the applicable law cannot be determined (art. 4.2, 3 and 4 RRI).

- **anti-discrimination legislation**

The EU has developed different common legislation to combat discrimination based on sex, race or ethnic origin, religion or convictions, age, disability or sexual orientation.[927] Although a legal framework against discrimination has been set up within the EU, it is necessary to ensure that it is applied effectively, since discrimination based on race has increased in recent years. In this sense, the EU created a programme Community action to fight against discrimination[928] that supports certain measures in order to challenge discriminatory behaviour and promote cultural development. Its objectives are to "improve the understanding of issues relating to discrimination, develop the capacity to prevent and address discrimination effectively, in particular through support via the exchange of information and good practice, and to promote and disseminate the values and practices underlying these efforts, including through the use of awareness-raising campaigns".[929]

In this regard, as we have seen above, the EU protects access to housing from acts of discrimination on grounds of sex, sexual orientation, race or nationality, because housing is an essential asset and not having access to it is clearly a problem of social exclusion.[930]

In Spain, article 14 CE foresees the fundamental right not to be discriminated against on grounds of age, race, sex, religion, opinion or any other condition or personal or social circumstance. Spain also includes housing among the goods offered to the public that are subject to the prohibition of discrimination (art. 29 Act 62/2003), in compliance with Directive 2000/43/CE. However, as we have seen above, it is regulated generically, without determining the specific situations which may be considered discriminatory. This is the case of the Law Project on equality of treatment and non-discrimination, which was not finally passed, which clearly defined that the lessor cannot deny access to housing to a person when his choice is based on a discriminatory personal or social circumstance.

The main actions that have been carried out to combat discrimination in housing schemes are: a) the recognition of equal rights for getting government assistance to nationals and foreigners with legal and long-term residence for renting a dwelling (art. 2.a PEFAV 2013-2016); and in the aforementioned provision for the payment of the rent in Catalonia (article 7.a of the resolution TES/1101/2013). b) The protection of certain groups considered vulnerable to the risk of social exclusion: disabled,

[927] According to art, 13 Treaty of Ámsterdam of 1997, amended for the Treaty of Nice in order to allow the Council to adopt encouraging measures by a qualified majority.
[928] Decisión 2000/750/CE del Consejo, de 27 de noviembre de 2000, por la que se establece un programa de acción comunitario para luchar contra la discriminación (2001-2006). (DO 02/12/2000 núm. L 303).
[929] Available at: <europa.eu/legislation_summaries/other/l14157_es.htm>, 6 November 2013.
[930] See in section 6.3 '*Restrictions on choice of tenant - antidiscrimination issues', supra.*

persons aged over 65, women who are victims of domestic violence or single-parent families. Policies of positive discrimination are adopted in their favour when they have limited economic resources, giving them preferential treatment in access to social housing or the receiving of public assistance for the payment of the rent (art. 6.4 and annex I PEFAV 2013-2016 and article 14.1 f. and g. Resolution TES/1101/2013).[931]

- **constitutional law affecting the EU and the European Convention of Human Rights**

There are quite a number of international treaties and conventions that grant and protect the right to housing explicitly: the Universal Declaration of Human Rights (art. 25), the International Covenant on Economic, Social and Cultural Rights (art. 11), the Convention on the Rights of the Child (art. 27), the Convention on the Elimination of All Forms of Discrimination against Women (arts. 14 and 15), the European Social Charter (arts. 16, 30 and 31 CSE), the European Convention of Human Rights (EHRC) and the most recent Charter of Fundamental Rights of the European Union (art. 34.3 ECHR), which has acquired full efficacy with the entry into force of the Treaty of Lisbon.

Despite the formal recognition of the right to housing at the international and supranational levels, as well as its constitutional development and the national laws of the Member States, as well as the case law of the European Courts, constitutional and ordinary, this right is in fact poorly protected. In the vast majority of European constitutions it is not configured as a directly enforceable right before the ordinary courts, and also at the international level the EU Courts of Justice and the ECHR do not offer the same protection to housing when compared to other civil and political rights.[932]

The only international instrument that, besides expressly guaranteeing the right to housing, provides for an almost jurisdictional procedure of protection of the social rights of citizens is the Revised European Social Charter (ESC). The right to housing is provided in article 31 of the revised Charter, which establishes that: “with a view to ensuring the effective exercise of the right to housing, the parties undertake to take measures designed: 1) to promote access to housing of an adequate standard; 2) to prevent and reduce homelessness with a view to its gradual elimination; 3) to make the price of housing accessible to those without adequate resources.” In this sense, the European Committee of Social Rights, in its first decision after the entry into force in 1998 of the additional protocol to the SSC, allowed the submission of collective complaints that argue violations of both the 1961 Charter and the revised Charter. In the case of the International Commission of Jurists vs. Portugal,[933] the Committee imposes on the Member States obligations of results, therefore it is not enough to adopt the means to establish housing policies that allow for the achievement of the

[931] See more in section 6.3 ‘Restrictions on choice of tenant - antidiscrimination issues’, supra.

[932] G. Guiglia, ‘El derecho a la vivienda en la Carta Social Europea: a propósito de una reciente condena a Italia del Comité europeo de derechos sociales’, *Revista de Derecho Público UNED* nº 82 (septiembre-diciembre 2011): 546-547.

[933] Decision on complaint number 1/1998. Available at: <www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp>, 11 November 2013.

above objectives, but that the means used must be effective and achieve the results that the Charter imposes.[934]

This recognition of imposing on Member States the need to obtain results is essential in order to ensure that public authorities satisfy the right to housing of the citizens. However, although Spain ratified the European Social Charter, signed in Turin on 18 October 1961, and the Protocol of 1988 and 1991, it has not ratified the Protocol of 1995 or the revised European Social Charter adopted in Strasbourg on 3 May 1996. Despite having signed the SSE reviewed on 23 October 2000, it has not ratified it and, therefore it has not become domestic law in Spain. Thus, Spain has not incorporated into its legal system the instrument that legally is the best protection of the right to housing. Spain has regulated the right to decent and adequate housing (art. 47 CE) as a mechanism that enables public authorities to implement and monitor public policies in housing, but it has not set it up as a legally protectable right before the ordinary courts. In this sense, it must be taken into account that in recent decades in Spain construction was used as an economic engine of the country, leaving aside the social value of housing in favour of its economic value, involving speculation and a rapid increase in prices, making it difficult for the housing market to be accessible, affordable, and secure for citizens.

The last instrument ratified by Spain, ECHR, does not provide a specific right to housing, but a right of people with limited resources to get assistance in the field of housing (art. 34.3).[935] In this sense, while in Spain there are public competitions for assistance to pay the rent,[936] this does not necessarily guarantee that housing prices are really affordable for people with limited resources. This essential objective to guarantee the right to housing of citizens is part of the CSER in article 30, and for Spain it is required, for example, in the Statute of Autonomy of Catalonia which aims to provide greater regulatory value to the right to a home than is granted constitutionally.[937]

- **harmonization and unification of general contract law (sources such as the Common European Sales Law, the Common Framework of Reference or the Principles of European Contract Law may be considered here)**

The differences between States regarding contract law entails an obstacle for traders and consumers who wish to undertake activities of cross-border trade in the European internal market. Business users and consumers adopt different national contractual regulations that are applicable to cross-border operations, which makes transactions at a European level more complex and costly. These costs are due to the need to gather information about the provisions of the applicable foreign contractual regulations, to obtain legal advice, negotiate the law applicable in transactions between companies and adapt contracts to the requirements to the

[934] G. Guiglia, 'El derecho a la vivienda en la Carta Social Europea: a propósito de una reciente condena a Italia del Comité europeo de derechos sociales': 551-552.
[935] For more details, see section 5 *'To what extent was tenancy law since its origins influenced by fundamental rights enshrined in the national constitution and/or international instruments, in particular the ECHR?', supra.*
[936] Section 3.6 *'Subsidization', supra.*
[937] See section 3.1 *'What is the role of the constitutional framework of housing?', supra.*

protective legislation of consumers in transactions between businesses and consumers.[938]

Before this requirement to unify contract law, on 12 February 2003, the Commission published a Plan of Action that suggested, among other measures, the creation of a Common Frame of Reference that collects principles, terminology and common model rules in European Contract Law. In 2009 the Draft Common Frame of Reference (DCFR) was published as an optional instrument that contributes to improving and simplifying the *acquis communautaire* in the field of contract law, as well as to ensure the consistency of the future *acquis*. It also allows the unification of the terminology of fundamental concepts and the identification of the best solutions to typical problems in order to submit proposals for the Community legislation. In this sense, it serves as a model legislation and toolbox for European and national legislators.[939] Although the DCFR does not apply to real estate, the general principles collected by the document in terms of obligations and contracts can be applicable to both the acquisition of housing and the urban lease, for example, the principle of contractual freedom, *pacta sunt servanda*, the cross-border cooperation principle or preservation of contracts, among others.

The Proposal for a Regulation of the European Parliament and of the Council on Common European Sales Law was subsequently presented on 11 October 2011 (CESL). This is an optional instrument to be used by the parties for business-to-consumer or business-to-business sales where at least one party is a small or medium sized business (art. 7). Thus, the parties can choose between the subjection of the contract to national legislation applicable to commercial operations and the application of this instrument (article 4.9). The sales may be governed by these rules, including real estate and related services (arts. 1 and 5). However, we should bear in mind that real estate has its roots in the place where it is located, thus each real estate has an exclusive jurisdiction (*lex rei sitae*). Therefore, the Common European Sales Law shall not apply to the operations of buying and selling real estate between individuals or large companies (art. 7). Therefore, its application may be useful when a real estate company operates in different Member States through the purchase and sale of real estate, avoiding the application of the different national legal systems, facilitating its activity on the Community market. Although these rules are not applicable to lease contracts, as we have already mentioned for the DCFR, the different regulations supplementing the European contract law collected general principles that inspire the formalisation of civil contracts in general, including the leasing of housing.

In this regard, the principles of European contract law (PECL) were created and serve to try to unify the terminology and basic concepts in order to harmonise legal regulations that come from very different systems, such as Civil Law and Common Law, and form the basis of future European legislation on contractual matters. This arduous work of unification of the law of contracts in the EU is also collected in the

[938] As set out in explanatory statement I of the Proposal for a Regulation of the European Parliament and of the Council on Common European Sales Law, 11 October 2011 (COM/2011/0635 final - 2011/0284 (COD)).

[939] F. Gómez Pomar y M. Gili Saldaña, 'El futuro instrumento opcional del Derecho contractual europeo: una breve introducción a las cuestiones de formación, interpretación, contenido y efectos' en *Revista para el análisis del Derecho InDret 1/2002*: 4-5.

Code of European Contracts (CEC), which is not compulsory for States, unlike the PECL.

So, it is intended to regulate relevant aspects at an international level for contracts and obligations, such as the transmission of the right of property or real rights contained in public or private documents, under penalty of nullity (art. 35.1 CEC). Under Spanish law, a sale is considered to be a consensual agreement, that only requires an agreement between the parties, and therefore, an oral contract (art. 1445 and 1450 CC) would be valid. However, in practice, oral contracts for the sale of properties are not usually performed because of the legal insecurity that they generate, essentially in probatory terms. The compensation for moral damages that arise from a breach of contract is also recognised (9:501 PECL and 164 CEC), relating to a non-pecuniary loss with pain and suffering, discomfort and mental affliction arising as a result of the breach.[940] Spanish legislation does not regulate moral damages, but case law has determined when it is applicable.[941]

- **fundamental freedoms**

- **e.g. the Austrian restrictions on the purchase of secondary homes and its compatibility with the fundamental freedoms;**
- **cases in which a licence to buy house is needed – is this compatible with the fundamental freedoms?**

In Spain personal restrictions on purchasing a dwelling are only imposed for social housing, because the fulfilment of certain residence requirements, either economic or social, is required in order to allow citizens to access VPO schemes or enjoy the direct allocation of these dwellings. For example, in order to purchase a home in a specific VPO housing development it is often necessary have been a resident in the town where the dwelling is located for a certain number of years, have an income between the minimum and maximum levels of incomes and, in addition, it may be established that there is a preference for certain groups at risk of social exclusion, as we have seen above.[942]

The European Court of Justice's ruling of 8 May 2013,[943] resolved on whether the requirement to prove a sufficiently strong link with the town by the potential recipients of housing (ie. demanding a certain duration of residence there) is consistent with EU legislation, and, in connection with this, dealt with the imposition of restrictions on developers that are obliged to sell, lease or transfer the use of the properties to certain people. In this sense, the Court considers that such requirement of having a strong link with the town in question, and the restrictions derived from it, could be contrary to freedom of movement and establishment (art. 41 TCE), freedom to provide services (article 44 TEC) and the free movement of capital (article 48 TEC), unless it pursues an objective of general interest, it is suited to obtain it and it does not go beyond what is necessary to attain that objective (art. 49 TEC).

[940] A. M. Rodríguez Guitián, 'La indemnización del daño moral en el incumplimiento contractual' en *Revista Jurídica de la Universidad Autónoma de Madrid* núm. 15 (enero 2007).
[941] See SSTS 15 April 2013 (RJ 2013\5129), 11 June 2012 (RJ 2012\9283), 20 February 2002 (RJ 2002\3501) and 25 June 1984 (RJ 1986\1145).
[942] See *'anti-discrimination legislation'*, supra.
[943] TJCE 2013\210.

As an example, in Spain the town of Sestao requires fifteen years of registration in the town in order for people to be eligible for social housing provided by the Town Council[944]. The Ombudsman of the Basque People gave his opinion in a resolution of 6 November 2006 in response to the proposal of the Town Council of Sestao for relocating due to risk of ruin only those families who were registered in the town for more than fifteen years[945]. In Barcelona there has been a recent proposal to give extra advantages in obtaining social housing to those residing in the city for more than 15 years[946].

These periods of registration, according to the STJUE of 8 May 2013, might be considered to be contrary to the fundamental freedoms protected by the European Union, such as freedom of movement. But, in addition, they may also be contrary to article 14 CE, which establishes that Spaniards are equal before the law, without being subject to any discrimination on the grounds of age, race, sex, religion, opinion or any other personal or social condition or circumstances; to article 19 CE, which provides that Spaniards have the right to choose freely their residence; and to article 47 CE which ensures that all Spaniards have the right to enjoy decent and adequate housing**.**

In this sense, the doctrine of the Constitutional Court [947], concerning the principle of equality in law recognised in article 14 CE, imposes on the legislator the duty to dispense equal treatment to people in the same legal situation, forbidding any unjustified or disproportionate inequality.

[944] As set out by J. Burón Cuadrado, 'Cláusulas abusivas de empadronamiento para acceder a una vivienda en Euskadi' de 6 de diciembre de 2008. Disponible en: <leolo.blogspirit.com/tag/derechos+y+libertades+fundamentales>, 13 de noviembre de 2013.

[945] Available at: <www.ararteko.net/RecursosWeb/DOCUMENTOS/1/2_246_3.pdf>, 13 November 2013.

[946] Available at: <www.abc.es/hemeroteca/historico-02-04-2007/abc/Catalunya/el-pp-de-barcelona-pide-ampliar-los-a%C3%B1os-de-empadronamiento-para-acceder-a-una-vpo_1632322032406.html>, 13 November 2013.

[947] SSTS 31 January 2005 (JUR 2005\75739), 8 March 2004 (RTC 2004\34), 2 June 1998 (RTC 1998\116), 22 July 1996 (RTC 1996\134) and 14 July 1994 (RTC 1994\214).

Please insert summary table 7, National housing policies and tenancy law

EU Policies	National housing policies and tenancy law
EU social policy against poverty and social exclusion	Services of general interest (Green Paper). Aid for rehabilitation, regeneration and urban renewal in the PEFAV 2013-2016, which will be co-financed with FEDER operational programmes.
Consumer law and policy	Protection for consumers against unfair terms (e.g. STJUE 14 March 2013). And more protective rules with respect to consumer credit, timeshare contracts of real estate, credit contracts for immovable property used as a dwelling and information to supply to the consumers in lease contracts and sale of housing.
Competition and state aid law	The state aid shall be compatible with the competition rules and it shall not benefit a specific developer. E.g. STPIUE 6 March 2002.
Tax law	EU tax harmonisation: temporary VAT reduction and the elimination of the tax deduction for buying a primary residence.
Energy saving rules	To reduce the emission of greenhouse gases, increasing the use of renewable energy and improving energy efficiency. State aid (PEFAV 2013-2016) intended for those who perform rehabilitation, regeneration and urban renewal works in their homes or buildings, and for improving energy efficiency.
Private international law including international procedural law	International jurisdiction: exclusive for the place where the building is situated. Exception made for tenancies of immovable property concluded for temporary private use (6 months): residence of the parties. Applicable law: agreement or the law of the place where the immovable asset is situated. Exception made for private and temporary tenancies (6 months): residence of the parties.
Anti-discrimination legislation	EU protects access to housing from discriminatory acts, on the basis of sex, sexual orientation, race, or nationality. Positive discrimination in access to housing or aids for rent payment for groups at risk of social exclusion.
Constitutional law affecting the EU and the European Convention of Human Rights	Spain has not ratified the revised European Social Charter, which best guarantees the right to housing. The EAC gives greater normative value to this right than article 47 CE.
Harmonization and unification of general contract law	The DCFR unifies key terminology and identifies the best solutions to typical problems in order to submit proposals for community and national legislation. The Proposal for a Regulation on Common European Sales Law allows the parties to submit to unified rules on cross-border transactions.
Fundamental freedoms	Unjustified or unreasonable restrictions on the access to housing may not be set, such as those that require too many years of registration in the town to apply for social housing benefits (STJUE 8 May 2013).

7.3 Table of transposition of EU legislation: Spain

DIRECTIVES	TRANSPOSITION	RELATED SUBJECT	PART QUESTIONNAIRE
CONSTRUCTION			
Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJEU 30.4.2004 No. L 134/114)	Act 30/2007, of 30 October 2007, *de Contratos del Sector Público* (BOE 31.10.2007 Nº 261). Repealed by paragraph 1 of the Sole Repeal Provision of Royal Legislative Decree 3/2011, of 14 November 2011, *por el que se aprueba el texto refundido de la Ley de Contratos del Sector Público*	It envisages a special allocation procedure for contrators when the target is the construction of social housing (art. 34).	
Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products (OJEC 11.02.1989 No. L 40/12)	Royal Decree 1630/1992, *por el que se dictan disposiciones para la libre circulación de productos de construcción, en aplicación de la Directiva 89/106/CEE.* (BOE 9/2/1993 Nº 34).	About construction products: free movement and the certificates required.	
TECHNICAL STANDARDS			
Energy efficiency			
Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJEU 14.11.2012 No. L 315/1).		Energy saving targets imposed on the State. It also deals with Public Administration buildings and others that require greater energy savings.	Part I.2.2.D 'Energy' & Part II 3.b 'energy saving rules'.
Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings (OJEU 18.06.2010 No. L153/13).	Royal Decree 235/2013, of 5 April 2013, *que aprueba el procedimiento básico para la certificación de eficacia energética de los edificios* (BOE 13/04/2013 núm. 89).	Energy efficiency of the new and the existing buildings.	Part I.2.2.D 'Energy' & Part II 2.a 'Regulation on energy saving'.

Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products (OJEU 18.6.2010 No. L 153/1).	Royal Decree 1390/2011, of 14 October 2011, p*or el que se regula la indicación del consumo de energía y otros recursos por parte de los productos relacionados con la energía, mediante el etiquetado y una información normalizada* (BOE 15/10/11 Nº 249).	Labelling and basic information for household electric appliances' users.	Part I.2.2.D 'Energy'
Commission Delegated Regulation (EU) Nº 874/2012 of 12 July 2012 supplementing **Directive 2010/30/EU** of the European Parliament and of the Council with regard to energy labelling of electrical lamps and luminaires (OJEU 26.9.2012 No. L 258/1).	Royal Decree 1390/2011+ Current legislation: Royal Decree 284/1999, of 22 February 1999, *por el que se regula el etiquetado energético de las lámparas de uso doméstico* (BOE 03/03/1999 Nº 51)		
Commission Directive 98/11/EC of 27 January 1998 implementing Council Directive 92/75/EEC with regard to energy labelling of household lamps (OJEC 10.3.1998 No. L 71/1).	Royal Decree 284/1999, of 22 February 1999, *por el que se regula el etiquetado energético de las lámparas de uso doméstico* (BOE 03/03/1999 Nº 53).		
Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJEU 5.6.2009 No. L 140/16).	Royal Decree-law 13/2012, of 30 March 2012, p*or el que se transponen directivas en materia de mercados interiores de electricidad y gas y en materia de comunicaciones electrónicas, y por el que se adoptan medidas para la corrección de las desviaciones por desajustes entre los costes e ingresos de los sectores eléctrico y gasista* (BOE 31/03/2012 Nº 78).	Promotion of the use of renewable energy in buildings.	Part I.2.2.D 'Energy' and Parte II 3.b 'energy saving rules'
Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (DOCE 14.8.2009 No. L 211/55).	Royal Decree-law 13/2012 + Act 17/2007, of 4 July 2007, amended Act 54/1997, of 27 November 2007, *del Sector Eléctrico* (BOE 05/07/2007 Nº160).	Basic standards for electricity sector.	Part I.2.2.D 'Energy'
Heating, hot water and refrigeration			

Commission Delegated Regulation (EU) No. 626/2011 of 4 May 2011 supplementing **Directive 2010/30/EU** of the European Parliament and of the Council with regard to energy labelling of air conditioners (OJEU 6.7.2011 No. L 178/1).	Royal Decree 1390/2011 + Current legislation: Royal Decree 142/2003, of 7 February 2003, *por el que se regula el etiquetado energético de los acondicionadores de aire de uso doméstico.* (BOE 14/02/2003)	Labelling and information to provide about air conditioners.	Part I.2.2.D 'Energy'
Commission Delegated Regulation (EU) No. 1060/2010 of 28 September 2010 supplementing **Directive 2010/30/EU** of the European Parliament and of the Council with regard to energy labelling of household refrigerating appliances (OJEU 30.11.2010 No. L 314).	Royal Decree 1390/2011	Labelling and information to provide about household refrigerating appliances.	Part I.2.2.D 'Energy'
Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJEU 14.8.2009 No. L 211/94).	Royal Decree-law 13/2012 + Act 12/2007, of 2 July 2007, *por la que se modifica la Ley 34/1998, de 7 de octubre, del Sector de Hidrocarburos, con el fin de adaptarla a lo dispuesto en la Directiva 2003/55/CE del Parlamento Europeo y del Consejo, de 26 de junio de 2003, sobre normas comunes para el mercado interior del gas natural* (BOE 31/03/2012 Nº 78).	Basic legislation about natural gas in buildings and dwellings.	Part I.2.2.D 'Energy'
Council Directive 1982/885/CEE of 10 December 1982 amending Directive 78/170/EEC on the performance of heat generators for space heating and the production of hot water in new or existing non-industrial buildings and on the insulation of heat and domestic hot-water distribution in new non-industrial buildings (OJEC 31.12.1982 No. L 378/19).		Legislation about heating and hot water in dwellings and buildings.	Part I.2.2.D 'Energy'
Household appliances			
Commission Delegated Regulation (EU) No. 392/2012 of 1 March 2012 supplementing Directive 2010/30/EU of the European Parliament and of the Council with regard to energy labelling of household tumble driers (OJEU 9.5.2012 No. L 123/1).	Royal Decree 1390/2011 + Current legislation: Royal Decree 574/1996, of 28 March 1996, *por el que se regula el etiquetado energético de las secadoras de ropa de tambor domésticas* (BOE 11/04/1996 Nº 88).	Labelling and information to provide about tumble driers.	Part I.2.2.D 'Energy'
Commission Delegated Regulation (EU) No. 1059/2010 of 28 September 2010 supplementing Directive 2010/30/EU of the European Parliament and of the Council with regard to energy labelling of household dishwashers (OJEU 30.11.2010 No. L 314/1).	Royal Decree 1390/201 1+ Current legislation: Royal Decree 864/1998, of 8 May 1998, *por el que se regula el etiquetado energético de los lavavajillas domésticos* (BOE 19/05/1998 Nº 119).	Labelling and information to provide about dishwashers.	Part I.2.2.D 'Energy'

Commission Delegated Regulation (EU) No. 1061/2010 of 28 September 2010 supplementing Directive 2010/30/EU of the European Parliament and of the Council with regard to energy labelling of household washing machines (OJEU 30.10.2010 No. L314/47).	Current legislation: Royal Decree 607/1996, of 12 April 1996, *por el que se regula el etiquetado de las lavadoras domésticas*, amended by Royal Decree 1626/1997, of 24 October 1997 (BOE 25/04/1996 Nº 100).	Labelling and information to provide about washing machines.	Part I.2.2.D 'Energy'
Commission Delegated Regulation (EU) No. 1062/2010 of 28 September 2010 supplementing Directive 2010/30/EU of the European Parliament and of the Council with regard to energy labelling of televisions (OJEU 30.11.2010 No. L 314/64).	Royal Decree 1390/2011	Labelling and information to provide about televisions.	Part I.2.2.D 'Energy'
Commission Directive 2003/66/EC of 3 July 2003 amending Directive 94/2/EC implementing Council Directive 92/75/EEC with regard to energy labelling of household electric refrigerators, freezers and their combinations (OJEU 09.07.2003 No. L 170/10).	Royal Decree 219/2004, of 6 February 2004, *por el que se modifica el Real Decreto 1326/1995, de 28 de julio, por el que se regula el etiquetado energético de frigoríficos, congeladores y aparatos combinados electrodomésticos* (BOE 13/02/2004 Nº 38).	Labelling and information to provide about household electric refrigerators and freezers.	Part I.2.2.D 'Energy'
Commission Directive 2002/40/EC of 8 May 2002 implementing Council Directive 92/75/EEC with regard to energy labelling of household electric ovens (OJEC 15.05.2012 No. L 128/45).	Royal Decree 210/2003, of 21 February 2003, *por el que se regula el etiquetado energético de los hornos eléctricos de uso doméstico* (BOE 28/02/2003 Nº 51).	Labelling and information to provide about household electric ovens.	Part I.2.2.D 'Energy'
Commission Directive 96/60/EC of 19 September 1996 implementing Council Directive 92/75/EEC with regard to energy labelling of household combined washer-driers (OJEC 18.10.1996 No. L 266/1).	Royal Decree 701/1998, of 24 April 1998, *por el que se regula el etiquetado energético de las lavadoras-secadoras combinadas* (BOE 08/05/1998 Nº 110).	Labelling and information to provide about household combined washer-driers.	Part I.2.2.D 'Energy'
Lifts			
European Parliament and Council Directive 95/16/EC of 29 June 1995 on the approximation of the laws of the Member States relating to lifts (OJEC 07.09.1995 No. L 213).	Royal Decree 1644/2008, of 10 October 2008, *por el que se establecen las normas para la comercialización y puesta en servicio de las máquinas* (BOE 11/10/2008 Nº 246).	Legislation about lifts.	
Boilers			

Council Directive 92/42/EEC of 21 May 1992 on efficiency requirements for new hot-water boilers fired with liquid or gaseous fuels (OJEC 22.06.1992, No. L 167). Amended by Council Directive 93/68/EEC of 22 July 1993 (BOE 27.03.1995 N**o.** 73).	Royal Decree 275/1995, of 24 February 1995, *relativa a los requisitos de rendimiento para calderas nuevas de agua caliente alimentadas con combustibles líquidos o gaseosos*, amended by Royal Decree 1369/2007 (BOE 23/10/2007):+ Royal Decree 919/2006, of 28 July 2006, *por el que se aprueba el Reglamento técnico de distribución y utilización de combustibles gaseosos y sus instrucciones técnicas complementarias* (BOE 04/09/2006 Nº 211).	Legislation about boilers.	
Hazardous substances			
Directive 2011/65/EU of the European Parliament and of the Council of 8 June 2011 on the restriction of the use of certain hazardous substances in electrical and electronic equipment (OJEU 01.07.2011 No. 174/88).	Royal Decree 219/2013, of 22 March 2013, *sobre restricciones a la utilización de determinadas sustancias peligrosas en aparatos eléctricos y electrónicos* (BOE 23/03/2013 Nº 71).	Legislation about restricted substances: organ pipes of tin and lead alloys.	
CONSUMERS			
Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJEU 22.11.2011 No. L 304/64).	Draft Bill amending Royal Legislative Decree 1/2007, of 16 November 2007, *Texto Refundido de la Ley General para la Defensa de Consumidores y Usuarios*.	Information and consumer rights. Legislation referred to procurement of services, car park. Immovables are excluded: lease of housing, but not of premises.	(RDL 1/2007) Part II 2.b. 'Ancillary duties of both parties in the phase of contract preparation and negotiation' & Parte II. 3 ' consumer law and policy'.
Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No. 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJEU 18.12.2009 No. L 337/11).	Royal Decree-law 13/2012 + Royal Decree 726/2011, of 20 May 2011, *que modifica el Reglamento sobre las condiciones para la prestación de servicios de comunicaciones electrónicas, el servicio universal y la protección de los usuarios, aprobado por Real Decreto 424/2005, de 15 de abril de 2005* (BOE 24/05/2011 Nº 123).	Consumer protection in the procurement of communication services.	

Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJEU 01.05.2009, No. 110/30).	Act 39/2002, of 28 October 2002, *de transposición al ordenamiento jurídico español de diversas directivas comunitarias en materia de protección de los intereses de los consumidores y usuarios* (BOE 29/10/2002 Nº 259).	Collective injunctions infringements of Directives Annex I.	
Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers with regard to certain aspects of timeshare, long-term holiday products, resale and exchange contracts Text with EEA relevance (DOCE 03/02/2009 núm. L 33/10).	Royal Decree-law 8/2012, of 16 March 2012, *de contratos de aprovechamiento por turno de bienes de uso turístico, de adquisición de productos vacacionales de larga duración, de reventa y de intercambio* (BOE 17/03/2012 núm. 66).	Timeshare contracts	Part II. 3 ' consumer law and policy'.
Directive 2008/48/EC of the European parliament and of the council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (DOCE 22/05/2008 núm. L133/66).	Act 16/2011, of 24 June 2011, *de contratos de crédito al consumo* (BOE 25/06/2011 núm. 151).	Credit agreements for consumers	Part II. 3 ' consumer law and policy'.
Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (OJEU 27.12.2006, No. L 376/21).	Act 29/2009, of 30 December 2009, *por la que se modifica el régimen legal de la competencia desleal y de la publicidad para la mejora de la protección de los consumidores y usuarios* (BOE 31/12/2009 Nº 315).	Misleading advertising and unfair business-to-consumer commercial practices.	
Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (OJEU 01.6.2005 No. L 149/22).			
Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (DOCE 07/07/1999 núm. L 171/12).	Arts. 80 - 92 of Royal Legislative Decree 1/2007	The sale of consumer goods and associated guarantees	Part II. 3 ' consumer law and policy'.
Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJEC 21.04.1993 No. L 095).	Act 7/1998, of 13 April 1998, *de Condiciones Generales de la Contratación* (BOE 14/04/1998).	Unfair terms	Part II 2.c 'control of contractual terms' & Part II. 3 ' consumer law and policy'.
HOUSING-LEASE			
Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations - Rome I (OJEU 04.07.2008 No. L 177/6).		Law applicable (art. 4.1.c and d and 11.5)	

Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (OJEC 16.01.2001 No. L 12/1).		Jurisdiction (art. 22.1)	
Commission Regulation (EC) No. 1920/2001 of 28 September 2001 laying down detailed rules for the implementation of Council Regulation (EC) No. 2494/95 as regards minimum standards for the treatment of service charges proportional to transaction values in the harmonised index of consumer prices and amending Regulation (EC) No. 2214/96 (OJEC 29.9.2001 No. L 261/46).		CPI harmonization. Art. 5 includes estate agents' services for lease transactions.	
Commission Regulation (EC) No. 1749/1999 of 23 July 1999 amending Regulation (EC) No. 2214/96, concerning the sub-indices of the harmonized indices of consumer prices (OJEC 13.8.1999 No. L 214/1).		CPI harmonization. Subscript 4: Lease, housing preservation and repair, water and other services.	Part II 2.d 'Index-oriented increase clauses'.
Council Regulation (EC) No. 1687/98 of 20 July 1998 amending Commission Regulation (EC) No. 1749/96 concerning the coverage of goods and services of the harmonised index of consumer prices (OJEC 31.07.1998 No. L 214/12).			
Commission Regulation (EC) No. 2214/96 of 20 November 1996 concerning harmonized indices of consumer prices: transmission and dissemination of sub indices of the HICP (OJCE 21.11.1996 No. L 296/8).			
DISCRIMINATION			
Recommendation 65/379/EEC: Commission Recommendation of 7 July 1965 to the Member States on the housing of workers and their families moving within the Community (OJEC 27.07.1965 No. L 137/27).		Discrimination on grounds of nationality. Equality in granting housing, aids, subsidies, premiums or tax advantages to workers who have moved within the EU.	Part II 2.c 'Restrictions on choice of tenant - antidiscrimination issues'.
Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJEU 21.12.2004 No. L 373/37).	Organic Law 3/2007, of 22 March 2007, *para la igualdad efectiva de mujeres y hombres* (BOE 23/03/2007 Nº 71).	Discrimination on grounds of sex.	Part II 2.c 'Restrictions on choice of tenant - antidiscrimination issues'.
Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJEC 19.07.2000 No. L 180/22).	Act 62/2003, of 30 December 2003, *de medidas fiscales, administrativas y del orden social* (BOE 31/12/2003 Nº 313).	Discrimination on grounds of racial or ethnic origin.	Part II 2.c 'Restrictions on choice of tenant - antidiscrimination issues' & Part II.3.b 'anti-discrimination legislation'.

IMMIGRANTS OR COMMUNITY NATIONALS			
Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (OJEU 18.06.2009 No. L 155/17).	Organic Law 2/2009, of 11 December 2009, *de reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social* (BOE 12/12/2009 Nº 299).	Equality of treatment in housing (art. 14.1.g.) However, Member States may impose restrictions (art. 14.2).	
Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJEU 30.04.2004 No. L 158/77)	Royal Decree 240/2007, of 16 February 2007, *sobre entrada, libre circulación y residencia en España de ciudadanos de los Estado miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo* (BOE 28/02/2007 Nº 51).	Discrimination on grounds of nationality. Free movement for european citiziens and their families.	
Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJEU 23.01.2004 No. L 16/44).	Organic Law 2/2009.	Equal treatment in housing (art. 11.1.f.)	Part II 2.c 'Restrictions on choice of tenant - antidiscrimination issues'.
Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJEU 03.10.2003, No. L 251/12).	Organic Law 4/2000, of 11 January 2000, *sobre derechos y libertades de los extranjeros en España y su integración social*, repealed by Act 2/2009.	The reunification applicant shall prove to have an habitable and large enough dwelling (art. 7.1.a).	
Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJEC 17.04.1964 No. L 257/2).		Equal treatment in housing and access to the housing applicants' lists (Art. 9 and 10.3).	Part II 2.c 'Restrictions on choice of tenant - antidiscrimination issues'.
INVESTMENT FUNDS			
Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No. 1060/2009 and (EU) Nº 1095/2010 (OJEU 01.07.2011, No. L 174/1).	Draft Bill amending Act 35/2003, of 4 November 2003, *de Instituciones de Inversión Colectiva, en materia del régimen aplicable a las sociedades gestoras de instituciones de inversión colectiva autorizadas conforme a la Directiva 2011/61/UE* (public information period closed).	Real estate investment funds	

ADR			
Directive 2008/52/CE of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (DOUE 24/05/2008 no. L136/3).	Act 5/2012, of 6 July 2012, *sobre mediación en asuntos civiles y mercantiles* (BOE 07/07/2012 núm. 162).	Mediation	Part II 2.h 'Is tenancy law often enforced before courts by landlords and tenants and/or are - voluntary or compulsory - mechanisms of conciliation, mediation or alternative dispute resolution used?'

8 Typical national cases (with short solutions)

8.1 What is considered a lease?

Case: Mr. X allows Mrs. Y to live in a house he owns. Is this a lease? Does it make any difference whether Mrs. Y pays a sum of money in exchange or how much this amount is? Does it make any difference the wording of the contract or its duration or whether it is in written form?

In first place, if Mrs. Y is allowed to live in Mr. X's property it should be analysed according to SSTS 30 April 2011[948] and 2 October 2008[949] whether or not there has been a contract between the parties, and particularly a commodatum contract, characterized by the free transfer of the thing for a fixed period or for a particular purpose. In this case, we shall apply the rules governing this contract (articles 1740 et seq Civil Code). However, in the event that no legal relationship exists, then we have a situation of precarious possession, namely, Mr. X would be allowed to put an end to that possession at his discretion. In this case, it does not matter whether or not the owner is a close relative.

If Mrs. Y pays a relevant sum of money (ie. equivalent to a rent, not only to pay for supplies) to X, it would be a lease because this contract is onerous due to the fact that the lessee is obliged to pay a rent (art. 17 LAU 1994, SAP Tarragona 19 May 2000[950] and SAP Valencia 14 July 2010).[951] The wording of the contract would be relevant to analyse the parties' will (article 1280 Civil Code), but in any case the judge has to analyse the content of the contract because "contracts are what they are and not what the parties say they are", see SSTS 19 September 2003[952] and 18 February 1997.[953] If the contract has been concluded for a definite period of time, it would be a lease if something relevant to a rent has been agreed.

8.2 Unilateral withdraw from the lease contract by the tenant

Case: The lease contract has been concluded for a definite period of time (3, 5 or 10 years). In what circumstances is the tenant allowed to withdraw from the lease contract unilaterally? Must he have any reasonable grounds to do so? Must he compensate the landowner and, if so, to what extent?

A) For contracts signed before 6th of June 2013.

According to article 11 LAU 1994 the tenant may withdraw from the lease contract only if the contract has reached the period of five years. However, jurisprudence has not maintained the same approach as far as the tenant's right to withdraw from the contract during the first five years of the contract is concerned. Some case law does not allow the tenant to do so, unless agreed otherwise in the contract (SAP Las

[948] RJ 2011\3724.
[949] RJ 2008\5587.
[950] AC 2000\1831.
[951] JUR 2010\349412.
[952] JUR 2003\243240.
[953] RJ 1997\1004.

Palmas 30 October 2007,[954] SAP Barcelona 21 December 2004,[955] and SAP Madrid 25 November 2004).[956] Others apply article 11 LAU by analogy, so the tenant must pay as damages the amount equivalent to one month of rent for each year of the contract which remain to be fulfilled (SAP Ávila 16 February 1998);[957] some other cases consider the tenant's attitude as a non-fulfilment of the contract and apply the general rules contained in the Civil Code (article 1124), allowing the landlord to resolve the contract and claim the damages actually suffered, not allowing him to claim all the remaining rents (SAP Tarragona 26 April 2011,[958] SAP Valencia 18 April 2006,[959] SAP Salamanca 8 October 1998,[960] SAP Cantabria 22 February 1999);[961] and finally, the rest consider that the tenant can withdraw from the lease contract freely without facing any damages (SAP Badajoz 22 March 1999.[962] In our opinion, it seems that the third solution (application of article 1124 Civil Code) would be the best solution.

B) For contracts signed after 6th of June 2013

However, this discussion does not exist for contracts agreed after 6 June 2013, because the law provides that the lessee may withdraw from the contract after six months since its formalisation. And the parties may agree the obligation to compensate the landlord (art. 11 LAU 1994). In this sense, if the tenant withdraws, for example, three months after the contract is signed, he would have to pay the three remaining months' rent plus the agreed compensation that can be up to a month's rent per non-fulfilled year.

However, it should be noted that according to the Supreme Court case law[963], the withdrawal cannot entail an excessive or disproportionate burden for the tenant, since in this case the courts may moderate the amount to pay. In addition, this economic burden limits their right to move freely and to choose residence, according to article 13 of the Universal Declaration of Human Rights of 1948.[964] It is also questionable whether the tenant has to pay the compensation anyway to the landlord if the latter rents the property to a third party immediately after the tenant has terminated the contract, as no damage is caused to him in this case (SAP Albacete 25 May 2007,[965] SAP Madrid 25 October 2007,[966] SAP Alicante 17 May 2006,[967] SAP Murcia 15 September 2006).[968]

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[954] JUR 2008\46140.
[955] JUR 2005\56346.
[956] JUR 2005\35733.
[957] AC 1998\3651.
[958] AC 2011\1306.
[959] JUR 2006\272770.
[960] AC 1998\2114.
[961] AC 1999\285.
[962] AC 1999\3924.
[963] SSTS 3 February 2006 (RJ 2006\823), 7 June 2006 (RJ 2006\ 3529), 30 October 2007 (RJ 2007\8262), 12 June 2008 (RJ 2008\4249) and 22 May 2008 (RJ 2008\3164).
[964] See section 6.6 *'May the tenant terminate the agreement before the agreed date of termination?', supra.*
[965] JUR 2007\277350.
[966] JUR 2008\40866.
[967] JUR 2006\ 260085.
[968] JUR 2006\287135.

8.3 Undue possession of the tenant once the lease contract is extinguished

- Case: The lease contract is extinguished and the tenant still continues in the possession of the property. Is it possible for the landlord to claim any kind of compensation?

Although the contract is extinguished, there are resolutions according to which the tenant still have the duty to pay the rent if he remains within the property premises (SAP Barcelona 24 May 2007).[969]
The LMFFMAV 2013 includes this modification in the LEC, establishing that the due amounts, in the process of eviction by expiration of the contractual or legal term or non-payment of the rent, will include the due rent accrued after the initiation of the claim and the delivery of the property's possession to the landlord. The amount of the last claimed rent will be taken as the basis of the future rent settlement (art. 220.2 LEC).

8.4 Rent increase

- Case: The landlord wants to increase the rent one year after the celebration of the lease contract. Is that right limited to some extent?

According to article 17 LAU 1994, landlord and tenant have the freedom in order to agree the rent to be paid during the whole contract. But for contracts signed before 6th June 2013 article 18 LAU 1994 limits the landlord's right to increase the rent during the first five years. In this vein, the rent is indexed to the consumer price index. However, for contracts agreed after 6 June 2013, article 18 LAU 1994 establishes that the parties can freely agree the update, so the landlord has a stronger discretionary power.

8.5 Updating the rent of those lease contracts for housing purposes agreed under the LAU 1964 (REMARK: that LAU 1964 is in force basically for those contracts arranged before 1994)

-Case: Landlord X wants to increase the rent of an old lady that has been living as a tenant in a flat since 1965. Is he free to fix any increase in the rent?

The transitional provision 2 LAU 1994 provides that leases which fall under the LAU 1964 will be governed by its provisions, taking into account the provisions laid down by this transitional provision. Specifically, paragraph D.11 provides that the rent specified in the contract can be updated at the request of the landlord, with prior notice to the tenant, provided that an annuity of the contract has been reached and taking into consideration the tenant's income.

Once this notice has been given, the tenant may answer the request in writing within thirty days of receiving it, either in the positive (accepting it) or negative sense; or not answer the request within this period of time. The lack of response to the request made by the landlord has raised the question of determining the scope of this silence: some provincial courts believe that there is a tacit acceptance if the tenant

[969] JUR 2007\268792.

does not communicate in writing to the landlord his opposition within 30 days of receiving the update request; others, by contrast, set out that the tenant's silence is equivalent to those cases where the tenant, even considering the right to update the rent, opposes it. In this vein, the effects of transitional provision 2 D.11.6 apply, that is, the rent can only be updated annually according to the Consumer Price Index for the twelve months immediately preceding the date of each update. The lease for which the tenant exercises the option referred to in this rule shall terminate in a period of eight years, even when there is a subrogation, that period starting from the date of the landlord's notice.

STS 27 December 2011[970] has set out that the lack of response implies a tacit acceptance, following the first approach.

8.6 Sublease in a lease for housing purposes. Extinguishment of the lease?

- Case: The tenant of a lease for housing purposes decides to completely or partially sub-lease the dwelling. Is that allowed in the system? Will there be any difference if the sub-letting is done in an informal way (eg. letting a relative or a friend stay in a room of the house in exchange for sharing expenses or for a small amount of money).

According to art. 8.2 LAU 1994 the leased property can only be partially subleased to a third party by the lessee as long as the landlord gives his prior written consent. In fact, the landlord is entitled to resolve the lease contract where a sublease is created without this consent (art. 27.2.d) LAU 1994). Furthermore, the subtenant´s right becomes extinguished at the same time as the lesse´s right (SAP Madrid 20 October 2005);[971] and the price of the sublease will not exceed, in any case, the price of the lease (SAP Madrid 15 June 2011).[972] According to the scholars it would be possible to have payment in kind by the lessee to the landlord[973] (or by the sub-lessee to the tenant).

8.7 Duration of the eviction process

- Case: Mrs. Y defaults in paying the rent in the third month of duration of the lease contract. Can the landowner, Mr. X, immediately start the eviction procedure once he realizes that Mrs. Y does not want to leave the dwelling? How long can it take until Mrs. Y is effectively out of the house? Are there any constitutional issues?

The landlord requires the tenant to pay the rent due. For that purpose a month's notice is given before starting the eviction process (SSTS 24 July 2008[974] and 19 December 2009).[975] Under the current law any claim of this nature follows the framework of oral proceedings (simpler and faster, art. 250 LEC). The eviction procedure may be accumulated to the due rent claim regardless of the amount owed

[970] RJ 2011\1784.
[971] JUR 2005\252920.
[972] JUR 2011\290303.
[973] See J. V. Fuentes Lojo, *Comentarios a la nueva ley de arrendamientos urbanos* (Barcelona: J.M. Bosch Editor, 2006).
[974] RJ 2008\4625.
[975] RJ 2009\23.

(article 438.3.3 LEC). With the admission of the claim, the Court Secretary will set the day and the time for the eviction, and if the lessee does not file a defence (he may only allege the payment or the enervation), the eviction on the day scheduled will be carried out without the need for a trial (art. 440.3 LEC, STS 27 December 2011[976]). Despite intention to improve the eviction process, the procedure may last up to one or one and a half years. The tenant cannot object on social grounds or appeal to the constitutional right to a home in order to stay in the property. Despite this, the law empowers the judge to temporarily suspend the eviction of those occupants of a dwelling who use it as a main residence and are in economic difficulties (art. 704.1 LEC).

8.8 Lessee's actions vs lessor's rights vs condominium's rights

-Case: Tenant Y, who is renting a flat in a condominium, wants to: a) paint the living room purple; b) knock down a separation wall with the bedroom; c) use part of the flat as his office; d) change the furniture in the dining room; d) have his horse in his flat; e) listen to loud music all the day long. Is he allowed to do all this?

The tenant's freedom in relation to what he can do or cannot do with the flat under Spanish law are quite limited. Therefore, restrictions can be imposed on him to not change the colour or the furniture of a room, and even more so, the internal structure of the dwelling. Some other described actions may interfere with the rights of other owners in the condominium, such as having a horse in the flat (health issues arise, such as at STS 19 July 2006)[977] or listening to loud music (his contract can be terminated for improper behaviour at the request of the condominium management body; that happened at SAP Pontevedra 27 July 2004).[978]

8.9 Is the sanctioning effect provided for in article 9.3 LAU if the lessor does not occupy the unit within the period of three months since the termination of the contract applicable to all cases? And if the property is only occupied by the owner or his relatives in first degree for a short period of time?

Case: The landlord terminates the lease contract in order to allow his daughter to occupy the property, as she needs it, although she only occupies it after five months. Once occupied, the daughter only lives there for fifteen days and subsequently the dwelling is rented to a third party (or even sold).

Art. 9.3 LAU allows the landlord to recover the rented property after the first year of lease has passed by, even if this has not been agreed by the parties in the contract. Act 19/2009 provides that there could be just cause not to occupy the dwelling within the period of three months because of force majeure, for example if the property is under relevant reparation works (SAP Barcelona 8 June 2005).[979]

However, even if the cause of force majeure does not exist, the lessee may not require the lessor for the fulfilment of the reinstatement or compensation obligation,

[976] RJ 2011\1784.
[977] RJ 2006\4731.
[978] JUR 2006\23608.
[979] PROV 2005\214771.

when he does not previously fulfil his own obligations by virtue of the contract. However, the STS 30 October 2008[980] affirms that not all breaches of the contract by the tenant may have these effects but non-payment of several months of rent, of taxes, of garbage collection fees and of consumption of hot water for a period of one year do have such effects.

Once the dwelling is unoccupied by the daughter of the owner, the latter may, in principle, freely proceed to sell or let it to a third party because the article does not establish a minimum period of occupation. However, this behavior may be considered an abuse of law by the owner of the dwelling (art. 7.2 CC), since he is acting in bad faith and overstepping the exercise of rights beyond ethical limits[981], as long as it is not the result of a legitimate reason[982] or a benefit covered by the rule is obtained.[983] The abuse of a right in this case could be based on the fact that the property can be recovered in advance by the landlord only if it is going to be used for permanent housing by his daughter; but if she lives there only fifteen days, the real purpose of the termination of the contract is not to cover her permanent housing need, something necessary that is provided for by article 9.3 LAU 1994, but to expel the tenant from the property in advance to be able to sell or lease the property to a third party.

8.10 Subrogation when the tenant dies

*Case: In the event of the death of the tenant, may a spouse married under the marital property regime of community of property (*gananciales*) continue as the holder of the contract without having to notify the subrogation as is required by article 16 LAU?*

Part of the case law attributed to a lease the character of a matrimonial asset, when it was the family dwelling, if the contract was entered into during the marriage and the marital property regime was the community of property. In this case, jurisprudence granted the spouse the co-ownership of the lease, and therefore, neither the subrogation nor the notice to the lessor was necessary, the spouse simply remaining in the leased dwelling.[984] However, this issue, much debated in the Courts, was doctrinally unified by the Supreme Court,[985] thus establishing that the subrogation cannot exist if the spouse does not meet the requirements of article 16.3 LAU 1994, since the right of subrogation by cause of death is part of the contents of the lease. This, as a personal right, produces effects between the parties and their heirs, and therefore they are not part of the community of property, being independent of the marital property regime. As a result, the LAU special scheme must be applied, since it has preference to the general regime. It also points out that if the lease is to be

[980] RJ 2008\5806.
[981] STS of 24 April 1999 (Ref. Iustel §230477).
[982] STS of 2 December 1994 (RA 9395).
[983] Thus, SSTS 26 September 2012 (Ref. Iustel: §351637), 9 January 2012 (Ref. Iustel: §345591), 13 December 2011 **(**Ref. Iustel: §346058**)** and 1 February 2006 (Ref. Iustel: §247292).
[984] This approach has been maintained by a doctrinal sector, based on the STC 31 October 1986 (RTC 1986\135), so this situation in the lease means that when one spouse dies, the other continues in his/her own right and not by subrogation. SSAP Barcelona 20 January 2009 (AC 2009\319), Murcia 23 February 2004 (PROV 2004\111958) and Pontevedra 5 May 2003 (PROV 2003\228771).
[985] Unified doctrine by STS 3 April 2009, FJ. 6 (RJ 2009\2806). Subsequently, similar views have also been expressed in SSTS 24 March 2011 (RJ 2011\3007), 9 July 2010 (RJ 2010\6031) and 10 March 2010 (RJ 2010\2335).

deemed a matrimonial asset, art. 16 LAU 1994 would make no sense, because it would be empty of content, by not being applicable.

In addition, the Constitutional Court[986] has also resolved that it is not possible to consider that this requirement of notification, in case of death, involves a breach of the principle of equality in article 14 CE, in relation to the solution given for the subrogation of the spouse in the event of separation, annulment or divorce, that is, the non-termination of the contract in the absence of notification of the event to the landlord.

Although the case law[987] and now (thanks to LMFFMAV 2013) article 15 LAU 1994 require the spouse of the tenant that is granted the use of the rented property by the court in the event of separation, annulment or divorce to notify the lessor of his/her intention to live there, if he/she does not do so, the lease is not extinguished on the grounds of lack of notification.

9 Tables

9.1 Literature

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[986] As set out by ATS 13 Semptember 1999, FJ. 3 (RTC 1999\213).

[987] SSAP Madrid 15 September 2005 (PROV 2005\219775), Barcelona 28 February 2005 (PROV 2005\117582), Baleares 29 February 2008 (PROV 2008\340017) and Cádiz 5 April 2011, FJ. 2 (AC 2011/1845). See more section 6.4 'Changes of parties', supra.

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I. General Direction of Registration and notarized

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9.3 Abbreviations

ADR	Mecanismos extrajudiciales de resolución de controversias.
AEAT	State Tax Administration Agency (*Agencia Estatal de la Administración Tributaria*).
AHE	Spanish Mortgage Association (*Asociación Hipotecaria Española*).
AJD	Document duties tax (*Impuesto sobre Actos Jurídicos Documentados*).
API	Real estate agents (*Agentes de la Propiedad Inmobiliaria*).
BOC	Boletín Oficial de Cantabria.
BOCM	Boletín Oficial de la Comunidad de Madrid.
BOE	Boletín Oficial del Estado.
BOLR	Boletín Oficial de La Rioja.
CC	Spanish Civil Code of 1889 (*Código Civil español*).
CCC	Catalonian Civil Code (*Código Civil de Cataluña*).
CE	Spanish Constitution 1978 (*Constitución Española de 1978*).
CEC	Código Europeo de Contratos.
CEDH	Convención Europea de Derechos del Hombre.
CESL	Propuesta de Reglamento del Parlamento Europeo y del Consejo relativo a una normativa común de compraventa europea.
CP	Criminal Code (*Código Penal*).

CSE	Carta Social Europea.
CSER	Carta Social Europea Revisada.
DCFR	Draft Common Frame of Reference.
Decreto 2114/1968	Decreto 2114/1968 por el que se aprueba su Reglamento para la aplicación de la Ley sobre viviendas de protección oficial.
DNI	Documento Nacional de Identidad
DOCV	Diario Oficial de la Comunidad Valenciana.
DOGC	Diario Oficial de la Generalitat de Cataluña.
DRF	Decreto del Registro de fianzas de los contratos de alquiler de fincas urbanas y el depósito de fianzas
EAC	Statute of Autonomy of Catalonia 2006 (*Estatuto de Autonomía de Cataluña* 2006).
ECV	Survey on Living Conditions 2012 (Encuesta de Condiciones de Vida).
EPF	Statute of Autonomy of Catalonia 2006 (*Estatuto de Autonomía de Cataluña* 2006).
ET	Worker´s statute (*Estatuto de los Trabajadores*).
EU	European Union.
FII	Real Estate Investment Funds (*Fondos de Inversión Inmobiliaria*).
GESTHA	Technicians Sindicate of the Ministry of Economy (*Sindicato de Técnicos del Ministerio de Economía y Hacienda*).
IBI	Property tax (*Impuesto de Bienes Inmuebles*).
ICC	Collective Investment Institutions (*Instituciones de Inversión Colectiva*).
INE	National Statistics Institute (*Instituto Nacional de Estadística*).
IPREM	Public Index of Multiple Purpose Income (*Indicador Público de Renta de Efectos Múltiples)*.
IRPF	Physical Persons Income Tax (*Impuesto de la Renta de las Personas Físicas*).
ITE	Technical inspection of buildings (*Inspección Técnica de Edificios*).
ITP	Property Transfer Tax (*Impuesto de Transmisiones Patrimoniales*).
IVA	Value Added Tax (*Impuesto sobre el Valor Añadido*).
LAU 1964	Urban Leases Act of 1964 (*Ley de Arrendamientos Urbanos de 1964*).
LAU 1994	Urban Leases Act of 1994 (*Ley de Arrendamientos Urbanos de 1994*).
LBRL	Ley reguladora de las Bases de Régimen Local.
LC	Ley 22/2003, de 9 de julio, Concursal.
LCI	Ley del Catastro Inmobiliario.
LDVC 2007	Catalonian Right to Housing Act (*Ley del Derecho a la Vivienda en Cataluña*).
LEC	Civil Procedure Act 1/200 (*Ley de Enjuiciamiento Civil*).

LEF	Ley de Expropiación Forzosa 1954.
Ley 10/2012	Ley 10/2012, por la que se regulan determinadas tasas en el ámbito de la Administración de Justicia.
Ley 37/2011	Ley 37/2011 de medidas de agilización procesal.
Ley 5/2012	Ley 5/2012 sobre mediación en asuntos civiles y mercantiles.
Ley 8/2013	Ley 8/2013 de rehabilitación, regeneración y renovación urbanas.
LGCU	Real Decreto Legislativo 1/2007 sobre consumidores e usuarios.
LH	Ley Hipotecaria de 1946.
LHL	Local Revenue Authorities (*Ley de Haciendas Locales*).
LIIC	Collective Investment Institutions Act (Ley de las Instituciones de Inversión Colectiva).
LIRPF	Physical Persons Income Tax Act (*Ley sobre el Impuesto de la Renta de las Personas Físicas*).
LIVA	Value Added Tax Act (*Ley del Impuesto sobre el Valor Añadido*).
LMFFMAV 2013	Measures of flexibilization and promotion of the rental housing market Act (Ley de medidas de flexibilización y fomento del mercado del alquiler de viviendas).
LOPDCP	Ley Orgánica de protección de datos de carácter personal.
LOPJ	Ley Orgánica del Poder Judicial
LPH	Ley de Propiedad Horizontal.
LS	Land Law 2008 (*Ley del Suelo de 2008*).
LTC	Ley Orgánica del Tribunal Constitucional 1979.
NGOs	Non-governmental Organizations.
NIE	Número de identidad de extranjero.
NMW	National Minimum Wage.
PAH	Plataforma de Afectados por la Hipoteca.
PDVC 2009-2012	Plan por el derecho a la vivienda de Cataluña 2009-2012.
PECL	Principios de Derecho Contractual Europeo.
PEFAV 2013-2016	Royal Decree that regulates the State Plan of Rental Housing Promotion, rehabilitation, regeneration and urban renewal 2013-2016 (*Plan Estatal de Fomento del Alquiler de Viviendas, la rehabilitación, regeneración y renovación urbana 2013-2016*).
PEVR 2009-2012	Housing and Rehabilitation State Plan 2009-2012 (*Plan Estatal de Vivienda y Rehabilitación 2009-2012*).
RBE	Basic Emancipation Income (*Renta Básica de Emancipación*).
RBI	Reglamento Bruselas I.
RD 3148/1978	Real Decreto 3148/1978, de 10 de noviembre, sobre política de vivienda.
RD 515/1989	Real Decreto 515/1989 sobre protección de los consumidores en cuanto a la información a suministrar en la compra-venta y arrendamiento de viviendas (BOE 17/05/1989 núm. 117).
RDIRPCAU	Real Decreto sobre inscripción en el Registro de la Propiedad de los contratos de arrendamientos urbanos.

RDL 1/2007	Real Decreto Legislativo 1/2007 sobre la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias.
RDL 31/1978	Real Decreto-Ley 31/1978 sobre política de vivienda de protección oficial.
REIT	Real Estate Investment Trust.
RH	Reglamento Hipotecario de 1947.
RRI	Reglamento Roma I.
SA	Stock Company (*Sociedad Anónima*).
SAP	Judgement of the Provincial Court *(sentencia de la Audiencia Provincial).*
SAREB	Society of Asset Management from Bank Restructuring (*Sociedad de Gestión de Activos Procedentes de la Reestructuración Bancaria*).
SII	Real Estate Investment Companies (*Sociedades de Inversión Inmobiliaria*).
SJPI	Judgement of the Court of first instance *(Sentencia del Juzgado de Primera Instancia).*
SOCIMI	Listed Investment Companies in the Property Market (*Sociedades Cotizadas de Inversión en el Mercado Inmobiliario*).
SPA	Tenancy Public Society (*Sociedad Pública de Alquiler*).
STC	Judgement of the Constitucional Court (*Sentencia del Tribunal Constitucional*).
STJUE	Sentencias del Tribunal de Justicia de la Unión Europea.
TEDH	European Court of Human Rights *(Tribunal Europeo de Derechos Humanos).*
TFUE	Tratado de Funcionamiento de la Unión Europea.
TS	Supreme Court (Tribunal Supremo).
TUE	Tratado de Lisboa.
UC	Unidad de convivencia.
UDHR	Universal Declaration of Human Rights of 1948.
URV	Universitat Rovira i Virgili.
VPO	Public Sector Housing (*Viviendas de Protección Oficial*, housing owned by Public Administrations subjected to a special regime).
VTP	Price-controlled housing (*Viviendas de Precio Tasado*).