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## Tenancy Law and European Contract Law[1]

Tenancy law in the single national legal orders has been subject to significant legislative reforms in the last part of the previous century and the first few years of the current one. In this brief contribution the term "tenancy law" will be assumed to involve both the laws of contract, which has been the major subject-matter of the study, but also to a large extent the laws of property and tort, although this varies from state to state. The relevant reforms may be placed into three categories: (1) reforms of the legislation pertaining to tenancy law itself; (2) legislative reforms involving related sectors, for example reform of the political welfare, environmental, and urban systems relating to technical standards, and of consumer law; (3) evolution of constitutional law.

Tenancy law is an area still generally governed by national legislation, and to a limited extent, by local and regional actors[2]. This does not mean however that the

[1] This brief contribution constitutes the premise of a more detailed study concerning the relationship between European contract laws and European tenancy laws which I am currently engaged in.

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[2] See for example the different powers exercised by Landers in Germany not only in relation to maintenance but also to contractual relationships to the extent that local authorities can enact public law regulations prohibiting the alienation of premises. Moreover Landers play an active function in alternative dispute resolution through the so called "mediation centres"; these kinds of regulatory powers have been enlarged by the introduction of par. 15a Implementation Law of the Civil Procedure Code (EGZPO), which allows the Landers to impose a mandatory conciliation procedure before a case is brought to court. See on these issues the German report by W. Wurmnest at page 12 and 13.

See also the Slovenian division of competences, which gives powers to local municipalities concerning housing inspection, rent control and optional registration of tenancy contracts, thus having regulatory effects on local housing markets. See the Slovenian Report by T. Kerestes at page 4.

Another example of the division of pure regulatory powers is shown in the Danish articulation of competences: the basic law of landlord and tenant is at state level (the Private Housing Act). The Temporary Regulation of Private Housing Act applies in most local government areas (especially the bigger ones) unless the local government authority decides to not to apply the Act in its area. Smaller local government authorities (fewer than 20,000 inhabitants) can decide that the Act shall apply in their jurisdiction. (Section 1 of the Temporary Regulation on Private Housing Act). See the Danish Report by H. H. Edlund at page 2.

The Belgian organisation of tenancy law is divided into two parts: federal and regional regulations. The difference between these two types of regulatory intervention consists in their differing obligatory force: "*While most federal tenancy rules are imperative (i.e. they protect particular interests so the Judge cannot invoke their violation automatically), the regional decrees are matters of* ordre public*, so their violation is to be invoked by the Judge as a matter of course*", see the Belgian Report by C. Delforge and L. Kerzmann, at page 2.

Meanwhile in Poland central and local authorities share the power to provide regulation concerning tenancy issues. On the central level tenancy legislation has been adopted solely as acts, statutes and regulations issued by Parliament and the relevant ministries, whilst on both central and local level, social and housing policy can be implemented. This complies with article 163 of Polish Constitution, which provides that "*local self governments shall perform public tasks not reserved by the Constitution or statutes to the organs of other public authorities*". In effect they carry out certain aspects of housing policy directly and independently of central authorities, while other functions are performed as delegated powers. Moreover, "*among the three existing administrative levels of local government, the foremost role in housing matters is played by the smallest administrative division called the commune or 'gmina'. The authorities typically adopt Guidelines for the Housing Policy. This document specifies the general direction of the development of housing policy in Poland and outlines the primary*

European legislation, especially regarding fundamental rights, has not had an important effect on those regimes[3].
Despite the absence of a specific legislative competence in the area of housing, the Community institutions recognise the relevance of the subject for other areas of government for which a specific competence exists[4].
The current systems, based on the attribution of normative competences, especially at a legislative level, bring a multilevel element to tenancy law. As will be seen, Community law has had both direct and indirect effects on the national tenancy laws. For example, the harmonisation of several areas of contract law has had effects on tenancy law, causing a partial "consumerisation" of it[5]. But a multilevel analysis of this area is necessitated not only by the influence of Community legislation on contract law. If we consider the national and local nature of systems of social law, welfare law, building development, urban regulation, and indirectly the financial market and the public and private finance systems relating to housing which affect contract law and its relation to property and tort law, it is easy to understand the need to analyse such relationships in the vertical multilevel scheme within which they operate.

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*instruments to be employed in fulfilling the housing needs of citizens*", see the Polish Report by E. Gromicka and P. Zysk, at page 15.

[3] There are numerous provisions at International and European level concerning the right to housing which may affect domestic tenancy law.

**Art. 25, U.N. Charter**

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, **housing** and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

**Art. 11, International Covenant on economic, social and cultural rights**

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The State Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

**Art. 31, European Social Charter Revised**

**The right to housing**

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

- to promote access to housing of an adequate standard;
- to prevent and reduce homelessness with a view to its gradual elimination;
- to make the price of housing accessible to those without adequate resources.

**Art. 34.3 of the Draft Constitution**

" …in the struggle against assistance and social alienation and poverty, the Union recognizes and accepts the right to social assistance and assistance in **housing** for the purpose of ensuring a dignified existence to all those who do not possess sufficient resources according to the methods established by European union law and member legislation and procedures."

[4] See the final document of the 15th informal meeting of Ministers of housing held in Padova on November 27th and 27th 2003, 'Housing Policies and European Integration: Problems and prospects, Final document proposal', (hereinafter 'Housing Policies') in which it was stated "*[a]lthough housing is not under the direct competence of the EU, it has complex links with many important issues with EU policies such as: building norms and energy conservation, competition rules, consumer policies, taxation, for instance on VAT, finance policies i.e. Basel II), social inclusion, NAP incl. and joint incl. Memorandums for the accession countries, social and economic rights, statistics, structural funds, and promotion of research and technological development*."

[5] In this respect I will distinguish between the direct and indirect impact of European legislation on national tenancy laws. See infra n. V

The aims and content of tenancy law may also depend on the public initiatives regarding access to property and the operation of the housing markets. There is also a correlation between tenancy law and the financing of tenancies, in particular the regimes of public subsidy using public funds and of bank loans[6].

The results of the research suggest that a link might be created between the 'property owned outright/property held under a lease' distinction and the content of the legislation, especially with regard to the level of protection of the rights of tenants. Thus it is possible that in countries where the public order promotes access to property for the lower social classes, the protection of these classes within the tenancy laws might be weaker and vary to a greater extent among different national territorial areas. The importance of this link changes according to whether the public initiatives on access to property and whether the corresponding enforcement mechanisms work on a national or local level.

When they work on a local level, it is possible that the enforcement mechanisms may vary and the very efficiency of the initiatives may change from region to region. An example, albeit with a slightly different emphasis, is that of the relationship between urban regulation and tenancy law especially with regard to the "warranty of habitability"[7]. The standards set by the regulation constitute the minimum requirements of the content of the rights of the tenant. In many systems the violation of such rules constitutes contractual non-performance or violation of the warranty[8].

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[6] Strong public policies aimed at subsidising low incomes to facilitate renting are generally associated with a decrease of a generalised regime of rent control. For example the recent Italian law-reform has decreased rent control and has defined specific policies to fund low-income and disadvantaged people. See also in Belgium, where regional societies have replaced the *Société Nationale des habitations et logements à bon marché*, since this field of law has been transferred to regions. These public housing agencies aim to guarantee housing for people with modest salaries, and in Wallonia, they have an "intermediary" role between private landlords and tenants. See Belgian Report at page 3.

Meanwhile, in the Netherlands half of the available housing belongs to bodies working in the interest of public housing, which consist mainly of legal persons governed by private law (corporations) under the surveillance of the minister of public housing. These bodies afford priority housing to persons who encounter difficulty in finding suitable housing, due to their income or to other circumstances. See the Dutch Report by D. Rueb and S. Kaufmann at page 6.

[7] See the Belgian situation where the regional authorities have the power to impose minimal requirements in order to ensure that each person has "decent" housing. In particular this relates to the obligation on the lessor to respect minimal requirements in terms of safety, health and equipment (see article 3 of the Brussels code of housing). See also article 7 of the Brussels code of housing which provides that furnished and small residences can be hired only after having obtained a certificate, and that a copy of this authorization be given to the tenant or the candidate tenant. See Belgian Report at page 10.

[8] See the Danish example, where Section 11 of the *Private Housing Act* and Section 22 of the *Temporary Regulation of Private Housing Act* charge the landlord with the duty of proper maintenance of the premises as part of his contractual obligations. If the non-performance of such an obligation leads to temporary frustration of the tenant's right of using the premises, the tenant could be entitled to a temporary reduction of the rent (Section 11(2) of the Private Housing Act). In the case that the state of the premises is agreed upon in the contract and is covered by a guarantee, the tenant may terminate the contract and claim damages. Under Danish legislation the tenant could also use public law mechanisms in order to enforce his right to good quality premises: see for instance Section 42 of the Environmental Protection Act (Consolidate Act n.753 of the 25th of August 2001). See the Danish report at page 20.

The difficulty of merging public health regulations with contractual law is widely acknowledged by the English system, where it is possible for the contract to contain an express clause imposing a duty on the landlord to keep the property in a reasonable state of repair. In the absence of such a clause the Landlord and Tenant Act 1985 imposes an obligation 'to keep in repair the structure and exterior of the dwelling-house'. The tenant could also bring a lawsuit grounded on the Defective Premises Act 1972, see the English report by D. Cowan, at pages 48-50.

The new frontiers of environmental regulation are another example of the interaction between tenancy law and regulatory intervention that may take place at different levels. In such cases a unified national legislative dimension to tenancy law may have a "compensatory" function on the differences housing systems concerning various regions.

The research undertaken was based on an attempt to discover which factors should be taken into account when choosing between the preservation of the national laws and/or transfer of a part or all of the competences in this area to the European sphere. In order to address this question a comparative analysis of the various systems (of both the current Member States and the candidate States) was considered to be indispensable in order to evaluate the evolution of these systems and verify the presence of convergence or divergence.

Some characteristics seem to be relatively common, for instance a distinction between tenancy for residence purposes, and tenancy for business purposes. Other traceable common features have been identified such as the increasing withdrawal of public regulatory intervention in the contractual relationship between tenant and landlord, in favour of larger public intervention in alternative dispute resolution: the setting up of market oriented regulations, granting consumer protection and the fundamental right to housing by means of public mandatory rules and policies.

The comparison of national legislation with the European Principles of Contract Law gives empirical evidence of the legislative effort that Member States have put in setting up an efficient housing market, based on the multilevel contractual regulation combined both with high standards of consumer protection and the enforcement of fundamental rights[9]. On the other hand the legislative choices with regard to the use of disciplines to be found in the code (where one exists) or the use of special disciplines which are foreign to the code seem to vary. Equally, the changes which have taken place in the Member States of the European Union seem to be different from those in the candidate, post-communist States.

With reference to the latter group, it is important to underline the difference between those countries which have radically restructured their legislation on tenancy, and those which have preserved the legislation of the communist period, regardless of a change in the constitution[10]. This fact highlights, as does the history of the relationship between Code and Constitution in Western European countries, that constitutional changes rarely if ever involve immediate change of the civil legislation. This is not to say that changes do not take place, but rather that change may often happen at an interpretative level, rather than at a legislative one, and involve difference times and means.

The analysis which has taken place during this research constitutes the basis for a reflection on the possibility of harmonising tenancy law, but also for an evaluation of the impact of the current and future harmonisation initiatives and coordination of European contract law on a tenancy law which remains entrusted to the national legislatures.

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[9] See conclusions reached by O. Remien "*Tenancy Law in Europe and the Principles of European Contract Law*" available on the web site of European Private Law Forum of the EUI.

[10] Compare Bulgaria where a new Constitution has been enacted and the regime is still laid down in the Law of Contract statute with Rumania where a new Constitution has been enacted and a change in the law has occurred through the approval of a special statute while the provisions of the Code concerning tenancy laws have been left substantially untouched. See the Bulgarian and Rumanian reports by E. Rousseeva and L. Dragomir respectively.

Without attempting to summarise the entirety of the rich number of themes which an analysis of the relationships between national systems involves, some transversal questions which emerge from the comparative analysis seem to be particularly interesting. Six of these are outlined below.

I) First, the nature of the rights granted to tenants merits discussion, with particular reference to the definition of their social rights. This question involves the extent to which constitutional values, directly or indirectly related to housing, appear in the contractual relationship as a result of the rights defined by the constitution[11]. This point does not apply merely to the numerous constitutional rules which are specifically addressed at the protection of such rights, but also to the relationship between the rights of the tenant and more general rights, such as that to dignity (art. 1 of the Charter of Fundamental Rights of the European Union) or for respect of the private life (art. 8 of the European Convention on Human Rights). In fact often wider protection has been provided more by general provisions than by those rules specifically endorsing rights to housing. In this area there has been a progressive change of attention, presumably due to economic expansion, away from the economic dimension of housing rights (which essentially involve the necessary resources to gain access to housing and maintain a relative stability, such as rent controls) towards those rights involving identity[12]. Many tensions in the area of constitutional values involve questions of the enjoyment of the

[11] As an example of constitutional provisions directly related to the right to housing, the Portuguese constitution offers no reference to the ECHR in Portuguese legislation, but it does for house and urban planning, namely in art. 65. These rights - housing and urban planning - are fundamental rights of a social nature, which stand in Chapter II (Social Rights and Duties), Title III (Economic, Social and Cultural Rights and Duties) of the Constitution. See the Portuguese report by S. Passinhas, at page 4-5.
Concerning the direct constitutional protection of fundamental rights, reference should be made to the German system, where the influence of the constitution (Basic Law) has been manifested in a huge number of judgments of the Federal Constitutional Court on tenancy law matters. Moreover, the Basic Law "*contains a guarantee both of private property (Art. 14 (I) BL) and of private autonomy (Art. 2 (I) BL, as interpreted by the Federal Constitutional Court). Property rights are limited in the social interest (Art. 14 II ). According to the Federal Constitutional Court, Art. 14 BL – despite its wording – also protects the tenant as a possessor of the premises although he is not the owner. For example, a tenant can rely on Art. 14 (I) BL to require the approval of a modification of the leased object from the landlord in order to allow proper use for handicapped people*". See the German report at page 8.

[12] The main example is provided by French law, where the 2002 Modernisation Sociale Act added two paragraphs to article 1 of the 1989 Tenancy Act, prohibiting discriminative behaviour in the choice of the tenant.
Article 1, par. 3 provides that:
"*Aucune personne ne peut se voir refuser la location d'un logement en raison de son origine, son patronyme, son apparence physique, son sexe, sa situation de famille, son état de santé, son mœurs, son orientation sexuelle, ses opinions politique, ses activités syndicales ou son appartenance ou sa non-appartenance vrai ou supposée a une ethnie, une nation, une race ou une religion déterminée.*
*En cas de litige relatif a l'application de l'alinéa précèdent, la personne s'étant vu refuser la location d'un logement présente des éléments de fait laissant supposer l'existence d'une discrimination directe ou indirecte. Au vu de ces éléments, il incombe a la partie défenderesse de prouver que sa décision est justifiée. Le juge forme sa conviction après avoir ordonne, en cas de besoin, toutes les mesures d'instruction q'il estime utiles.*"
Therefore, the person who was refused the tenancy simply has to "*present factual elements that infer the existence of direct or indirect discrimination*" for the landlord to have to prove that his decision to refuse this applicant was justified. That could trigger the multiplication of actions grounded on mere allegations and thus landlords would be forced to prove their good faith, but might be unable to produce the required "justification".

relevant property and thus the freedom within the domestic space (frequent tensions occur over agreements in which the landlord attempts to limit the freedom of the tenant to live with other persons, or to put up guests)[13]. The

[13] Tenants' rights can be pursued in front of the European Court of Human Rights on the basis of two main provisions: art. 8 of the Convention, and art. 1 of Protocol No. 1, which provide respectively:
Art. 8
"*1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
*2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*".
Art. 1 of Protocol No. 1
"*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
*The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties*."
Sometimes the former are related to an obligation of non-discrimination, based on art. 14, which provides that:
"*The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*"
As a matter of fact, the latter complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to the "rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of one or more of such provisions, and to this extent it is autonomous, there can be no room for its application unless the facts of the case fall within the ambit of one or more of the latter. See *Karner v. Austria*, 24th July 2003, no. 40016/98, para. 32; *Petrovic v. Austria*, 27th March 1998, Reports 1998-II, para. 22.
The connection between art. 8 and art. 14 is used when the Court deals with rights of tenants: in cases where a tenancy is transferred by succession or where the treatment of tenants renting State-owned property and other private tenants renting from private landlords is under scrutiny, the difference in treatment should have an objective and reasonable justification. In other words, there must be a legitimate reason which might justify a difference in treatment, but it should be ascertained whether the principle of proportionality has been respected in the cases presented to the Court (see *Spadea and Scalabrino v. Italy*, 28th September 1995, Series A no. 315-B, para. 45; *Petrovic*, cited above, para. 30). In particular, the Court has stated that if the difference in treatment is based exclusively on the ground of sex the reasons that should have put forward must be particularly weighty (See *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 29, § 27; *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24; *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, § 29, ECHR 1999-IX; *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 94, EHCR 1999-VI; *Fretté v. France*, no. 36515/97, §§ 34 and 40, ECHR 2002-I; and *S.L. v. Austria*, no. 45330/99, § 36, 9 January 2003). In case *Karner v. Austria*, (cited above, para. 39-43), the right of the surviving partner to succeed to a tenancy is not restricted to heterosexual couples, because the Austrian provision at issue protected persons who had been living together for a long time without being married against sudden homelessness, and applied to homosexuals as well as to heterosexuals,.
The principle of proportionality does not merely require that the measure chosen is in principle suited for achieving the aim of the national provision, it must also be shown that it was necessary to exclude a specific category from the scope of application of a provision in order to achieve that aim, and this is even more important when the margin of appreciation afforded to member States is narrow.
There are also further cases in which the tenants complained that a prolonged inability to recover possession of an apartment was a violation of its right of property, as embodied in Article 1 of Protocol No. 1.
The Court's case-law explains that the article guarantees in substance the right of property, and it comprises three distinct rules. The first, expressed in the first sentence of the first paragraph, lays down the principle of peaceful enjoyment of property, and moreover is of a general nature applicable to all

conflict between the right to property and rights to housing is only one dimension of the frequent clash of constitutional values that occur both at national and European level.

It should be made clear that fundamental rights are not the only means by which collective constitutional values appear in and condition the contractual tenancy relationship and also affect the relevant fields of property and tort law.

II) A second comment involves the actors which are deputised to produce the rules governing tenancy law. The evolution in the individual countries, for differing historical reasons, displays a progressive reduction in interventionist legislation, based on systems of mandatory rules directed at the content and duration of the tenancy contract. In place of this, an increasing reliance on the principle of freedom of contract (via private party autonomy) has grown up: in a few cases private party autonomy has a prominent role in the formation of the contract as well as for the specific covenants there contained[14]. This is the

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kinds of 'goods'. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, among other things, to control the use of property in accordance with the general interest. See *Mellacher and Others v. Austria*, 19th December 1989, Series A no. 169, pp. 24-25, para. 42; *James and Others v. the United Kingdom*, 21st February 1986, Series A no. 98, pp. 29-30, para. 37.

The Court reiterates that an instance of interference must strike a "fair balance" between the demands of the general interest and the requirements of the protection of the individual's fundamental rights. *Sporrong and Lönnroth v. Sweden*, 23rd September 1982, Series A no. 52, p. 26, para. 69; *James and Others*, cited above, p. 34, para. 50; *Immobiliare Saffi v. Italy*, no. 22774/93, ECHR 1999-V, para. 49; *Chassagnou and Others v. France*, 29th April 1999, para. 75; *Iatridis v. Greece*, no. 31107/96, para. 55, ECHR 1999-II; Therefore there must be a reasonable relationship of proportionality between the means employed and the aim pursued. In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question. In spheres such as housing, which plays a central role in the welfare and economic policies of modern societies, the Court will respect the legislature's judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation. See *Istituto Nazionale Case v. Italy* (dec.), nos. 41932/98, 41934/98, 41937/98, 41938/98, 42730/98 and 42733/98, 5th September 2002.

As an example, taken from the endless number of cases involving Italy, a system of temporary suspension or staggering of the enforcement of court orders followed by the reinstatement of the landlord in his property is not in itself open to criticism. However, such a system carries with it the risk of imposing on landlords an excessive burden in terms of their ability to dispose of their property and must accordingly provide certain procedural safeguards so as to ensure that the operation of the system and its impact on a landlord's property rights are neither arbitrary nor unforeseeable. See among others *Immobiliare Saffi*, cited above; *Scollo v. Italy*, 28th September 1995, Series A no 315-C; *Lunari v. Italy*, no. 21463/93, 11th January 2001; *Palumbo v. Italy*, no. 15919/89, 30 November 2000.

From another point of view, article 8 of the ECHR was used as a legal basis in order to suit English tenancy law regulations. The procedure for the termination of an assured shorthold tenancy has been challenged on the basis that it contravenes article 8, because of the court's lack of discretion to deny the landlord possession. In *Poplar Housing and Regeneration Community Association Ltd v Donoghue* (2001, EWCA Civ 595), the Court of Appeal concluded that the eviction did impact on the tenant's family life, thereby engaging article 8(1). However, it could be justified under article 8(2) on the basis that it was necessary to have in place a procedure for the orderly recovery of possession at the end of a tenancy. The *Poplar* case illustrates well the courts' deference to Parliament in matters raising human rights issues.

[14] Nevertheless the process under discussion should be regarded as an ongoing one, thus showing that Member States are actually rethinking the relationships between market and regulations which are laid down in their private law systems. On the same issue, see also the German national report, at page 7, where the influential role of the Constitution in the shift from private autonomy to a "*publicly*

case especially, but not only, for those legal systems "in transition" after the Communist era, where the privatization of public housing implies the systematization of private law in civil codes or statutes of contracts and obligations as well as reallocation of regulatory powers, with subsequent enlargement of parties' autonomy. An interesting example of this "new deal" in tenancy law can be found in Irish regulations and in particular in the Residential Tenancies Bill 2003, whose main aim will be, if it comes finally into force, to "underpin a more attractive, professional and efficient private rented sector"[15]. There is evidence of the same process in the evolution of Greek legislation on the minimal duration of lease contracts and the re-adjustments of rent[16]. The shift of regulatory powers from State to market is the policy guideline of the most recent Italian statute on tenancy law (L. n. 431/1998), aimed at balancing property rights and the need to protect the weaker party (or tenants). It states that the rent is to be freely negotiated between the parties (for 'normal' tenancy contracts), and determined by landlord and tenant associations (for special tenancy contracts)[17]. An interpretation of this phenomenon might attribute it to a growing tendency to reallocate power from the State to the market: in the area of tenancy law however such a reallocation is partial for two reasons:

i. The redistribution of normative power from the State to private parties has involved a significant development in the presence of collective actors (primarily associations of landlords and tenants but also other categories) with differing functions: from the availability of standard-form contracts, to that of mediation and conflict-resolution procedures[18]. Thus the scene often involves at

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*regulated social owner-and-user relationship*" is expressly acknowledged. It is necessary to point out that the German case is a well established example of multilevel regulation, as previously described, see supra fn. 2. An example concerning the difficult balance between parties' autonomy and public mandatory rules (as well as social concerns), is to be found in English contract law, in which borderline cases of misused contractual freedom in order to avoid mandatory legislation appear; see S. Bright "*Avoiding Tenancy legislation: sham and contracting out revisited*", Cambridge Law Journal 61 (2002), p.146-168.

[15] See the Irish report by A. Ryall, at page 12.

[16] See the Greek report by K. Tsekouras at page 10.

[17] See the Italian report by U. Breccia and E. Bargelli, at page 19.

[18] Under French legislation there was already a role for tenants' organisations in the 1950's, in reaction to despicable housing conditions and they actively participated in governmental negotiations in 1974. Most of the content of the agreements then signed was integrated into the 1982 Act, which was first repealed and then introduced again in 1989. Recent legislative reforms have "*increased the role of these organisations, by introducing them within new decision making procedures (at the national as well as the local level) or by authorising them to represent tenants before the courts (under certain conditions)*", see the French report by N. Boccadoro and A. Chamboredon, at page 5. At present, anyway, it has to be underlined that landlord and tenant associations have no seats at standard contracts drafting tables.

Unsurprisingly the process was fully brought forward in Germany and Denmark. As far as the former is concerned, both landlord and tenant associations have several rights, such as to assist in drafting rental tables, statistics on local rent levels and to provide legal advice to their members. Only landlord associations regularly issue standard contracts. See the German national report by at page 15. As for the latter case, the Danish Ministry of Social Affairs has issued a standard contract (tenancy agreement) for private rented properties; the contract is open to adjustments in order to meet the parties' needs, providing space for individual terms and covenants. Under section 5(2) of the Private Housing Act, tenant and landlord association have the right to participate in the drafting process issued by the Ministry of Social Affairs. See the Danish report, at page 17.

least three classes of actors: (1) the State, or rather (considering the multilevel analysis adopted above) the public actors; (2) the individual proprietors and tenants; (3) the associations.

The increasing role of collective autonomy gives rise to the production of standard-form contracts which may be used in place of or together with those which the parties would define individually. When the definition of the main content of the contract is entrusted to associations the level of state intervention via mandatory rules is reduced greatly in proportion to the level of state intervention which occurs through mandatory rules when the main content of the contract is defined by private parties[19]. At the same time however, a nucleus of mandatory rules is developed by collective autonomy. The result is a limited amount of private autonomy albeit for a different reason.

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Other examples can be found in the Irish system, where both organisations' have representatives on the Expert Commission on the private Rented sector, charged with consultative functions in the drafting process of forthcoming legislation. The Irish case nevertheless has peculiar features, since there are currently two models of standard contract competing on the private rented market. The first one was drafted by the Dublin Solicitors Bar Association taking into careful account observations and recommendations made by an NGO active in this field (Threshold). The second model was drafted by Threshold in 1993 and it is commonly used in practice. See the Irish report at page 24.

As previously acknowledged, under the Italian legislation the landlords' and tenants' associations' role in drafting processes reflects the complexity of multilevel articulation of sources at the parties' disposal. These associations might sign both general and local agreements, the former pursuant to art.4 L. n.431/98 and the latter pursuant to art.2 subs, 4 L.431/98). The parties can opt for such a special regime or they can choose the general mandatory regime. For deeper analysis of this issue, see the Italian report at page 4.

Notwithstanding the fact that in Poland the activity of NGOs in this field does not have a long history, recent legislation (namely the Act on Protection of Competition and Consumers 15th of December 2000) grants them the possibility to take part in legislative drafting process by means of consultative and proposal functions.

Since adjudication by means of a court trial is becoming more and more inefficient, being time consuming and expensive for the States, many European systems provide landlords' and tenants' associations with some prerogative alternative dispute resolution or grant them standing in a listed number of fact patterns. See for instance the Italian system, in which consumer associations can challenge in court abusive terms contained in a contract (pursuant to art. 1469 *sexies* Civil Code) or might bring lawsuits aimed at the protection of consumers' rights listed in art.1, subs. 2 L.281/98, which implemented the European Directive on Unfair Terms in Consumer Contracts. Also the Dutch Civil Code, with regard to implementation of this Directive, contains similar provisions concerning party representation or group action (art.6:240 et seq. DCC, art.3:305a and 3:305c DCC). Forms of obligatory conciliation procedures are provided in the German (see the German report at page 15) and Polish systems (see the Polish report at page20).

[19] See for instance the Italian tenancy statute n. 359/1992, which led to a partial deregulation of the market, as it excluded newly built premises from the application of "equo canone" (fair rent), and allowed the contracting parties to derogate from the "fair rent" rules, provided that they accepted the obligatory assistance of landlords' and tenants' associations.

Furthermore, the most recent statute (L. n. 431/1998) sought to remedy the deficiencies of the previous one, and aims at weighing property rights against the need to protect the weaker party (or tenants). It states that the rent is to be freely negotiated between the parties (for 'normal' tenancy contracts), and determined by landlord and tenant associations (for special tenancy contracts).

Moreover, the tenancy statute n. 431/1998 provides that housing contracts can last fewer than four or three years if they are concluded for temporary needs (see art. 5, subs. 1). And they are valid if the rent is determined in accordance with the rent ceiling determined by agreements between landlord and tenant associations. Yet, this contract must be concluded in conformity with the additional rules stated by the local agreements made between landlord and tenant associations.

ii. A reduction in the direct intervention on the tenancy contract is partially compensated by the increase in the influence of consumer protection laws, applicable also to the tenant, or at least to certain types of tenant (one example of this are the laws on unfair contract terms). This development leads to the "consumerisation" of the tenants in the tenancy contract putting tenants on the same level as other operators in the market, giving them analogous protection to those given to other consumers in contractual agreements regarding other types of commodities.

iii. Consumerization of tenancy law may not be appropriate solution if market failures relating to housing present different problems than those relating to consumer protection and therefore require specific intervention. Legislation such as that directed at consumer protection, which has the primary object of redressing market failures, associated to consumer goods, is only partially suited to guaranteeing all the rights related to housing and tenancy. In fact other types of national interventions are applied to this task, such as subsidies or fiscal advantages for tenants with low incomes.

III) A third observation involves the extent of freedom of contract which, although it has increased, remains limited. It can clearly be seen that, other than a redistribution of emphasis between mandatory rules and freedom of contract in tenancy law, there has been a change in the content and aims of the legislative initiatives embodied in mandatory rules, also due to the trend of "consumerisation" identified above. In particular one can observe the so-called "neoformalism" which has caused a profound difference in the method of intervention, moving away from control on the contractual content towards control on the process of contract formation, assuming that the increase of formal warranties allows the reduction of abusive behaviour on the part of the landlord .

IV) The fourth observation links the two previous ones. It concerns the function of associations in tenancy contract law and its possible relevance to the debate on harmonisation of contract law. The role of collective autonomy in the formation of tenancy contracts and in the definition of their content gives rise to some questions about the philosophy which underlies the debate about harmonisation of European contract law and in particular the link, perhaps not yet adequately discussed, with the evolution of the relationship between mandatory rules and rules from which the parties may explicitly deviate. Indeed, the balance between the two changes if, alongside the concept of individual freedom of contract, one considers collective autonomy[20].

In reality this question does not only concern the relationship between mandatory and non-mandatory rules, but also the role of general clauses, such as good faith and public order (ordre public). The function of general clauses in contract law systems differs significantly from one legal system to another. In contexts in which the production of private law rules is entrusted generally to the State and to the freedom of contract of private parties, general clauses permit consideration of collective values which may be different from those

[20] See the Italian system of mandatory-enabling rules and general-special regimes, supra fn.19.

protected by the mandatory rules. In particular general clauses have represented valuable means to ensure compliance with constitutional values especially when their direct justiciability was not allowed. This difference is due to a number of reasons, among which an important one is the possibility of giving a voice to social communities which would not be adequately recognised by mandatory rules or rules developed from the freedom of individual contracting parties. When the role of associations, which provide a means of expression of the values present in the relevant community, grows, the function of general clauses is destined to change, although not necessarily to be reduced[21]. It is important to underline the particular sensitivity of tenancy law and more general of housing to changes brought about by the formation of multicultural communities with different traditions.

The different balance between mandatory and non-mandatory rules and the change in the function of general clauses are only two of the possible consequences for the substantive tenancy law deriving from the participation of associations and from the increased influence of collective autonomy on the formation of contracts. Can this experience, developed in national contexts, constitute a phenomenon which it is possible to employ on a European level? If so, would this be limited to tenancy law or could it be employed to other sectors involving the application of a future European contract law?

But what is the current attention paid to collective autonomy in European contract law? How can the phenomenon of the intervention of intermediate social bodies in the production of norms be integrated in the basic structure, especially considering the role of harmonising agents which these might perform?[22] In this context of course the discussion could be vastly enhanced by comparing the recent experience of tenancy law with the more consolidated experience of employment law[23].

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[21] In Denmark, for instance, the Ministry of Social Affairs has issued a standard contract (tenancy agreement) for private rented properties. This agreement, made in co-operation with tenants and landlords associations, contains everything needed, including space for individual terms and an explanatory text to help filling in the blank spaces in the contract. It should be stressed that the usage of this tenancy agreement is not mandatory, but if landlords use other agreements that are not authorised by the Ministry of Social Affairs, the Private Housing Act rules apply. See the Danish Report, at page 16.

Meanwhile in Ireland two standard form contracts are currently available. The older was drafted by the Dublin Solicitors Bar Association in the 1960s. It is still commonly used by solicitors and landlords, despite its very pro-landlord terms, and its length and complexity. The DSBA drafted a modern standard form lease in 1999. This is a far more balanced contract, which takes account of the rights and obligations created pursuant to the Charter for Rented Housing, where various measures of tenant's protection were collectively described. See the Irish Report at page 24.

[22] For some implications of governance of European contract law see F. Cafaggi, '*Una governance per il diritto europeo dei contratti?*', in F. Cafaggi (ed.) *Quale armonizzazione per il diritto europeo dei contratti*, Padova, 2003.

[23] See the Communication from the Commission to the European Parliament and the Council, *A more coherent European contract law - An action plan*, COM/2003/0068 final. This Action Plan seeks to promote the elaboration of EU-wide standard contract terms and to examine whether non-sector specific measures such as an optional instrument may be required to solve problems in the area of European contract law. It states that "*in a large majority of cases, and in particular for fairly straightforward and often repeated transactions, parties often are interested in using standard contract terms. The use of standard contract terms spares the parties the costs of negotiating a contract. (...) The Commission believes that if such general terms and conditions were developed more widely, they could solve some of the alleged problems and disincentives reported. This is why the Commission intends to promote the establishment of such terms and conditions in the following ways: a)*

V) A fifth reflection summarises several of the considerations already made, because it is related to the effects that the current or future harmonisation processes may have on tenancy law, assuming that the latter remains at a national level. The effects of harmonisation can be put into two categories: direct and indirect. The direct effects are those which translate into changes in national systems, whose object coincides with the harmonising intervention, whether at a legislative or judicial level (for example the initiatives on warranties of sale which, although modified, have a direct effect on national legal systems). Indirect effects are those which are produced on areas functionally connected to those harmonised, but are not considered directly by the harmonisation process. Such effects occur sometimes independently of, but sometimes even directly contrary to, the explicit will of the legislator. In the former case, the Community legislator defines an aim of the intervention without considering the functional dependencies which the area might have on other sectors. For example in the case of the Directive on Unfair Contract Terms the Community legislator had not explicitly considered the impact which that norm might have had on tenancy law, once it was accepted that that norm could apply to such contracts[24].

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*Facilitating the exchange of information on initiatives. (...) b) Offering guidelines on the use of standard terms and conditions*". See pages 21-22.
Moreover, the Commission emphasise that regulatory instruments different from the traditional ones exist, in particular co-regulation, self-regulation, voluntary sectoral agreements, open method of coordination, (that have already been noted in Action plan 2001 "Simplifying and improving the regulatory environment", COM (2002) 278 final, page 3). However, the Commission is aware that this mix of non-regulatory and regulatory measures would not solve all problems of contract law.

[24] The analysis of national tenancy law regimes highlights that the implementation of the Directive 93/13/EC on Unfair Contract Terms has played a role in recent development of tenancy law. In the case of France, some mandatory legislation on unfair terms was provided even before the cited Directive: obligations of parties and standard terms were included in the Tenancy Act of 1989 (these provisions are *d'ordre public*, *i.e.* they are compulsory and can be automatically raised by the judge without any demand from the parties). The dominant idea behind this Act was to balance powers between tenants and landlords. "*Abusive clauses are strictly controlled as regards to tenancy law. Article 4 of the 1989 Tenancy Act prohibits 10 different types of clauses, which are simply considered as "non existent" (non écrites). This means that if such a clause is included in a contract, it has no legal value, just as if it had never been written. A tenant does not have to comply with it, he does not even have to go before the judge to have it withdrawn*", see French report at page 31. A *Commission des clauses abusives* was created in 1978 (L. 132-2 of the Consumer code), and it was attached to the Minister in charge of Consumer Affairs. The duties of the Commission are to control the terms of standard contracts and thus recommend suppression or modification of terms which create a significant inbalance between rights and obligations of the non-professional as opposed to those of the professional. In 1995, the definition of abusive clauses was modified as to comply with the 93/13/EC Directive. The commission also publishes recommendations on specific contracts; in particular, the Recommendation of July 2000 was issued on rental contracts concerning the letting of dwellings. See the French Report p.31
Unsurprisingly, the German implementation of the Directive went far beyond the mechanical transposition of community provisions, and have a strong influence on tenancy law. First of all the Council Directive 93/13/EEC, transposed in §§ 305 sqq. BGB, is applicable to lease contracts. For instance, "*a clause that obliges the tenant to have the premises renovated by craftsmen is void because it is contrary to the requirement of good faith since it puts an unreasonable disadvantage on the tenant causing a significant imbalance in the parties' rights*", see the German Report at page 10.
Moreover, art. 3, para. II, lett. a) of the Council Directive 85/577/EC to protect the consumer in respect of contracts negotiated away from business premises, excludes the application of the directive's regime to lease contracts. "*However, the German legislature has gone beyond the European level of consumer protection as permitted by Art. 8 of the Directive when transposing it by granting also tenants a right of cancellation: According to § 312 (I) BGB, in the case of a contract between a business person and a*

In the second case, the legislator explicitly excludes effects on other sectors, declaring that the directive does not change any national rules. An example of this is that of the relationship between product liability law and warranties in sales. It is notable that in all the individual systems there is a relationship between these two concepts: in some cases they are synonymous, in others they work complementarily, and in others still they are alternatives. Where, in the Directive on Product Liability, provision is made for the norm not to have effects on the law of sale, this envisages direct effects but did not consider the indirect effects[25]. Equally in the case of the Directive on Sale of Consumer

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*consumer concerning performance for remuneration which the consumer has been induced to conclude (i.) as a result of oral negotiations at his place of work or in a private residence, (ii.) on the occasion of a leisure event organised by the business person or by a third party which at least was also in the interest of the business person, or (iii.) subsequent to a surprise approach in a means of transport or in an open public space, the consumer is entitled to a right of cancellation pursuant to § 355 BGB. Therefore, a tenant also has such a right of cancellation, since a lease is a contract concerning performance for remuneration*". See the German report at page 11

As for the Irish legislation, the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 purport to implement Directive 93/13/EEC on unfair terms in consumer contracts into Irish domestic law. But the Office of the Director of Consumer Affairs (ODCA), which is responsible for enforcing the Irish regulations, appears to have "*very little awareness of the potential application of the directive, and the implementing regulations, in the particular context of standard form tenancy agreements in Ireland*". See the Irish report at page 18.

Directive 93/13/EC has been implemented in England and Wales by secondary legislation. The Unfair Terms in Consumer Contracts Regulations 1999 stipulate that a seller or supplier is "*any natural or legal person who … is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned*." Therefore it can be assumed that, in general, landlords can be considered to be 'suppliers'. "*However, there may be circumstances in which private landlords will not be considered to be 'suppliers', for example where landlords are not making their living out of letting. If it is the case that the Regulations do not apply to such landlords, then this is potentially a serious gap in the protection of tenants*", see the English report by D. Cowan and E. Laurie, at page 44. However, it is worthwhile noting that the Office of Fair Trading has produced detailed guidance notes on unfair terms in tenancy agreements (*Guidance on unfair terms in tenancy agreements* OFT 356 November 2001) and an information leaflet on "unfair tenancy terms".

The analysis of the Polish case is also interesting, because there the effort to reach the *acquis communautaire* via legal reform is counterbalanced by peculiar conditions of the housing markets. Under Polish legislation, separate legal acts have been adopted and changes have been introduced to the Civil Code to cover standard form contracts. Prior to the implementation of European legislation, all consumer contracts (including standard terms) were governed by the same set of rules as commercial transactions. An amendment to the Polish Civil Code in the year 2000, modelled upon European legislation, has elevated consumer protection to a level not known previously. Obligations flowing from the Association Agreement and the National Programme for the Adoption of the *Acquis* led to the adoption of a number of statutes that serve to construct an institutional framework for protection of consumer rights. This structure has been established by virtue of the Act on protection of Competition and Consumers.

Poland has also implemented the Directive 93/13/EC and the Directive 85/577/EC on protection of consumers in respect of contracts negotiated away from business premises: Act of 2 March 2000 on the protection of some consumer rights and liability for damage by dangerous products contains an exemplary catalogue of standard terms that cannot be included in contracts involving consumers. "*One has to note that the scope of application of the legislation on consumer protection will be limited in the case of tenancy relationships. Apart from the general rules in the Civil Code specific consumer protection measures have been devised to protect a weaker party in a contract concluded with another, who acts in a commercial/ business capacity. At present, due to historical developments and the structure of ownership in Poland not many tenancy contracts are concluded in which one of the parties acts in a commercial capacity, therefore it is not likely that the lex specialis consumer protection measures will have application to the contracts in question*". See the Polish report at page 11.

[25] See Council Directive, 25th July 1985, on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products,

Goods the provision by which no effect is to be had on the law of producer liability is aimed at direct effects rather than indirect effects[26]. In both cases the initiatives have produced important indirect effects which have redefined the boundary between contractual and non-contractual liability.

The changes to the national laws of contract made by European initiatives have mainly involved indirect effects caused by functional interdependencies in the individual systems. This observation is important given the current debate on the merits of harmonising the general rules of European contract law. A discussion of the indirect effects which such a harmonisation might involve with regard to specific contracts is thus important but has not so far taken place.

VI) The sixth and final comment concerns the possible "institutional" responses which might be aimed at the question of coordination of the various initiatives on tenancy law. There are at least two distinct aspects of this problem. On the one hand, even independently from any European intervention which might have a direct or indirect effect on tenancy law, the creation of coordination systems involving housing initiatives would have the advantage of increasing social cohesion and promoting the battle against exclusion. On the other hand, the project of greater European intervention in the area of contract law means that there will be many direct and indirect effects on the national tenancy laws. These effects may have important ramifications for the individual national systems of tenancy law even if these are not expressly subject to coherent institutional design.

Both these phenomena evoke a necessity for coordination which can design models of coherent normative intervention for the housing sector and for harmonisation of the indirect effects[27]. Such an intervention might be achieved by different techniques: drawing on the techniques used in the sector of employment law, such as the so-called Open Method of Coordination, or other forms of coordination more similar to those used by regulators.

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(85/374/EEC), which provides at n.11 that "*Whereas under the legal systems of the Member States an injured party may have a claim for damages based on grounds of contractual liability or on grounds of non-contractual liability other than that provided for in this Directive; in so far as these provisions also serve to attain the objective of effective protection of consumers, they should remain unaffected by this Directive; whereas, in so far as effective protection of consumers in the sector of pharmaceutical products is already also attained in a Member State under a special liability system, claims based on this system should similarly remain possible*" .

[26] See Directive of the European Parliament and of the Council, 25th May 1999, on certain aspects of the sale of consumer goods and associated guarantees (1999/44/EC). Article 8 provides that "[*t]he rights resulting from this Directive shall be exercised without prejudice to other rights which the consumer may invoke under the national rules governing contractual or non-contractual liability*".

[27] On the necessity to improve coordination see 'Housing Policies', point 16, "*Considering the importance of housing for social inclusion, while noting that each Member nation adopts different housing policies - including national programs to fund housing measures - which are reflected in their National Action Plans for social inclusion, the European Ministers hereby propose the diffusion and continuation of exchange of information at the informal Ministers meeting on housing on the policies adopted by each member nation for the purpose of assessing best practice and its possible application especially with the new Member states where there are many examples of cooperation at different levels*".