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FLEXIBILITY OF RESIDENTIAL LEASE RELATIONS FROM THE TENANT'S PERSPECTIVE: ESTONIAN LAW IN A COMPARATIVE CONTEXT

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Abstract. A certain degree of "default" flexibility in residential lease relations is important in guaranteeing the tenant's right to free movement and facilitating mobility in the labour market; in other words, the tenant should enjoy a right to terminate the tenancy relationship without extensive adverse consequences. With this in mind, I will first elaborate the comparative analysis on the tenant's right to terminate. Next, I will argue that tenants in Estonia have no real choice to opt for the flexibility needed without a trade-off in terms of stability, and why asymmetry of the parties' right to terminate is recommendable. Finally, I propose considering Europe-wide best practices and the local socioeconomic environment, with draft amendments to Estonian tenancy law in order to meet needs.

Keywords: freedom of movement, comparative contract law, tenancy law, residential lease contract, right to terminate

Introduction

Stability and flexibility in the rental relationship are two important cumulative elements of tenancy regulation aimed at ensuring a secure[2], well-functioning tenancy from the tenant's point of view (cf. Nasarre, 2014, p. 819). In other words, the tenant should have a degree of flexibility without the stability of their tenure being compromised. The question should therefore be asked about conditions surrounding the tenant's right to terminate for reasons belonging to his or her own sphere of risk – that is, the consequences of making choices in the labour market or in their personal life. Given that more flexibility for one party means less stability for another, it is clear that to fulfil both criteria simultaneously, the parties' rights in relation to contract termination should be asymmetric. However, while keeping in mind the tenant's right to free movement – that is, the interest of the tenant as an individual – and the public interest for optimal mobility of the labour force, balanced regulation should also consider the interest of the landlord towards the promised performance.

In the following discussion[3], the above considerations are examined for **Latvian**, **Lithuanian**, **Swedish**, **Finnish**, **German**, **Swiss** and, ultimately, **Estonian** law[4]. For this purpose, a comparative descriptive overview is provided of regulation and the practice of parties' right to terminate. The ultimate aim, however, is to apply functional analysis to determine whether a regulatory model for residential lease contracts exists that offers the tenant both

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[2] For information on the concept of "secure occupancy", see e.g. Hulse & Milligan, 2014.
[3] This article is largely based on country reports and comparative studies of housing policy and the legal framework for the residential rental market in European countries prepared under the grant (Agreement No. 290694) of the European 7th framework programme on Tenancy Law and Housing Policy in Multi-level Europe. Available at: http://www.tenlaw.uni-bremen.de/reports.html.
[4] For a reasoning of the choice of countries for comparison, as well as a brief overview of their tenancy regulations and analysis of the landlord's right to terminate, please see Hussar & Kull, 2016.

sufficient stability and flexibility, while also respecting the landlord's property rights, irrespective of their name as contracts for an unspecified or for a specified term. This analysis does not include special cases of residential lease, such as that related to space leased only for temporary use, residential space that is part of a furnished dwelling inhabited by the landlord him or herself, or residential space that a legal person under public law or a recognised private welfare work organisation has leased to permit for use by persons in urgent need of accommodation if, when the lease was entered into, it drew the attention of the lessee to the intended purpose of the residential space and to its exemption from the provisions (BGB § 549 sec. II, Article 272 of the LOA) – whereby special regulation applies. The outcome is presented in a matrix that illustrates the general interplay between elements of stability and flexibility in various countries and various contract formats. This, in turn, provides a tool for visualising certain policy issues and evaluating Estonian law with regard to the question at hand.

1. Contract stability: the landlord's right to terminate

1.1. Contract term

It is generally safe to start by stating that in all countries under comparison, residential lease contracts could, in principle, be concluded for either a specified or an unspecified term. This is not, however, the whole truth in the case of **Germany**. A contract for a specified term could only be concluded subject to a justified reason from the landlord for fixing the term; otherwise, the tenancy is deemed to be concluded for an indefinite period of time (BGB § 575 (I 2)). According to Article 575 (I) of the BGB, the reason is justified, *inter alia*, if the landlord wishes to use the premises as a dwelling for him or herself, or members of their family or household. To understand the context of German regulation in terms of stability and flexibility issues, it should therefore be kept in mind that tenancy contracts are mainly concluded for an indefinite period of time.

Meanwhile, in **Baltic countries**[5] residential lease contracts can be agreed for a specified or unspecified term without any judicial restriction, but in practice the majority are concluded for a specified period. In **Latvia**, this might be partly explained by the fact that landlords there are not permitted to terminate open-ended contracts by giving an ordinary termination notice – that is, without providing valid reasons for doing so (Article 28 of the LRT). As a result, a landlord will probably choose a time-limited contract to facilitate repossession of the leased property if that is necessary in the future (Kolomijceva, 2014, pp. 157, 174). In **Estonia** and **Lithuania**, the reason is less obvious as in the case of contracts for an unspecified term, the landlord may terminate (in line with ordinary termination) by giving at least three or six months' notice, respectively. However, tenants may not wish to opt for a contract for an unspecified term precisely because of the landlord's (almost) unlimited right to terminate. It is meanwhile worth noting that former Estonian regulation – namely, the Dwelling Act[6] – did not recognise contracts for an unspecified term, a factor that might still affect the perspectives of the parties. Although the part of the Estonian Law of Obligations Act (LOA)[7] that has regulated tenancy contracts since 1 July 2002 is largely based on German Civil Law (and the Swiss Civil Code)[8], the existing regulation does not restrict the right to conclude term contracts, as with the case in Germany cited above.

[5] For other elements relating to the stability of tenancy relations in the Baltics, see Kull & Hussar, 2018.
[6] Dwelling Act (elamuseadus), passed 23.04.1992, entry into force 01.07.1992. Available (in English) at https://www.riigiteataja.ee/en/eli/501072015010/consolide [last viewed 15.08.2018].
[7] Law of Obligations Act (LOA) (võlaõigusseadus), passed 26.09.2001, entry into force 01.07.2002. RT I 2001, 81, 487. Available (in English) at: https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/516092014001/consolide [last viewed 15.08.2018].
[8] For more details on developments in Estonian tenancy law, see Hussar (2014b), pp. 80-81.

In **Sweden** and **Finland** too, tenancy contracts can be entered into for a limited or unlimited period of time. However, as will be outlined shortly, the similarities with respect to tenancy law between those two Scandinavian countries are exhausted.

1.2. Contracts concluded for an unspecified term

In essence, three types of regulation that address "ordinary termination" of a contract for an unspecified term by the landlord can be discerned. Firstly, most of the regulatory regimes examined here acknowledge the landlord's right to give notice without stating any reason or to state "any old reason", though this is subject to some form of control under the good-faith principle under the tenant's initiative (in **Lithuania** (Article 6.614 of the CC; Mikelėnaitė, 2014, p. 156), **Finland** (Articles 52 and 56 of the ARL), **Switzerland** (Article 266a of the Swiss CO) and **Estonia** (Article 311 (II) of the LOA).

Secondly, under **German** law, for termination of a contract with an unspecified term, the landlord needs to prove a justified interest, such as that they need the premises as a dwelling for him or herself, or members of their family or household (BGB § 573). If the landlord is interested in getting back the property after a certain period, they should conclude the contract for a specified time (MüKoBGB/Häublein, BGB § 573 Rn. 1-4). Termination for the reason of personal needs is ultimately regarded as an abuse of rights if the landlord could have foreseen his or her needs at the time of concluding the tenancy contract. These protective rules are, however, available to the tenant only for the first three years of the tenancy, a period that can therefore be considered "secure". If the right to terminate exists, the term for advance notice ranges from one to nine months.

Finally, in **Sweden** (Bååth, 2014, pp. 95–99) and **Latvia** (Article 28 of the LRT), the landlord principally does not have the right to give notice insofar as the tenant fulfils their obligations.

1.3. Contracts concluded for a specified term

The level of stability for the tenant also varies in the case of contracts for a specified term. Firstly, in **Latvia** (Article 28 of the LRT), **Lithuania** (Articles 6.497 and 6.611 of the CC; see Mikelėnaitė, 2014, pp. 83, 156) and **Sweden** (Bååth, 2014, p. 96), it is practically impossible for the landlord to terminate a contract for a specified term for reasons other than a fundamental breach of contract by the tenant or a situation in which the dwelling posing a hazard.

Secondly, another group of countries comprising **Germany** (BGB § 543), **Switzerland** (Article 266g of the Swiss CO) and **Estonia** (Article 313 (1) of the LOA) acknowledges a general rule of "unforeseeable compelling reason". In **Germany**, application of this general rule presupposes, in principle, that the compelling reason originates from the other party's sphere of risk, as in the case of breach of contract by that party. Under **Swiss** and **Estonian** law, the reason may also originate from the landlord's own sphere of risk, whereby termination by the landlord would be valid but is subject to a damage claim by the tenant, as long as the circumstances still satisfy the condition necessary for application of the general clause that the landlord cannot reasonably be expected to continue fulfilling the contract due to unforeseeable circumstances (Hussar & Kull, 2016, pp. 80-82). However, mere desire to use the dwelling for themselves is not, in principle, considered a compelling reason in the context of extraordinary termination of a contract with a specified term.

Finally, **Finland** has developed special regulation that differs from those described above. In that country, the court may exceptionally – and subject to reasonable compensation for any loss incurred as a result of premature termination – grant the landlord the right to terminate: 1) if he or she needs the flat for their own use or use by a member of their family for reasons that the landlord could not have been aware at the time when the agreement was made; or 2) if, for some comparable reason, the agreement's remaining in force until the agreed date would

be patently unreasonable from the landlord's point of view (Section 55 of the ARL).

In broad terms, despite insignificant differences and details that will not be dealt with here[9], contracts for a specified term can be considered sufficiently stable for the tenant to fulfil the necessary stability criteria.

1.4. Summary remarks on stability

In conclusion, **Sweden** and **Latvia** comprise countries where tenants can feel secure with contracts for a specified and unspecified term alike, because the right to terminate the contract is non-existent or strongly limited. The level of tenant protection is also relatively high in **Germany**, where even contracts concluded for an unspecified term may be terminated by the landlord only subject to (unforeseeable) justified reason. Less protection is provided under **Estonian**, **Finnish** and **Swiss** law, whereby a tenant who is party to a contract for an unspecified term is not protected from notice of termination without reason, except in a few cases wherein the notice is considered to contravene the good-faith principle or good practice.

In the case of contracts for a specified term, however, **Finnish** and **Swiss** law provide a higher degree of protection than under **Estonian** law by placing the burden of the initiating court's review on the landlord and guaranteeing compensation for damage in the event of termination for reasons originating within the landlord's own sphere of risk. The positioning of **Lithuania** among those countries poses some difficulties, because there the landlord has no right to terminate contracts that have a specified term (in other words, providing strong protection) but an unlimited right to terminate those with an unspecified term (weak protection).

The structuring described above was necessary to determine the format of contracts that fulfil the *stability criteria*. A schematic description of the conclusions reached is presented in **Table 1**. The next part of the analysis is aimed at defining which of the contract formats that provide stability are also flexible enough to guarantee the right of tenants to free movement. After examining default rules, a brief reference is made to contractual clauses that guarantee necessary flexibility if the default rules do not.

2. Contract flexibility: the tenant's right to terminate

2.1. Contracts concluded for an unspecified term

As a generally accepted principle, provided that the delay for notice is observed, the tenant has the right to terminate the contract concluded for an unspecified term without invoking any substantial reason. The notice period in the countries being compared is set at between one month (**Latvia** (Article 27 of the LRT), **Lithuania** (Article 6.609 of the CC) and **Finland** (Articles 51 and 52 of the ARL) and three months (**Estonia** (Articles 311 and 312 para 1 of the LOA), **Sweden** (Sections 3 and 5 of the Tenancy Act; Bååth, 2014, p. 95), **Germany** (BGB § 573) and **Switzerland** (Articles 266a and 266c of the Swiss CO; Weber, 2011, Article 266a, Rn. 1.) (see **Table 1**). This period cannot be extended by agreement.

However, it should be kept in mind that a contract for an unspecified term – with the exception of **Latvian**, **Swedish** and principally also **German** law, as stated in the previous section – does not offer *de jure* necessary stability because the landlord has the right to give notice without stating any reason, merely respecting the certain term for notice.

[9] For general discussion on stability, see Hussar & Kull, 2016.

2.2. Contracts concluded for a specified term

As a general rule, a contract concluded for a specified term is meant to run to the end under the term agreed.

As expected, **Swedish** tenants have a higher degree of stability and flexibility, as they are free to move by giving three months' notice without stating any reason, even if the contract was concluded for a specified term (Sections 3 and 5 of the Tenancy Act; Bååth, 2014, p. 95). However, the landlord, does not have such a privilege (see previous section; Section 4 of the Tenancy Act). In this way, the parties' rights are clearly asymmetric, which might even raise questions relating to infringement of the landlord's property rights – a topic addressed elsewhere (Schmid & Dinse, 2014, p. 622).

In **Finland**, as a matter of principle, neither party can give notice to terminate a contract that has a specified term unless otherwise agreed in the tenancy agreement. If the tenant moves out during the fixed term, it is considered a breach of contract and the tenant is liable for damages. In exceptional cases and after providing the other party with an opportunity to be heard, a court may permit the tenant (or, respectively, the landlord) to give notice on special grounds. Namely, the tenant may be permitted to give notice on an agreement if: 1) the tenant's need for an apartment comes to an end or is essentially altered as a result of illness or disability on his or her part, or that of a family member living in the apartment; or 2) the tenant moves to another locality for reasons of study, employment, or his or her spouse's employment; or 3) if, for some comparable reason, the agreement remaining in force until the date agreed would be patently unreasonable from the tenant's point of view (Articles 55(2) and (5) of the ARL). If the court permits one party to give notice on a fixed-term agreement, the other party is entitled to reasonable compensation for any loss incurred as a result of the contract's premature termination (Articles 55(2) and (5) of the ARL).

Under **German** law, the tenant (as well as the landlord) may terminate a lease agreement limited in time only extraordinarily – that is, for a compelling reason (Cornelius & Rzeznik, 2014, p. 164). The latter is deemed to be the case if, after all circumstances are taken into account and the interests of the parties are weighed, the party giving notice cannot reasonably be expected to continue with the lease until the end of the notice period or until the lease ends in another way – principally because of a fundamental breach of contractual obligations or if the dwelling is in an unacceptably bad condition (BGB § 543). Provided the termination is justified with a compelling reason, the landlord has no right to any compensation and neither are contractual penalty clauses effective (BGB § 555). Prospects for a new job in another city are not considered a compelling unexpected reason. In practice, however, if the tenant wants to move out before expiry of the statutory notice period for a reason such as a new job elsewhere, landlords often agree on condition that the tenant can propose a suitable and solvent prospective tenant who is willing to move in soon (Cornelius & Rzeznik, 2014, p. 165). Moreover, under certain conditions the landlord may even be bound to accept a suitable and solvent prospective tenant under the principle of good faith (BGB § 242).

Similarly in **Switzerland**, the lease may be terminated by giving a legally prescribed notice expiring at any time *(extraordinary termination*) only when performance of the contract becomes unconscionable for the parties for reasons of good cause (*aus wichtigen Gründen)*. In this case, the court determines the financial consequences of early termination, taking due account of all circumstances (Article 266g of the Swiss CO; Guhl *et al.*, 1995, § 44, p. 411). However, facts already known or foreseeable at the time the contract was concluded cannot be invoked as good reasons for terminating it extraordinarily (BGE 63 II 79; Guhl *et al.*, 1995, § 44, p. 411). In addition, a party cannot invoke reasons that were caused by him or herself (Weber, 2011, Art. 266g, Rn. 5; for further reference, see Wehrmüller, 2014, p. 122). A mere intention to change residence, be it for employment reasons, does not seem, as such, to qualify as unexpected compelling reason (Pra 84 [1995] Nr. 142; Weber, 2011, Art. 266g, Rn. 5). With regard to possible alternative arrangements, see section 2.4 below.

Meanwhile, **Latvian** law neither distinguishes between ordinary and extraordinary notice of the tenant, nor differentiates contracts for a specified or unspecified term. Article 27 of the LRT stipulates that unless the contracting parties have agreed otherwise, the tenant has the right to terminate a rental contract at any time, giving notice one month in advance without any need for reasoning. An obligation to pay outstanding rental and other payments or compensate for losses if the tenant terminates the contract before the end of the agreed term without justified reason is not established in a precise and unequivocal manner. Termination for a reason belonging to a tenant's own sphere of risk would probably, as "unjustified termination", trigger an obligation with regard to rental and other payments or to compensate for losses (Kolomijtseva, 2014, pp. 152-154).

Finally, under **Lithuanian** law, a tenant has the right to terminate a contract of lease before the term is over principally only in the case of a breach by the landlord or if there are other grounds specifically agreed in the contract (Article 6.498 of the CC). Special provision for residential leases (namely, Article 6.609 of the CC) additionally provides that the lessee of a dwelling has the right to terminate the contract of lease by warning the landlord in writing one month in advance, irrespective of the term of the contract. However, the previous tenant may face a claim for lost income by the landlord if the tenant terminated the fixed-term residential lease contract before the term was over without any legal grounds (Mikelėnaitė, 2014, p. 152), unless proposing the new tenant. In that respect, the outcome in Latvia and Lithuania is probably similar.

2.3. Estonian law in a comparative context

In line with German and Swiss law, in the case of a lease agreement for a specified term under **Estonian** law (Article 313 of the LOA), only *extraordinary termination* with a compelling reason is possible. A reason is considered "compelling" if, upon the occurrence thereof, a party who wishes to terminate cannot be presumed to continue fulfilling the contract when all the relevant circumstances and interests of both parties are taken into account. The reason is also "compelling" only if it is unexpected by the parties. The application of Article 313 (1) of the LOA requires the court's application of discretionary authority, whereby the court is required to consider whether the interest of the party that wishes to terminate the contract is more significant and would be more severely damaged if the contractual relationship were to continue (e.g. CCSCd 29.5.2004, 3-2-1-100-04, para. 13; CCSCd 21.05.2004, 3-2-1-62-04, para. 14; CCSCd 9.11.2010, 3-2-1-84-10, para. 10). If those conditions are fulfilled, the terminating party has no duty to cover any damages claimed by the other party. If the necessity for termination derives from that party's own sphere of risk, ending the contract would be considered a breach and the other party is then entitled to demand compensation for any resulting damages (e.g. CCSCd 29.5.2004, 3-2-1-100-04, para. 13; CCSCd 21.05.2004, 3-2-1-62-04, para. 18; CCSCd 9.11.2010, 3-2-1-84-10, paras 12-13). However, even in the cases encompassed by the latter terms, the reason for termination should qualify as an "unforeseeable extraordinary circumstance" that would "more severely damage interests" of the party wishing to terminate considering the interests of both parties (Paal/Varul *et al*., 2007, § 313, 4.4).

There is only limited case law that deals with cases in which the residential tenant wants to move out before term. At least in one case, the court did not consider the fact that a family house was found and bought earlier than expected as a "compelling" reason for terminating an existing lease contract (Pärnu County Court 21.11.2013, 2-13-14850). As the same regulation has been applied in the context of business leases on several occasions, the reasoning in such judgments might also be of use in cases relating to residential leases. Thus, the need for a larger amount of space may in principle be a good cause for termination, but even in such a case the interests of both parties must be considered and termination (in combination with compensation for damage) is justified only in the event that the interest of the party wishing to terminate the contract is more significant and would be more severely damaged if the contractual relationship were to continue (CCSCd 9.11.2010, 3-2-1-84-10, pp. 11-12). However, there is no case law confirming that after considering the interests of both parties, termination by the tenant for professional reasons could satisfy the condition of being "extraordinary and compelling".

2.4. Alternative arrangements

Two alternative arrangements that could compensate for a lack of full flexibility by default may be of importance. Firstly, in contracts that have a specified term, the parties may agree to the condition that the lessee can terminate the lease early in the case of unforeseen employment-related circumstances such as unexpected transfer to another location. Such conditions should be interpreted restrictively in that if, for instance, the tenant wishes to relocate for private reasons, he or she is not able to automatically invoke this condition. Under **Estonian** law, for example, a residential lease contract may be entered into with a resolutive condition, whereby the contract is deemed to have been entered into for an unspecified term and the tenant may terminate the contract "ordinarily" by giving at least three months' notice (Article 309 (4) of the LOA). This general clause is actually intended to protect the tenant against unexpected eviction, but also serves as the basis for the condition related to a tenant's need to move (Paal/Varul, *et al.*, 2007, § 309, 4.3). As it is always permitted to agree on conditions more favourable to the tenant, a shorter period for notice may be agreed. These types of arrangement presuppose, however, that the possibility of a change in circumstances is foreseeable and contracting around default rules would not be too costly for the tenant.

Secondly, flexibility may be supported by regulations on subleasing (Nasarre, 2014). Also under **Estonian** law, a tenant may sublet a dwelling with the consent of the landlord (Article 288 of the LOA). A landlord may refuse to grant consent for the sublease of a thing only if they have good reason. In this context, a special provision in **Swiss** law appears noteworthy – namely, under Article 264 of the CO it states that "where the tenant returns the object without observing the notice period or the deadline for termination, he is released from his obligations towards the landlord [only] if he proposes a new tenant […] who is acceptable to the landlord […], solvent and willing to take on the lease […] under the same terms and conditions" ; "Otherwise, the tenant […] must continue to pay the rent until such time as the lease ends or may be terminated under the contract or by law". It further specifies that "against the rent owing to him, the landlord […] must permit account to be taken of any expenses he has saved, and any earnings which he has obtained, or intentionally failed to obtain, from putting the object to some other use". This would not, however, lead to the inversion of obligations to mitigate damages by way of searching for a substitute tenant (by the former tenant), but only emphasises the obligation to act in good faith and cooperate with the tenant in this process (Weber, 2011, Art. 264, Rn. 10). This special rule should not be confused with the "ordinary" rules on subletting (Art. 262 of the CO) and the transfer of leases (Art. 263 of the CO) (Guhl *et al.* (1995) § 44; Honsell (1991), § 19, VII).

2.5. Summary remarks on flexibility

The question examined was whether notice for termination by the tenant in the case of a lease contract with a specified term for personal or professional reasons can be considered valid without further consequences (**Sweden**), whether termination is valid but considered as non-performance subject to claims for damages (**Finland**, **Lithuania** and **Latvia**), or, unless otherwise agreed (see section 2.4 above) or there are extraordinary compelling circumstances (**Germany** and **Estonia**), or the tenant finds a "replacement tenant" (**Switzerland**), termination in such circumstances is not valid and non-payment of rent for the period after leaving the premises is subject to a claim for specific performance. Specific performance[10] as a remedy refers to the obligation to pay rent until the end of the term. Hence, *de jure*, the contract remains valid. A damage claim as a remedy usually refers to rental payments until a new tenant has been found. The most important difference derives from the mitigation of damage rules that motivates the landlord to take reasonable actions to find a new tenant as soon as possible. In the event that the remedy of specific performance prevails, the tenant may be able to mitigate the damage by proposing a new tenant – a solution constituted by legal provisions in Swiss law, or otherwise known in practice.

[10] For general discussion, see von Bar *et al*. (DCFR) III.-3:301- III.-3:303.

In this vein, **Finnish** and **Swiss** law differ only with regard to placing the risk of finding a new tenant – that is, mitigating damages – on the landlord or the tenant. At this point, it is worth bringing to mind that the idea that where the creditor has not yet performed reciprocal obligations for which payment will be due and it is clear that the debtor in terms of monetary obligations will be unwilling to receive performance, the creditor may not proceed with performance and may recover payment if performance would be unreasonable in the circumstances is generally acknowledged in III.–3:301 of the CFR (also Article 9:101: Section 2 of the PECL). It is even more so for service contracts, whereby the client can simply terminate the contractual relationship subject to a claim for damages by the service provider (IV.C.–2:111 of the CFR; and similarly, Article 655 of the Estonian LOA).

Apparently, the **Estonian** practice not to consider mere intention to move for employment reasons as "compelling" is influenced by a **German** rigid interpretation concerning the possibility of terminating a contract with a specified term. However, as stated above, two specific elements of German law should be kept in mind. Firstly, in contrast with Estonian law, the conclusion of a contract for a specified term is restricted to cases in which the landlord has a legitimate reason and secondly, termination by the landlord is restricted even in the case of contracts with an unspecified term. These two characteristics make tenancy models under Estonian and German law hard to compare. Neither is comparison complete with **Swiss** law, as there is no special rule on a "substitute tenant" known from Swiss law (see section 2.4 above). This special rule is consistent with the restrictive interpretation of "compelling" reason, makes a clear cut between the risks of the parties and is of key importance in practice.

It is clear from the above that it is **Finland** where the flexibility of the tenant – most importantly in the context of mobility of the labour force – has been addressed most specifically. Even though **Estonian** regulation is newer, being from the year 2002, and constituted a major reform from the former Soviet-era-driven Dwelling Act, it combines "good old" **German** and **Swiss** law. **Finnish** law, by contrast, went through major changes in the mid-1990s and is now considered one of Europe's most liberal systems (Whitehead *et al*., 2012, p. 122; de Boer & Bitetti, 2014, pp. 15-16). Even though the term "liberal" might refer to less protection for the tenant in broad terms, the level of protection is comparable to **Estonia**. However, instead of an abstract provision on "compelling reason" as a valid motive for termination, **Finnish** tenancy law is better targeted towards solving practical problems. In contrast with **Estonian** law and practice, foreseeability or the landlord's interests do not seem subject to discussion when the objective criterion "the tenant moves to another locality for reasons of study, employment, or his or her spouse's employment" has been established.

To summarise, in contrast with **Estonian** law, most of the systems studied above differentiate between regulation that concerns the right to terminate for the landlord and for the tenant. This is the case, for example, in **Germany** and, by way more contrast, in **Sweden.** Meanwhile, **Latvian** and **Lithuanian** law does not treat the parties equally in terms of the right to terminate, rightly taking into account that the position of the tenant is more vulnerable than that of the landlord in this regard.

3. Policy considerations

The 2016 European Policy Brief[11] defines profitability, respect for the property rights of the landlord, and affordability, stability and flexibility for the tenant as general principles that national tenancy regulation should respect and balance adequately[12]. More specifically, it is proposed that, as a general principle, the tenant should always be allowed to terminate the contract with a delay of not more than three months. From the tenant's perspective, this general "right to move" should be backed by an open-ended contract that the landlord can terminate only for legitimate good reasons (such as personal need of the owner unforeseen at the conclusion of the contract, or a legitimate change to economic use of the building). Moreover, during the three-year period of "secure tenure", termination by the landlord would only be possible in the event of a manifest breach of the contract by

[11] Available at: http://www.tenlaw.unibremen.de/POLICY%20BRIEF%20final_02112016.pdf.
[12] For a similar approach, see Nazarre (2014).

the tenant or for reasons of force majeure. Clearly, this model presumes parties' asymmetric rights. Regulation cannot be considered balanced if, in order to obtain stability, the tenant has to compromise on flexibility.

Next, given the topic at hand, it seems appropriate to compare modern tenancy relationship with other "life time contracts" with social connotations, such as labour contracts and consumer credit contracts (see Nogler & Reifner, 2014; Malmberg, 2007). In simple terms, private persons are not free in terms of their choices at the start of these types of relationship – and even less so during those relationships or when terminating them, as the social consequences of those choices might be substantial and may affect third parties. This is exactly the reason why both stability and flexibility are highlighted with regard to such relationships. Whether a credit product, residential tenancy or employment contract, their incompatibility with the essential needs of their "consumers" brings a decrease in demand in the long term, as well as unreasonable pressure on substitute or similar "products" and eventually ineffectiveness at a macro level. It is therefore appropriate to remind consumers of their rights to early repayment of credit, restrictions on concluding labour contracts limited in term, employers' limited rights in terms of terminating labour contracts, and the overall mandatory nature of those provisions – principles that are also well known under Estonian law. All arguments used in establishing such rules are apparently also valid while considering stability and flexibility elements in tenancy law, and most importantly, arguing for asymmetric rights of parties.

The analysis above revealed that, except in the case of **Swedish** tenancies, a contractual clause is the only safe (or less costly) way out. However, contracting around default rules may be costly, and even more so if the market is dominated by the supply side. Nonetheless, from classical law and economics approaches we know that when there may be obstacles to values moving towards the most valuable use (such as a tenant negotiating better terms), the law must divide initial rights in a way that enables the most effective use. In the context of housing policy, however, the aim is not always to follow the efficiency in economic terms, but to guarantee adequate dwellings for everyone. To this general slogan, we could add "and facilitate the right to free movement and flexibility of the labour market". To put it more simply, the question is how should the risk that the tenant is offered a better job or, in the worst cases, any job at all, be allocated?

In this context, it seems appropriate to recall the principle of efficient breach, under which contracts should be performed as long as that performance is efficient and breached whenever that breach is efficient (generally, e.g. Cooter and Ulen, 2000, pp. 238-245; Posner, 1998, p. 131). Non-opportunistic breaches can broadly be classified as being *voluntary* or *involuntary*. A breach can be categorised as involuntary when performance of the contract becomes impossible or impossible at a reasonable cost by an act or contingency not controlled by the obligor. In terms of tenancy contracts and their flexibility, this type of contingency is well covered by the special regulation of "extraordinary compelling reason" or similar, releasing the party from a contractual relationship. Voluntary non-opportunistic breaches should only be justified under the condition of a potential Pareto improvement – that is, when the breach is efficient. In economic terms, these breaches are "involuntary". If the tenant (or a member of their family) has to move for professional reasons, the performance by the former landlord is rendered of no use to him or her – and hence, the whole transaction is more costly than benefits received (a situation known as "*unfortunate contingency").*

As a principal, the non-breaching party should be kept indifferent as to whether or not the other party performs. In considering the interests of both parties and a potential efficient breach, it should be taken into account that the other party is willing to recover reasonable damages. Perfect expectation damages would generally create an efficient choice between performance and breach (generally, e.g. Mahoney, 2000, pp. 117-120). However, promises with a *vague value* cannot be substituted by money damage because then the price for breach of the contract does not count in the externalities, or as per the old common law principle that specific performance is only an exceptional remedy when damages are *not adequate* (generally, e.g. Treitel, 1997, pp. 43-71). The approach of classical civil law theory is that specific performance is a primary remedy, given that it almost always

compensates adequately while offering certain advantages as a bonus[13]. These are two ends of the same road, as the ultimate question would be what the desirable incentives are that the default rule should create. In the context of tenancy relations, it is clear, however, that the loss of rental income in a functioning market, in which substitute transactions are available for the landlord without excessive burden, does not have a vague value – and damages would therefore be an adequate remedy in this case. In contrast, the interests of the tenant in a stable and flexible tenancy relationship have a vague value and cannot be easily substituted with monetary compensation. If an intention to move for employment reasons is not therefore the valid reason for termination, the landlord has a right to claim specific performance – in other words, that rent payments until the end of the contract term and a possible claim for damages are never an issue. However, if the landlord decides to terminate the contract due to non-payment of rent (since the tenant had to leave) or the termination is considered valid by default, the latter is under a duty to mitigate damages – that is, search for a new tenant. As a professional, the landlord usually has better and less costly opportunities to find a new tenant than the former tenant by looking for a possible subtenant. All in all, there is no real argument as to why the tenant has to accept performance (that is, enforced performance by the landlord and a respective claim for rent) that has no value for him or her, considering that the damages would compensate the landlord adequately. This, in turn, leads us to the conclusion that flexibility should be a default term and, only if considered necessary by the landlord, contracted over (to signal the distribution of risk) – but not vice versa.

Foreseeability also seems to be a key word. It would run counter to the general principle of efficiency in contract law if reasonably foreseeable circumstances were not be taken into account when deciding on the contract format. As asymmetric information may lead to adverse selection or a moral hazard, it is essential that the party that possesses the relevant information will reveal it to another party. This is an underlying idea behind the concept of limiting the landlord's right to terminate (even) in the case of contracts for an unspecified term to cases in which the landlord has a legitimate interest that was unforeseeable at the time the contract was concluded – as is the case in **Germany**. On the tenant's part, it would also seem fair and reasonable to reveal any possibility that he or she might have to leave before the term is over if this is foreseeable at the time when the contract is concluded. At the same time, it seems reasonable to ask whether not revealing such a possibility would count as a guarantee to stay until the end of the term. The difficulty lies in the fact that determining whether one should have foreseen the intention to move is arbitrary. In this context, it is worth noting that if a tenant in **Finland** moves to another locality for reasons of study, his or her employment or that of their spouse, it is already considered a serious interest of the tenant, and in this case the interest of the landlord is disregarded. It is also noteworthy that this kind of reasoning is not limited to cases in which such a reason was not foreseeable at the time when the agreement was made. Under this logic, the possibility of moving for professionals reason should never be excluded, and via the default rule, this condition is also notified to the landlord. The latter may well be satisfied with a guarantee for damages.

Conclusion

In reaching a conclusion, it is first worth noting that the **Estonian** housing market is in general not very dynamic: between 2007 and 2012, for example, only 15.5% of the population changed their place of residence (compared with 30 to 40% in northern countries). At the same time, the rental housing sector seems overly "flexible" compared to that in most other EU countries: in Estonia, about 35% of tenants have stayed in the same dwelling for five years (compared with an average of 56.8% for EU countries).[14] This indicates, on the one hand, that the entire housing market lacks mobility, which can at least be partly explained by the market's limited proportion of rental housing (estimated at 15 to 20%). On the other hand, it suggests that the rental sector, as small as it is, has oriented itself towards temporary tenancies in the form of short-term contracts and has not established a real alternative to home ownership. Eventually, those two elements are interrelated, because limited offer in the market

[13] E.g. as far as possible, the creditor obtains what is due to it under the contract; difficulties in assessing damages are avoided; and the binding force of contractual obligations is stressed. Lando and Beale (2000), comment to Article 9:102.
[14] For more details, see Kõre, 2016, p. 1278.

can only satisfy the demand of "short-term tenants", such as students, young couples and temporary workers. However, if tenancy is targeted as a real alternative to home ownership from the tenant's perspective and a long-term financial product from the investor's perspective, there would be a segment of tenants willing to opt for contracts for a longer term, or for an unspecified term[15]. But as shown above, agreeing to a contract for a (longer) term for stability purposes would generally mean sacrificing on flexibility, as a contract for an unspecified term would not provide the necessary stability.

In broad terms, therefore, Estonian tenants have to opt for all or nothing – total stability with very limited flexibility or flexibility without real stability. However, a person should not be forced to provide a guarantee that he or she will not move for employment reasons just to obtain stability in tenancy relations. In Estonia, where the residential tenancy market is still in the process of development and market practices are not well set, it seems that it would be preferable to have clear-cut rules promoting efficiency and not so much reliance on good faith, counting on the landlord's common sense and social consciousness. Given the above considerations, it would seem appropriate to call for an efficient breach, damages as a default remedy and respect for mitigation of damages rule in Estonian tenancy law.

[15] For information on the Estonian residental lease market, see generally Hussar, 2017.

Table 1 Default rules on the tenant's position: stability vs flexibility

Contract concluded for an unspecified term							
	Estonia	Latvia	Lithuania	Finland	Sweden	Germany	Switzerland
Termination by the **landlord**	**YES**, min. 3 months' notice	**NO**	**YES,** min. 6 months	**YES**, 3/6 months' notice	**NO**	**ONLY** in the case of justified interest, 3 to 9 months	**YES,** min. 3 months' notice
Termination by the **tenant**	**YES,** 3 months' notice	**YES,** 1 month's notice	**YES,** 1 month's notice	**YES,** 1 month's notice	**YES**, 3 months' notice	**YES**, 3 months' notice	**YES**, 3 months' notice
Contract concluded for a specified term							
Contract for a specified term possible	**YES**	**YES**	**YES**	**YES**	**YES**	**ONLY** in the case of legitimate interest	**YES**
Early termination by the **landlord**	**ONLY** for extraordinary compelling reasons	**NO**	**NO**	**ONLY** for good reasons/authorised by court + damage claim	**NO**	**ONLY** for extraordinary compelling reasons	**ONLY** for extraordinary compelling reasons
Generally, early termination by the **tenant**	**ONLY** for extraordinary compelling reasons	**YES,** 1 month's notice	**YES,** 1 month's notice	**ONLY** for good reasons/authorised by court + damage claim	**YES,** 3 months' notice	**ONLY** for extraordinary compelling reasons	**ONLY** for extraordinary compelling reasons
Early termination just for employment or other personal reasons	**NO**	**YES,** but rental payments or damage claim for "unjustified termination"	**YES,** but damage claim	**YES,** but damage claim	**YES**	**NO** (in practice: if new tenant proposed)	**ONLY** if new tenant proposed

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