

BLACK MARKET AND RESIDENTIAL TENANCY CONTRACTS IN HOUSING IN SOUTHERN EUROPE: NEW TRENDS IN PRIVATE LAW MEASURES[•]

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I. INTRODUCTION. BLACK MARKET DEFINITION AND AIMS.

This paper explores the black market in the private residential rental sector in the legal systems of southern Europe, namely Cyprus, Greece, Italy, Malta, Portugal and Spain. In Part I, the paper overviews some common features of the legal systems in the residential rental sector and their impact on the black market. In Part II, the paper concentrates on the current black market background and, finally, analyses existing and possible future legal measures to tackle this practice, focusing on private law rather than traditional tax law.

Firstly, the ‘rental black market’ is defined in order to clarify what the present paper deals with, then the downsides generally associated with this practice are explained and, finally, the reasons why Southern European countries are under the spotlight are clarified.

In the present article black market falls under the definition given in the TenLaw project¹, embracing ‘unofficial, informal contracts, which violate legal regulations and therefore remain in an extra-legal, unprotected sphere, typically to the detriment of the

· The paper is based on reports and results from the 7FP project Tenancy Law and Housing policies in Europe, which are published on the website www.tenlaw.uni-bremen.de.

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¹ C. U. Schmidt, ‘Comparative Tenancy Law and Black Rental Contracts in Europe’, <http://www.google.it/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCoQFjAAAhUKewiJo_OonYnGAhWLWxQKHbaBAOw&url=http%3A%2F%2Fwww.tenlaw.uni-bremen.de%2FPresentation%2520Tarragona_140613.pptx&ei=DIR6VYnkKIu3UbaDguAO&usg=AFQjCNEGafX4ILK-D--EXyc2OWX-oKT-Fg&bvm=bv.95515949,d.d24>, 2013, 11.

tenant'. This implies that such contracts necessarily remain secret between the contracting parties.

This does not mean that all non-written tenancy contracts fall under the heading 'black market'. In cases where a national legal system does not state a written requirement for the stipulation of the tenancy contract, where the parties do not infringe any tax regulations and where the contract does not remain secret, no black market takes place. Conversely, even where the written requirement is fulfilled and the contract is valid under private law, a black market exists if the contract is kept secret between the parties in order to circumvent public regulations, such as taxes or habitability requirements. In these situations the contract is formal and unofficial at the same time. For this reason, the term 'unofficial contracts' seems to be more pertinent and convincing than 'informal contracts', which does not cover all black market cases.

The reasons why parties are willing to hide a tenancy contract typically fall into three groups.

Firstly, parties may desire to sign unofficial tenancy contracts just because they want to evade taxes on the rental earned or circumvent further fiscal payments such as the full tax rate which would be imposed to the landlord who bought the dwelling for residential purposes that entitled him/her to a lower rate of purchase taxes and then infringed the prohibition to sell or to rent it for a number of years (five years under Italian law).

Secondly, landlords may be primarily interested in circumventing mandatory limits to contractual freedoms, such as rent control, minimal rental terms, restrictions to termination rights, rent ceilings, sub-letting prohibitions or any other mandatory rule, generally in favor of the tenant.

Thirdly, parties may keep the contract hidden in order not to incur legal (administrative or criminal) sanctions for non-compliance with various public law standards or prohibitions. This happens, for instance, where habitability requirements are not met, tenants are illegal immigrants, or premises are rented for criminal or, more generally, illegal purposes, such as prostitution.

Since the reasons of the parties are so different, the black market is quite a broad and multifaceted phenomenon. However, the common, unfailing element of such practice is tax evasion. In fact, since the term 'rental black market' entails a contract which remains hidden between the parties, it necessarily results in tax evasion. In

addition, the parties may have other objectives, which, as pointed out above, imply the infringement of various kinds of legal duties.

II. THE BLACK MARKET AS BAD PRACTICE IN RESIDENTIAL TENANCY MARKET

The TenLaw project assumes that the black market is a bad practice which should be counteracted.

Since the black market is associated with tax evasion, it necessarily results in a reduction of revenues in the coffers of the State. Furthermore, the violation of public law rules such as fiscal duties and habitability requirements leads to market distortions,² as shadow rental markets flourish beside the official ones.

Unofficial contracts may also lead to a lack of or reduced legal protection of tenants and low quality of housing, since no legally-binding obligations exist for the landlord, and the tenant cannot give evidence of the existence of a tenancy contract, or may not be able to access judicial actions since the tenants are themselves in an illegal situation (for instance, illegal immigrants). The black market in Europe tends to be associated with illegal evictions,³ which is a bad practice in itself, sanctioned by criminal law in some European countries⁴ and condemned by the European Court of Human Rights.⁵

² In Spain around 2.926 billion euros a year in submerged revenues are derived from these undeclared tenancies, which have not been included in the taxable amount of the Physical Persons Income Tax (IRPF, *Impuesto sobre la Renta de las Personas Físicas*), according to the 'Fourth Edition of the Submerged Rents in Spain Report': Madrid, GESTHA (Sindicato de Técnicos del Ministerio de Economía y Hacienda), 2008.

³ Although there are no figures on illegal evictions, this practice is perceived to flourish in the context of black market.

⁴ Apart from the legal systems mentioned below (No. 9), this also happens, for instance, in France and Great Britain.

⁵ *Buckley v the United Kingdom* App No 20348/92 (ECHR, 25 September 1996), (1997) 23 EHRR 101; *McCann v United Kingdom* App No 19009/04 (ECHR, 13 May 2008), (2008) 47 EHRR 913: 'The loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end'.

Finally, unofficial contracts may lead to further distortions, where, for instance, tenants are precluded from accessing public subsidies, which require official contracts in order to qualify.⁶

The black market in tenancy law is not a unique feature of Southern European countries. As the TenLaw project has clearly shown, it is quite widespread all over Europe and has recently reached a peak in Eastern Europe.

Nevertheless, there are two reasons why this paper focuses specifically on the legal systems in Southern Europe.

On the one hand, their rental markets and housing sectors share some common features, which correspond to similar cultural, economic, and social backgrounds. Even the black-market background shows similar trends. This makes it easier to compare their policies and legal measures over recent years.

On the other hand, the black market is traditionally widespread in Southern European countries, although it is structurally difficult to assess. Nevertheless, implementing effective measures to counteract this practice has not been a priority for many years.

PART I COMMON FEATURES IN THE HOUSING MARKET AND THEIR IMPACT ON THE BLACK MARKET

III. COMMON FEATURES IN THE HOUSING MARKET

Little research has been published in English on housing in specific relation to Southern Europe. One of the few, seminal books dealing with this geographical and political area is ‘Housing and Welfare in Southern Europe’, which describes the common features of the rental market.⁷ Some of these are relevant for the present research, since they impact on the extent and the characteristics of the black market in Greece, Italy, Malta, Portugal and Spain. They are as follows: A) a high ownership rate combined with the underdevelopment of both the private rental market and social housing; B) a significant percentage of immigrants and low-income households living in rented tenures;

⁶ This is reported to happen in Malta: see K. Xerri, *Maltese Tenancy Law: Tenants’ perspectives and the prospects for revision*, unpublished M.A. (Laws) dissertation, Faculty of Laws, University of Malta, 2014, 129.

⁷ J. Allen - J. Barlow - J. Leal - T. Maloutas - L. Padovani, *Housing and Welfare in Southern Europe*, (New Jersey: Wiley-Blackwell, 2004).

C) a share of substandard rented tenures in low rental areas; and D) a high share of tax evasion in the private rental sector.

A) High ownership rate and underdevelopment of both the private rental market and social housing.

Southern European countries are traditionally characterized by a high percentage of homeownership and consequently by a limited percentage of rental tenures.

Social housing is very infrequent in Italy, Portugal and Spain.⁸ In Greece it is almost non-existent.⁹ This typically leads low-income people to resort to the private rental sector.

The table below shows the share of homeownership and rented tenures. These tenures include both private rentals and public housing.

Table 1 – Tenure structure in 2013*

COUNTRY	Cyprus	Greece	Italy	Malta	Portugal	Spain	EU 28
OWNER	74%	75.8%	73%	80.3%	74.2%	77.7%	70%
RENT	26%	24.2%	27%	19.7%	25.8%	22.3%	30%

⁸ In Italy social housing accounts for about 5.5% of the whole housing sector (R. Bianchi, 'National Report for Italy', <http://www.tenlaw.uni-bremen.de/reports/ItalyReport_09052014.pdf>, 19); in Portugal the percentage of social or supported leases is less than 2% (D. Correia – N. Santos – M. O. Garcia, 'National Report for Portugal', <http://www.tenlaw.uni-bremen.de/reports/PortugalReport_18052015.pdf>, 20); also in Spain social rental housing accounts for less than 2% of the whole housing market ('Housing Statistics in the European Union. Income and Living Conditions', Eurostat, 2010).

⁹ T. Konistis, 'National Report for Greece', <http://www.tenlaw.uni-bremen.de/reports/GreeceReport_09052014.pdf>, 24.

* This table is derived from Eurostat data, which do not consider intermediate forms of tenure.

Table 2 shows the percentage of tenants who might have difficulties in affording rent.

Table 2 - Households that spend 40% or more of their equivalent disposable income on housing in 2013 (% of population)

COUNTRY	Cyprus	Greece	Italy	Malta	Portugal	Spain	EU 28
Tenant at market price	17.7%	58.3%	32.9%	28.2%	35.2%	42.3%	25.7%
Tenant at reduced price or free	0.9%	38%	10.4%	2.3%	6.3%	9.5%	10.6%

The situation has been impacted to different extents by the economic crisis. While in Malta economic growth did not stop and the mortgage market carried on being relatively strong, all the remaining countries were hit by the economic recession. Greece, Portugal and Spain were majorly affected by the financial crisis and, as a consequence, there was a decrease in mortgages and housing sales.¹⁰ Although the level of indebtedness of Italian households is among the lowest in Europe, even lower than in Cyprus and Greece¹¹, housing transaction rates dropped.

The combination of these factors has led to a slight development of the private rental market in the countries mentioned, which has become the only accessible alternative for a number of households. However, notwithstanding signs of growth, the share of the private rental market remains considerably lower than that of home ownership.¹²

¹⁰ Konistis, 'National Report for Greece', 21; Correia - Santos - Garcia, 'National Report for Portugal', 44; E. M. Roig, 'National Report for Spain', <http://www.tenlaw.uni-bremen.de/reports/SpainReport_16092014.pdf>, 33.

¹¹ In 2011 the mortgage debts per household in thousands of euros were respectively: Cyprus, 15.74; Greece 6.93; Italy, 5.98.

¹² R. Bianchi, 'Comparative Report on Cyprus, Greece and Italy', <<http://www.tenlaw.uni-bremen.de/intrateamcom/CY-GR-IT%20comparison%20report%2020150203.pdf>>, 2015, 2; Roig, 'National Report for Spain', 3 ff.; Correia - Santos - Garcia, 'National Report for Portugal', 6.

B) Significant percentage of immigrants living in rented tenures

From 2000 to 2008 immigration from Eastern Europe, Africa and Asia played a significant role in the housing market in Italy, Spain, Portugal and Malta, as it increased the amount of low-income or unemployed people looking for affordable accommodations in the private rental market.¹³ In fact, due to the limited development of social housing in Southern Europe, a significant share of households living in privately rented tenures is currently made up of immigrants¹⁴ many of whom live in substandard tenures.

In those years the impact of immigration was more limited in Greece and Cyprus.

The economic crisis mitigated the trend in immigration towards Southern European countries, except for Malta, whose economic growth led to an increase in its immigration figures.

Table 3 - Immigrants living in rented accommodation

COUNTRY	Cyprus	Greece	Italy	Malta	Portugal	Spain
YEAR	No data available	2003	2012	No data available	No data available	2008
IMMIGRANTS		91.8%	62.8%			67%

¹³ M. F. Fonseca - J. McGarrigle - A. Esteves, 'Possibilities and limitations of comparative quantitative research on immigrant's housing conditions', Prominostat, Working Paper no. 6, 2010, 12: «In countries where social housing is residual and a larger proportion of stock is owned (for example Spain, Belgium, Portugal, Hungary, Slovenia, Greece and Italy) immigrants often resort to the private rented sector. This sector is notoriously difficult to research and indeed monitor. Pereda et al. (2005) report that immigrants living in Spain have to resort to the private rented market as a result of the residual nature of the social housing sector. However, some immigrants who arrived in earlier migration flows lived in the private rented sector initially, and began to consider owner occupancy when their migration project was established – this was also the case with some PALOP households in Portugal (Fonseca, 2009)».

¹⁴ In 2012 in Spain 12.1% of the population was composed of immigrants (Spanish National Statistics Institute - INE). More than two-thirds of immigrants from developing countries live in rented tenures both because of their limited resources and of the limited access to loans (*Avance de la explotación estadística del Padrón*, 1 January 2012; J. Leal -A. Alguacil, 'Vivienda e inmigración: las condiciones y el comportamiento residencial de los inmigrantes en España', in *Anuario de Inmigración en España*, ed. J. Oliver, J. Arango & E. Aja, (Barcelona: CIDOB, 2012), 131-134). In Portugal immigrants are assessed to be around 3.7%, and, similarly, are concentrated in the rental market, having restricted access to loans (J. Malheiros - L. Fonseca, 'Acceso a habitação e problemas residenciais dos imigrantes em Portugal', <http://www.ceg.ul.pt/migrare/Estudo48_WEB.pdf>, 2011, 95). In Malta in 2011 immigrants were 4.9% (NSO, *Census on Population and Housing 2011*, 111).

C) The share of substandard rented tenures in low rental areas

Italy, Portugal and Spain provide legal requirements for habitability and have experienced an increase in the quality of residential tenures.¹⁵ Conversely, no standard of quality or regulations regarding habitability of residential tenures are provided in Greece, Malta and Cyprus.¹⁶

However, in Italy the percentage of satisfaction expressed by tenants in some surveys strongly suggests that houses and flats to rent in many cases do not meet the quality standards required by the occupants.¹⁷ Notwithstanding the lack of habitability standards, this problem seems to be less evident in Greece and Cyprus, and the 2011 census highlighted a general improvement in living conditions in the first decade of the 21st century.¹⁸

An incentive to increase the quality of both existing and new dwellings was given by the Directive No. 2002/91/CE on the energy performance of buildings. After this directive came into force all the countries surveyed started to tackle the problem of energy saving, which had previously been neglected. However, recent research shows that no legal obligation to comply with a specific energy saving standard has been enacted, whereas there are several incentives to encourage landlords to renovate their premises and improve these standards on a voluntary basis. Furthermore, there are no complete figures on the energy performances of the existing housing stock in Southern European countries since, apart from new buildings, certificates of energy performance are required only if the dwelling is sold or leased.

Substandard tenures or even informal settlements exist in metropolitan, low rental areas. A proportion of low-income people are reported to occupy abandoned buildings or substandard public buildings. Immigrants represent a significant rate of such occupants. In Italy, Portugal and Spain, unacceptable housing conditions, such as over-

¹⁵ Bianchi, 'National Report for Italy', 60 ff.; Correia - Santos - Garcia, 'National Report for Portugal', 89; Roig, 'National Report for Spain', 54 ff.

¹⁶ Konistis, 'National Report for Greece', 47; K. Xerri, 'National Report for Malta', <http://www.tenlaw.uni-bremen.de/reports/MaltaReport_23102014.pdf>, 90; T. Konistis, 'National Report for Cyprus', <http://www.tenlaw.uni-bremen.de/reports/CyprusReport_09052014.pdf>, 46.

¹⁷ Bianchi, 'National Report for Italy', 15 ff.

¹⁸ See respectively Konistis, 'National Report for Greece', 13 and Konistis, 'National Report for Cyprus', 11.

crowded dwellings or those lacking basic facilities, are reported to affect above all immigrants.¹⁹

Table 4 – Rented dwellings in good condition

COUNTRY	Cyprus	Greece	Italy	Malta	Portugal	Spain
YEAR	No data available	2011	2007	2005	2001	2001
CONDITIONS		No statistics available: 'generally adequate quality'	49%	55.9%	59%	82%

In summary, although data seem to show that most tenures are in adequate or good conditions, there is no reliable information on how many informal settlements or substandard premises are occupied by tenants.

D) High proportion of vacant dwellings

A further common feature is the high proportion of vacancies²⁰.

Malta and Cyprus share the highest percentages of vacant dwellings among the EU-27 countries, respectively with 22.3% and 16.6% of the dwelling stock.²¹ Some sources argue that Spain too has over 20% of dwellings vacant, well over the official rate claimed by government surveys of 13.2%.²² Greece and Portugal have percentages of about 14% and 12.6%, respectively²³, with Italy being much lower and roughly estimated

¹⁹ Bianchi, 'National Report for Italy', 22 ff.; Correia – Santos - Garcia, 'National Report for Portugal', 12 ff.; Roig, 'National Report for Spain', 43.

²⁰ The expression 'vacant dwellings' is used to indicate dwellings which are waiting to be sold, rented, renovated or demolished and are different from 'holiday houses', which are used, even though occasionally, during the year. In Southern European countries, such holiday houses represent a high share of the dwelling stock.

²¹ Xerri, 'National Report for Malta', 25: this rate does not include dwellings which need to be renovated or demolished; Konistis, 'National Report for Cyprus', 11.

²² Roig, 'National Report for Spain', 26.

²³ Konistis, 'National Report for Greece', 14; Correia – Santos - Garcia, 'National Report for Portugal', 33.

at around 5%.²⁴ The main reason for this lower percentage in Italy seems to be that in the past two decades the dwelling stock has not increased as much as in all the other Southern European countries, where in many cases there was a “building boom”.

This explains why in those countries most of the vacant dwellings are new and in good condition. Therefore it is likely that such high figures of vacancies hide at least a part of the black market of tenancies. For example, in Italy it is estimated that about two thirds of apparently ‘vacant dwellings’ are unofficially rented.²⁵

A possible reason for the high proportion of vacant dwellings is that the legal systems do not provide enough disincentives to vacancies. In Cyprus, Greece, Malta and Spain owners of vacant dwellings do not bear any additional financial burden.²⁶ In Italy, after many recent changes to housing fiscal rules, in 2014 a new statute required that owners should pay a share (50%) of a fictitious income tax also for ‘non-rented dwellings’, provided that such dwellings are located in the same municipality as the owner’s ‘first home’.²⁷ In Portugal owners must pay double the tax they would pay for a non-vacant dwelling.²⁸

Similar fiscal measures are aimed at counteracting vacancies. However, their impact has not been assessed yet.

Obviously these taxes can be unpopular in countries where the past “building boom” generated an offer of houses exceeding the present demand, but in order to counteract the black market it is advisable for governments to introduce measures which discourage vacancies.

IV. IMPACT ON THE PROPORTION OF TAX EVASION IN THE RENTAL SECTOR

Pro-ownership oriented policies seem to offer the main explanation for the weakness of the fight against the black market and the high rate of vacant dwellings. The consequent underdevelopment of the rental market combined with a passive conception of the related incomes lies at the core of the low quality of the rented dwellings. Substandard rented tenures in low-rental areas or even informal settlements offer a fertile

²⁴ Bianchi, ‘National Report for Italy’, 17.

²⁵ Bianchi, ‘National Report for Italy’, 17.

²⁶ Konistis, ‘National Report for Cyprus’, 22; Konistis, ‘National Report for Greece’, 28; Xerri, ‘National Report for Malta’, 48; Roig, ‘National Report for Spain’, 51.

²⁷ This provision specifically excludes holiday houses, which are supposed to be located in different municipalities: Bianchi, ‘National Report for Italy’, 53.

²⁸ Correia – Santos - Garcia, ‘National Report for Portugal’, 63.

ground for unofficial contracts, although the numbers of such contracts are quite difficult to assess.

It is not surprising that, notwithstanding the lack of official figures and statistics regarding unofficial contracts, the black market is reported to be widespread in Southern Europe.

In Italy informal contracts seem to be around 950,000, i.e. about 20% of the whole rental sector.²⁹

In Spain the share is even higher, as there are apparently more than a million informal contracts i.e. more than half of the whole market: 55.83% of the total rented stock in 2008.³⁰ A high percentage of unofficial tenancies (65.8%) is concentrated in the Autonomous Communities of Madrid, Andalusia and Catalonia. Conversely, la Rioja (0.98%), and Aragón (25.54%) are reported to be the Autonomous Communities with the fewest illegal tenancies.³¹

In Malta the black market is estimated at 25.8% of the GDP.³² Unfortunately data regarding the amount of black market in the rental sector do not seem to be available, but it is perceived that there are ‘various irregularities’ in this field as well.³³

In Greece and Portugal data and studies on the black market are reportedly unavailable. However, informal contracts are perceived as being widespread.³⁴ In Portugal, the black market is seen as an increasing parallel market, due to the rise in housing tax and burden. Even the “Troika” (European Commission, European Central Bank and International Monetary Fund) has recommended that Portugal should present a report on the black market. According to press reports in the country there are about 400,000 unofficial rental agreements evading taxes.³⁵ Given that there are around 800,000 tenancy contracts, this would mean that about half of the market is unofficial.

²⁹ ‘CGIA Mestre, ‘Quasi un milione di affitti in nero’, <<http://www.cgiamestre.com/wpcontent/uploads/2013/02/affitti-in-nero.pdf>>, 2013.

³⁰ Roig, ‘National Report for Spain’, 25 ff., who quotes the ‘Fourth Edition of the Submerged Rents in Spain Report’: Madrid, GESTHA (Sindicato de Técnicos del Ministerio de Economía y Hacienda), 2008.

³¹ Roig, ‘National Report for Spain’, 27.

³² F. Schneider, ‘Size and development of the Shadow Economy from 2003 to 2012: some new facts’, 2011.

³³ Xerri, ‘National Report for Malta’, 25 ff.

³⁴ Konistis, ‘National Report for Greece’, 11: *«landlords often do not register the tenancy contract with the competent tax authority, as is required by Law, resulting in tax evasion; although there are no figures to prove this occurrence, it is known that this situation gives rise to various irregularities».*

³⁵ See <www.arrendanahora.com/noticia/financas-vao-aumentar-inspeccoes-para-detectar-arrendamentos-ilegais>, 17 April 2014.

Table 5 – Unofficial contracts in the rental market

COUNTRY	Cyprus	Greece	Italy	Malta	Spain	Portugal
YEAR	No data available but the problem exists	No data available but widespread problem	2013	No data available but perceived as significant	2008	2014
RATE			About 20%		About 66%	About 50%

V. LEGAL BACKGROUND TO CURRENT BLACK MARKET. RENT CONTROL, MANDATORY MINIMAL DURATION, EVICTION RULES

The black market used to be mainly associated with strong rent control regimes, which landlords were willing to circumvent by negotiating less protective contracts that were by necessity unofficial.

In various periods, rent control regimes have been in force in Italy, Spain, Portugal, Malta and Cyprus. Curiously, this was not the case of Greece, where statutory limits to the contractual freedom have never been introduced into the rental market, as the protection of the weaker party relied rather on rent supplement schemes, which since 2012 have been cancelled for state budget reasons.³⁶

In Italy the mandatory rent ceiling (the so-called '*equo canone*', which means 'fair rent'), was in force from 1978 (L. no. 392/1978) in the residential rental sector until 1998 (L. no. 431/1998), however mandatory rental terms still apply to both residential and non-residential tenancy contracts. Some of the black market incentives were consequently removed and, at the same time, measures to induce landlords to register tenancy contracts were introduced, as we will show below. A further step towards the liberalization of the rental market took place in 2014, when the mandatory rental terms were abrogated for 'big' non-residential tenancies.³⁷ However, rather than dissuading landlords from stipulating informal contracts, this measure was introduced in order to boost this rental market sector, which may involve transactions where tenants are medium or large-sized enterprises.

³⁶ Konistis, 'National Report for Greece', 34.

³⁷ See Art. 79 L. no. 392/1978, modified by D.L. no. 133/2014 and converted with modifications by L. no. 164/2014.

In Spain the liberalization of the rental market started in 1994 (L. no. 29/1994) and ended in 2013 (L. no. 4/2013), when the parties were left free to negotiate even increases in rent. However, until 2013 a mandatory minimal five year-term applied to residential tenancy contracts, a circumstance which is reported as a reason for stipulating unofficial contracts.³⁸ In 2013 (L. no. 4/2013) more flexible rules were introduced as regards landlords rights of termination, in order to foster the rental sector by reinforcing the protection of property rights. In particular, tenancies were subject to a shorter mandatory minimal duration (three years, rather than the previous five years). Landlords' rights of termination were extended and eviction procedures became more rapid.³⁹

In Portugal, rent control was dismantled in 2006 (L. no. 6/2006) for any contract stipulated after this year. The 2012 reform (L. 31/2012) further liberalized the rental sector by giving landlords the right to terminate contracts signed before 1990 and subject to rent control, as well as the right to raise rents and transform pre-existing open-ended contracts into short-term contracts. In addition, the new law reduced taxes to be paid on rental incomes (see Sect. 8). The reform aimed to encourage investments in the housing sector, strengthen the rental market, and encourage landlords to rent vacant dwellings.

Similarly, in Malta rent control was abolished in 1995 (Housing Act 1995) for contracts signed after this statute came into force, while the 2010 reform (Act X of 2009) allowed landlords to increase rents stipulated before 1995.

In Cyprus the rent control statute of 1983 is still in force. However, it has been amended several times and, currently, does not state any rent ceiling.⁴⁰

In summary, mild rent regulations or even liberalized regimes are currently in force in all the countries surveyed. Consequently, circumventing strict rent controls no longer seems to be at the core of the black market.

A further issue which is commonly reported as a driving force behind the black market is the length of eviction procedures in the private rental market. In other words, landlords seem to be induced to stipulate unofficial contracts in order to escape mandatory protective rules at the eviction stage hindering a prompt recovery of the dwelling. In Spain this was the argument supporting the statutory introduction of a faster

³⁸ Roig, 'National Report for Spain', 26.

³⁹ Roig, 'National Report for Spain', 79.

⁴⁰ Konistis, 'National Report for Cyprus', 65.

eviction procedure, which was enacted in 2013 with the expectation to reduce the 55% of black market that existed in 2008.⁴¹

The question arises because Italian, Portuguese and Spanish legislations traditionally give a grace period or suspend eviction procedures in certain situations.⁴² Therefore, landlords may perceive tenants as being overprotected at this stage.

However, two arguments may actually minimize the importance of this issue.

On the one hand, an unofficial contract does not necessarily preclude tenants from enjoying legal protection at the eviction stage. In fact, in most legal systems a written form and registration are not needed for the validity of the contract; if this is the case, they are not required for the enforcement of the contract on the tenant's side.⁴³ Therefore, once the tenant succeeds in proving the (unofficial) tenancy contract, legal protection may apply, notwithstanding the lack of any written form of contract and registration (see Section 4 below). In other words, strong protection for tenants at the eviction stage is likely to encourage landlords to keep their properties vacant rather than prompting them to stipulate unofficial tenancy contracts.

On the other hand, most of the above mentioned countries have reacted to the economic crisis by liberalizing eviction procedures. In fact Portugal and Spain amended the previous legislation and speeded up the eviction process in 2013 and 2012, respectively.⁴⁴ In Malta, too, the 2009 statute introduced a new procedure in order to facilitate evictions.⁴⁵ This means that past trends on eviction procedures are likely to change as the result of recent regulations.

Conversely, the Italian legislator confirmed past policies on evictions by reiterating suspensions of eviction orders for expiry of tenancy contracts in favor of vulnerable tenants until June 2015 (L. 228/2012 and L. 11/2015). In 2013 a national fund was set up for non-faulty tenants in arrears (L. 124/2013) and distributed to

⁴¹ Roig, 'National Report for Spain', 167.

⁴² Bianchi, 'National Report for Italy', 173 ff.; Correia - Santos - Garcia, 'National Report for Portugal', 155 ff.; Roig, 'National Report for Spain', 164 ff.

⁴³ In most European countries that require the written form for tenancy contracts the issue of avoiding invalidity becoming detrimental to the tenant has been dealt with by adopting innovative legal solutions: these countries are Croatia, Czech Republic, France, Hungary, Italy, Latvia. The registration of at least some kinds of tenancy contracts is required in several European countries (Austria, Belgium, Croatia, Ireland, Italy, Lithuania, Luxembourg, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia), but only in Italy does it affect the validity of the contract.

⁴⁴ Roig, 'National Report for Spain', 167; Correia - Santos - Garcia, 'National Report for Portugal', 9.

⁴⁵ Xerri, 'National Report for Malta', 186 ff.

regions. This measure resulted in the cancellation of eviction procedures grounded on the non-payment of the rent, provided that tenants successfully applied for receiving the grant from the local municipalities.⁴⁶ The national fund for innocent tenants in arrears initially received 40 million euros for the years 2014/2015 and, therefore, its impact was quite limited. In 2016 the fund was increased and received further 190 million euros for the years 2016-2020.

In summary, although the aim of circumventing mandatory contractual limits and tenant's protection measures may be still a reason to stipulate informal contracts, the recent trend in the liberalization of the rental market has definitely reduced the portion of the black market that was strictly related to such circumvention.

For this reason, the present paper assumes that the current ground of the black market in southern European countries lies in the infringement of public law regulations, rather than that of mandatory contractual rules. Since it is not possible to assess to what extent each type of infringement of public regulation impacts on the black market, the present paper focuses on tax evasion, which, as pointed out above, is the result of any type of black market.

PART II MEASURES TO TACKLE THE BLACK MARKET

The black market is based on an implicit or explicit agreement between landlords and tenants about keeping the contract hidden. Both contracting parties may actually benefit from the unofficial contract, as landlords can increase their net rental income and tenants keep the rent lower or gain access to a market which, otherwise, they would be precluded from (because, for instance, they are illegal immigrants). In some situations, however, it is only the landlord who benefits, for instance, when tenants have no suitable alternatives in the market, or simply want to be on good terms with their contracting party, or are not concerned about being outside the law.

For this reason, the most efficient measures to make hidden contracts surface are those which provide incentives to landlords not to evade taxes and disincentives to tenants to accept the agreement.

⁴⁶ Definition of non-faulty tenants in arrears and requirements to apply for the fund are defined by Ministry of Infrastructures and Transports Decrees 14 May 2014 and 30 March 2016.

Below public law measures will be examined first, then the paper will focus on private law measures.

VI. DUTY OF SERVICES PROVIDERS TO INFORM PUBLIC AUTHORITIES ABOUT USE OF UTILITIES IN RENTED ACCOMMODATIONS

A further measure to tackle the black rental market would be to oblige service providers to inform tax collectors with data on water, electricity and gas consumption.

This information would help to discover supposedly unoccupied tenures which are actually rented.

However, this measure does not seem to apply in the surveyed countries.

In Italy, for example, service providers have to inform the Tax Administration (*Agenzia delle Entrate*) regarding contracts concerning the supply of gas, electricity and water. This information, however, does not include the actual consumption of such services.

In Spain the duty of electricity providers to collect data on consumption was introduced in 2006 (Act no. 36/2006). This measure was envisaged by the Resolution of 24 February 2012. However, it has not yet come into force.⁴⁷

VII. FISCAL MEASURES

The reduction of taxes and contributory burdens is often associated with a decrease in the black market. For this reason almost all the countries at issue have introduced specific fiscal provisions for rental incomes. In some of them (Spain, Cyprus) landlords are benefitted by higher deductions, while Italy, Portugal and Greece have introduced a flat tax rate regardless of the landlord's total income.

In Spain, rental incomes are cumulated with all the other incomes of the landlord and taxed with the same rates. However, a wide range of deductions is provided, including mortgage interests, costs for repairs and renewals, 3% annual depreciation allowance on whichever is the highest: the purchase cost the cadastral value of the property. This net income is reduced by 60% if the tenancy is intended for residence, with the consequence that landlords pay taxes only on 40% of the net yield.

⁴⁷ Roig, 'National Report for Spain', 26.

In Cyprus the regime is similar but the deduction regards only 20% of the rental income.⁴⁸

Italy, Greece and Portugal have enacted systems of calculating taxes on rental incomes which do not take into account the landlord's total income.

In Portugal a statute of 2012 introduced a compulsory cap of 28% on taxation on rental incomes to stimulate the rental market. For example, a private landlord who pays 40% tax on his/her general income only pays 28% on the amount he/she receives from rents.⁴⁹ In addition, landlords are allowed to deduct up to 500 Euros when rented dwellings are undergoing renovation.

In Greece the tax rate for rental income amounts to 11% if the annual rental income does not exceed 12,000 euros, and 33% if the annual rent income exceeds this sum. In comparison with ordinary tax rates, this regime is particularly favourable for rental incomes up to 12,000 euros, after which it is less advantageous or even more expensive than regular tax rates.⁵⁰ No deductions are allowed for landlords.

Malta introduced an alternative fiscal regime for rental incomes in 2014.⁵¹ Landlords may choose between ordinary rates with deductions in relation to the costs incurred in the production of income (such as expenses for acquisition and maintenance) or a flat tax at 15%, which is calculated on the gross income.⁵² An even lower rate (10%) applies for landlords renting out to beneficiaries of the Rent Subsidy.

Similarly, Italy introduced the option for a flat rate tax (21% for 'free-market tenancies' and 19% for 'assisted tenancies'⁵³) on the rental incomes (the so-called *cedolare secca*: Art. 3 Leg. Decree no. 23/2011) in 2011.⁵⁴ The flat rate for 'assisted tenancies' was

⁴⁸ It is worth mentioning that in Cyprus there is a rather high tax free ceiling of up to 19,500 euros. Landlords must also pay the 'Special Contribution for Defence', which amounts to 3% of the 75% of the total rent premiums collected.

⁴⁹ Correia – Santos – Garcia, 'National Report for Portugal', 170.

⁵⁰ As for "employees", tax rates are the following: for an income of up to 25,000 euros, 22%; for incomes between 25,001 and 42,000 euros, 32%; for income exceeding 42,000 euros, 42%. As for "freelance activity": for incomes up to 50,000 euros, 26%; for income exceeding 50,000 euros, 33%.

⁵¹ Income Tax Act (Cap. 123), Art. 31 D.

⁵² Ordinary rates range from 15 to 35%, with a tax free ceiling which depends on the personal status of the taxpayer up to 8,500, 9,800 or 11,900 euros. This means that the more landlords earn, the more advantageous the flat tax regime is.

⁵³ Landlords and tenants may opt for the regime of 'assisted tenancies' and agree for a moderate rent: this regime provides that the amount of rent is fixed between the parties below the market level.

⁵⁴ Ordinary rates in Italy are the following: for income up to 15,000 Euro, 23%; for income between 15,001 Euro and 28,000 Euro, 27%; for income between 28,001 and 55,000, 38%, for income between 55,001 and 75,000 Euro, 41%, for income exceeding 75,000 Euro, 43%.

made even lower from 19% to 15% in 2013 (Art. 4 Leg. Decree no. 102/2013) and from 15% to 10% in 2014 (L. no. 80/2014). This measure was aimed to induce parties to opt for the fair rent instead of the market rent. A further requirement is that the rented tenure is located in certain municipalities, that is: a provincial capital, a neighbouring municipality with over 10,000 inhabitants or a municipality affected by a 'scarcity of available tenures' (L. no. 61/1989) or 'severe housing issues' (Resolution CIPE no. 87/2003)⁵⁵. As this flat tax rate regime is more favourable than the regular one for the vast majority of landlords, it has been quite successful.⁵⁶ In 2014 it was estimated that almost 50% of landlords had already opted for it,⁵⁷ while the percentage of new contracts with the option for *cedolare secca* is even higher. This new fiscal measure led to an increase in registered contracts (plus 15% in 2010-2012)⁵⁸ and, therefore, succeeded in partially defeating the black market, although not as much as had been hoped for.

It is not easy to calculate how many unofficial tenancy contracts surfaced as a consequence of this new fiscal provision. In any case, between 2012 and 2011 the registered contracts increased by 100,000 and in the same period incomes from properties increased by about one billion euros.⁵⁹

Most Southern European countries have thus introduced landlord-friendly taxes on rental incomes as a means of counteracting the black market or of stimulating the rental market. Nevertheless the mere reduction of taxes on rental incomes ends up by giving a net benefit to landlords but without being fully effective in tackling the black market, or at least if it is not accompanied by two concurrent measures: i) significant fiscal incentives to put vacant tenures into the rental market; and ii) tax deductions to tenants so that they are encouraged to make tenancy contracts surface too.

Only Portugal and Italy provide some deterrents regarding vacancies (see above).

As far tax deductions for tenants are concerned, Cyprus, Malta and Greece do not provide any kind of deduction. Italy allows tenants to deduct a sum whose amount depends on both the features of the tenancy contract (whether public or private, whether

⁵⁵ See Art. 3, subs. 2 Leg. Decree 14 March 2011, no. 23, as modified by Law 28 October 2013, no. 124. These categories practically include most of the middle and all the big Italian cities.

⁵⁶ In addition, registration tax and stamp duty are not due. Nevertheless, in case of *cedolare secca*, the rent cannot be increased during the contract, not even within the limit of the inflation rate.

⁵⁷ C. Dall'Oste, 'Affitti, boom di adesioni alla cedolare secca nell'ultimo anno: la sceglie (quasi) un proprietario su due', *Il Sole 24 Ore*, 27 March 2014.

⁵⁸ E. Sgambato, 'Affittare casa costa meno: canoni giù del 16% in 5 anni', *Casa 24 Plus - Il Sole 24 Ore*, 27 June 2013.

⁵⁹ C. Dall'Oste, 'Affitti, boom di adesioni alla cedolare secca'.

subject to market or assisted rents) and the household's annual income (30,987.41 euros is the maximum level to enjoy some deductions). Accordingly, deductions for tenancies in the private sector range from 150 to almost 500 euros per year. This benefit is probably too limited to balance any potential advantages of an unofficial tenancy even for the tenant.⁶⁰

Also in Portugal deductions for tenants are available for contracts stipulated after 1991, but within the upper limit of 502 euros.

Spain seems to provide a wider range of deductions for rents: these can be up to 9,040 euros for household incomes of up to 17,707.20 euros and lower sums for incomes up to 24,107.20 euros.⁶¹ The provision states that tenants may deduct only 10.05% of the rents paid, so considering the average amount of rents, it seems unlikely that tenants deduct thousands of euros. Therefore it seems that for the average Spanish tenant this deduction is not much higher than in Portugal.

In summary, in order to counteract the black market simply reducing the landlord's burden is not enough. This reduction needs to be accompanied by a decrease in vacancies and an increase in deductions for tenants, which would thereby create a 'conflict of interests' between landlords and tenants and encourage tenants to make unofficial contracts surface.

VIII. CRIMINAL/ADMINISTRATIVE SANCTIONS

Some legal systems provide for both criminal and administrative sanctions in the case of tax evasion.

In Malta the Income Tax Management Act (ITMA) (Chapter 372, Art. 52) lays down that any person who willfully evades or assists another person in evading tax is guilty of an offence. He/she could therefore be liable on conviction to a fine, to imprisonment for up to six months and to a three-fold increase in the amount of tax due. Moreover, in accordance with Art. 31 D (5) of the Income Tax Act, any rental income that is not declared is subject to 35% tax .

⁶⁰ Deductions in the public sector are higher (from 450 to 900 euros) but it is evident that they are not meant to counteract unofficial tenancies.

⁶¹ More precisely, when the tax base is between 17.707,20 and 24.107,20 euros per year, the maximum base for the deduction is 9.040,00 euros subtracting the result of multiplying by 1.4125 the difference between the tax base and 17.707,20 euros per year.

This shows a strict approach against tax evasion of rental incomes in Malta, which is confirmed by the Budget Speech held by the Minister for the Economy in 2014, when the 15% withholding tax on rents was presented. On that occasion the Minister said that «*Now everyone will have the opportunity to declare rental income at a fair rate. Evasion will not be tolerated*».⁶²

Italian sanctions for tax evasion are severe too. According to Leg. Decree 471/1997, the landlord shall be liable to a fine ranging from 120% to 240% of the tax due, and there is a minimum fine even if no tax is due. If the income tax return is submitted but is not correct, the fine ranges from 100% to 200% of the difference between the tax paid and the tax actually due.⁶³ Sanctions for non-registered contracts were increased in 2011 (Art. 3, subs. 8 Leg. Decree 23/2011).

In addition, Leg. Decree 74/2000 provides for criminal sanctions. If someone omits the income tax return and the tax evaded is over 30,000 euros, s/he shall be liable to imprisonment for one to three years. The same sanction applies if the income tax return is submitted but is not correct, the tax evaded is over 50,000 euros and the hidden income is more than 10% of the total. The highest sanctions are provided if the income tax return is altered with fraud (such as false invoices): the imprisonment ranges from eighteen months to six years.

In Greece too there is a combination of both administrative and criminal sanctions. If the taxpayer does not submit the tax income return or if the return is not correct, the tax authority may impose a fine of between 10% and 100% of the tax due. Regarding criminal sanctions, pursuant to Act 2523/1997, anyone who commits tax evasion faces imprisonment of at least one year if the tax evaded exceeds 15,000 euros, and between five and twenty years if the evaded tax exceeds 150,000 euros.

In Cyprus the fine is stricter, as it can be up to four times the tax evaded, while imprisonment, pursuant to Act no. 4/1978, can be up to five years.

However, in Spain and Portugal no criminal sanctions are provided for in the case of tax evasion.

In Spain the tax authorities may impose a fine between 50% and 150% of the tax due (Ley 58/2003).

⁶²

See

<https://mfin.gov.mt/en/The-Budget/Documents/The_Budget_2014/Budget2014_Speech_EN.pdf>.

⁶³ In all these cases the taxpayer, within the time to appeal against the decision of the Tax Authority, can avail him/herself of the right to close the procedure by paying one third of the sanction.

In Portugal, measures seem to be less strict. However, on 31 March 2015, a new provision (Order No. 98-A/2015 from the Ministry of Finance) was enacted in order to reduce tax evasion on incomes from rents. In particular, landlords must issue electronic rent receipts by accessing the Tax Department's website; otherwise they are subject to a fine from 150 to 3,750 euros according to the length of the infringement of their duty. Nevertheless, landlords older than 65 are exempted from this duty, apparently due to their lack of computing knowledge.

All the countries at issue provide severe administrative and/or criminal sanctions against tax evasion. The question arises as to whether such sanctions are effective.

IX. PRIVATE LAW MEASURES

1) *Written form*

Under private law, written form and registration are the classic legal tools to ensure that tenancy transactions are transparent.

The written form is not a requirement for the valid stipulation of a contract in Spain and Greece. In Malta the formal requirement was introduced in 2010, but the effects of this rule on the validity and the enforcement of the contract are not yet clear and, therefore cannot be fully examined in this paper.⁶⁴ In Cyprus, pursuant to the provision of art. 77 (1) Chap. 149, if the tenancy refers to an immovable and is stipulated for a term exceeding one year, then it should be made in writing in the presence of two witnesses, otherwise the contract is void.⁶⁵ Italy and Portugal are the only legal systems where a written form is required for the valid stipulation of any residential tenancy contract.

Where the written form is required for the validity of the contract, the question arises as to whether the infringement of such duty is to the tenant's detriment, as far as no binding obligation exists between the parties.

Italy is the only country where the written form was introduced - in 1998 - not only as means of enhancing tenant protection by granting transparency, information and easier evidence, but also explicitly to counteract tax evasion and to react to the

⁶⁴ Xerri, 'National Report for Malta', 109.

⁶⁵ Konistis, 'National Report for Cyprus', 54.

widespread black market due to the rent control in force in the 1980s and 1990s.⁶⁶ As a general rule, the written form is required for the stipulation of valid residential tenancy contracts from the coming into force of L. no. 431/1998 (art. 1, subs. 4). According to a further provision, any rent agreement exceeding the amount written in the official contract and registered by the landlord in the tax register is void and, as a consequence, the tenant may claim for the restitution of the extra-payment (art. 13, subs. 1 and 2). As a further consequence, where the landlord unilaterally wanted the contract to be informal and, nevertheless, the tenancy agreement is proved, the tenant may claim for the rent to be set by the court according to the lower, non-market amount negotiated by landlords and tenants associations (former art. 13, subs. 5 L. no. 431/1998). In doing so, the legislator intended to discourage tax evasion by sanctioning landlord's unfairness and, at the same time and gave an incentive to tenants to report informal contracts by granting the enforceability of their contractual rights and even a lower rent. In addition, tenants may file the action within six months from leaving the dwelling, a time in which they are no longer under landlords' pressure. L. no. 208/2015 extended this measure to any non-registered contract, that is even to written contracts which have not been registered⁶⁷. While the upside of this measure is sanctioning informal tenancies, protecting tenants from the risk of being evicted and giving them an incentive to report tax evasions,⁶⁸ the downside is that, notwithstanding its well-balanced set of rights, it has rarely been applied in practice.

The connection between a written form of a contract and anti-black market policies is less evident in Portugal. Here the informal tenancy contract is defined as void (arts 1069 and 220 Civ. Cod.). However, the lack of this requirement does not necessarily imply a detriment to the tenant. In fact, if the landlord refuses to comply with that provision, it is considered an abuse of rights and, as a consequence, he or she is prevented from claiming for the nullity of the agreement.⁶⁹ However, the tenant seems to be unprotected where both parties agree on the infringing of the written requirement, even though the tenant's will is 'weak' having accepted an informal contract solely to be on good terms with the landlord or due to ignorance of the law. Therefore, the legal

⁶⁶ In this sense, G. Gabrielli – F. Padovini, *La locazione di immobili urbani*, (Padova: CEDAM, 2005), 133. However, note that the authors criticise the use a rule of invalidity in terms of its supposed ability to protect a fiscal interest.

⁶⁷ See Sect. 9.2.B) below.

⁶⁸ The landlord's position is in some way protected as the tenant must provide evidence that the landlord did not want to sign a written agreement.

⁶⁹ Correia – Santos - Garcia, 'National Report for Portugal', 88.

consequence of the lack of a written form of the contract does not seem to be convincing at all.

In Cyprus formal requirements – namely the written form or the presence of two witnesses – are needed. In theory, this should mean that from a legal point of view the tenancy contract is void. In practice, however, such tenancy is considered as a periodic month-to-month tenancy, which is automatically renewed at the end of each month, unless the landlord gives proper notice.⁷⁰

In summary, in tenancy law the written form is advisable as means of enacting the transparency, the completeness and the fairness of the contract. However, where the requirement is not fulfilled, the legal consequence should not be the unenforceability of the contract, since ideally binding obligations should exist in favour of the tenant. As a consequence, the tenant should be entitled to file an action for the nullity of the informal agreement and/or raise the exception of nullity in case s/he is claimed for the enforcement of the tenancy contract, while the landlord should not be allowed to exploit the lack of the formal requirement to evict the tenant or deny his/her contractual rights.⁷¹ Furthermore, it would be advisable to provide tenants with the right to claim for compliance with the written form requirement. Under Spanish law, each party may compel the other to stipulate the contract in writing (art. 37 LAU 1994).⁷² A similar provision is enshrined in art. 3 subs. 7 of the French *Loi Mermaç*. This would ensure a stronger protection to tenants and, at the same time, indirectly help in the fight against the black market.

As proof of tenancy contracts, the written form is helpful also as means to tackle the black market, although it is *per se* weak or insufficient to fully succeed.

2) *Registration*

Registration in land or tax registers is quite a common requirement in the countries surveyed. However, the types and consequences of registration vary considerably.

All the legal systems apart from Malta provide for registration in land registers, with the general purpose of making the contract effective *erga omnes*.

⁷⁰ Konistis, 'National Report for Cyprus', 78.

⁷¹ E. Bargelli, 'Le locazioni abitative', in *Trattato del contratto*, ed. V. Roppo (Milano: Giuffrè, 2014), 1036 ff.

⁷² Roig, 'National Report for Spain', 101.

In Italy and in Greece, tenancy contracts must be registered in both the tax and the land register. In Italy, land registration, however, is required only in cases where the lease of an immovable property is agreed for a period exceeding nine years (art. 2643 It. Civ. Cod.).

In Spain there are several registries (Property Registry, Administrative Registry of Rent Deposit, Real Estate Cadaster Registry, Municipal Register of Inhabitants),⁷³ but none of these is a true tax register. However, registrars of the Property Register require compliance with civil, administrative and tax provisions.⁷⁴

In Portugal, registration is due only in the Land Register for tenancy contracts whose term exceeds six years. However, tenancy contracts have to be communicated to the tax office.

In Cyprus the registration in the Land Register is merely an option for tenancy contracts whose term exceeds fifteen years in order to let the tenant acquire limited legal rights.

Conversely, there is no registry for rented property in Malta, therefore neither the landlord nor the tenant are under any obligation to register their rental contract.⁷⁵

When registration in the land register is a legal requirement, the infringement of such duty implies that the tenancy contract has no effects *erga omnes*, a result which is detrimental to tenants but not a deterrent to landlords, nor does it incentivize tenants to report hidden contracts.

The question arises as to whether, in order to induce landlords to make tenancy contracts official, the legal systems should provide incentives or sanctions as a consequence of the violation of the tax registrations or communications.

The measures to incentivize landlords to fulfill this duty are rare and ineffective. There are two main measures: stating the non-binding force of non-registered tenancy contracts; preventing or restricting the right of eviction where the tenancy contract is not registered.

⁷³ Roig, 'National Report for Spain', 103 ff.

⁷⁴ Roig, 'National Report for Spain', 102.

⁷⁵ Xerri, 'National Report for Malta', 110.

A) No binding force of non-registered tenancy contracts. The developments of the Italian legal system

Overriding the binding force of the tenancy contract for non-fulfilment of the registration duty is an extreme consequence which is currently applicable only in Italy. Therefore, it is worth providing a deep analysis of this very particular Italian regulation and its developments over the last twenty years.

As pointed out above, L. 431/1998 provides that, where the actual rent is over the amount written in the contract presented to the Tax Register, it is not due (Art. 13, subs. 1: «*Any rental agreement exceeding the amount fixed by the written and registered contract is null*»). Consequently, the tenant is entitled to claim for the restitution of the rent exceeding the fictitious amount registered, which might be much below the market level. In doing so, the legislator intended to punish tax evasion by using a private law mechanism: the nullity of the concealed rent.⁷⁶ At the same time, it attempted to facilitate tenants in reporting false registrations. However, in 2003 the Italian Supreme Court (hereafter, Corte di Cassazione) gave a restrictive interpretation to this provision. By arguing that infringement of fiscal regulations may not lead to contractual invalidity, the court concluded that only supervening agreements on rent increases could be void. In other words, it denied that the cited provision applies to simulated rents.⁷⁷ This line of thought was confirmed by the Italian Constitutional Court in 2004.⁷⁸

In order to make clear the will of the legislator (*voluntas legis*), a subsequent statute proclaimed that «*Tenancy contracts, or in any case contracts which give the faculty of enjoyment, regarding dwellings or portions of dwellings, in any way executed, are null and void, if they are not registered when this is required*» (Art. 1, subs. 346 L. no. 311/2004). This provision clearly refers to any non-registered contracts and, according to the prevailing opinion, denies any binding force to them, since the underlying rationale is grounded on the protection of the public interest to grant the fulfillment of fiscal duties.⁷⁹ An alternative view insisted that infringements of tax duties could not invalidate any agreement and reasoned that registration should be considered a mere requirement for the enforceability of the

⁷⁶ Italian authors dealing with this provision define the measure as a "sanction": V. Cuffaro, 'Patti contrari alla legge (contratto di locazione e nullità speciali)', *Rivista di Diritto Civile*, 1999, 495.

⁷⁷ Cass., 3.4.2009, no. 8148, *Giustizia Civile Massimario*, 2009, 583; Cass., 27.10.2003, no. 16089, *Foro Italiano*, 2004, I, 1155.

⁷⁸ Const. Court, 19.7.2004, no. 242.

⁷⁹ Trib. Roma, 29.9.2011 (ord.), not published (quoted by *Il Sole 24 Ore* 5.10.2011).

contract,⁸⁰ with the further consequence that the subsequent fulfilment of this duty would amend the initial defect.

In 2011 the legislator changed again the legal effect of non-registration and, in doing so, it made the contract enforceable from the tenant's side (Art. 3, Leg. Decree no. 23/2013). In particular, where the landlord does not fulfil the registration duty in due time, upon request of the tenant the contractual terms are compulsorily changed as follows: instead of the negotiated rent, a new low default rent set by the law (which is three times as much as the cadastral rent) is due; a mandatory minimal duration of four years beginning from the date of the registration is imposed on the landlord. This rule is supposedly in line with the one stated for informal tenancies unilaterally imposed by the landlord (see above under Sect. 9.1.), but the disadvantageous contractual terms apply regardless of the landlord's bad faith and are much stronger, since the standard of the default rent is generally below the one set by landlords and tenants associations agreements.

The above provision was aimed to make the lack of registration disadvantageous for the landlord and, at the same time, to induce tenants to report informal contracts. Nevertheless, it was disputed and declared as unconstitutional by the Constitutional Court in 2014 for procedural irregularities by the government in its implementation.⁸¹ Given its limited time of application, its effectiveness could not be tested. As a consequence of this decision, L. no. 208/2015 extended the treatment of informal tenancies to any non-registered contract. In particular, the amended art. 13, subs. 6 L. no. 431/1998 states that if the contract is not registered, the tenant may claim for the rent to be set by the court according to the lower, non-market amount negotiated by landlords and tenants associations and is entitled to the restitution of the extra-rent paid. In addition, the legislator made clear that the landlord is the only party required to register the contract. In doing so, the legislator induced both landlords to register tenancy contracts and tenants to report non-registration.

Finally, the Grand Chamber of the Cassazione came back to the question on the legal consequences of simulated rent in 2015. After having rejected the restrictive interpretation previously stated by the Cassazione since 2003⁸², the Grand Chamber proclaimed that, where the parties secretly agreed to a higher rent than the fictitious one

⁸⁰ F. Padovini, 'La disciplina della locazione immobiliare fra regime attuale e prospettive future', *Nuova giurisprudenza civile e commerciale*, 2012, II, 269.

⁸¹ Const. Court, 14.3.2014, no. 50, *Guida al Diritto*, 2014, no. 14, 13.

⁸² See *above*, footnote no. 60.

registered in the tax registry, the concealed agreement is void and unenforceable in any case. As a consequence, the tenant only has to pay the lower amount reported in the tax registry and nothing more.⁸³ In providing an interpretation consistent with the wording of art. 13 L. 431/1998, the Grand Chamber emphasized that the underlying rationale is to counteract tax evasion, a behavior which is considered to be against the public order. The Court further reasoned that even a subsequent registration by the landlord could not validate *ex post* the hidden agreement on a higher rent, which should remain unenforceable.

This interpretation will give a strong incentive to tenants not to pay the concealed rent if the registered rent is lower. At the same time, it should deter landlords from reporting lower rents in the Tax Registry.

As a consequence of this judgment, both non-registered contracts and concealed rents are void and unenforceable.

The reasoning of the Grand Chamber is convincing where it rejects the previous restrictive interpretation of the Supreme Court, which limited the nullity to supervening rent increase. However, it seems to go too far in the case of non-registration of the whole contract, as, according to the doctrine provided by the Grand Chamber, it should be fully non-binding and cannot be validated by a subsequent registration. This would lead to the undesirable consequence that the tenant has no enforceable rights and no incentive to report the lack of registration.

For this reason, an alternative interpretation is advisable, which is to consider registration as a *condicio iuris* rather than a requirement for the validity of the contract. This would allow the enforceability of the contract even where it is fulfilled *ex post* either by the landlord or the tenant.⁸⁴

B) *No Right of Eviction where tenancy contract is not registered in or communicated to the tax offices. The Italian and Portuguese experiences*

The non-fulfilment of fiscal duties may lead to a reduced access to justice by the landlord.

⁸³ Cass. Sezioni Unite, 17.9.2015, no. 18213, *Giustizia Civile Massimario*, 2015.

⁸⁴ Bargelli, 'Le locazioni abitative', 1052; C. Ulessi, 'Registrazione e nullità della locazione dopo la «cedolare secca»', *La Nuova Giurisprudenza Civile Commentata*, 2012, II, 287 f.

In fact, this happened under Italian law, as art. 7 L. 431/998 stated that landlords were prevented from enforcing their right to evict tenants if the contract was not duly enrolled in the tax register and, therefore, fiscal duties were not fulfilled.

However, in 2001 the Constitutional Court declared that this provision was unconstitutional, stating that the fulfillment of a fiscal duty cannot be the pre-condition to access to a judicial remedy.⁸⁵ In other words, the impossibility for the landlord to evict the tenant, in cases where the contract was not regularly registered, was considered an excessive limitation of the landlord's rights, not justified by the aim to counteract the black market.

In 2013 a similar measure was introduced in Portugal, where, in the case of informal contracts, landlords are prevented from enjoying the fast eviction procedure conducted by the BNA (*Balcão Nacional do Arrendamento*, that is National Office for Tenant's Eviction). This is an alternative-to-court administrative procedure aimed to finalize eviction within three months (art.15-A to art.15-S of Act no. 6/2006 as amended by Act no. 31/2012 and by Decree-Law no. 1/2013, which was enacted in January 2013), which is not applicable in the case of termination for non-payment of the rent. If, after the BNA's notification, the tenant is not willing to quit, the BNA issues a mandatory order to a bailiff or to a notary to evict the tenant as soon as possible. If the tenant has legal grounds to stay longer, he/she has to apply for judicial proceedings.⁸⁶

Unlike the former Italian provision, the Portuguese law does not prevent landlords that have stipulated an informal contract from protecting their rights through judicial proceedings. This solution is similar to that in Ireland and Romania. In Ireland the conclusion of informal contracts implies the application of the mandatory judicial proceedings instead of the ADR (Alternative Dispute Resolution).⁸⁷ In Romania it leads to a faster eviction procedure.⁸⁸

⁸⁵ Const. Court, 5.10.2001, no. 333, *Giurisprudenza italiana*, 2002, 694.

⁸⁶ Correia – Santos - Garcia, 'National Report for Portugal', 155 ff.

⁸⁷ M. Jordan, 'National Report for Ireland', <http://www.tenlaw.uni-bremen.de/reports/IrelandReport_09052014.pdf>, 110.

⁸⁸ According to the new 2011 Romanian Civil Code, when the landlord needs to enforce a tenancy contract, in order to obtain the payment of the rent or to evict the tenant, if the contract was registered with the fiscal authorities, a trial is not required, the only formality is forced execution of the terms of the contract: I. Bejan – F. Botonogu – I. Armasu, 'National Report for Romania', <http://www.tenlaw.uni-bremen.de/reports/RomaniaReport_09052014.pdf>, in part. 58 ff. and 72.

The milder solution introduced in Portugal grants landlords an incentive to report tenancy contracts to the Tax Office without interfering with their judicial remedies and, therefore, it is in line with their constitutional right to judicial protection.

X. CONCLUSIONS

In recent years the countries surveyed began to increase measures to tackle tax evasion in the rental market, which is still widespread in Southern Europe despite important changes in tenancy regulations in recent years.

The most effective way of counteracting this practice seems to be a combination of private and tax law deterrents and incentives. The present paper has focused on private law (more precisely, contract law) measures, which are generally neglected in legal and economic studies on black market.

Among the countries at issue, Italy and Portugal have recently adopted contractual measures to induce landlords to pay taxes. Italy is definitely the most active in introducing and reiterating such type of measures in order to tackle unofficial contracts and, for this reason, its experience has been analyzed to a greater extent than the other countries surveyed. The core of the Italian measures consists in an attempt to break off the parties' illegal agreement on keeping the contract unofficial by granting tenants incentives to report the contract, and by making tax evasion risky or expensive for landlords. In doing so, the legislator introduced private law sanctions, the most severe of which consisted in the compulsory change in the contractual terms to detriment of the landlord. However, one of these measures was declared unconstitutional by the Constitutional court (see Sect. 9.1.A) above).

A further feature of the Italian fight against the black market is the combination of written form and registration as requirements for the enforceability of tenancy contracts. Both are basic means of assessing tenancy transactions and, therefore, they should be introduced in countries where they are still lacking. Registration may be replaced by any form of duty to report tenancy contracts to the Tax Office.

At the same time, the non-fulfilment of these requirements may not lead *sic et simpliciter* to the unenforceability of the contract, as it would be to the tenant's detriment and deter him/her from reporting informal contracts to courts. Informal or non-registered contracts should instead be unenforceable only on landlord's side, while

tenants should be entitled to fill the gaps by claiming for the formalization of the contract, registering the transaction and exercising their contractual rights (see Sect. 9.1 and 9.2 above). For instance, stating that rents exceeding the written and registered level may not be claimed by landlords and claimed back by tenants is an appropriate measure, which is provided by the Italian legislator.

A further measure to be taken into account is that introduced by the recent reform of tenancy law in Portugal, which prevents landlords from availing themselves of a faster, extrajudicial eviction procedure when fiscal duties have not been fulfilled (see Sect. IX.2.B).

Although the present paper concentrates on contract law measures, tax law is still at the core of the fight against black market.

As to fiscal measures, incentives to report tenancy transactions to the Tax Office such as a discounted tax rate on rents earned have to be combined with strong disincentives to keeping dwellings vacant, as well as tax deductions for low-income tenants. Italy was quite successful in introducing the flat rate on rental income, but little progress has been made in reducing the amount of vacant dwellings.

Vacancies are still widespread in the countries at issue and, therefore, policymakers should make them inconvenient for landlords and prevent the latter from evading taxes on rental incomes by keeping dwellings fictitiously vacant.