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***Promoting Protection of the Right to Housing – Homelessness Prevention in the Context of Evictions***

Brussels: European Commission

### **Introduction**

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The recent European Union (EU) report on promoting protection of the right to housing: *Homelessness prevention in the context of evictions* is to be welcomed for presenting the first continent-wide analysis of evictions within the EU and putting forth a number of important findings and recommendations. The report makes clear that eviction is a pan-EU phenomenon, which requires increased co-ordination between Member States and, indeed, the EU in understanding and engaging with the difficult issues surrounding eviction and homelessness. The report contains a wealth of legal, economic and social analysis, which is novel, insightful and generally comprehensive throughout, and will be of interest to a wide audience – particularly anyone professionally concerned with the difficult issues surrounding eviction in Europe and further afield. This review will attempt to outline the structure and substance of the report, drawing particular attention to a number of issues that are of interest to the author.

### **Part I – Eviction across the EU**

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The report is divided into two parts comprising 10 chapters in total. Part I comprises a root and branch analysis of the nature of eviction across the EU. A good deal of the focus is on drawing together and analysing data on evictions across the EU from 2010-2013. After identifying trends and profiles of evictions in that period, the focus shifts to considering risk factors for evictions, framed in the context of the varying levels of social protection and access to affordable secure housing. The authors identify a number of individual 'triggers' for eviction before going on to trace the links between eviction and homelessness. In light of the various definitions of homelessness across Europe, the report adopts the

comprehensive ETHOS definition, which captures ‘four main living situations which can constitute homelessness: rooflessness, houselessness, insecure accommodation and inadequate housing.’

### ***Framing eviction within the legal and policy context***

At the outset, the authors illustrate the fundamental importance of housing to human dignity and well-being. Linking housing to the concept of home, the authors draw on Lorna Fox’s ground breaking research, which stresses the conceptual importance of housing as home – i.e., “house plus an ‘x-factor’” – in order to locate the concept of ‘home’ within the context of international human rights law. The urgency of this report is made clear as the authors illustrate the centrality of housing to the financial crisis of 2008 and indeed how the profound impact of that crisis continues to reverberate in housing systems across Europe.

Turning to EU policy in this area, the report outlines various measures that the EU has taken to support and complement EU Member State actions in tackling and preventing homelessness (chapter 2). While the report sets out that primary responsibility for tackling homelessness and its prevention lies with EU Member States, a considerable amount of EU activity directed at combating social exclusion is catalogued, including the EU PROGRESS programme, the Social Protection Committee, the Roma Framework and the EU Framework for National Roma Integration Strategies.

Throughout the report, eviction is framed as a housing rights issue. The right to housing, the authors indicate, “often refers to wider rights of housing access, quality and other factors, as well as protection from evictions and prevention of homelessness” (p.26). Housing rights can be framed in constitutional, legislative or social provisions. The report outlines how “evictions, which involve interference or authorisation of such interference with the home, by State or non-State institutions, has been the subject of many constitutional and legal provisions, establishing strict legal limitations” (p.27). A detailed analysis reveals that in all EU Member States, legislation and court rules provide the framework for the legal process of evictions, while complying with constitutional/statutory and human rights standards. The report addresses the role of EU law in this field by outlining the effect of EU law on property, human rights, housing, citizenship, migration, non-discrimination, consumer protection and social inclusion. The authors identify a growing role for the EU in this field by reference to the Charter of Fundamental Rights of the European Union, which is now part of Treaty law. However, the extent of EU competency, and in particular the potential issues surrounding Article 345 of the Treaty on the Functioning of the European Union (TFEU), is not considered in detail. While Article 345, which preserves Member State competency over substantive national property law, appears to set a severe limit on EU action in this area, the reality is

not so straightforward and further discussion here could have been illuminating. For instance, it is apparent that EU competence stirs where a cross border element is present. The report is exceptionally clear in presenting eviction and homelessness as a pan-EU issue. Yet intra-EU migration is also a pan-EU phenomenon. In the context of popular and growing intra-EU migration, the benefits are often stressed while the risks to the individual tend to attract less attention. This is in spite of the fact that many EU Member State economies remain in a fragile state where unemployment, low wages and high housing costs continue to be of pressing concern. When language barriers, cultural/customary differences and the absence of a support network are thrown into the mix, it becomes clear that the risk of eviction and of becoming homeless is real for many intra-EU migrants and it would have been interesting if this had been explored in greater detail.

***Profiles of evicted households: data, triggers and pathways to homelessness***

A major part of Part I of the Report is concerned with gathering and analysing existing statistics on eviction from across Europe (chapter 3). In this effort, a three stage process is used: pre-court, court phase and after court to execution of eviction. In carrying out this analysis, the authors identify a fundamental problem: that “most of the data reported from the 28 Member States is not directly and simply comparable, and is recorded according to very different criteria” (p.47). This is a fundamental problem that, time and again, has confronted comparators seeking to analyse housing issues across Europe. In spite of the difficulties with data, the report identifies some commonality of patterns by classifying the wide range of national evictions measures into ‘triggers’ (the reasons for the eviction), ‘catalysts’ (what stimulates/advances the process of eviction) and ‘inhibitors’ (what slows down/curtains evictions). The report notes that “the triggers for eviction mainly relate to the pre-court phase” (p.67), such as mortgage default or a breach of tenancy terms.

One of the most disconcerting features of the report is the fact that only a handful of Member States collect robust data on those evicted. This is a major gap that undermines how evictions are understood and treated across Europe. However, utilizing the best available data, the report constructs an insightful profile of those households involved in the process of evictions (chapter 3). Unsurprisingly, one-person households tend to be most numerous, followed by lone parents (mostly mothers) with children. With regard to gender, the majority of persons involved tend to be male. The report goes further, stating that most available indicators show that a large number of households threatened with eviction were unemployed and relied on transfer incomes, notably subsistence benefits, while a significant proportion were specifically vulnerable persons such as asylum seekers or Roma.

The discussion then moves on to identifying the risk factors for eviction (chapter 4). Once again, the report adopts a useful framework of analysis, dividing risks into structural risks (poverty, unemployment, lack of affordable housing), systemic/institutional risks (lack of legal protections, shortage of social support, etc.), interpersonal risks (family status, relationship situation, etc.) and personal risks (economic/employment status, disability, illness, etc.). These findings are particularly illuminating and will no doubt contribute to the growing discussion surrounding rising income and wealth inequality in Europe.

Next, the report moves on to trace the links between eviction and homelessness (chapter 5). Understanding the complex 'pathways' of homelessness is fundamental to informing policy interventions. As such, the report's conclusion that the nature of homelessness differs across Europe is particularly noteworthy. The report sets out that in Southern Europe, unlike the North, homelessness "rarely involves those with complex support needs or addiction issues, and is more directly related to economic, structural issues and housing costs. Since almost 50% of homelessness in Greece and Spain is caused by unemployment, the major differences become clear" (p.109). Ultimately, the report states that in most Northern and Western EU Member States, a clear link between evictions and homelessness can be established. One of the more striking findings of the report in this respect is the finding that short-term tenancies are a major pathway into homelessness, particularly in the UK.

## **Part II – Prevention and Anti-eviction Measures**

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In Part II, the report describes and analysis a range of prevention and anti-eviction measures. The authors differentiate the various prevention measures into primary (general), secondary (focused interventions) and tertiary (already affected) prevention measures. One particularly engaging statistic put forward stems from "rough calculations in Austria and Germany" that "indicate that €1 spent on prevention services (including counselling and assumption of rent arrears) may save €7 in costs of providing temporary accommodation and rehabilitation for homeless households" (p.112). Thus, prevention is not only more humane but is also more cost-effective in the long term.

### ***Primary prevention measures***

Primary prevention measures (chapter 7) are macro level in scope and application, and include general welfare state-related measures (mainly social measures that have important legal and financial aspects), housing system-related measures (mainly legal measures, some of them with important financial and social aspects) and mortgage market-related measures (mainly legal measures with important

financial and social aspects). With respect to general welfare measures, the report notes that “access to housing is related to income and all EU Member States ensure minimum standards of living through the use of social transfers, subsidies or other means of support” (p.116). However, the report identifies the fact that in many parts of Europe these supports are falling increasingly short.

A further primary support identified is the support and development of mortgage markets. The report critically analyses the various methods of supporting and developing mortgage lending, including mortgage interest subsidy and mortgage guarantees. The report traces the ways in which concerns surrounding irresponsible lending have guided policy interventions in recent years – most notably Codes of Practice as well as the Mortgage Credit Directive, which is considered in brief.

Another means of primary support identified in the report is the development of intermediate tenures, i.e., tenures that combine elements of renting and homeownership. The report notes that this concept was developed in the UK in the 1980s but has since spread to a number of EU Member States in response to affordability issues. However, the experience of the sale and rent back market in England and Wales makes clear there is considerable scope for unscrupulous commercial activity in the shared ownership market, and that Member States pursuing intermediate tenures should proceed with caution. Homeowners who entered the market were often facing repossession and turned to the sale and rent back deal as a last resort, often with disastrous consequences (many have lost their homes – *Scott v Southern Pacific Mortgages Limited* [2014] UKSC 52). Concern about the operation of the sector led the financial authorities to intervene and all but shut down the market in 2009.

The final primary support discussed is the promotion of private rental housing. The report notes that “a well-developed and efficient rental market providing a viable alternative to ownership plays an important balancing role by alleviating house price pressures and smoothing housing market dynamics” (p.134) and goes on to consider different means of promoting renting. In this respect, the rapid growth in the British private rented sector has set the British model of extremely limited security of tenure and market rents apart in a European context. While it is unsurprising that other EU Member States have sought to follow the British model and liberalise their private rental markets, the British model should be viewed in the round. The British private rental market is the most expensive in Europe and as the report makes clear, the AST (assured shorthold tenancy) presents a major pathway to homelessness. Furthermore, the links between low regulation and a large private rental sector are not so straightforward, given that the Member States with the largest private rental sectors also have the strongest regulation.

### *Secondary prevention measures*

The report then moves on to secondary prevention measures (chapter 8). These include public and third sector housing aid, the support of friends/family, advice, counselling, loan rescheduling, and the obligation of courts to inform housing/social agencies of evictions. The report outlines the critical importance of public and third sector housing aid to preventing eviction by supporting the payment of rent and mortgage arrears. However, while financial supports are vital, they often fall short of meeting housing costs, which makes other secondary supports all the more important. In this context, the significance of housing advice and counselling in preventing eviction is clearly set out by the report, which notes that “while the availability of timely and skilled housing advice and counselling can be a key preventative measure for evictions the provision of such advice varies greatly across the EU in respect of its extent, nature and intensity” (p.146). The extent of this variation is unjustifiable given the pan-European nature of eviction and homelessness.

In terms of interventions, the report identifies the period following a default but prior to the start of a judicial claim after default as being crucial in the effort to prevent evictions and thus avoid “the instigation of the lengthy, costly and harrowing process of evictions” (p.148). Amongst the measures considered are loan rescheduling by lenders, debt cancellation and mortgage-to-rent schemes. The report notes that the mortgage-to-rent scheme offers “an interim solution between debt restructuring, *datio in solutum* or personal insolvency.” In practice, “the mortgage is transferred to a third party (or written off) and the borrower is allowed to remain in the home as a tenant, thus being spared from eviction” (p.151). To a household barely treading water in terms of meeting their mortgage costs, such a scheme may appear a life raft. However, the English experience with respect to intermediate tenures (outlined above) has illustrated that looks can be deceiving and what may appear to be a life raft may well turn out to be a sinking deadweight.

The report identifies the fact that once a judicial claim takes place, secondary measures become even more critical. It is at this stage that an obligation of the courts to inform housing/social agencies of the eviction could play a major role in preventing eviction through early intervention. However, the report makes clear that such an obligation remains the exception rather than the rule across the EU. In terms of legal supports, alternative dispute resolution or specialised institutions as a means of avoiding or diverting eviction are detailed in the report. However, a cautionary note is sounded as the report sets out that such measures have mixed results in relation to evictions. With respect to legal aid, the report captures the complexities surrounding its utility in preventing eviction. The report notes how “in civil proceedings, such as evictions, the right to legal aid is not absolute and may be subject to legitimate and proportional limitations” (p.165). Nevertheless, the

report makes clear that even where legal aid is available it may be of limited utility. For instance, in the UK, the AST terminates automatically and no valid defence is available. Finally, the report goes on to outline the potential for courts to place limitations on the granting of eviction orders. The report notes that “courts must comply with well-established limitations, principles and procedures of constitutional, legislative, general or public interest law. Limitations on the granting of eviction orders have been examined by the European Court of Human Rights, which assesses whether ‘a fair balance’ has been struck between the general interest and the individual interests at stake (such as property rights)” (p.166). Of particular note is the report’s discussion on rent regulation, which is clear and comprehensive and, in light of ongoing affordability problems in many Member States, prescient.

### *Tertiary prevention measures*

Finally, the report moves on to consider tertiary prevention measures (chapter 9). These are “measures aimed at reducing the consequences of evictions” and are targeted at people who have already been evicted. The report identifies minimum protected income and debt relief schemes as playing a vital role in helping the evicted household to secure immediate rehousing. In this context, ensuring access to private rented housing and targeted housing allocation systems is vital. The discussion of the growing statute of Social Rental Agencies (SRA) is particularly illuminating.

In terms of addressing the impacts of eviction, the report notes that access to homelessness services is imperative. While informal support networks such as families or friends are often important, the report outlines that “this form of ‘couch surfing’ can be stressful and erode social relationships” (p.187). The report then turns to focus on formal homelessness services. As in most areas, practice varies widely across Europe. In some Member States, there is a statutory duty on local authorities to provide temporary shelter or housing while in others the extent of support may be limited to advice and information. However, even where statutory duties are strongest, the reality is that often there is insufficient housing stock available to meet applications for support and waiting lists grow while pre-conditions, such as local connection requirements, multiply.

The report concludes by detailing the “paradigm shift in models of rehousing homeless people” (p.188) that has taken place in recent years. Increasingly, the Treatment First approach, which required that people with complex support needs should first undergo treatment and stabilization, has been replaced by the Housing First approach, which is based on rapid rehousing with intensive social support. The report welcomes this shift, noting that “the unstable housing situation is in itself seen as a major barrier for stabilisation and recovery for the individual” (p.189).

## Recommendations

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The report reaches its apotheosis in setting out a number of recommendations, which are primarily directed at addressing the issues raised in the preceding analysis. However, they tend to go further towards developing standards of best practice in preventing evictions (chapter 10). Throughout, the recommendations draw heavily on jurisprudence stemming from the right to housing. This is unsurprising, given that the body of law generated in this area represents international standards of best practice. These principles form the core of the recommendations to ensure protection of the right to housing and access to sufficient and suitable housing.

A number of recommendations are directed at addressing the dearth of data on evictions across Europe. The report has identified the fact that eviction is a pan-European phenomenon but the dearth of data makes the task of understanding this unnecessarily difficult. While practices and even definitions vary across Europe, the failure to maintain meaningful statistics on such a fundamental issue as eviction is unjustifiable, particularly in light of ongoing technological developments. The report's recommendations of promoting research into personal factors leading to evictions, improving the monitoring of evictions, assessing the impact of anti-eviction measures on the efficiency of mortgage and housing markets and establishing national services tasked with preventing eviction are entirely sensible and would go a considerable way towards addressing the current data deficit and, indeed, improving practice.

In response to the issues thrown up by the preceding analysis, a number of specific recommendations are set out. These include recommending that Member States introduce a legal obligation on courts to inform specialist agencies of any evictions, thus allowing early specialist intervention; that Member States ensure legal aid, advocacy and representation are made available in evictions cases; and that rapid rehousing is prioritised. There is considerable merit in these recommendations. In the first place, the duty to inform a specialist agency of any evictions could greatly support early intervention, which has been demonstrated to be absolutely crucial in preventing eviction and, indeed, homelessness; likewise, rapid rehousing. Ensuring provision of legal aid in eviction cases can play a significant role in preventing evictions. However, it is not a panacea, particularly with respect to the automatic termination of short-term fixed tenancies where no defence may be raised.

Following the discussion surrounding pathways to homelessness, the report recommends that Member States secure a 'fresh start' for over-indebted borrowers, that responsible mortgage lending and consumer protection be promoted and, finally, that short term tenancies be restricted to special circumstances. There is



also merit in these recommendations. However, how that ‘fresh start’ is achieved is more challenging. For instance, the English experience with intermediate tenures indicates that mortgage-to-rent schemes should be approached with real caution. In light of the link between short-term tenancies and homelessness that is demonstrated in the report, the restriction of short-term tenancies to special circumstances has much weight behind it.

## Conclusion

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This report makes it clear that eviction is a pan-EU phenomenon and that it should be increasingly approached as such in order to understand and address the difficult issues surrounding it effectively. It is equally apparent that there is a strong divergence in practice and understanding regarding eviction across the EU, yet in many ways this variety, while challenging in some respects, also represents an opportunity for the identification and transfer of best practice from Member State to Member State. This report has begun that process by collecting and analysing a wealth of material on evictions and homelessness across the EU. The findings offered – particularly in terms of identifying risk factors for eviction, developing a profile of evicted households and tracing the links between eviction and homelessness – are as important as they are striking and will undoubtedly contribute much to the growing discussion surrounding rising income and wealth inequality in Europe. While further discussion of some issues, such as the extent of EU competency or the links between intra-EU migration and eviction, would have been welcome, those topics are worthy of attention as freestanding issues and perhaps could be treated as such in the future. Finally, as the discussion on anti-eviction measures in Part II makes clear, prevention of evictions is not only more humane but also often much more cost-effective in the long run. The report describes a wide range of preventative measures. However, the recurring theme throughout is that, regardless of the policy measure, early intervention is imperative. Ultimately, eviction can leave a bitter legacy. This is because, as put by Michael Davitt who experienced eviction first hand as a child when his family were evicted in Straide in the West of Ireland in 1850, “an eviction... is a challenge to every human feeling and sentiment”. For those seeking to offset the ‘bitter’ legacy of eviction, there is much to commend in the recommendations put forward in this report.

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