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Termination of Tenancy Contract in Slovenia: Time for a Change

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Abstract

This article is concerned with the currently most critical part of the 2003 Housing Act: the regulation of the termination of a tenancy contract. We will try to show that the current system is outdated, incomplete and unproportionate when it comes to safeguarding the interests of both parties. Nowadays, a rental contract may be terminated by the landlord only in a court procedure. Moreover, if a landlord wants to use the apartment himself, he may terminate a tenancy contract only if he is able to secure the tenant with a new, adequate apartment. On the other hand, the tenant living in the apartment with a (silent or express) consent of the landlord upon the expiry of a limited-in time tenancy, is considered an illegal occupant. Accordingly, the landlord may file for eviction any time even if the tenant regularly pays the rent for years after the expiry of the initial contract. We will argue why and in what manner these provisions shall be changed.

Keywords: • tenancy contract • termination of tenancy contract • housing policy • private rental • non-profit rental

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Odpoved stanovanjske najemne pogodbe v Sloveniji: čas za spremembo

ŠPELCA MEŽNAR & TAMARA PETROVIĆ

Povzetek

Avtorici se v članku ukvarjata s pravno ureditvijo prenehanja najemne pogodbe, ki je trenutno najšibkejši člen Stanovanjskega zakona (SZ-1). V razpravi argumentirata, zakaj je veljavna ureditev zastarela in nepopolna in zakaj se z njo ne vzpostavlja ravnovesje med interesi obeh pogodbenih strank. Stanovanjska najemna pogodba se po veljavnem slovenskem pravu odpoveduje sodno (s tožbo v civilnem postopku). Poleg tega je najemodajalec najemniku dolžan zagotoviti drugo primerno stanovanje, če odpove pogodbo zaradi lastne potrebe po stanovanju. Obe zahtevi sta nesmiselni in pretirano ščitita najemnika, ki pa po drugi strani ostaja nezaščiten, če po poteku najemne pogodbe za določen čas z najemodajalčevim soglasjem ostane v stanovanju, pri čemer pa stranki ne skleneta nove pogodbe. V tem primeru namreč lahko najemodajalec kadarkoli zahteva najemnikovo izselitev, pa čeprav ta redno plačuje najemnino. Avtorici v članku predlagata modernejše rešitve naštetih težav.

Ključne besede: • najemna stanovanjska pogodba • odpoved najemne pogodbe • stanovanjska politika • tržni najem • neprofitni najem

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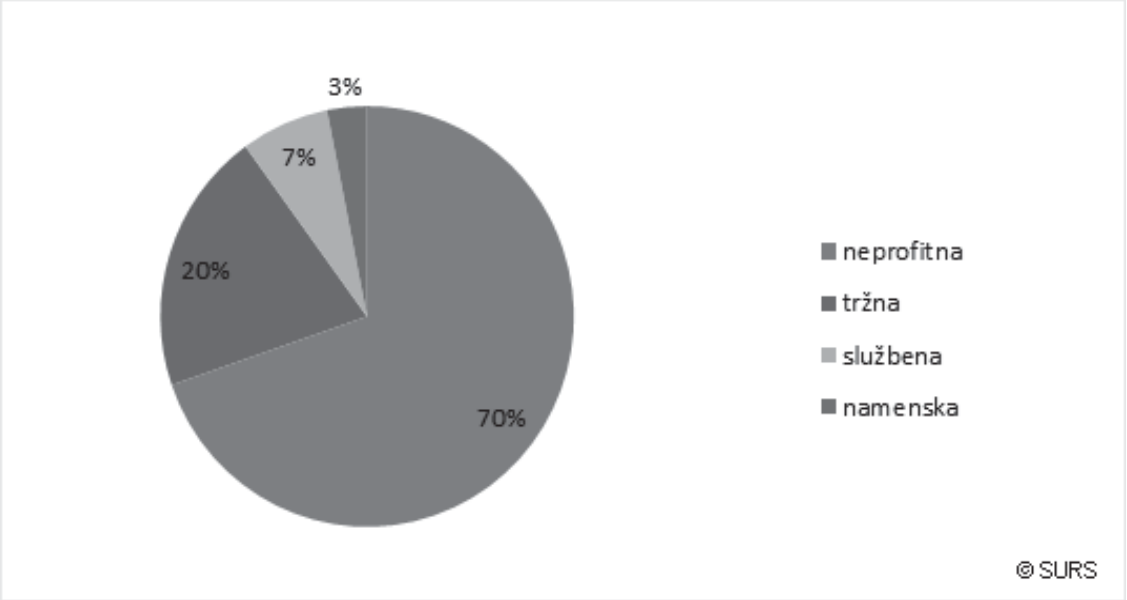
1. Introduction

The current housing situation in Slovenia is typical for a post-socialist transitional economy. A study by *Cirman* indicates that Slovenians prefer homeownership over rental to a great extent. Some of the preferences are caused by the financial attractiveness of homeownership to the households and the lack of adequate alternative. Moreover, the housing policy in Slovenia has been greatly supporting the homeownership, while discriminating against rental sector. Therefore, the main question of many households used to be merely when the household will be able to afford a home of their own (Cirman, 2006: 130). In 2011, there are 849,825 houses (dwellings) in Slovenia. Among those, 518,127 are owner occupied, and only 61,113 are rented ones. Other forms of tenure (e.g. the residents of the house are not its owners nor they pay rent) account for 93,480 dwellings. Mostly due to 1991 privatization process, the percentage of privately owned dwellings versus rented is by far the highest in Europe. Prior to the privatization, the ratio of owners to tenants was 70% as compared to 30%. Afterwards, with around 140,000 dwellings sold, this ratio went up to 92% as compared to 8%.

There are several kinds of rental tenures in Slovenia: 70% (or 42,666 dwellings) are non-profit rentals (inhabited by 102,913 residents in 47,288 households), 20% are market rentals, 7% are employment based and 3% purpose-based[1]. This article is only concerned with the first two categories as they dominate both in practice as well as in the legal regulation.

Figure 1:. Rental tenures according to their share in the housing stock



[1]According to Art. 83 of the Housing Act, these dwellings are meant for institutionalized care of elderly citizens, retired and special categories of adults.

As the current economic crisis progresses, it has become more and more difficult for an average citizen to purchase an apartment (Cirman, 2007: 14-16). Accordingly, the need for rentals (both market in non-profit) has increased. This in turn affects the legal regulation of rentals: tenancy law has (too) long been underdeveloped, but with its growing importance the necessity of a more modern regulation has become obvious.

This article is concerned with the currently most critical part of the 2003 Housing Act: the regulation of the termination of a tenancy contract. We will try to show that the current system is outdated, incomplete and unproportionate when it comes to safeguarding the interests of both parties. Nowadays, a rental contract may be terminated by the landlord only in a court procedure. Moreover, if a landlord wants to use the apartment himself, he may terminate a tenancy contract only if he is able to secure the tenant with a new, adequate apartment. On the other hand, the tenant living in the apartment with a (silent or express) consent of the landlord upon the expiry of a limited-in time tenancy, is considered an illegal occupant. Accordingly, the landlord may file for eviction any time even if the tenant regularly pays the rent for years after the expiry of the initial contract. We will argue why and in what manner these provisions shall be changed.

2. Conclusion of the tenancy contract

Two principal statutes regulate tenancy law in Slovenia. General provisions are contained in the Code of Obligations[2], whereas more specific ones are to be found in the 2003 Housing Act.[3] The generalities of any lease contracts (and not just the rental contracts for dwellings) are regulated in the CO in the Chapter X. The provisions include: the definition of lease contracts, obligations of lessor and lessee, lessees' rights, sub-lease and cancellation of contracts.

The 2003 Housing Act regulates contents of rentals for dwellings. Its provisions govern in most part the relationship between the landlord and the tenant. It also defines the types of rental dwellings, rights and obligations of landlords and tenants, contents of rental contracts, non-profit housing, termination of rental contracts, rent prices, subventions, inspection, etc.

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[2] Obligacijski Zakonik (hereinafter: CO), Official Gazette of the Republic of Slovenia, Nr. 83/2001.

[3] Official Gazette of the Republic of Slovenia, Nr. 69/2003, 57/2008, 56/2011, 87/2011.

The provisions of the CO are in principle dispositive (non-mandatory) and may be replaced by the agreement of the parties. On the other hand, provisions of the 2003 Housing Act contain a number of mandatory rules, since the basic premise is to protect the tenant, a socially weaker party in relation to the landlord. A greater level of protection for tenants is guaranteed, especially when it comes to termination of the contract.

2.1. Non- profit and market rentals

The basic difference between the non-profit and market rentals is the social function of the non-profit rentals. Non-profit rentals are dwellings awarded by a municipal, state, public housing fund or other non-profit housing organization. They are intended for tenants with low incomes, limited property and poor housing conditions. According to Art. 115(2) of the 2003 Housing Act, the rental price of the market, purpose and employment based apartments is to be determined freely on the market, whereas the rent for the non-profit apartments must be determined in accordance with Art. 117 of the 2003 Housing Act with a special methodology. The procedure for awarding non-profit apartments is based on a public tender. The rental contract for non-profit apartment may only be concluded for indefinite period of time. On the other hand, the rentals freely negotiated between private parties are defined as "market rentals". Parties are autonomous to decide on the price (rent), termination, duration and other issues. Clearly, the relationship between the parties is again shifted towards the tenant due to his weaker position.

2.2. Duration of the contract: open-ended and limited-in-time contracts

Although the 2003 Housing Act does not regulate the duration of market rentals, in practice they are mostly concluded for a limited period of time (Cirman, 2006: 166). There are no limitations regarding the minimum or maximum duration. If the contract is concluded for a limited period, this contractual term is regarded as essential (Art. 90(1/10) of the 2003 Housing Act). According to Art. 95 of the 2003 Housing Act, the prolongation of the contract is dependent upon the explicit demand of the tenant. He is obliged to ask the landlord for the prolongation within thirty days before the termination of the initial contract. If the landlord agrees, the annex[4] is

[4] The annex must be concluded in writing, stating the new period, for which the contract is prolonged (Šinkovec & Tratar, 2003: 175).

concluded. Otherwise, the tenant is obliged to vacate the premises within the period prescribed in the contract. A possibility of a tacitly renewed lease, regulated in Art. 615 of the CO[5], does not apply to the tenancy contracts due to the protection of the landlord (J. Šinkovec & B. Tratar, 2003: 175).

On the other hand, contracts for non-profit rentals must be concluded for the indefinite period of time (Art. 90(1) of the 2003 Housing Act). Every five years, the landlord is entitled to verify whether tenants still meet the criteria from the Rules on Renting Non-profit Apartments. Thus, the criteria for obtaining non-profit apartment must be fulfilled during the entire period (Šinkovec & Tratar, 2003: 166). If a tenant no longer meets the criteria for paying a non-profit rent, the tenancy contract is changed into market rental. If the social circumstances of the tenant deteriorate again, the tenant is entitled to demand verification of the circumstances and change of his profit rent to non-profit once again (Art. 90(2) and (3) of the 2003 Housing Act).

2.3. Autonomy of the parties and its limitations

In general, landlords and tenants in market rentals are free to agree on the terms of the contract. However, Art. 109 of the 2003 Housing Act imposes obligation on landlords to conclude the contract with certain individuals in the case of death of the tenant: tenant's spouse or extramarital partner or one of the closer family members. In order to have such right these individuals must actually have had resided in the dwelling with the deceived tenant, they must have had their residence registered on that address and they must have been enlisted in the rental contract as users of the apartment. Most of the limitations are intended to protect the tenant. However, his position is stronger vis-à-vis landlords in public sector. In the private sector (market rentals), the landlords are not necessarily "stronger" parties, especially when it comes to termination of the contract.

3. Termination of the tenancy

The position of the landlord is marked with the social function of tenancy relations. Majority of provisions regulating the position of the landlord are mandatory, preventing him to misuse his (usually) superior position in

[5] Art. 615 of the CO: (1) If following the end of the period for which the lease contract was concluded the lessee continues to use the thing and the lessor does not oppose such, a new lease contract for an indefinite period shall be deemed to have been concluded with the same terms and conditions as the previous contract.

relation to tenant (Vlahek, 2008). This especially refers to landlords in non-profit apartments, whereas the position of the landlord in market rentals is somewhat more lenient. Tenancy law usually aims to protect the tenant's right to home by offering him special protection when it comes to landlord's right to terminate the tenancy.

The 2003 Housing Act differentiates the reasons for termination based on the type of rental relation. Non-profit rental contracts may only be terminated for "liability based" reasons enlisted in Art. 103. Market rentals may be terminated for other reasons as well, as long as they are clearly governed by the rental contract (Art. 105 of the 2003 Housing Act)[6].

3.1. Agreement on reasons for termination

Parties in market rentals can of course agree upon the reasons for termination. Art. 105 of the 2003 Housing Act stipulates that landlords in market, employment based and purpose rentals may terminate the contract for any reason, provided it is governed in the contract[7]. In general, parties may agree upon the reasons for termination, termination period (if any), procedure for notice, etc. (Vlahek, 2006; Vlahek: 2008). Most contracts in practice are however not concerned with such mutually agreed termination reasons. Legal regulation of the reasons for termination therefore remains of utmost importance.

3.2. Termination by the tenant

Art. 102 of the 2003 Housing Act determines that, unless otherwise agreed, tenant may terminate the contract without reasons at any time, if he gives written termination notice with a ninety days termination period. The law does not provide an answer whether this provision only applies to open-ended contracts or not. Some authors take the view that Art. 102 refers exclusively to open-ended contracts (Juhart, 2004: 717). It might make sense to restrict the use of this right to contracts concluded for very short periods (such as six month or even shorter) to safeguard the interests of the landlord. On the other hand, contracts, which are formally concluded for a limited period of time, may in practice be functionally closer to open-ended contracts

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[6] However, such agreement is excluded as far as the non-profit rentals are concerned (Vlahek, 2008).

[7] This paragraph explicitly does not refer to the market rental, since it regulates situations, when the tenant or some of his household's members has an ownership right over another dwelling, which is irrelevant for market rentals.

(for example, a tenancy for 15 years). As the current wording of Art. 102 does not really support the view that it is applicable exclusively to open-ended contracts and as there is no case law either, a clear position by the law maker would be welcome.

3.3. Termination by the landlord

In practice, the termination by the landlord is definitely more sensitive as it may cause that the tenants is deprived of his "home". The law-maker has to carefully balance the interests of both parties: the tenant's constitutional right to a dwelling and landlord's constitutional right to his property and autonomy. It seems that the balancing in 2003 Housing Act could have been made better in some respects.

3.3.1. Liability based reasons (tenant's fault)

There are twelve liability based reasons for termination.[8] The first eleven apply in non-profit and market rentals alike, while the twelfth reason only applies to non-profit rentals. The liability based reasons for termination are the following:

1. causing significant damage to either the dwelling or common areas by the tenant or other users[9],[10]
2. pursuing commercial activity in the dwelling without the permission or contrary to it[11];
3. not maintaining the dwelling in accordance with the Rules on Standards for the Maintenance of Apartment Buildings and Apartments;
4. not paying the rent price or other running costs within the deadline set with the contract or, if such deadline is not set, within sixty days from receiving the bill;[12]

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[8] It is important to stress that these reason must also be stated in the tenancy contract in accordance with Art. 91 of the 2003 Housing Act, regardless of the fact that they are stated in the 2003 Housing Act, to ensure that both parties are aware of them (Vlahek, 2006).

[9] Although the provision does not mention other individuals, who are present in the dwelling with the tenant's or users' consent, and inflicting the damage, it is deemed that in that case, the tenant or the users are held culpable for the actions of third individuals (Vlahek, 2006).

[10] Decision regarding causing damage to the common areas: decision of the Higher Court of Ljubljana, no. VSL II Cp 484/2000 from 20 March 2000.

[11] Breach of Art. 14(6).

[12] It is irrelevant if the unpaid amount represents only certain proportion of the rent price or the running costs. (Decision of the Higher Court of Ljubljana, no. VSL II Cp 4850/2010 from 24 May 2011).

5. grave violation of fundamental rules of neighbourly cohabitation by the tenant or other users'[13] manner of use, which are regulated with the house rules, or severe disturbance of other cohabitants' peaceful use;
6. performing alternations of the dwelling or installed equipment without the landlord's permission, apart from the cases regulated with Art. 97[14];
7. use of the dwelling by other person(s), not enlisted in the tenancy contract, without landlord's consent, during more than sixty days within three months period;
8. sub-renting the dwelling without the landlord's permission;
9. refusing the entry to the landlord in cases regulated with Art. 94 (3)[15] and 99[16];
10. refusing to take over the dwelling or reside in the dwelling within thirty days after the conclusion of the contract;
11. ceasing to use the dwelling for three months consecutively by the tenant or other users;
12. providing false information for obtaining the rent subsidy in accordance with Art. 121.

It is important to note that even in such cases the tenant may prove before the Court that the reason was incurred due to circumstances beyond his control or that he was unable to resolve it without fault at his part in due time (Vlahek, 2006). The Court may then deny the landlord's request for termination. In order to lawfully terminate[17] the contract, the landlord must notify the tenant in writing. The notification must refer to the breach and specify the manner for its removal as well as an adequate deadline (minimum fifteen days) (Art. 103(3) of the 2003 Housing Act).[18] If the deadline is not stated, the admonition is not valid and the termination is unlawful.[19]

3.3.2. Other reasons

Other reasons for termination are regulated in Art.106. This Art. refers to both profit and non-profit rentals, open-ended as well as limited in time. If

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[13] Or by third individuals, who are in the dwelling with the consent.
[14] Technical modernization, which is in accordance with the tenant's interests and which do not present threat to other users of the building and the exterior of the building.
[15] Two times a year, to check the condition of the dwelling.
[16] For performing maintenance and repair work.
[17] Lawful termination is given with a lawsuit in front of the competent Court. See supra/infra
[18] Art. 103(3) of the 2003 Housing Act.
[19] Decision of the Higher Court in Celje, no. VSC Cp 1721/2006 from 16 August 2007.

the landlord wants to terminate the contract for any other reason than those regulated in Art.103 or in the tenancy contract[20], he is to provide another adequate dwelling for the tenant. (Art. 106(1) of the 2003 Housing Act.) This includes justifiable reasons such as landlord's own housing needs (or his closer family member's[21]) and objective circumstances regarding the dwelling, due to which it is no longer habitable (anticipated demolition, change in the purpose of the building, endangered safety of residence, etc.). The costs of the moving are borne by the landlord (Art. 106(5) of the 2003 Housing Act).

In our opinion, the current regulation is not appropriate as it does not take sufficient account of the landlord's interests. The vast majority of private landlords do not possess more than one rental dwelling, which means that termination of the tenancy for their own private reasons is practically impossible. The requirement to provide for an adequate dwelling shall in our view be abolished in the case of other justified termination reasons governed by Art. 106(3). Facts in a recent case before Higher Court in Ljubljana clearly highlighted that this clause is deeply problematic in practice.[22]

3.4. Procedural issues

The landlord is entitled to terminate the contract with a notice period of at least ninety days (Art. 112(1)). The provision is mandatory, in order to protect the tenant's position (Vlahek, 2006). Thereafter, the landlord must reimburse any investments of the tenant into the dwelling (Art. 112(2) of the 2003 Housing Act). The notice on termination is to be given in writing, in accordance with Art. 53 (on the rescission of contracts concluded in certain form) of the CO (Vlahek, 2006).

If there is a dispute between the parties on the termination of the contract,[23] the landlord is to file a lawsuit with a Court of general competence (Art. 112(3) of the 2003 Housing Act). It is insufficient to demand only the emptying of the dwelling, which is irrelevant without the prior termination of

[20] If such "other" reasons are governed by the contract, Art. 106 is not applicable.
[21] As such, the statute deems the needs caused by the increased number of closer family members, increased number of households in accordance with the Rules on Renting Non-Profit Apartments.
[22] Decision of the Higher Court in Ljubljana, no. VSL I Cp 881/2012 from 24 October 2012.
[23] It is deemed that there is a dispute, if the tenant does not move out from the dwelling within the set deadline in the termination notification.

the contract. In addition, it is insufficient to demand that the Court only establishes that the contract was lawfully terminated.[24]

The Court is to determine the deadline for the moving out of the tenant, which may not be shorter than 60 and longer than 90 days (Art. 112(4) of the 2003 Housing Act). The procedures are urgent (Art. 112(5) of the 2003 Housing Act). The termination has no effect if the tenant proves that the reason did not occurred due to his fault or that he was not able to remove it without his fault in due time (Art. 112(6) of the 2003 Housing Act).

If the tenant uses the dwelling after the tenancy contract is no longer valid (after the period for which the contract was concluded) and the contract was not prolonged, he is using it unlawfully. In that case, the Court is not obliged to offer sixty to ninety days period for the moving out.[25]

3.5. Conclusion

In short: the landlord may terminate the contract with a written statement and with a ninety days notice period. If however the tenant disagrees with the reasons for termination, the landlord must (once again!) terminate the contract with a lawsuit filed to the Court. The confusing regulation is problematic in many ways.[26] First, even the courts seem to disagree whether the tenancy contract may only be terminated with a court claim or also by a simple statement.[27] In such unpredictable situation it is natural that most of the landlords do not take risk and rather file a claim. Secondly, it is unreasonable to demand from the landlords to file a claim every time when they terminate a tenancy contract. In a normal business world, a written termination served to the tenant shall suffice. If the tenant believes that his rights were violated, he must then have the right to a legal remedy (an action for annulment of the termination as provided by labour law). The suggested solution would decrease the number of court cases as the landlords would no longer bring actions just to avoid potential conflicts with tenants. At the same

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[24] Decision of the Higher Court of Maribor, no. VSM I Cp 1823/2009 from 28 September 2009.

[25] Decision of the Higher Court in Ljubljana, no. VSL II Cp 1770/2012 from 18 September 2012.

[26] The mere starting point of this provision is illogical: how could a landlord possibly predict whether there is going to be agreement or disagreement about the reasons for termination? And yet, this is the crucial factor for his procedural choice of termination – whether to merely hand over a written statement to the tenant or to file a claim.

[27] Decisions of the Higher Court in Ljubljana, no. VSL I Cp 881/2012 from 24 October 2012 and no. VSL Cp 3987/2008 from 10 March 2009.

time, only the tenants with reasonable chances of success would be inclined to safeguards their rights before courts.

Other problems in the current legislation have been analysed. If the landlord wants to terminate the contract for any other reason than those regulated in Art. 103 or in the tenancy contract, he is to provide another adequate dwelling for the tenant. This includes justifiable reasons such as landlord's own housing needs. The requirement to provide for an adequate dwelling shall in our view be abolished in the case of justified termination reasons governed by Art. 106(3). Bearing in mind the economic situation of an average private landlord, this requirement is not proportional to its goal (protection of the tenant). Other solutions would serve the purpose of protecting the tenant just as well, for example providing him with a longer notice period.

On the other hand, if a tenant is living in the apartment with a (silent or express) consent of the landlord upon the expiry of a limited-in time tenancy, he is considered an illegal occupant. Accordingly, the landlord may file for eviction any time. We believe that such silent prolongation shall be legally binding for both parties (either as a renewal of the tenancy for the same period of time as initially agreed or for an indefinite period of time). To sum up, a clear-cut distinction in the 2003 Housing Act between market and non-profit rentals would be welcome, at least as far as termination of tenancy contracts is concerned.

Although there is a widespread cliché that virtually entire market rental sector is executed through black market, the actual state of affairs is quite opposite. Quite a high proportion of market tenants have a written contract. However, the genuine acquaintance of the parties with their rights and obligations, as well as their practical impact is questionable. A mere improvement of legislation with no institutional framework (operative organization of tenants) will not produce optimal results. Therefore, a comprehensive approach is needed, in order to bring closer the rental sector to both parties.

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