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Obligations for Owners to Climate-Proof Buildings in Spain

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1. Introduction

The Energy Performance of Buildings Directive 2010/31/EU¹ (EPBD) and the Energy Efficiency Directive 2012/27/EU,² which has been recently modified by the Recast Energy Efficiency Directive 2023,³ aim to boost the energy performance of buildings and to attain a highly energy efficient and decarbonized building stock by 2050. Achieving such a goal is a great challenge for Spain, since more than 80 % of buildings have an energy efficiency classification of E, F or G, according to data from the Spanish Energy Diversification & Saving Institute (IDAE),⁴ an agency assigned to the Spanish Ministry of Industry, Energy and Tourism. It comes as a no surprise, then, that the building sector as a whole, accounts for approximately 30 % of energy consumption in Spain, with domestic water heating (DWH) and household heating being the most significant, followed by lighting and household appliances.⁵ This is due to the fact that the Spanish building stock is very old, with approximately 54 %

1 Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings [2010] OJ L153/13.

2 Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC [2012] OJ L315/1.

3 Directive on energy efficiency and amending Regulation (EU) 2023/1791 [2023] OJ L231 (Recast Energy Efficiency Directive 2023).

4 IDAE, 'Estado de la certificación energética de los edificios' (10th report, 2021) <https://energia.gob.es/desarrollo/EficienciaEnergetica/CertificacionEnergetica/Documentos/Documentos%20informativos/2022_Informe-seguimiento.pdf> accessed 22 September 2023.

5 Spanish Ministry of Transport, Mobility and Urban Agenda, 'Long-term strategy for energy rehabilitation in the building sector in Spain' (2020) 47ff <https://cdn.mitma.gob.es/portal-web-drupal/ERES/ERESEE_2020version_ingles.pdf> accessed 22 September 2023.

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of homes in Spain (14 million) having been built more than 40 years ago. At that time, no mandatory energy efficiency standards were in force, since the first mandatory energy standards were enacted after the oil crisis in 1979 with the Basic Building Standard NBE-CT-79,⁶ and the first rule on heating, air conditioning and hot water facilities in 1981.⁷ This legislation governed the minimum requirements for buildings until the introduction of the Technical Building Code (CTE) in 2006 (Royal Decree 314/2006,⁸ currently in force), which obliges builders to comply with minimum energy efficiency standards. As a matter of fact, only 7 % of all Spanish homes have been built in accordance with the energy efficiency standards and beneficial use of energy required by the mandatory CTE since 2007.⁹ In addition, almost one million dwellings are in poor, bad or dilapidated condition,¹⁰ making the task of reducing their energy expenditure quite onerous.

For these reasons, the Spanish National Integrated Energy and Climate Plan 2021-2030¹¹ aims to reach 1.2 million energy-efficient homes in the next decade, reduce household non-renewable primary energy consumption by 30 % and improve comfort and habitability. The approximately 30,000 homes that are renovated in Spain each year are clearly not enough to achieve this objective. In fact, the annual renovation rate in Spain does not reach 0.1 % of the total number of dwellings.¹²

To reach this goal, the housing aspect of Spain's Recovery and Resilience Plan¹³ supports the green transition through investments of over €7.8 billion in the energy

6 Real Decreto 2429/1979 of 6 July 1979 <www.boe.es/eli/es/rd/1979/07/06/2429> accessed 6 December 2023 (no longer in force).

7 Real Decreto 1618/1980 of 4 July 1980 <www.boe.es/eli/es/rd/1980/07/04/1618> accessed 22 September 2023.

8 Real Decreto 314/2006 of 17 March 2006 <www.boe.es/eli/es/rd/2006/03/17/314/con> accessed 22 September 2023.

9 According to Javier Serra María-Tomé and Luis Vega Catalán, 'Contexto actual: la UE, España y agentes motores de la sostenibilidad edificatoria' (2017) 145 *Práctica urbanística* 1.

10 Instituto Nacional de Estadística, 'Censos de Población y Viviendas, Viviendas según tipo de vivienda y estado del edificio' (2011) <www.ine.es/jaxi/Tabla.htm?path=/t20/e244/viviendas/p01/10/&file=00013.px&L=0> accessed 22 September 2023.

11 Ministerio para la transición ecológica y reto demográfico, 'Plan Nacional Integrado de Energía y Clima' <www.miteco.gob.es/content/dam/miteco/images/es/pnieccompleto_tcm30-508410.pdf> accessed 22 September 2023.

12 Ministerio De Derechos Sociales y Agenda 2030 and others, 'Claves de sostenibilidad para acelerar el proceso de rehabilitación de viviendas en España. Orientado al desarrollo de políticas públicas en coherencia con la Agenda 2030' (2022) 7ff <www.mdsocialesa2030.gob.es/agenda2030/documentos/infr-reah-accesible.pdf> accessed 11 December 2023.

13 European Commission, 'Spain's recovery and resilience plan' (2022) <https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility/spains-recovery-and-resilience-plan_en> accessed 22 September 2023.

efficiency of public and private buildings including new social housing. Under this plan, a proportion of the so-called Next Generation Funds¹⁴ with a planned investment of €6.82 billion, managed by Autonomous Communities and the IDAE, has been assigned to improve the quality and energy efficiency of homes and buildings, the success of which remains to be seen.

In addition, multi-unit buildings play a key role in Spain in terms of energy efficiency, because Spain has the highest percentage of people living in flats (66.1%) in Europe.¹⁵ Composite ownership (condominium, *propiedad horizontal*) is the dominant legal type of multi-apartment buildings in Spain, which means that owners own their apartment and all owners jointly own the common parts and land such as the roof, façade, entrance hall, lifts, staircases, ground, gardens and/or swimming pools.¹⁶ This has an impact on the granting of public aid or loans for renovation and the execution of energy efficiency works in the building, as the decisions are taken collectively by the board of the community of owners. That is why the Spanish Condominium Act 49/1960¹⁷ (LPH) has been recently amended to facilitate applications for EU funding submitted by communities of owners.¹⁸ From the perspective of the works carried out inside the dwelling, it is also important to determine the extent to which landlords may undertake renovations and subsequently increase the rent when the term of the current tenancy contract expires.

In this context, the role of governmental powers to compel owners to climate-proof their buildings, as well as the legal framework on condominiums and leases, becomes increasingly important for reaching national and EU climate targets. Split incentives¹⁹ appear in multi-unit buildings and rented housing, preventing parties

14 Real Decreto 853/2021 of 5 October 2021 <www.boe.es/eli/es/rd/2021/10/05/853/con>. See also Spanish Ministry of Transport, Mobility and Urban Agenda, 'Programa de ayudas para la rehabilitación integral de edificios residenciales y viviendas' (2023) <www.mitma.gob.es/ministerio/proyectos-singulares/prtr/vivienda-y-agenda-urbana/programa-de-ayudas-para-la-rehabilitacion-integral-de-edificios-residenciales-y-viviendas> accessed 22 September 2023.

15 EUROSTAT, 'Distribution of population by degree of urbanisation, dwelling type and income group – EU-SILC survey' <https://ec.europa.eu/eurostat/databrowser/view/ILC_LVHO01/default/table?lang=en> accessed 22 September 2023.

16 See EU Science Hub, *Energy efficiency upgrades in multi-owner residential buildings: Review of governance and legal issues in 7 EU Member States* (2018) 36ff.

17 Ley 49/1960, of 21 July 1960 <www.boe.es/eli/es/l/1960/07/21/49/con> accessed 22 September 2023.

18 According to the Preamble of the Law 10/2022 (see para 4.2), 'With this law, the milestone established in the Recovery, Transformation and Resilience Plan, related to reform C02.R06 "Improvement of the financing of rehabilitation actions" included in number 25 of the annex to the Proposed Decision of the Council of 16 June 2021, regarding the approval of the evaluation of Spain's recovery and resilience plan, is met.'

19 Art. 2(54) Recast Energy Efficiency Directive defines split incentives as a 'lack of fair and reasonable distribution of financial obligations and rewards related to energy efficiency investments among

from investing in energy efficiency. Public-law obligations to retrofit can resolve the impasse occurring when co-owners or landlords and tenants do not agree to do so. This contribution explores the existing and future obligations to climate-proof buildings in Spain, including the enforcement of such obligations and the extent to which they may restrict the right to property.

This study first sets out the institutional and legal context of obligations to climate-proof buildings in Spain (Section 2). Afterwards, it describes and analyses existing obligations to climate-proof buildings and the proportionality of these impositions (3). Subsequently, it assesses the effect of positive obligations to retrofit condominiums and rented dwellings and the legality of such obligations (4), as condominiums, on the one hand, and rented dwellings, on the other hand, are two schemes where split incentives are present.²⁰ Finally, Section 5 lays out the conclusions of this contribution. This contribution shows that existing legislation prevents public bodies from unilaterally imposing positive obligations to climate-proof buildings, impacting the energy performance of multi-unit buildings and rented dwellings.

2. The Institutional and Legal Framework for Obligations to Climate-Proof Buildings

2.1 General Overview

The territorial organization of Spain affects the legal framework of positive obligations to climate-proof buildings. In terms of competences, Spain is a multi-level legal system, so the 17 Autonomous Communities may assume their own legislative competences on certain issues, such as housing and planning (Art. 148.1.3 Spanish Constitution of 1978, CE; see below).²¹

Nevertheless, the General State Administration is also legally competent in matters of basic legislation related to public administration and to land law²² (Constitu-

the actors concerned, for example, the owners and tenants or the different owners of building units, or owners and tenants or different owners of multi-apartment or multi-purpose buildings'.

²⁰ As seen above, Art. 2(54) Recast Energy Efficiency Directive confirms that split incentives are present in relationships among 'owners and tenants or the different owners of building units, or owners and tenants or different owners of multi-apartment or multi-purpose buildings'.

²¹ *Constitución Española* (Spanish Constitution, 1978) <[www.boe.es/eli/es/c/1978/12/27/\(1\)/con](http://www.boe.es/eli/es/c/1978/12/27/(1)/con)> accessed 22 September 2023.

²² Refer to the section on the administrative competences on building conservation: María Luisa Gómez Jiménez, 'Introducción. La vivienda como problema jurídico y su sostenibilidad' in María Lui-

tional Court decisions 61/1997,²³ and 141/2014).²⁴ It may also legislate on civil law, although certain Autonomous Communities are entitled to preserve, modify and develop their own civil law.²⁵ Furthermore, Art. 45 CE provides for the protection of the environment, constituting a general principle that shall inspire the policies and running of the whole public administration.

The fragmentation of the legal framework of positive obligations is also caused by the fact that certain energy-efficient appliances have their own specific regulation, such as oil-boilers.²⁶

2.2 The Specific Status of Urban Property

Article 33.1 CE stipulates that “The right to private property and inheritance is recognized.” In this regard, the Constitutional Court decision 37/1987²⁷ held that this provision regulates the right of private property as a set of duties and obligations established, in accordance with the laws, in response to the values and interests of the community, that is, to the social purpose of private property, enshrined in Art. 33.2 CE.²⁸ This decision also held that different types of property with different legal regimes are included within Art. 33.1 CE (so it does not reproduce, and it is not equal to, the liberal conception of property enshrined in Art. 348 of the Spanish Civil Code).²⁹ Accordingly, the Constitutional Court decision 164/2001³⁰ entitles the State to

sa Gómez Jiménez (ed), *Sostenibilidad social y rehabilitación de vivienda. Especial referencia a Andalucía* (Dykinson 2015) 61ff.

23 Tribunal Constitucional *sentencia* 61/1997 of 20 March 1997 <www.boe.es/boe/dias/1997/04/25/pdfs/T00003-00126.pdf> accessed 22 September 2023.

24 Tribunal Constitucional *sentencia* 141/2014 of 11 September 2014 <www.boe.es/boe/dias/2014/10/07/pdfs/BOE-A-2014-10211.pdf> accessed 22 September 2023.

25 Not all Autonomous Communities had their own civil law when the Spanish Constitution entered into force, so that only some of them may develop their own civil law: Aragón, Catalonia, Navarre, the Basque Country, Galicia and the Balearic Islands.

26 Judith Gifreu Font, ‘La integración de medidas de eficiencia energética en el sector de la edificación en España a la vista de los objetivos de la UE para los horizontes 2020–2030. Las redes district heating and cooling’ (2019) 1 *Revista Catalana de Dret Ambiental* 16.

27 Tribunal Constitucional *sentencia* 37/1987 of 26 March 1987 <www.boe.es/diario_boe/txt.php?id=BOE-T-1987-9279> accessed 18 December 2023.

28 ‘The content of these rights shall be determined by the social function which they fulfil, in accordance with the law’. See about the right of private property and the social function of the property, Ángel M López y López, *La disciplina constitucional de la propiedad privada* (Tirant lo Blanch 2018).

29 Real Decreto of 24 July 1889 <www.boe.es/eli/es/rd/1889/07/24/1/con> accessed 19 December 2023.

30 Tribunal Constitucional *sentencia* 164/2001 of 11 July 2001 <www.boe.es/buscar/doc.php?id=BOE-T-2001-15937> accessed 18 December 2023.

regulate the “basic conditions” that guarantee the “equality” of all landowners in the exercise of their right of urban property, so that the content and enjoyment of urban property may be defined by each municipality according to its competences.

This is reflected in the Spanish Land Act,³¹ which regulates the specific features of urban property. In this vein, Art. 15.1(b) Land Act establishes that the right of ownership of land (*derecho de propiedad del suelo*) includes the duty to maintain the property in the legal conditions that ensure safety, health, universal accessibility, a suitable state of repair and other conditions required by law. The legal duty to conserve urban property is based on the social function of the property³² (Art. 33.2 CE) and the specific status of land.³³ Therefore, health and safety measures are deemed to be social values enshrined in the legal duty to conserve urban property. The right to property also entails the duty to carry out additional works ordered by the relevant Administration for the improvement of the quality and sustainability of the urban environment (Art. 15.1(c) Land Act).

The first question is whether energy efficiency works may be included within the scope of the legal duty of conservation provided for in Art. 15.1(b) and (c) Land Act. Scholars argue that a duty to undertake these works is not enforceable under these provisions as the terms “safety, health, universal accessibility” (b) and “quality and sustainability of the urban environment” (c) are too vague for such purposes.³⁴ Accordingly, the power granted by law to the administration to guarantee the duty of conservation, in general terms, may not go beyond the standard health and safety requirements.³⁵

The second question is whether the Spanish lawmaker may introduce the legal duty to meet energy efficiency standards in the built environment as another social value within the Land Act. In our view, such a measure would contribute to the common good, but any limitation of the right of private property must respect its essential content (Art. 53.1 CE).³⁶ According to the latest cases from the Spanish Con-

31 Real Decreto Legislativo 7/2015 of 30 October 2015 <www.boe.es/eli/es/rdlg/2015/10/30/7/con> accessed 22 September 2023 (RDL 7/2015).

32 Tribunal Supremo *sentencia* 715/2007 of 26 June 2007, Westlaw-Aranzadi: RJ 2007\8362.

33 Tribunal Constitucional *sentencia* 61/1997 (n 23).

34 Isabel González Ríos, ‘Eficiencia energética: especial referencia a la rehabilitación de edificios’ in José F Alenza García and Lorenzo Mellado Ruiz (eds), *Estudios sobre cambio climático y transición energética* (Marcial Pons 2022) 180; Ángel Menéndez Rexach, ‘Nuevas políticas de suelo y vivienda: Viviendas vacías, rehabilitación urbana y mejora de la eficiencia energética de los edificios’ (2017) 10 JURISMA 46.

35 Jaime Rodríguez-Arana Muñoz and Almudena Fernández Carballal, *La buena administración del urbanismo: Principios y realidades jurídicas* (Tirant lo Blanch 2018) 426.

36 ‘The rights and liberties recognized in Chapter Two of the present Title are binding for all public authorities. The exercise of such rights and liberties, which shall be protected in accordance with the

stitutional Court dealing with the expropriation and taxation of empty dwellings by Autonomous Communities,³⁷ it may be concluded that the Constitutional Court has not adopted the absolute conception regarding the essential content of the right of private property, according to which any fundamental right has a ‘core’ or ‘nucleus’ outside the legislator’s scope, but the relative one, which argues that a fundamental right may be limited through the proportionality principle. Proportionality includes the analysis of the suitability or adequacy of the measure, its necessity and that of proportionality in the strict sense.³⁸ This means, *inter alia*, that the essential content of the right of private property will be respected insofar as a sufficient individual or economic utility for the owner of the right is guaranteed once the proportionality principle is applied. In order for this principle to be respected, owners would only be obliged to pay up to half of the value of the construction of a new building equivalent to the original one (Art. 15.3 Land Act);³⁹ otherwise, it would be a limitation of the right of private property that should be compensated. Only in extremes cases, *i.e.*, lack of any economic utility for the owner, would this lead to the necessary expropriation by the Administration (Art. 33.3 CE).

2.3 Basic Requirements of Buildings

Regarding the basic requirements for the habitability of buildings, the legal framework of reference used for the development of land is the Spanish Building Act 38/1999,⁴⁰ which establishes that buildings must be projected, constructed, maintained

provisions of Article 161.1(a), may be regulated only by law which shall, in any case, respect their essential content.’

37 See in this sense, Héctor Simón Moreno, ‘La evolución constitucional de la función social de la propiedad y el nuevo régimen del derecho de propiedad sobre una vivienda en la Ley por el derecho a la vivienda’ (2023) 42 *Derecho Privado y Constitución* 139ff <www.cepc.gob.es/sites/default/files/2023-07/40173dpyc4204simon-moreno.pdf> accessed 20 December 2023.

38 About these theories, see L. Michael, ‘El contenido esencial como común denominador de los derechos fundamentales en Europa?’ (tr C Elías Méndez, 2009) 6 *Revista Española de Derecho Constitucional Europeo* 177ff.

39 Following Sofía Simou, ‘La configuración filoclimática del derecho de propiedad’ (2017) 3 *Indret. Revista para el Análisis del Derecho* 41ff <<https://indret.com/wp-content/themes/indret/pdf/1320.pdf>> accessed 20 December 2023. She argues that the quantitative criterion of 50 % seems to serve as an indicator to estimate whether the incorporation of phylotclimatic interventions, especially on urbanized/urban land, is uneconomical and disproportionate for the property; it must be compensated what exceeds 50 %. See also the Tribunal Supremo *sentencia* of 5 December 2001, Aranzadi-Westlaw: RJ 2002/511.

40 Ley 38/1999 of 5 November 1999 <www.boe.es/eli/es/l/1999/11/05/38/con> accessed 22 September 2023 (Spanish Building Act).

and conserved in such a way that satisfies a number of basic requirements. Within the scope of the habitability requirements, Act 38/1999 also takes into consideration energy savings and the thermal insulation necessary to ensure a rational use of energy needed for the building to be inhabited properly (Art. 3.1(c)). This provision is further developed by:

- 1) the Technical Building Code (CTE), the regulatory framework that establishes the basic quality requirements for buildings and services, such as the Basic Document on Energy Saving (DB-HE).⁴¹ The CTE was modified in 2019⁴² to introduce the duty to review minimum energy performance requirements at regular intervals established in Art. 4 EPBD. Following what is established in Art. 4.2 EPBD, Spain has exempted industrial, defence and agricultural buildings from meeting minimum energy efficiency standards. Additionally, the CTE does not apply to technically simple or minor constructions, which are not of residential or public nature, and are built on a single floor (Art. 2.2 CTE). According to Royal Decree 173/2010,⁴³ all existing residential buildings should comply with the basic universal accessibility standards provided in the CTE without prejudice to other regional and local regulations. Nevertheless, the other standards stipulated in the CTE, including minimum energy efficiency standards, are only binding for

⁴¹ Ministerio de Vivienda y Agenda Urbana, 'Código Técnico de la Edificación' (2022) <www.codigo-tecnico.org/DocumentosCTE/AhorroEnergia.html> accessed 22 September 2023. The DB-HE contains rules concerning (1) the limitation of energy consumption (HE0; *e.g.*, it sets limits for non-renewable primary energy consumption and total primary energy consumption for all buildings, which limits depend on the use (residential or not), the climate zone and on the internal 'load' of the building); (2) conditions for controlling energy demand (HE1, *e.g.*, it establishes values for the 'control of demand' in enclosures and windows, as well as setting a limit for the incident solar radiation that can pass through the windows in summer, which in practice will imply that the windows must have solar protection: blinds, slats or awnings); (3) conditions of thermal installations (HE2, which makes reference to the RITE, see below); (4) conditions of light fixtures (HE3, *e.g.*, which establishes energy efficiency values for the light fixtures); (5) minimum contribution of renewable energy to cover the demand for domestic hot water (HE4, solar thermal energy is not specifically mentioned, so in practice, it facilitates the possibility of installing heat pumps in homes, and it requires a 70 % renewable contribution for heating the water of swimming pools and for the production of DHW when the daily consumption is greater than 5000 litres. In homes, where the DHW does not have to be permanently at 60°C and the minimum renewable contribution will generally be 60 %, this requirement can be covered by a heat pump); and (6) minimum generation of electrical energy (HE5, which focuses on buildings with a constructed surface area of more than 3,000 m². A photovoltaic system with a power output of between 30 and 100 kW is required).

⁴² Real Decreto 732/2019 of 20 December 2019 <www.boe.es/eli/es/rd/2019/12/20/732> accessed 22 September 2023.

⁴³ Real Decreto 173/2010 of 19 February 2010 <www.boe.es/eli/es/rd/2010/02/19/173> accessed 22 September 2023.

- new and existing buildings that are subject to improvement works (Art. 2.3 CTE).⁴⁴
- 2) Regulation of Thermal Facilities in Buildings (RITE).⁴⁵ The RITE is the basic normative instrument regulating the energy efficiency and safety requirements that thermal installations in buildings must meet, *i.e.*, fixed installations for air conditioning (heating, cooling and ventilation) and for the production of domestic hot water required to meet the demand that provides for people's well-being and hygiene (Art. 2.1).⁴⁶ RITE applies when the building must provide people with an adequate level of thermal comfort and hygiene, so the thermal installations used in industrial, agricultural or other processes, are not within its scope (Art. 2.6).
 - 3) There are other rules worth highlighting, such as the Royal Decree 390/2021,⁴⁷ which requires the energy efficiency certificate to be delivered to the buyer or the new tenant; the Royal Decree 736/2020,⁴⁸ which transposes into Spanish Law Directive 2018/2002, amending Directive 2012/27/EU on energy efficiency;⁴⁹ and the Spanish Housing Act,⁵⁰ which makes energy efficiency one of the goals of public policies (Art. 2.1(g)) and a priority as far as public aid is concerned (Art. 33.1(e)).

44 Agents that participate in the building process are liable for compliance with these standards. Agents include the developer, the builder, the designer, suppliers, and subcontractors (Art. 5.1 Spanish Building Act; in fact, the building planner (*proyectista*) is the person liable for ensuring that the building fulfils the energy saving requirements included in the Regulation of Thermal Installations in Buildings (RITE) when signing off the project). The fulfilment of these standards is usually controlled when asking for a building permit (Art. 11.3 RLD 7/2015) or when trying to register the new building with the Land Registry (Art. 20 Spanish Building Act). Indeed, when asking for the building permit, the owner must submit a project that complies with the technical requirements of the current CTE, including the installation of a minimum level of insulation in the house (Art. 15.1.3 CTE).

45 Real Decreto 1027/2007 of 20 July 2007 <www.boe.es/eli/es/rd/2007/07/20/1027> accessed 22 September 2023. The last revision of the RITE took place through Real Decreto 178/2021 of 23 March 2021.

46 RITE aims to achieve a more efficient operation of heat and cold generation equipment, conduits for thermal fluids, as well as the regulation and control of air conditioning equipment, renewable energies (specifically solar energy and biomass), and the implementation of energy recovery subsystems and the use of residual energy.

47 Real Decreto 390/2021 of 1 June 2021 <www.boe.es/eli/es/rd/2021/06/01/390> accessed 22 September 2023 (which approves the basic procedure for the certification of the energy efficiency of buildings).

48 Real Decreto 736/2020 of 4 August 2020 <www.boe.es/eli/es/rd/2020/08/04/736/con> accessed 22 September 2023 (regulating the accounting of individual consumption in buildings that use a centralized thermal installation).

49 Directive (EU) 2018/2002 of the European Parliament and of the Council of 11 December 2018 amending Directive 2012/27/EU on energy efficiency [2018] OJ L328/210.

50 Ley 12/2023 of 24 May 2023 <www.boe.es/eli/es/l/2023/05/24/12/con> accessed 22 September 2023 (Housing Act 12/2023).

2.4 Distribution of powers among Autonomous Communities and Municipalities

As stated above, the Spanish Autonomous Communities may take on responsibility for town/country planning and housing, so that the State has no direct enforcement powers in this field, but only the legal competence to regulate the basic requirements as pointed out above. Therefore, these Autonomous Communities and municipalities may implement stringent requirements. Furthermore, the municipalities have exclusive legal competence regarding legislation on preservation and renovation of buildings,⁵¹ with the aim of preventing risks for people and property or eliminating hygiene-related hazards in compliance with state or regional law (Art. 25 of the Local Government Regulatory Act 7/1985).⁵²

To this end, municipalities can issue local ordinances (*ordenanzas*) on the basis of their legal competence on environmental protection (Art. 25.2(b) Act 7/1985) and urban planning (Art. 25.2(a) Act 7/1985), always in compliance with the rules enacted by the State or the Autonomous Communities.⁵³ Enforcement of the CTE is thereby a regional and a local issue. Article 59 of the Land Act stipulates that municipalities will oversee the enforcement of the duties imposed on owners and developers, which may include works to improve the sustainability of the urban environment (Art. 15.1(c) Land Act). In fact, some Autonomous Communities have regulated the possibility of municipalities imposing maintenance works on owners, such as Art. 197 Act on Urban Planning of Catalonia,⁵⁴ Art. 170 Land Act of Madrid,⁵⁵ or Art. 106 Land Act of *Castilla y León*.⁵⁶ The enforcement of the CTE by municipalities, in particular regarding sustainability standards, is carried out by means of issuing

⁵¹ Tribunal Supremo *sentencia* of 22 May 2015, ECLI:ES:TS:2015:2338.

⁵² Ley 7/1985 of 2 April 1985 <www.boe.es/eli/es/l/1985/04/02/7/con> accessed 22 September 2023 (Local Government Regulatory Act; Act 7/1985).

⁵³ According to Art. 49 Act 7/1985, the procedure for the approval of such *ordenanzas* starts with the initial approval by a plenary session of the competent authority (Art. 21.1(j) Act 7/1985), then the relevant information is made public and an audience is arranged with the interested parties, after that a minimum period of 30 days follows for the presentation of claims and suggestions (Art. 25.1 RLD 7/2015). Afterwards, the municipality addresses all claims and suggestions presented, before proceeding with the final approval by a plenary session of the competent authority (Art. 22.2(c) and 123.1(i) Act 7/1985).

⁵⁴ Decreto Legislativo 1/2010 of 3 August 2010 <www.boe.es/eli/es-ct/dlg/2010/08/03/1/con> accessed 22 September 2023.

⁵⁵ Ley 9/2001 of 17 July 2001 <www.boe.es/eli/es-md/l/2001/07/17/9/con> accessed 22 September 2023 (on Land of the Community of Madrid).

⁵⁶ Ley 5/1999 of 8 April 1999 <www.boe.es/eli/es-cl/l/1999/04/08/5/con> accessed 22 September 2023 (on Town Planning in Castilla y León).

an order for the execution of works or through the subsidiary arrangement of the execution of works (Art. 15.4 RDL Land Act).

2.5 Subsidies

The State Housing Plan in force for the period 2022–2025 (Royal Decree 42/2022)⁵⁷ provides for grants intended to foster social housing that requires the achievement of minimum levels of energy efficiency. For instance, the programme for the promotion of housing for the elderly and people with disabilities requires new or renovated buildings to have an energy efficiency class of A (Art. 72 RD 42/2022). The same requirement applies to the programme that aims to foster temporary accommodation, cohousing models and intergenerational housing (Art. 82 RD 42/2022). Also, the programme for the elimination of degraded areas, shantytowns and substandard housing may finance energy efficiency works, provided that they achieve an energy efficiency of class A. As pointed out above, the Spanish Housing Act 12/2023 sets energy efficiency as one of the priorities for the designation of public aid, so it is expected that future State housing plans will continue to increase the aid offered in this area.

The other main source of subsidies to climate-proof buildings is the Recovery, Transformation and Resilience Plan mentioned above, following Regulation (EU) 2021/241.⁵⁸ The so-called Next Generation Funds provide for six funding programs that aim to renovate the existing building stock. By means of example, the plan regulates a funding programme focused on the improvement of the energy efficiency of housing (Programme 4), which gives owners, usufructuaries or tenants the equivalent of 40 % of the renovations' costs, with a maximum amount of EUR 3,000 (Art. 44 RD 853/2021).

However, the distribution of aid, the lack of transparency and information, the complexity of processing applications and the fact that owners must advance the money are all barriers to the success of this programme.⁵⁹ In addition, as the responsibility for regional planning and housing has been assumed by the Spanish Autonomous Communities on the basis of Art. 148.3 CE, they have their own housing plans and policies that might not include all measures funded at national level.⁶⁰

57 Real Decreto 42/2022 of 18 January 2022 <www.boe.es/eli/es/rd/2022/01/18/42/con> accessed 22 September 2023 (RD 42/2022).

58 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L57.

59 'Fondos Europeos: La compleja gestión y la falta de transparencia en su tramitación despiertan las alarmas' (2023) 584 CIC: Arquitectura i sostenibilitat 50ff.

60 An agreement between the State and each Autonomous Community is needed to fund regional plans with national public funding.

3. Proportionality and the Powers of Public Bodies to Compel Owners to Retrofit Buildings

3.1 The General Rule: the Inability of Municipalities to Order Renovation Works

One of the key issues in the debate on positive obligations is whether, under Spanish law, a public body may impose the performance of energy efficiency works in existing buildings without providing appropriate compensation. In this regard, the following must be taken into consideration:

1. Article 84.2 Act 7/1985 establishes that any intervention undertaken by a municipality shall, in any event, be adjusted to the principles of equal treatment, consistent with the reasons and purposes that justify the action and be performed with respect for individual freedom.
2. According to the Supreme Court,⁶¹ the owner can only be compelled to carry out those works necessary for the end pursued.
3. The public body competent to order renovation works is the local authority, provided that (1) the execution order contains the economic quantification of what was ordered and a predictable budget, and (2) the public body complies with local regulations and (3) observes the principle of administrative proportionality with the prior hearing of the interested person.⁶² The proportionality principle involves that the public body shall assess and balance the rights of citizens and the need for better energy efficiency conditions when imposing these orders.

As explained above, neither the Spanish Land Act nor the CTE allows public bodies to order works for the improvement of the urban environment that include renovations for the improvement of energy efficiency. The determination of the duty to incorporate technical innovations into the building may also depend on the sectorial legislation,⁶³ which may impose specific duties on homeowners that deviate from the general doctrine explained. This is the case when it comes to old boilers: owners of any building should check if it complies with the current requirements established in the RITE concerning oil-fired boilers; if it does not, they should replace the existing boiler.

⁶¹ Tribunal Supremo *sentencia* of 9 February 1998, Aranzadi-Westlaw: RJ 1998\1531.

⁶² Tribunal Supremo *sentencia* of 1 September 1997, Aranzadi-Westlaw: RJ 1997\6791.

⁶³ José Zamorano Wisnes, 'El derecho a la ciudad sostenible' (2012) 15 *Revista de Estudios de la Administración Local y Autonómica* (2012) 15 *Nueva Época* 101.

Accordingly, an order for the execution of works requiring the owner⁶⁴ to bear the costs without a previously established legal obligation would generally not comply with the proportionality principle (*i.e.*, these restrictions or sanctions by public authorities do not meet the criteria of necessity and suitability to the end pursued),⁶⁵ as there is currently no obligation to adapt these buildings to comply with existing laws. Such an order would breach Art. 25 and 26 CE, so the validity of this administrative act could be challenged based on Art. 47.2 Act 39/2015,⁶⁶ according to which the acts of public administrations that violate the Constitution, laws or other administrative provisions of a higher rank (in this case, Art. 33 CE and Art. 15 Land Act), are null and void. Once the administrative procedure has been terminated, following the filing of an appeal before the administrative authority (Art. 121 Act 39/2015), the claimant could bring an action before the Administrative Court (Art. 45 of Act 29/1998).⁶⁷

It would be necessary to amend current legislation (whether primary or secondary), in order to impose a new requirement on the owners of existing buildings, compelling them to comply with minimum energy efficiency standards (for example, through an amendment of the CTE) in order to consider it legally admissible for the public administration to enforce these works. If the Proposal for a Directive on the energy performance of buildings (Proposal EPBD Recast) ever entered into force, Spain would probably require the introduction of positive obligations applicable to the existing building stock. According to Art. 9 of the Proposal, minimum energy performance standards would have to be set.⁶⁸ Furthermore, Art. 9 would also require that these obligations be supported by other measures, such as financial mechanisms, one-stop-shops or removing split incentives.

Nevertheless, there are two exceptions to the general rule that positive obligations to retrofit are impermissible: when renovation works are undertaken and when the works are included in urban planning.

64 Tribunal Supremo *sentencia* of 18 July 1994, Aranzadi-Westlaw: RJ 1994\5544.

65 Tribunal Supremo *sentencia* 6602/2004 of 3 December 2008.

66 Ley 39/2015 of 1 October 2015 <www.boe.es/eli/es/l/2015/10/01/39/con> accessed 22 September 2023 (Act 39/2015).

67 Ley 29/1998 of 13 July 1998 <www.boe.es/eli/es/l/1998/07/13/29/con> accessed 22 September 2023 (Act 29/1998).

68 For residential buildings and their units, after 1 January 2030, at least an energy performance class F; and after 1 January 2033, class E.

3.2 First Exception: the Performance of Improvement Works

The first exception to the general rule is when improvement works are undertaken. In this case, the current energy efficiency requirements of the CTE must be met, provided that these requirements are compatible with the nature of the renovation, for example when the owner performs renovations affecting the thermal generation systems and more than 25 % of the total surface area of the final thermal envelope of the building (Basic Document HE, Energy Savings and Art. 2.3 CTE). Under such circumstances, the municipality will be able to oblige the owner to comply with current energy efficiency standards in accordance with Art. 15 CTE. This requirement follows the mandate of Art. 7 EPBD. Another example is when owners renovate the thermal installations of their houses. In this case, current RITE requirements are applicable and owners must adapt the new boiler if they: a) install or modify air conditioning or domestic hot water production subsystems; b) replace or increase the amount of heat generating or cooling equipment; c) change the type of energy used or incorporate renewable energy sources; or d) change the intended use of the building. The agents responsible for ensuring that existing installations are correctly adapted to meet RITE standards are the professionals involved in the design, execution, maintenance, and inspection of these installations, as well as the entities and institutions involved in the approval and supervision of the projects or who draw up technical reports, in addition to the owners and users of the installations.

In these cases, owners could be ordered to implement the energy efficiency measures, provided that the principle of proportionality is observed. Also, owners would only be obliged to pay up to half of the value of the construction of a new building equivalent to the original one (Art. 15.3 Land Act).

As a result, old buildings have an obligation to adapt to existing requirements in terms of energy efficiency if major renovations are undertaken. However, it must be taken into account that owners may choose the most appropriate way to comply with the requirements set out in the CTE. Taking as an example district heating systems,⁶⁹ these are not required by the CTE, so that owners are not obliged to con-

⁶⁹ According to the Association of Heat and Cold Networks Companies (ADHAC), ‘Censo de Redes de Calor y Frío’ (2020) <www.adhac.es/asociacion.php?t=census&k=Censo%20de%20redes&i=10> accessed 22 September 2023, there are 468 district heating systems (DH&C) in Spain, covering 5,700 buildings. The vast majority are located in the Autonomous Communities of Catalonia and Castilla-León, and more than 90 % only provide heat. 67 % of the clients belong to the tertiary sector, 55 % of the networks are publicly owned, and biomass is the main source of energy. In relation to DH&C systems, following the Basic energy saving Document HE number 4 CTE (Minimum contribution of renewable energy to cover the demand for domestic hot water), buildings shall satisfy their needs for domestic

nect to them and do not need to implement a specific measure, provided that the equipment they decide to install is efficient, according to Art. 15 CTE. Another example is solar panels.⁷⁰ For each climate zone and for different levels of demand for domestic hot water (at a reference temperature of 60 °C), the CTE establishes a minimum annual solar contribution depending on whether the support energy source is diesel, propane, natural gas, or others. The CTE does not specify the term ‘renewable energy sources’, so that the owner could install renewable sources other than solar panels (for instance, micro wind power plants or biomass boilers). As a result, although the Land Act allows public bodies to order works for the improvement of the quality and sustainability of the urban environment, the order for the execution of works would probably not fulfil the principle of proportionality, as the owner is not obliged to install a specific source for renewable energy.

3.3 Second Exception: Imposing Renovation Works at Local Level through Urban Planning

Compulsory energy efficiency requirements may be introduced in new urban developments on the basis of the special status of the urban property. As a matter of fact, the establishment of a specific purpose for land or the imposition of other types of administrative limits or limitations (urban planning standards) does not, in princi-

hot water and indoor pool heating by largely using energy from renewable sources or renewable cogeneration processes, either generated in the building itself or through connection to an urban heating system. To meet the minimum contribution of energy from renewable sources, these will need to cover at least 70 % of the annual energy demand for domestic hot water. Generally speaking, this requirement is applicable to both new and existing buildings with a demand for domestic hot water greater than 100 l/d.

⁷⁰ Solar panels are subject to several sectorial pieces of legislations, such as the Ley 24/2013 of 26 December 2013 <www.boe.es/eli/es/l/2013/12/26/24/con> accessed 22 September 2023; Real Decreto-ley 15/2018 of 5 October 2018 <www.boe.es/eli/es/rdl/2018/10/05/15/con> accessed 22 September 2023 (on urgent measures for the energy transition and the protection of consumers); or Real Decreto 244/2019 of 5 April 2019 <www.boe.es/eli/es/rd/2019/04/05/244/con> accessed 22 September 2023 (regulating the administrative, technical and economic conditions of the self-consumption of electric energy), intended to regulate the use of solar panels for self-consumption. Subsidies for the installation of solar panels are included within the Spanish Recovery and Resilience Plan. Some Spanish regions provide for a deduction on the personal income tax for solar panels (e.g., Canary Islands, Catalonia) and some municipalities (Fundación Renovables, ‘Análisis comparativo de bonificaciones fiscales al autoconsumo en las principales ciudades españolas’ (2020) <<https://fundacionrenovables.org/averigua-municipio-bonifica-ibi-ocio-autoconsumo/>> accessed 22 September 2023) even provide for a reduction on Property Tax after the installation.

ple, generate a right to compensation for individuals (Art. 4.1 Land Act).⁷¹ Additional requirements may be introduced through special urban plans, which must be issued in compliance with the general urban development plan of each municipality, a basic instrument used for the comprehensive planning of the territory of one or more municipalities. As a result, the current and any future owner of a property would be bound to carry out energy efficiency works. The proprietary or “in rem” nature of such obligations is provided by the publication of the urban plan according to the Land Act. As pointed out above, Art. 15.1 establishes that the right of ownership of land comprises several duties, and Art. 27.1 establishes that the transfer of land does not modify the obligations of the owner with respect to the fulfilment of duties established by the legislation related to territorial and urban planning, which in turn are applicable or enforceable through the issuing of orders for the execution of works. As the urban planning commitments derive from the law, not from publication in the Land Registry,⁷² the transfer of the land to a third party in good faith (Art. 34 Spanish Mortgage law, LH)⁷³ does not affect the duties or limits imposed by authorities.⁷⁴

4. The Effects of Positive Obligations to Retrofit Condominiums and Rented Dwellings

4.1 Introduction

Retrofitting condominiums and rented dwellings constitutes a more complex process due to the conflicting interests of several actors, including co-owners, neighbours, tenants, and their family members. The EU is aware that there are multiple barriers to overcome when retrofitting multi-unit buildings or rented dwellings, as

71 Sofia Simou, ‘La configuración filoclimática del derecho de propiedad’ (InDret 2017/3) 24 <<https://indret.com/wp-content/themes/indret/pdf/1320.pdf>>.

72 Eduardo Estrada Alonso, ‘Efectos civiles de las determinaciones urbanísticas que afectan al uso del suelo’ (2020) 779 *Revista Crítica de Derecho Inmobiliario* 1464.

73 According to which an acquisition by a third party in good faith and for consideration will be maintained once the right has been registered regardless of whether the transferor was actually the owner or the holder of the transferred property right or not. Decreto of 8 February 1946 <[www.boe.es/eli/es/d/1946/02/08/\(1\)/con](http://www.boe.es/eli/es/d/1946/02/08/(1)/con)> accessed 22 September 2023 (Mortgage Act).

74 Luis Javier Arrieta Sevilla, ‘Ordenación territorial y seguridad jurídica en la contratación inmobiliaria’ (2017) 760 *Revista Crítica de Derecho Inmobiliario* 611. See also Tribunal Supremo *sentencia* of 29 December 2011, ECLI:ES:TS:2010:7038.

shown by EU Parliament resolution of 17 September 2020.⁷⁵ This resolution recognizes that split incentives, regulatory and administrative barriers in rented dwellings and buildings with multiple owners act as significant limits to investments (recital 17). The EU Green Deal 2019⁷⁶ also refers to this issue when confirming that ‘the Commission will also work to lift national regulatory barriers that inhibit energy efficiency investments in rented and multi-ownership buildings’.

In 2012, the Energy Efficiency Directive referred to ‘split incentives’ in Art. 19. Nevertheless, this phenomenon was not legally defined until the Recast Energy Efficiency Directive 2023 (Art. 2(54)) as a lack of distribution of fairly and reasonable rewards among the involved parties (that is, landlords and tenants, and owners of apartments or building units) that ballast energy efficiency investments. Indeed, there are non-regulatory and legal barriers to retrofitting the existing building stock, when dwellings are rented or in a multi-unit building:

- Non-regulatory barriers are mainly information asymmetries that would make homeowners and tenants unaware of the energy efficiency level of their homes and the benefits of having more efficient homes.⁷⁷
- Regulatory and legal barriers are specific pieces of legislation that contribute to the energy efficiency market failure. In particular, the stability of tenancy relationships, rent regulation, distribution of costs, the obligation of the tenant to tolerate energy refurbishment works and the possibility of increasing the rent after retrofitting a rented home, are key issues when promoting energy efficiency works.⁷⁸ Also, owners and occupants of multi-family dwellings were underrepresented in energy conservation programs.⁷⁹ Owners in multi-unit buildings must decide on the convenience of undertaking energy efficiency works in

⁷⁵ EU Parliament resolution of 17 September 2020 on maximizing the energy efficiency potential of the EU building stock [2021] OJEU C385/68.

⁷⁶ Commission, ‘Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal’ COM (2019) 640 final.

⁷⁷ Dorothe Charlier, ‘Split incentives and energy efficiency: Empirical analysis and policy options’ (2014) Options Document from travail ART-Dev No 7; Stefano Cellini, ‘Split incentives and endogenous inattention in home retrofits uptake: a story of selection on unobservables?’ (2021) 104 *Energy Economics*; Hongguang Nie and others, ‘Split incentive effects on the adoption of technical and behavioral energy-saving measures in the household sector in Western Europe’ (2020) 140 *Energy Policy*.

⁷⁸ Federal Institute for Research on Building, Urban Affairs and Spatial Development (BBSR) within the Federal Office for Building and Regional Planning (BBR), *Tenancy Law and Energy Renovation in European Comparison* (BBSR-Online-Publikation 2016) 14 <www.bbsr.bund.de/BBSR/EN/publications/OnlinePublications/2016/bbsr-online-14-2016-dl.pdf?__blob=publicationFile&v=41> accessed 3 January 2024.

⁷⁹ Lucie Maruejols and Denise Young, ‘Split incentives and energy efficiency in Canadian multi-family dwellings’ (2011) 39 *Energy Policy* 3655.

common areas, which will be paid by all of them jointly. Depending on the decision-making process or the quorum required by legislation to execute the works, they may encounter barriers to improve the energy efficiency of the whole building.⁸⁰

The Spanish lawmakers have approached these issues as follows.

4.2 Condominiums

Condominiums are relevant in Spain. As already pointed out above, it has the highest proportions of citizens living in flats in the European Union, with the vast majority of these flats being organized as condominiums. In regard to energy efficiency, since the entry into force of Royal Decree Law 19/2021⁸¹ and Law 10/2022,⁸² which amend the Spanish LPH, the quorum required to implement energy efficiency measures has been changed. In particular, the works or actions that contribute to the improvement of energy efficiency (leading to an upgrade in the building's energy efficiency class through, for example, low-power boilers and thermal insulation in roofing or false ceilings), the implementation of renewable energy sources for common use (for instance, solar, geothermal and aerothermal), as well as the request for subsidies, loans or any type of funding to public or private entities to carry out such works or actions, will require a simple majority vote, that is, 50 % plus one vote, of owners attending the meeting of the community of owners, who must also make up a simple majority of the participation quotas. Without such a specific rule, a simple majority vote in relation to the total number of owners of the condominium would be required. It is, however, necessary to ensure that when the cost of implementing those measures is passed on in the form of annual payments, with subsidies or public aid discounted and financing arrangements applied, where appropriate, the cost does not exceed the amount of twelve ordinary monthly payments of common expenses (Art. 17.2 LPH).⁸³ It is not clear from the law what hap-

⁸⁰ EU Science Hub, *Energy efficiency upgrades in multi-owner residential buildings: Review of governance and legal issues in 7 EU Member States* (2018).

⁸¹ Real Decreto-ley 19/2021 of 6 October 2021 <www.boe.es/eli/es/rd/2021/10/05/19/con> accessed 22 September 2023 (RDL 19/2021).

⁸² Ley 10/2022 of 14 June 2022 <www.boe.es/eli/es/l/2022/06/14/10/con> accessed 22 September 2023 (Law 10/2022).

⁸³ Nonetheless, the installation of an electric vehicle charging point for private use in the building's parking lot, provided that it is located in an individual parking space, will only require prior communication to the community (Art. 17.5 LPH).

pens if the cost exceeds the amount of twelve ordinary monthly payments of common expenses, in particular whether the agreement could be challenged by the dissident owners (Art. 18.1 LPH) or they could only be obliged to pay the maximum amount established by law.⁸⁴ In this regard, RDL 19/2021 amended Art. 9.5 of the Land Act in order to provide the community of owners with legal personality when applying for such loans or public aid. This is necessary because, as a general rule, the community of owners has no legal personality in Spain, only for specific legal acts. However, the civil liability regime of the community of owners enshrined in Art. 22 LPH is not clear enough to provide legal certainty to lenders, as they are not entitled to seize the common parts of the building and the owners are only liable towards the community of owners because they are not a contractual party to the loan concluded between the lender and the community. This poses difficulties for lenders in seizing owners' apartments. For this reason, lenders require in practice all owners to be part of the contract, who will be jointly liable with the community of owners.⁸⁵

In a similar vein, Catalan Decree-Law 28/2021⁸⁶ and, later, Law 3/2023⁸⁷ have amended the Civil Code of Catalonia (CCC)⁸⁸ to facilitate the execution of works to improve energy or water efficiency and the installation of renewable energy systems.⁸⁹ Accordingly, the same majority vote mentioned above will be enough to approve the execution of works so as to install common infrastructure or equipment with the purpose of improving the mobility of users, energy or water efficiency (in this case, even for particular use in common elements), renewable energy systems or to connect broadband telecommunications services or to individualize the measurement of water, gas or electricity consumption or for the installation general provision of charging points for electric vehicles (Art. 553–25.1(c) and (d) CCC).

⁸⁴ In favour of the first possibility, Ángel Carrasco Perera, 'Contratos de financiación y avales de comunidades de propietarios para rehabilitación de eficiencia energética' (Gómez-Acebo & Pombo 2022) 1 <www.ga-p.com/wp-content/uploads/2021/10/Contratos_financiacion.pdf> accessed 20 December 2023.

⁸⁵ See Alejandro Fuentes-Lojo Rius, 'Novedades legales sobre obras para la mejora de la eficiencia energética en comunidades de propietarios' (2022) 9983 *Diario La Ley*; and Sergio Nasarre Aznar and Héctor Simón Moreno, 'Los efectos de diez años de crisis en las comunidades de propietarios' (2020) 778 *Revista Crítica de Derecho Inmobiliario* 1075ff.

⁸⁶ 'Diari Oficial de la Generalitat de Catalunya' (*Gencat*) <<https://dogc.gencat.cat/es/document-del-dogc/?documentId=916751>> accessed 22 September 2023.

⁸⁷ Ley 3/2023 of 16 March 2023 <www.boe.es/eli/es-ct/l/2023/03/16/3> accessed 22 September 2023.

⁸⁸ Ley 5/2006 of 10 May 2006 <www.boe.es/eli/es-ct/l/2006/05/10/5/con> accessed 22 September 2023.

⁸⁹ As a result, the favourable vote of the majority of owners, who, in turn, must represent the majority of the participation quotas, will be enough to approve the agreements related to the energy efficiency of buildings.

From the right of property perspective, the community of owners necessarily implies the need to reconcile the concurrent rights and interests of a plurality of owners and occupants of the flats,⁹⁰ so that legal or statutory restrictions to the rights of use and enjoyment of the apartment may be put in place.⁹¹ As a result, the community of owners' association may agree on the improvement of the energy efficiency of the buildings, which is binding on all homeowners (Art. 17.9 LPH).

These rules follow the same logic as the Land Act. Whereas the conservation works that are performed to comply with the basic safety and habitability requirements will be mandatory and will not require prior agreement from the community of owners' board, in accordance with the LPH (Art. 10.1(a) LPH), the improvement works that increase energy efficiency do require such prior agreement, thereby hindering the chances of improving the energy efficiency of the building if the homeowners association declines to do so.

4.3 Rented Dwellings

When a dwelling is rented, according to Art. 22 of the Urban Leases Act 29/1994 (LAU),⁹² the tenant must tolerate the performance of improvement works by the landlord, provided that they cannot reasonably be deferred until the end of the contract. The improvement works that cannot be deferred until the end of the contract, are those that are imposed by a judicial authority, public administration or even by the community of owners' board.⁹³ It is doubtful whether landlords may also enforce these works when receiving public funds to undertake them, even if they allege that these public funds shall be used in a timeframe.⁹⁴ Therefore, the

⁹⁰ Tribunal Constitucional *sentencia* 301/1993 of 21 October 1993 <www.boe.es/buscar/doc.php?id=BOE-T-1993-26833> accessed 22 September 2023.

⁹¹ Tribunal Supremo *sentencia* of 3 December 2014, ECLI:ES:TS:2014:5403.

⁹² Ley 29/1994 of 24 November 1994 <www.boe.es/eli/es/l/1994/11/24/29/con> accessed 22 September 2023.

⁹³ Miriam Anderson, 'L'onada de renovació energètica dels edificis: adaptabilitat i limitacions de les institucions de dret civil' (2013) 66 *Revista Catalana de Dret Públic* 119; Vicente Guilarte Gutiérrez, 'Art. 19. Elevación de la renta por mejoras' in Vicente Guilarte Gutiérrez and Francisco Crespo Allué (eds), *Comentario a la Ley de Arrendamientos Urbanos* (Thomson Reuters 2014); Federico Rodríguez Morata, 'Régimen de las obras y mejoras en la Ley de Arrendamientos Urbanos de 1994' (1995) 3 *Aranzadi civil: revista quincenal* 173.

⁹⁴ Rosa Maria García-Teruel, 'Private law as a tool to overcome split incentives on energy efficiency in the residential rental market' in Marta Santos and others (eds), *Routledge Handbook on Private Law and Sustainability* (Routledge forthcoming).

Spanish system creates challenges for landlords when it comes to carrying out energy efficiency improvements.

Following Art. 19 LAU, once the first five years of the tenancy contract have elapsed (or seven if the landlord is a legal entity), the landlord may increase the annual rent by the amount resulting from investments in the improvement of the property, the legal monetary interest rate at the time of the completion of the works plus three points,⁹⁵ as long as it does not exceed an increase of 20 % of the current rent. To calculate the invested capital, public subsidies obtained for undertaking the works must be deducted.

In view of this system, the application of positive obligations on owners is necessary to allow landlords to impose these works on tenants, and to increase the rent due to these renovations after five or, respectively, seven years. Paradoxically, when reaching this duration, and provided that the contractual term did not exceed five or, respectively, seven years (which is not a common practice in Spain), the landlord may set a new rent to conclude a new contract.⁹⁶ Therefore, the possibility to increase the rent due to energy efficiency works may be considered superfluous in view of the fact that, in general terms, the contract terminates once it reaches five or, respectively, seven years. Nevertheless, incentives could be provided to landlords and tenants, encouraging them to retrofit rented housing, for instance, ensuring long-term leases for tenants that decide to invest in energy efficiency or allowing landlords to increase the rent by a fair amount if they bear the costs of these works.⁹⁷

In any case, if energy efficiency works are carried out and these works last more than 20 days, tenants have the right to reduce the rent (Art. 21.2 LAU).

5. Concluding observations

The legal framework regarding energy efficiency is fragmented in Spain due to the distribution of competences between the State, Autonomous Communities, and municipalities, and further due to the fact that industrial sectors need specific regulation governing specific types of energy efficiency appliances. These circumstances add difficulties when determining which public body may impose obligations to

⁹⁵ The legal interest rate in 2023 is 3.25, which shall be increased by 3 points (total: 6.25).

⁹⁶ Unless rent controls are applicable. Current Art. 17 LAU (reformed by the Housing Act 12/2023) controls the rent of tenancy contracts for housing purposes located in stressed housing market areas (*zonas tensionadas*), but nowadays (December 2023) rent controls are still not applicable in Spain due to the fact that stressed areas have not been defined by the General State Administration.

⁹⁷ BBSR and BBR (n 78) 14.

climate-proof buildings, and to verify whether these obligations meet the proportionality principle.

The standards stipulated in the CTE, including minimum energy efficiency standards, are only binding for newly constructed buildings or for existing buildings that are subject to improvement works or major renovations, following what is currently established under Art. 7 EPBD. Accordingly, public bodies currently cannot unilaterally impose positive obligations to climate-proof buildings, except in the case of new urban developments or as prescribed by sector-specific legislation, for example to replace old boilers. Other positive obligations would go against Art. 25 and 26 CE, so the validity of this administrative act could be challenged. This is due to the fact that the duty of legal conservation enshrined in the Land Act does not specifically include energy efficiency works. As a result, it is not considered a social value covered by safety and health standards.

From the perspective of the right of property, the special legal framework of urban property (mainly the Land Act) may be amended to include energy efficiency as another social value within the legal duty of conservation of dwellings and buildings, based on the social function of the property (Art. 33.2 CE). As a matter of fact, energy efficiency is one of the key elements required for housing to be considered adequate (Art. 3.1(c) Spanish Housing Act 12/2023). If the duty of conservation included the possibility of enforcing energy efficiency improvements, owners would only be obliged to pay up to half of the value of construction of a new building equivalent to the original one, the costs exceeding this amount would be borne by the public administration (Art. 15.2 Land Act).

The current lack of positive obligations for the existing building stock has a clear negative impact on the energy performance of existing buildings and, in particular, of multi-unit buildings and rented dwellings where split incentives arise. In condominiums, energy efficiency works require specific approval from the community of owners' board, contrary to the works related to safety or health. Indeed, Art. 10.1 LPH stipulates that the works necessary for the proper upkeep and maintenance of the building and its facilities in order to preserve appropriate conditions as regards its structure, imperviousness, habitation, accessibility and safety, will not require a previous agreement from the community of owners' board. This is in line with the general provision enshrined in Art. 15 Land Act. Even though a simple majority is required to approve these works, this requirement may affect the implementation of energy efficiency measures, especially if homeowners are not interested in investing in the improvement of the building's energy performance. This may be the case when homeowners rent out their units, as they are not responsible for paying the utility bills. Condominium law could change the current approach and exempt these measures from the prior approval of the community of owners' board, but this would require energy efficiency improvements to be included within

the the duty of conservation, as explained above. Thanks to the legal nature of condominiums with the need to regulate the concurrent rights and interests of a plurality of owners and occupants of the flats, the interests of the tenants (who pay the bills) would also enjoy higher consideration. If these amendments are not implemented, the improvement of energy efficiency in old buildings will depend mainly on public aid.

A lack of positive obligations also affects the energy performance of rented dwellings. Following what is established in the LAU, landlords may only impose on tenants those improvement works that are deemed to be 'urgent'. Therefore, if the public administration regulates positives obligations, landlords may unilaterally undertake these works and increase the rent once the first five or, respectively, seven years of the contract have elapsed, which is normally when the contract terminates. Otherwise, landlords require the consent of the tenant to undertake energy efficiency works, which adds additional barriers to the improvement of the energy performance of the rented housing stock.

In view of these difficulties, it remains to be seen whether the current Next Generation Funds will achieve their intended impact, since there is a risk of those living in inadequate housing (that is, those suffering from hidden homelessness and other marginalized groups) of being excluded from accessing energy and accessibility improvements for the benefit of condominiums with more economic resources. This is mainly caused by the fact that, in order to receive public funds to undertake energy efficiency works, owners shall also fund these works, leaving behind those ones with less financial resources. Accordingly, it remains to be seen whether these funds will again produce the unintended effects of sustainability policies/side-effects of existing policies, becoming a mismatch between the need and the reality.

Nevertheless, this might change if the Draft EPBD Recast ever came into force, since its Art. 9 would provide for minimum energy performance standards to be implemented after 1 January 2030 in residential buildings and their building units. In any case, positive obligations to climate-proof buildings should be encompassed with additional measures, ensuring that enough financial mechanisms and incentives are available to the parties involved and, at the same time, ensuring that any kind of obligation to homeowners must meet the proportionality principle. These measures may include technical assistance through one-stop-shops, financial measures, or the removal of split incentives (for example, through some changes to the legal framework of rented housing), as stated in Art. 9.3 Draft EPBD Recast.