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# Human Rights and Protection against Eviction in Anti-social Behaviour Cases in the Netherlands and Germany

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## Abstract

The European Court of Human Rights requires that any person at the risk of losing their home should be able to have the proportionality of the eviction determined by an independent tribunal in the light of the relevant principles under Article 8 ECHR. Consequently, member states of the Council of Europe are obliged to implement a minimum level of protection against the loss of the home. This paper analyses how the requirements are implemented in Dutch and German tenancy law with a focus on eviction cases concerning anti-social behaviour. With the help of a comparative analysis several methods of implementing the European requirements are identified. The Netherlands and Germany seem to comply technically with the requirements because of national built-in proportionality checks. However, it is questionable whether the European requirements really improve the position of tenants or whether they should be characterised primarily as a procedural hurdle that courts have to meet.

## Keywords

anti-social behaviour – article 8 ECHR – proportionality – tenancy law – eviction – Germany – the Netherlands – United Kingdom

### 1 Introduction

The problem of anti-social behaviour caused by tenants is common across Europe.<sup>1</sup> In the majority of the cases, the problem can be solved with the help of informal interventions such as neighbourhood mediation and warning letters.<sup>2</sup> Nonetheless, in the case of serious anti-social behaviour landlords tend to rely on the use of evictions to deal with the problem. The European Court of Human Rights seeks to limit the use of this instrument because under Article 8 of the European Convention on Human Rights 1950 (ECHR) it characterises the loss of one's home as 'a most extreme form of interference with the right to respect for the home'.<sup>3</sup> According to the European Court, any person at the risk of losing one's home should 'in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end'.<sup>4</sup>

For that reason, Schmid and Dinse argue that the European Court is 'becoming a serious player in the field and can no longer reasonably be ignored at national level'.<sup>5</sup> To comply with the European requirements, the member states

1 See C. Hunter, J. Nixon & M. Slatter, 'Neighbours Behaving Badly: Anti-social Behaviour, Property Rights and Exclusion in England and Australia', *Macquarie Law Journal* 5 (2005) 149; B. Randall, *Safe as houses. EU social housing organisations: preventing and dealing with anti-social behaviour* (Brighton: CECODHAS, 2005); J. Flint and J. Nixon, 'Governing Neighbours: Anti-social Behaviour Order and New Forms of Regulating Conduct in the UK', *Urban Studies* 43 (2006) 939; A. Millie, *Anti-social Behaviour* (Maidenhead: Open University Press, 2009); D.P. Varady and H. Schulman, 'Social Disorders in the Early Stages of Public Housing Decline: A Helsinki Case Study', *Housing Studies* 22 (2007) 313.

2 K. Jacobs and K. Arthurson, *Developing effective housing management policies to address problems of anti-social behaviour* (Melbourne: AHURI, 2003) at 22–26; Randall, *supra* (n 1); M. Vols, 'Neighbors from hell: problem-solving and housing laws in the Netherlands', *The Arizona Summit Law Review* 7 (2014) 507.

3 *McCann v United Kingdom* (2008); 47 EHRR 40 at para 50.

4 *Ibid.*

5 C. Schmid and J. Dinse, 'Towards a Common Core of Residential Tenancy Law in Europe? The Impact of the European Court of Human Rights on Tenancy Law', *Zentrum für Europäische Rechtspolitik Bremen* (2013) at 19.

of the Council of Europe are obliged to implement a minimum level of protection against the loss of the home into their national jurisdictions.<sup>6</sup>

In the United Kingdom, the necessity and desirability of these European requirements are moot topics. According to Nield, Article 8 ECHR has led to a clash of the ‘titans of our judicial order, namely the House of Lords (now the Supreme Court) and the European Court of Human Rights (the ‘Strasbourg Court’):<sup>7</sup> In a number of cases concerning anti-social behaviour, courts in the United Kingdom have had to decide whether a defendant in possession proceedings was entitled to an assessment of the proportionality of the eviction, in circumstances where the legislation in the United Kingdom required the court to make a mandatory order for possession. This mandatory order is supposed to be granted without any consideration of the reasons for seeking possession, the tenant’s personal circumstances or the overall reasonableness of the order. For mandatory orders for repossession all that was required is for the necessary procedures to be adequately followed.

Previously the House of Lords held that it was not open for a residential occupier against whom possession was sought by a local authority to raise a proportionality argument under Article 8 ECHR.<sup>8</sup> The Supreme Court however amended this position in 2010 through the *Pinnock* case.<sup>9</sup> The Supreme Court re-interpreted the mandatory requirements in national legislation<sup>10</sup> and accepted that ‘any person at risk of being dispossessed of his home at the suit of a local authority should in principle have the right to raise the question of the proportionality of the measure and have it determined by an independent tribunal in the light of article 8, even if his right of occupation has come to an end.’<sup>11</sup> Still, the precise scope of this requirement remains unclear in the United Kingdom.<sup>12</sup> Some practitioners suggest that the proportionality requirement

6 See A. Remiche, ‘Yordanova and Others v Bulgaria: The Influence of the Social Right to Adequate Housing on the Interpretation of the Civil Right to Respect for One’s Home’, *Human Rights Law Review* 4 (2012) 787; P. Kenna & D. Gailiute, ‘Growing coordination in housing rights jurisprudence in Europe?’, *European Human Rights Law Review* 6 (2013) 606.

7 S. Nield, ‘Clash of the titans: Article 8, occupiers and their home’, in: S. Bright (ed), *Modern Studies in Property Law - Volume 6* (Oxford: Hart, 2011) at 102. See also L.F. Fox, *Conceptualising Home. Theories, Laws and Policies* (Oxford: Hart Publishing, 2007) at 451–522.

8 See *Harrow London Borough Council v. Qazi* [2003] UKHL 43; *Kay v Lambeth London Borough Council* [2006] UKHL 10; *Doherty v Birmingham City Council* [2008] UKHL 57.

9 See *Manchester CC v Pinnock* [2010] UKSC 45.

10 I.e. s 143D(2) of the Housing Act 1996.

11 See *Manchester CC v Pinnock* [2010] UKSC 45 at para 45.

12 See A.J. van der Walt, ‘Common law, expropriation and human rights in the intersection between expropriation and eviction law’, in: L.F. Fox O’Mahoney and J.A. Sweeney

can be overcome by better record keeping and a change in terminology used, reducing perhaps the import of the proportionality requirement to something of a procedural level.<sup>13</sup>

In contrast with the UK, the implementation and impact of this European minimum level of protection against the loss of the home has yet to receive sustained attention at judicial level and correspondingly amongst academics in continental Europe. For that reason, this study addresses the following two questions: (i) which specific obligations arise from the European minimum level of protection against the loss of the home? (ii) in what way does this European minimum level of protection against the loss of the home manifest itself in the tenancy law of the Netherlands and Germany, especially in cases in which the landlord wants to evict the tenant because of anti-social behaviour?

The scope of this study is limited to German and Dutch tenancy law for a number of reasons. Firstly, the legal systems of Germany and the Netherlands are comparable. For a comparative analysis it is required that the legal systems share 'common characteristics, which serve as the common denominator, the *tertium comparationis*'.<sup>14</sup> The Netherlands and Germany are both contracting parties to the ECHR and can be characterised as a 'civil law culture'.<sup>15</sup> Secondly, tenancy law plays an important role in the Dutch and German society, because a substantial share of the housing stock is rented housing. In 2012 over 45% of all the Dutch premises were rented from housing associations (*woningcorporaties*) or private landlords.<sup>16</sup> The German housing market also

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(eds), *The idea of home in law: displacement and dispossession* (Surrey: Ashgate, 2010) 55; I. Loveland, 'The shifting sands of Article 8 jurisprudence in English housing law', *European Human Rights Law Review* 2 (2011) 151; D. Cowan and C. Hunter, 'Yeah but, no but' – Pinnock and Powell in the Supreme Court', *The Modern Law Review* 75(1) (2012) 78; I. Loveland, 'The holy grail as an empty chalice? Proportionality review in possession proceedings after Pinnock and Powell', *Journal of Planning & Environment Law* 6 (2013) 622; S. Nield, 'Article 8 Respect for the home - A human property right?', *King's Law Journal* 23(2) (2013) 147.

- 13 P. Marcus, 'Pinnock, Powell and Proportionality: What's a landlord to do know?'. 24 March 2011. Retrieved 16 October 2014 <http://www.zenithchambers.co.uk>.
- 14 A.E. Öricü, 'Methodology of comparative law', in: J.M. Smits (ed), *Elgar Encyclopedia of Comparative Law, Second Edition* (Cheltenham: Edward Elgar Publishing, 2012) at 561. See also <http://www.tenlaw.uni-bremen.de/>.
- 15 See H.P. Glenn, *Legal traditions of the world. Fourth Edition* (Oxford: Oxford University Press, 2010) at 165–176.
- 16 See CBS Statline, 'Woningvoorraad naar eigendom'. 4 March 2014, Retrieved 16 October 2014 <http://www.statline.cbs.nl>.

features a significant share of rental dwellings (52%).<sup>17</sup> Thirdly, a comparative analysis of the Netherlands and Germany is interesting because addressing anti-social behaviour has received considerable attention from policymakers in both countries. Whilst both countries have a substantial rental sector they also differ from each other in that Germany has a predominately private rented sector and the Netherlands a social rented sector. Lastly, in both countries research data concerning anti-social behaviour is available and accessible. In both countries some research has been conducted,<sup>18</sup> however, no comparative analysis has been made before.

Moreover, the scope of this study is limited to protection against eviction in cases concerning housing related anti-social behaviour. This is an important topic within the field of housing law. According to Cowan, anti-social behaviour 'has been a policy and legislative, as well as academic, focus for the past 15 or so years'.<sup>19</sup> Anti-social behaviour causes harassment, alarm or distress to individuals not of the same household of the perpetrator. In the majority of cases, the anti-social behaviour requires interventions from the relevant authorities. However, criminal prosecution and punishment usually are inappropriate because components of the behaviour are not prohibited by the criminal law or in isolation constitute relatively minor offences.<sup>20</sup> Although the majority of cases concerning eviction actually relate to rent arrears, a significant number of cases refer to anti-social behaviour, such as drug dealing, noise nuisance, and intimidation.<sup>21</sup> Lastly, the case law from the UK concerning the compatibility of national tenancy law with Article 8 ECHR was concerned primarily with possession proceedings due to anti-social behaviour.

17 See German Statistical Office, 'Zensus 2011: Gebäude und Wohnungen sowie Wohnverhältnisse der Haushalte Bundesrepublik Deutschland am 9. Mai 2011', Retrieved 16 October 2014 [https://www.destatis.de/DE/PresseService/Presse/Pressekonferenzen/2013/Zensus2011/gwz\\_zensus2011.pdf?\\_\\_blob=publicationFile](https://www.destatis.de/DE/PresseService/Presse/Pressekonferenzen/2013/Zensus2011/gwz_zensus2011.pdf?__blob=publicationFile) at 6 and 14.

18 See U.P. Börstinghaus, 'Verwahrlosung, Lärm und Nachbarstreit im Wohnraummietrecht. Der Umgang mit Beschwerden aus rechtlicher Sicht', *Neue Zeitschrift für Miet- und Wohnungsrecht* (2004) 48; V. Eick, 'Preventive urban discipline: rent-a-cops and neoliberal globalization in Germany', *Social Justice*, 33(3) (2006) 66–84; M. Vols, 'Aanpak overlast door private verhuurder', in J.G. Brouwer and A.E. Schilder (eds), *Van een andere orde* (Den Haag: Boom Juridische uitgevers, 2014) 159.

19 See D. Cowan, *Housing law and policy* (Cambridge: Cambridge University Press, 2011) at 325. See also M. Vols, *Woonoverlast en het recht op privéleven* (Boom Juridische uitgevers: Den Haag, 2013).

20 See A. Millie, *Anti-social behaviour* (Maidenhead: Open University Press, 2009) at 16–17.

21 See S.A. Stenberg, L. Van Doorn & S. Gerull, 'Locked Out in Europe: A Comparative Analysis of Evictions Due to Rent Arrears in Germany, the Netherlands and Sweden', *European Journal of Homelessness* 5 (2011) 39; Vols supra n 2.

Proportionality issues are likely to play a role in cases concerning anti-social behaviour, because a significant number of the tenants in these cases seem to suffer with mental health issues, family breakdown, and addiction.<sup>22</sup>

As found by Hulse *et al.*,<sup>23</sup> Dutch and German tenancy law is not particularly focused on anti-social behaviour *per se* when compared, for example, with housing law in the United Kingdom where specific instruments such as selective licensing (sections 79–100 Housing Act 2004) have been implemented to tackle anti-social behaviour.<sup>24</sup> Despite the lack of emphasis in both the Dutch and German codes on this issue, both jurisdictions nonetheless provide landlords the opportunity of seeking eviction against anti-social tenants and case law suggests that landlords usually do. Dutch and German law both lack a statutory definition of anti-social behaviour. However, under both Dutch and German law, causing anti-social behaviour qualifies as a breach of the tenant's statutory obligations. Article 7:213 and Article 7:214 of the Dutch Civil Code (*Burgerlijk Wetboek*, BW) oblige the tenant with regard to the use of the rented property to act as a prudent tenant and use the premises as agreed. Based on established case law a tenant can be evicted if he causes noise nuisance,<sup>25</sup> is involved in harassing/intimidating behaviour,<sup>26</sup> sells drugs or grows a large amount of cannabis in the premises,<sup>27</sup> or uses the premise for prostitution or compulsive hoarding.<sup>28</sup> According to Article 541 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB), a tenant should use the premise as agreed upon between landlord and tenant (*vertragsgemäßer Gebrauch*). The exact meaning of 'vertragsgemäßer Gebrauch' is determined by what the landlord

22 See I. van Laere, M. de Wit & N. Klazinga, 'Evaluation of the Signaling and Referral System for Households at the Risk of Eviction in Amsterdam', *Health and Social Care in the Community* 17 (2008) 1; I. van Laere, M. de Wit, & N. Klazinga, 'Preventing Evictions as a Potential Public Health Intervention: Characteristics and Social Medical Risk Factors of Households at Risk in Amsterdam', *Scandinavian Journal of Public Health* 37 (2009) 697.

23 K. Hulse, F. Milligan and H. Easthope, *Secure occupancy in rental housing: conceptual foundations and comparative perspectives* (Melbourne: AHURI, 2011) at 133; K. Hulse and F. Milligan, 'Secure occupancy: A new framework for analyzing security in rental housing', *Housing Studies* 29 (2014) at 13.

24 J. Sidoli del Ceno, 'Selective licensing and resident satisfaction: a case study', *International Journal of Law in the Built Environment* 4 (2012) 126; J. Sidoli del Ceno, P. Kenna & G. Spencer, 'Selective Licensing - Residents, Landlords and Community Engagement: The Perspectives of Scheme Managers', *Journal of Housing Law* 17 (2014) 72.

25 See Gerechtshof's-Hertogenbosch 18-12-2012, ECLI:NL:GHSHE:2012:BY6932.

26 See Gerechtshof's-Gravenhage 16-08-2011, ECLI:NL:GHSGR:2011:BR4887.

27 See Gerechtshof's-Hertogenbosch 31-07-2012, ECLI:NL:GHSHE:2012:BX3348.

28 See Rechtbank Almelo 24-02-2012, ECLI:NL:RBALM:2012:BV8427.

and tenant have laid down in the tenancy agreement.<sup>29</sup> Under German law, causing nuisance to other residents qualifies as ‘vertragswidriger Gebrauch’ and may result in eviction.<sup>30</sup>

Whilst centred on Dutch and German law, the comparative analysis is relevant for other jurisdictions facing similar issues and provides an insight into different national jurisprudence. In most European jurisdictions eviction is used to fight anti-social behaviour and ‘quality of life offences’ in residential areas.<sup>31</sup> At the same time, Member States all have to meet with the requirements that stem from Article 8 ECHR. This comparative analysis aims to present different methods that seek to implement the European minimum level of protection against the loss of the home and to improve the compliance with the requirements that arise from Article 8 ECHR too.

This paper has been divided into three parts. The first part analyses European case law concerning the minimum level of protection against eviction that stems from Article 8 ECHR. The second part will examine the impact of the European requirements on Dutch and German tenancy law in detail. The final part presents the conclusions.

## 2 Article 8 ECHR and Protection against the Loss of the Home

In 2008, the European Court decided in the case of *McCann v. United Kingdom* that the loss of one’s home must be characterised as ‘a most extreme form of interference with the right to respect for the home’. Moreover, the European Court ruled in the same case that any person at risk of losing his home should ‘in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end.’<sup>32</sup> Subsequently, the European Court elaborated the precise requirements that stem from Article 8 ECHR in a number of other important judgements.<sup>33</sup>

29 See Bundesgerichtshof 10-10-2007, (2008) *Neue Zeitschrift für Miet- und Wohnungsrecht* 37, (2007) *Wohnungswirtschaft und Mietrecht* 678.

30 See Landgericht Hamburg 21-10-1986, (1987) *Wohnungswirtschaft und Mietrecht* 218; Bundesgerichtshof 10-12-1986, (1987) *Neue Juristische Wochenschrift* 831; Amstgsgericht Bad Segeberg 5-10-1999, (2000) *Wohnungswirtschaft und Mietrecht* 601.

31 Vols supra n 2. See also <http://www.tenlaw.uni-bremen.de/>.

32 *McCann v United Kingdom* (2008); 47 EHRR 40 at para 50.

33 See *Stanková v Slovakia* Application No 7205/02, Merits, 9 October 2007 at para. 57; *Ćosić v Croatia* Application No 28261/06, Merits, 15 January 2009 at para. 22; *Zehentner v Austria*



It appears from the European case law that the scope of the notion of ‘home’ under Article 8 ECHR is flexible and broad.<sup>34</sup> According to the European Court it is a question of fact whether a property is to be classified as a home. This qualification does not depend on the lawfulness of the occupation under domestic law.<sup>35</sup> Consequently, for the determination of whether or not an interference with the right to respect for the home exists it is irrelevant whether the occupier has an occupation right (e.g. a right that arise from a tenancy agreement) or not. As a result, Article 8 ECHR provided protection to squatters and unauthorised campers (e.g. Travellers) as well.<sup>36</sup> Buyse found that ‘not the legal façade - form of tenure or legality of habitation - but the facts behind it are decisive’.<sup>37</sup>

Moreover, the protection provided by Article 8 ECHR is applicable to owner-occupiers as well as tenants.<sup>38</sup> In the latter case, it is irrelevant whether the tenant rents the house from a public authority (e.g. the city council), a social landlord (e.g. a housing association) or a private landlord.<sup>39</sup> For example, the European Court applied the same standards in the case of *Brežec v. Croatia*, in which the tenant rented from a private landlord, as in the case of *McCann v. United Kingdom*, in which the tenant rented from a local authority.<sup>40</sup>

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(2011); 52 EHRR 22 at para 59; *Paulić v Croatia* Application No 3572/06, Merits, 22 October 2009 at para 43; *Kay e.a. v United Kingdom* (2012); 54 EHRR 30 at para 68; *Kryvitska & Kryvitskyi v Ukraine* Application No 30856/03, Merits, 2 December 2010 at para 44; *Igor Vasilchenko v Russia* Application No 6571/04, Merits, 3 February 2011 at para 83; *Buckland v United Kingdom* Application No 40060/08, Merits, 18 September 2012 at para 65; *Rousk v Sweden* Application No 27183/04, Merits, 25 July 2013 at para 137; *Winterstein v France* Application No 27013/07, Merits, 17 October 2013 at para 155.

34 See A. Buyse, ‘Strings attached: the concept of “home” in the case law of the European Court of Human Rights’, *European Human Rights Law Review* 3 (2006) 294; Remiche supra n 7 at 8–10.

35 See *McCann v United Kingdom* (2008); 47 EHRR 40 at para 50; *Bjedov v Croatia* Application No 42150/09, Merits, 29 May 2012 at para 57.

36 See *Buckley v United Kingdom* (1996); 23 EHRR 101 at para 76; *Chapman v United Kingdom* (2001); 33 EHRR 399 at para 92; *Connors v United Kingdom* (2004); 40 EHRR 189; *Yordanova e.a. v Bulgaria* Application No 25446/06, Merits, 24 April 2012 at para 103; *Winterstein v France* Application No 27013/07, Merits, 17 October 2013 at para 141.

37 Buyse supra n 34 at 305.

38 See *Rousk v Sweden* Application No 27183/04, Merits, 25 July 2013; *Zrilić v Croatia* Application No 46726/11, Merits, 3 October 2013.

39 See S. Nield, ‘Strasbourg triggers another Article 8 dialogue’, *The conveyancer and property lawyer* 2 (2013) 148.

40 See *Brežec v Croatia* Application No 7177/10, Merits, 18 July 2013 at para 7 and 37–40. See also *Belchikova v Russia* Application No 2408/06, Merits, 25 March 2010. Cf. the separate

Paragraph 2 of Article 8 ECHR requires that an interference with the right to respect for the home meets three criteria. Firstly, the interference has to be in accordance with the law. An Act of Parliament, any other legal provision or case law which prescribes an interference with the right to respect for the home has to be accessible, sufficiently clear as to the circumstances in which an infringement may be justified and consistent with the rule of law.<sup>41</sup> Secondly, the inference should be in the interest of one of the legitimate goals as laid down in the second paragraph of Article 8 ECHR. Case law suggests that contracting states do not encounter great difficulties to meet the first two criteria in cases concerning evictions. In most cases, the national legislation provides a statutory basis for the eviction and it is relatively easy to argue that the eviction is in the interest of one the legitimate aims (e.g. the protection of the rights of others).<sup>42</sup>

Thirdly, the interference has to be necessary in a democratic society.<sup>43</sup> A number of sub-requirements arise from this third limb. There has to be a pressing social need for the loss of the home. Moreover, the European Court requires that arguments should be put forward to explain the necessity of the interference.<sup>44</sup> The reasons for the eviction should be relevant and sufficient.<sup>45</sup> Furthermore, the loss of the home has to be proportionate to the legitimate aim pursued. In addition, the contracting states should provide procedural safeguards to the individual at risk of losing his/her home. The decision-making process leading to the loss of the home has to be fair and the interests safeguarded to the individual by Article 8 ECHR should be respected.<sup>46</sup>

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opinion of Judge De Gaetano to *Buckland v United Kingdom* Application No 40060/08, Merits, 18 September 2012.

- 41 D. Harris, M. O'Boyle, E. Bates & C. Buckley, *Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 2009) at 344–348. See *Zrilić v Croatia* Application No 46726/11, Merits, 3 October 2013 at para 60.
- 42 See *Bjedov v Croatia* Application No 42150/09, Merits, 29 May 2012 at para 63; *Buckland v United Kingdom* Application No 40060/08, Merits, 18 September 2012 at para 63; *Zrilić v Croatia* Application No 46726/11, Merits, 3 October 2013 at para 60.
- 43 See *Igor Vasilchenko v Russia* Application No 6571/04, Merits, 3 February 2011 at para 81–85; *Buckland v United Kingdom* Application No 40060/08, Merits, 18 September 2012 at para 63.
- 44 See *Bjedov v Croatia* Application No 42150/09, Merits, 29 May 2012 at para 70.
- 45 See *Connors v United Kingdom* (2004); 40 EHRR 189 at para 81; *Rousk v Sweden* Application No 27183/04, Merits, 25 July 2013 at para 136.
- 46 See *Yordanova e.a. v Bulgaria* Application No 25446/06, Merits, 24 April 2012 at para 117–118; *Buckland v United Kingdom* Application No 40060/08, Merits, 18 September 2012 at para 64.

Yet, the European Court allows a margin of appreciation to the national authorities, 'who by reason of their direct and continuous contact with the vital forces of their countries are in principle better placed than an international court to evaluate local needs and conditions'.<sup>47</sup> In general, the European Court emphasises that the margin of appreciation is wide in cases concerning social or economic policies, such as housing.<sup>48</sup> However, the margin of appreciation will tend to be narrower in cases 'where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights', such as the right to respect for the home.<sup>49</sup> According to European Court, the context of the case will determine the scope of the margin of appreciation left to the authorities and attention should be paid to the 'particular significance attaching to the extent of the intrusion into the personal sphere of the applicant'.<sup>50</sup> In the assessment whether the contracting state has remained within its margin of appreciation, the European Court will pay considerable attention to the procedural safeguards available to the individual.<sup>51</sup> The European Court made clear that 'where there is no reason to doubt the procedure followed, the margin of appreciation allowed to the domestic courts in such cases will therefore be a wide one'.<sup>52</sup>

The most important element of the required procedural safeguards is the possibility to have the proportionality of the measure leading to the loss of the home determined 'by an independent tribunal in the light of the relevant principles under Article 8 of the Convention'.<sup>53</sup> It was this aspect that was specifically relevant in *Pinnock*. In a number of cases the European Court also requires that the individual should also be able to have the reasonableness of the eviction determined by court.<sup>54</sup> It remains unclear what is the exact difference between the assessment of proportionality and reasonableness, but in any

47 *Yordanova e.a. v Bulgaria* Application No 25446/06, Merits, 24 April 2012 at para 118.

48 *Ibid.*

49 *Ibid.*

50 *Ibid.*

51 *Ibid.* See also *Buckland v United Kingdom* Application No 40060/08, Merits, 18 September 2012 at para 64.

52 *Pinnock & Walker v United Kingdom* Application No 31673/11, Merits, 24 September 2013 at para 28.

53 *McCann v United Kingdom* (2008); 47 EHRR 40 at para 50.

54 See *Čosić v Croatia* Application No 28261/06, Merits, 15 January 2009 at para 22; *Yordanova e.a. v Bulgaria* Application No 25446/06, Merits, 24 April 2012 at para 118; *Bjedov v Croatia* Application No 42150/09, Merits, 29 May 2012 at para 66; *Brežec v Croatia* Application No 7177/10, Merits, 18 July 2013 at para 45; *Zrilić v Croatia* Application No 46726/11, Merits, 3 October 2013 at para 65.

case the national court has to consider the risk of homelessness and the personal circumstances (e.g. health status and the duration of the occupation)<sup>55</sup> of the individual that raised an Article 8 defence.<sup>56</sup> If an individual advances a proportionality defence, the domestic court should examine the arguments ‘in detail and provide adequate reasons’.<sup>57</sup>

The European Court ruled that determining the proportionality in procedural enforcement proceedings and the availability of a temporal adjournment of an eviction is not sufficient to comply with the requirements that stem from Article 8 ECHR. According to the European court, ‘the enforcement proceedings – which are by their nature non-contentious and whose primary purpose is to secure the effective execution of the judgment debt – are, unlike regular civil proceedings, neither designated nor properly equipped with procedural tools and safeguards for the thorough and adversarial examination of such complex legal issues’.<sup>58</sup> The European Court ruled that the ‘competence for carrying out the test of proportionality lies with a court conducting regular civil proceedings in which the civil claim lodged by the State and seeking the applicant’s eviction was determined’.<sup>59</sup>

However, it is not mandatory to have the proportionality of the eviction determined by court in every case. The requirement of *ex officio* testing of the proportionality does not stem from Article 8 ECHR. Only if the tenant ‘wishes to raise an Article 8 defence to prevent eviction, it is for him to do so and for a court to uphold or dismiss the claim’.<sup>60</sup> Moreover, the European Court ruled that it does not accept ‘the grant of the right to an occupier to raise an issue under Article 8 that would have serious consequences for the functioning of the

55 See *Bjedov v Croatia* Application No 42150/09, Merits, 29 May 2012 at para 68.

56 See *Stanková v Slovakia* Application No 7205/02, Merits, 9 October 2007 at para. 57; *Ćosić v Croatia* Application No 28261/06, Merits, 15 January 2009 at para. 22; *Zehentner v Austria* (2011); 52 EHRR 22 at para 59; *Paulić v Croatia* Application No 3572/06, Merits, 22 October 2009 at para 43; *Kay e.a. v United Kingdom* (2012); 54 EHRR 30 at para 68; *Kryvitska & Kryvitskyy v Ukraine* Application No 30856/03, Merits, 2 December 2010 at para 44; *Gladysheva v Russia* Application No 7097/10, Merits, 6 December 2011 at para 94; *Igor Vasilenko v Russia* Application No 6571/04, Merits, 3 February 2011 at para 83–85; *Buckland v United Kingdom* Application No 40060/08, Merits, 18 September 2012 at para 65; *Zrilić v Croatia* Application No 46726/11, Merits, 3 October 2013 at para 61–69. See also *Remiche* supra n 7 at 796–800.

57 *Yordanova e.a. v Bulgaria* Application No 25446/06, Merits, 24 April 2012 at para 118.

58 *Bjedov v Croatia* Application No 42150/09, Merits, 29 May 2012 at para 71.

59 *Ibid.*

60 See *McCann v United Kingdom* (2008); 47 EHRR 40 at para 28 and 54; *Orlic v Kroatije* Application No 48833/07, Merits, 21 June 2011 at para 66; *Brežec v Croatia* Application No 7177/10, Merits, 18 July 2013 at para 46.

domestic systems or for the domestic law of landlord and tenant'.<sup>61</sup> Furthermore, the European Court made clear that 'in the great majority of cases, an order for possession can be made in summary proceedings and that it will be only in very exceptional cases that an applicant will succeed in raising an arguable case on Article 8 grounds which would require a court to examine the issue in detail'.<sup>62</sup>

### 3 Impact of the European Requirements on a National Level

Has the European case law concerning protection against the loss of the home had impact on Dutch and German law? In the Netherlands, the Supreme Court fully acknowledged the requirements arising from Article 8 ECHR in 2011. In a case concerning the eviction of a squatted building, the squatters argued that Article 8 ECHR was applicable and the proportionality of eviction should have been considered before the eviction took place. Citing the abovementioned European case law, the Dutch Supreme Court concluded that eviction is a very serious interference with the right of the inviolability of the home. According to the Supreme Court, everyone at risk of this interference should in principle be able to have the proportionality of the eviction determined by an independent court before the eviction is carried out.<sup>63</sup>

In Germany, the abovementioned European case law does not seem to have had a direct impact on the level of protection against the loss of one's home. However, this does not mean that German law does not offer protection to tenants that face eviction. In 1993, the German Constitutional Court (*Bundesverfassungsgericht*) ruled that the tenant's right to enjoyment of the rented property must be considered equal as the right to property *per se* as laid down in Article 14 of the German Constitution (*Grundgesetz*). The statutory requirements of termination of a tenancy agreement have to respect the competing interests of both landlord and tenant.<sup>64</sup>

Furthermore, the European requirements can become apparent in the already built-in safeguards in Dutch and German tenancy law. In order to examine the possible manifestations of the European minimum level of protection against the loss of the home two stages of protection can be distinguished.

61 *Orlic v Kroatijë* Application No 48833/07, Merits, 21 June 2011 at para 66; *Bjedov v Croatia* Application No 42150/09, Merits, 29 May 2012 at para 67.

62 *Pinnock & Walker v United Kingdom* Application No 31673/11, Merits, 24 September 2013 at para 28.

63 Hoge Raad 28-10-2011, (2013) *Nederlandse Jurisprudentie* 153.

64 *Bundesverfassungsgericht* 26-05-1993, (1993) *Neue Juristische Wochenschrift* 2035.

The first stage concerns the protection that the national law offers against the termination of a tenancy agreement. The second stage concerns the legal protection against the actual eviction.

### 3.1 *Protection against Termination of Tenancy Agreement*

The protection against the loss of one's home in the first stage can be characterised as substantive tenure protection. According to Maass 'the essence of substantive tenure security is generally to allow the tenant (or any occupier) to continue occupying the leased premises a lawful occupier'.<sup>65</sup> Usually, tenants are lawful occupiers and, provided they are not in breach of their obligations, therefore have a valid defence against eviction. An eviction can typically only take place if the tenancy relation is terminated.

German and Dutch law provide tenants robust protection against the termination of the tenancy agreement in the case of anti-social behaviour.<sup>66</sup> First of all, it has to be taken into account that in both countries tenancy agreements are usually concluded for an indefinite period of time.<sup>67</sup> This is in sharp contrast with the assured shorthold tenancy regime in the UK where tenancies typically are for six or twelve months duration. Under Dutch tenancy law it is possible to enter into a tenancy agreement for a fixed term, but according to Article 7:271 BW the level of tenure protection for the tenant of residential space is the same as the protection provided to a tenant with an agreement for an indefinite period of time. Under German law, a tenancy agreement for a definite period of time can only be agreed upon if the landlord has a specific reason (as listed in Article 575 (1) BGB,) such as planned renovation works or reconstruction. In the case that the reason no longer exists, Article 575 (3) BGB rules that the tenant is allowed to demand the continuation of the tenancy agreement for an indefinite period of time.

Furthermore, the national law may provide different types of protection against the termination of the tenancy agreement. Firstly, the law may prescribe that a tenancy agreement can only be terminated by court. The Dutch and German Civil Codes both lay down the rule that in principle in the event that the tenant does not agree to the termination, only the Court is entitled to terminate a tenancy agreement. Secondly, the law may lay down limited and specified grounds for termination of the tenancy agreement. Thirdly, the law may require that the interests of the landlord and tenant have to be weighed

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65 S.M. Maass, *Tenure security in urban rental housing* (Stellenbosch: Stellenbosch University, 2010) at 3.

66 See Hulse and Milligan *supra* (n 23) at 648.

67 *Ibid.*

up prior to any termination of the tenancy agreement. Fourthly, the law could require that the termination of the tenancy agreement is subject to procedural controls and requirements.

### 3.1.1 Termination Grounds

In both the Netherlands and Germany, the landlord has to comply with a number of legal requirements in the case that termination with mutual consent is not possible. The Civil Codes prescribe specific and limited grounds for the termination of the tenancy agreement. Under Dutch law, the landlord has two main options if the tenant does not agree with the termination of an agreement. He may send the tenant a written notice of termination or request court to terminate the tenancy agreement. According to the exhaustive list of grounds for giving a notice of termination in Article 7:274 (1) BW, the landlord is entitled to give notice of the termination if the tenant did not behave as a 'prudent tenant'. So, anti-social behaviour can be a ground for giving notice.<sup>68</sup> After giving notice, the landlord has to wait for six weeks for the tenant to respond. If the tenant does not respond or does not agree to the termination, the tenancy agreement is not terminated and the landlord has to request court to terminate the tenancy agreement.<sup>69</sup> According to Article 7:274 (1) BW, the court has to be satisfied that the tenant did not behave as a prudent tenant. If that is the case, the court may allow the landlord's claim and will issue an eviction order on the basis of Article 7:273 (3) BW. If the court dismisses the landlord's claim, the tenancy agreement will be extended for a fixed or indefinite period of time.<sup>70</sup> If the court extends the agreement for an indefinite period of time, the landlord is not entitled to give the tenant notice of termination within three years after the court decision.

In practice landlords prefer to request the court to terminate the tenancy agreement rather than using the notice procedure because this mechanism is less bureaucratic and time consuming.<sup>71</sup> Article 7:231 BW rules that a tenancy agreement can be terminated by judicial decision directly in the case the tenant has failed to comply with his obligations. Moreover, Article 6:265 BW lays down the strict general rule that "any failure" (*elke tekortkoming*) of the

68 See Rechtbank North Netherlands 17-10-2013, ECLI:NL:RBNN:2013:6673. See also Rechtbank Utrecht 9-09-2009, ECLI:NL:RBUTR:2009:BJ7364.

69 See Rechtbank Maastricht 4-10-2012, ECLI:NL:RBMAA:2012:BY0624.

70 See Rechtbank Zutphen 6-10-2010, ECLI:NL:RBZUT:2010:BO0453.

71 See A.S. Rueb, H.E.M. Vrolijk and E.E. Wijkerslooth-Vinke, *De huurbepalingen verklaard* (Kluwer: Den Haag, 2006) at 183; A. De Jonge, *Huurrecht* (Den Haag: Boom Juridische uitgevers, 2013) at 306–307.

tenant in the performance of one of his or her obligations justifies the termination of the tenancy agreement.<sup>72</sup> To convince the court to terminate the tenancy agreement, the landlord has to prove conclusively that the tenant breaches his or her obligations by causing housing related anti-social behaviour.

Under German law, two methods of termination of tenancy agreements can be distinguished: the *ordinary* termination and the *immediate* termination. Article 573 (1) BGB prescribes the rules to be followed in the ordinary termination procedure (*ordentliche Kündigung*). The landlord is entitled to terminate the tenancy agreement if he has a justified interest (*berechtigtes Interesse*) in the termination.<sup>73</sup> According to Article 573 (2) BGB, a failure of the tenant to comply with his obligations provided that they cannot be considered to be insignificant (*nicht unerheblich*) qualifies as a justified interest. The exact meaning of this termination ground is not clear because the German Civil Code lacks a statutory definition though, according to the German legislator the contractual breach do not have to be very serious.<sup>74</sup> In principle, breaches that occur sporadically<sup>75</sup> or have only minor consequences<sup>76</sup> cannot be qualified as a justified interest for the termination. Nonetheless, in some cases, breaches that occurred only once, such as crimes committed against the landlord, his staff or other tenants, can justify the termination. In short, it is not the number of breaches but their gravity and the possibility of their reoccurrence that are the decisive factors for the courts.<sup>77</sup>

An immediate termination (*außerordentliche Kündigung*) without a notice period is possible if the landlord has a compelling reason (*wichtiger Grund*) for the termination. According to Article 543 (1) BGB, this is the case if the continuation of the tenancy agreement cannot be reasonably required from the landlord under the given circumstances and after balancing all the landlord's

72 See F.B. Bakels, *Ontbinding van overeenkomsten* (Deventer: Kluwer, 2011) at 82–83.

73 According to Article 573a BGB, no justified interest is required in the case that the premise is part of a building with one or two dwellings and one dwelling is inhabited by the landlord himself. However, the statutory notice period is extended by three months. Article 573a BGB does not apply when there are more than two dwellings in one building, even when the third dwelling is vacant or (temporarily) used by the landlord himself. See Bundesgerichtshof 17-11-2010, (2011) *Neue Juristische Wochenschrift-RR* 158.

74 See Deutscher Bundestag, 6. Wahlperiode. *Drucksache VI/1549* at 8.

75 See Amtsgericht Hamburg-Harburg 7-12-2010, (2011) *BecksRS* 07623. See also Amtsgericht Gelsenkirchen 20-09-1994, (1994) *BecksRS* 11623 and Amtsgericht Berlin-Wedding 29-09-2010, (2010) *BecksRS* 28205.

76 See Kammergericht 18-11-2004, (2005) *Neue Zeitschrift für Miet- und Wohnungsrecht* 524.

77 See Amtsgericht Berlin-Pankow/Weißensee 22-10-2009, (2010) *BecksRS* 30713.



and tenant's interests. Additionally, under Article 569 (2) BGB the immediate termination procedure can be followed if the tenant has breached the 'domestic peace' (*Hausfrieden*) 'permanently' (*nachhaltig*) and the continuation of the tenancy agreement, under the given circumstances and after balancing all the landlord's and tenant's interests, cannot be reasonably be required (*unzumutbar*) from the landlord. Although the German Civil Code does not provide a definition of 'domestic peace', case law suggests that the 'domestic peace' refers to the obligation of residents to take each other into account in order to make living together in one building possible (*Gebot der gegenseitiger Rücksichtnahme*).<sup>78</sup> A tenant may therefore breach the 'domestic peace' if he or she causes nuisance to residents of the same apartment building as well as causing anti-social behaviour.<sup>79</sup>

Under both German and Dutch law, the existence of a failure of the tenant in the performance of their obligations is required to justify the termination of the tenancy agreement. However, when compared, the failures required differ from each other. Under Dutch law, in both the notice procedure (Article 7:272 BW) as well as the court termination procedure (Article 7:231 BW & Article 6:265 BW), *any* failure of the tenant in the performance of his obligations justify the termination of the tenancy agreement. Compared to the German requirement for the ordinary termination (Article 573 (1) BGB), which requires a failure of the tenant to comply with his contractual obligations that is *not insignificant*, the Dutch requirement seems to offer less protection to the tenant and the termination can therefore be justified much more easily. Under Dutch law, the court must only examine whether or not there is a failure, whilst, under German law, the court must examine whether or not there is a failure that is not insignificant. Moreover, under German law, the termination grounds differ between ordinary and immediate termination procedure. Whilst the ordinary termination procedure requires the existence of a failure that is not insignificant, the immediate termination (Article 543 (1) & Article 569 (2) BGB) requires a *compelling reason*. With regard to anti-social behaviour the permanent breach of domestic peace is required: the 'Gebot der gegenseitiger Rücksichtnahme' has to be breached seriously and continually and there should be a change or possibility of the breach reoccurring. When compared to the required failure of the ordinary termination procedure (a failure that is not insignificant) and to the Dutch requirement (any failure), it is clear

78 See Kammergericht Berlin 1-09-2003, (2003) *BecksRS* 30326902; Landgericht Berlin 10-02-2003, (2003) *BecksRS* 30904506.

79 See Amtsgericht Merzig 5-09-2005, Application No 23 C 1282/04; Amtsgericht Berlin-Lichtenberg 15-04-2009, (2009) *BecksRS* 21510. See also Börstinghaus supra n 18.

that the German immediate termination ground is very strict. Consequently, it offers the most protection to tenants and termination of the tenancy agreement will not easily be justified. With regard to the European requirements that stem from Article 8 ECHR and its case law, the Dutch termination grounds themselves, at this stage, do not offer enough protection to the tenant due to the fact that, in principle, every minor failure could justify the termination.

### 3.1.2 Balancing of Interests

To comply with the European minimum level of protection against the loss of the home, it is crucial to assess whether the tenant is able to have the proportionality and reasonableness of the measure determined by an independent court or tribunal in the light of the relevant principles under Article 8 of the Convention. It was found that in both Germany and the Netherlands, the tenant is entitled to request the court to balance the interests of the landlord and tenant and to consider the tenant's personal circumstances and the proportionality of the termination of the tenancy agreement.

Under Dutch law, a tenant can argue that terminating the tenancy agreement is not justified and is disproportional. In the procedure of Article 7:231 BW, the general rule is that any failure of the tenant in the performance of one of his obligations justifies the termination of the tenancy agreement. However, Article 6:265 BW gives an exception to this strict rule.<sup>80</sup> The court has the discretion not to terminate the tenancy agreement if the failure in the performance by the tenant of his or her obligations, given its specific nature or minor importance, does not justify it overall. The court may, for example, conclude that the anti-social behaviour reported did not constitute a serious breach of the tenant's obligations and, therefore, does not justify the termination of the tenancy agreement and its consequences. The court may also conclude that the termination of the tenancy agreement and the subsequent eviction have disproportional consequences (e.g. homelessness, health issues, financial consequences) for the tenant and other residents.<sup>81</sup> It should be noted, however, that according to the Dutch Supreme Court the court is only allowed to balance interests if the tenant puts forward a proportionality defence.<sup>82</sup> In the less used termination procedure of 7:272 BW, the court will

80 See Bakels *supra* (n 72) at 82–83.

81 See Vols *supra* (n 19). See also M. Vols, P.G. Tassenaar, J.P.A.M. Jacobs, 'Legal protection against eviction in the case of housing-related anti-social behaviour in the Netherlands: a first statistical analysis', *International Journal of Law in the Built Environment* (forthcoming).

82 See Hoge Raad 22-10-1999, (1999) *Nederlandse Jurisprudentie* 179.

also check whether the eviction complies with the principle of proportionality. Although the legislature removed the statutory requirement to balance the interests of both parties in 1979,<sup>83</sup> the court still requires that the termination of the tenancy agreement and the subsequent eviction is proportionate.<sup>84</sup>

In the German ordinary termination procedure the tenant has a specific right of defence (*Widerpruchsrecht*). According to Article 574(1) BGB the tenant may dispute the termination of the tenancy agreement with the plea that it results in unjustifiable hardship (*soziale Härte*). These pleas may concern the current home of the tenant,<sup>85</sup> the tenant's personal circumstances,<sup>86</sup> or the impossibility to find adequate alternative accommodation. If a tenant disputes the termination of the tenancy agreement with the plea concerning unjustifiable hardship, the interests of the tenant and the landlord have to be balanced. If the assessment leads to a conclusion in the tenant's favour, the tenant is entitled to claim the continuation of the tenancy agreement for a reasonable period of time. However, if the continuation of the tenancy agreement cannot reasonably be required from the landlord, the tenant is only entitled to claim the continuation of the tenancy agreement under different conditions (*Fortsetzung zu geänderten Bedingungen*). In the case that landlord and tenant are not able settle the conflict amicably, Article 574a (2) BGB entitles the court to balance the interests of both parties and to decide on the continuation of the tenancy agreement, the specific rental period and the conditions under which the tenant will use the premise.<sup>87</sup>

In the German immediate termination procedure, the tenant does not have a specific right of defence. Nonetheless, the termination grounds of both

83 See A.H.J. van den Biesen, 'Het nieuwe huurrecht', *Nederlands Juristenblad* (1979) 669.

84 See P. Abas, *Huur* (Kluwer: Deventer, 2007) at 193; A.M. Kloosterman, H.J. Rossel and M. Rozeboom, *Hoofddlijnen in het huurrecht* (Kluwer: Deventer, 2014) at 245. See also *Kamerstukken II* 1999–2000, 26089, nr. 6 at 26.

85 See Oberlandesgerichts Köln 28-06-1968, (1968) 1834 or Oberlandesgerichts Frankfurt a.M., 23-06-1971, (1971) *Wohnungswirtschaft und Mietrecht* 168.

86 See Oberlandesgerichts Köln 28-06-1986, (1968) *Neue Juristische Wochenschrift*; Landgericht Aachen 17-02-1985, (1986) *Neue Juristische Wochenschrift-RR* 313; Amtsgericht Landau 10-03-1993, (1993) *Neue Juristische Wochenschrift* 2249; Landgericht Essen 23-03-1999, (1999) *Neue Zeitschrift für Miet- und Wohnungsrecht*; Bundesgerichtshof 20-10-2004, (2005) *Neue Zeitschrift für Miet- und Wohnungsrecht* 143.

87 According to Article 574c (1) BGB, the tenant is entitled to demand the further continuation of the tenancy agreement due to unforeseen circumstances. Article 574 (2) BGB rules that the tenancy agreement may be continued for an indefinite period of time in the case that is uncertain whether the hardship is expected to cease.

Article 543 (1) and Article 569 (2) BGB imply a balancing of interests. The termination grounds already require that all circumstances of the specific case should be considered. The main question to answer is whether the breach of the domestic peace can reasonably be required of the landlord. Whether the breach of the domestic peace is the tenant's fault is an important but not decisive factor in the balancing of interests.<sup>88</sup> Case law suggests that a high level of tolerance is required from a landlord (and other residents) in the case of anti-social behaviour caused by children.<sup>89</sup> The same conclusion applies to nuisance caused by tenants due to old age and mental health problems.<sup>90</sup> However, this is not an ironclad rule because case law shows that both elderly and ill tenants were evicted after causing serious and ongoing anti-social behaviour.<sup>91</sup> Furthermore, another important factor in the balancing of interests is the landlord's conduct towards the tenant. It appears from the case law that provocative conduct by the landlord can be a reason for the court to refuse the immediate termination of the tenancy agreement.<sup>92</sup>

There are a number of interesting differences between Dutch and German rules concerning the balancing of interests. The Dutch Civil Code does not require an *ex officio* balancing of interests but entitles the tenant to put forward a proportionality defence. According to Article 6:265 BW, the court will not terminate the tenancy agreement if the failure in the performance of the tenant, given its specific nature or minor importance, does not justify the termination. The German ordinary termination procedure also does not include an *ex officio* balancing of interests but entitles the tenant to raise the defence concerning unjustifiable hardship (Article 573 (3) BGB). The court will not terminate the tenancy agreement if it allows this defence. Consequently, both the

88 See Deutscher Bundestag, 14. Wahlperiode. *Drucksache* 14/5663 at 82.

89 See Landgericht Bad Kreuznach (2003) *Wohnungswirtschaft und Mietrecht* 328; Amtsgericht Frankfurt a.M 9-09-2005, (2005) *BecksRS* 30998327.

90 See Oberlandesgerichts Karlsruhe 9-06-2000, (2000) *BecksRS* 30116917; Bundesgerichtshof 8-12-2004, (2005) *Neue Zeitschrift für Miet- und Wohnungsrecht* 300; Amtsgericht Köln 22-03-2005, Application No 221 C 3/05; Amtsgericht München 18-10-2006, (2006) *BecksRS* 18182.

91 See Amtsgericht Bremen 3-03-2004, (2004) *BecksRS* 08315; Amtsgericht Bonn 11-12-2008, Application No 5 C 56/08; Amtsgericht Berlin-Schöneberg 16-06-2009, (2010) *BecksRS* 00150; Amtsgericht Bernau 20-10-2009, (2009) *BecksRS* 89203; Amtsgericht Heidelberg 12-11-2010, (2011) *Becks* 09687; Amtsgericht Berlin-Wedding 25-06-2013, (2013) *BecksRS* 15036.

92 See Bundesgerichtshof 3-12-1985 (1985) *BecksRS* 31076542; Amtsgericht München 19-01-2009, Application No 424 C 18547/08; Amtsgericht Berlin-Neukölln 17-10-2012, (2013) *BecksRS* 09941.

Dutch termination as well as the German ordinary termination procedure offer the possibility for the tenant of letting the court examine the proportionality of the termination by assessing its justification or the opposing interests. Moreover, in both the ordinary and immediate termination procedures a proportionality check is embedded into the statutory grounds.<sup>93</sup> The ordinary termination requires a tenant's failure to comply with the contractual requirements that cannot be characterised as insignificant. Consequently, the court always has to assess the seriousness of the anti-social behaviour in a given situation. The immediate termination procedure requires a double proportionality check. First, in the case that the landlord relies on Article 569 (2) BGB, the court has to assess whether the breach of 'domestic peace' is permanent and whether a threat of reoccurrence exists. Second, the court has to assess whether under the given circumstances the continuation of the tenancy agreement cannot be reasonably required from the landlord.

When compared, both systems, at this stage, seem to comply with the European requirements that stem from Article 8 ECHR and its case law. The required assessment of the proportionality is available in the Dutch procedures as well as in the German ordinary termination procedure in the form of a defence right. Moreover, the German termination procedures offer an incorporated balance of interest that not only allows the tenant to put forward a defence but compels the court to assess the seriousness of the termination. So, the fact that the German immediate termination procedure does not offer a defence right is negligible because of the incorporated double proportionality check.

### 3.1.3 Other Procedural Safeguards

Under both Dutch and German law, the landlord's right to terminate the tenancy agreement is restricted by formal procedural control over the termination of the actual tenancy agreement itself. Under Dutch law, Article 7:272 BW requires the landlord to give notice of the termination and wait for six weeks for the tenant to respond. If the tenant does not respond or does not agree to the termination, the tenancy agreement is not terminated and the landlord has to apply to the court to terminate the tenancy agreement.<sup>94</sup> Under German law the valid termination notice will terminate the tenancy agreement. However, if the tenant does not respond or does not agree to the termination, the landlord has to request the court to confirm the validation of the termination of the tenancy agreement.

93 Cf. Abas *supra* (n 84) at 193.

94 See *Rechtbank Maastricht 4-10-2012*, ECLI:NL:RBMAA:2012:BY0624.

Furthermore, under Dutch and German law, the landlord has to specify the grounds of the termination in the written notice and the landlord has to make clear that he wants to terminate the tenancy agreement. With regard to the German ordinary termination procedure even stricter rules are applicable. The landlord has to describe the tenant's breach and all the relevant circumstances (e.g. the date on which the tenant acted in an anti-social manner, the nature of the nuisance, etc).<sup>95</sup> Further, Article 573c BGB compels the landlord to observe a statutory notice period of three months. However, this period is extended by three months if the tenant has rented the premises for five years and by another three months if the tenant rented for eight years or more. Consequently, the minimum notice period is three months and the maximum is nine months. The landlord is not, however, required to issue a warning notice before issuing a notice of termination.<sup>96</sup>

In the case of the German immediate termination procedure, the landlord does not have to observe a statutory notice period at all. However, he is required to issue a warning notice at an earlier stage that describes the anti-social behaviour as specifically as possible.<sup>97</sup> The notice has to make it clear that the landlord considers the nuisance to be serious and will take action if the tenant continues to cause problems.<sup>98</sup> Nonetheless, the landlord does not have to issue a warning notice in cases where it would clearly have no effect or where the anti-social behaviour is deemed to be very serious.<sup>99</sup>

When compared, both legal systems provide procedural safeguards in order to protect the tenant against hurried and groundless terminations. Both systems provide a statutory notice period and both systems require the landlord to state the reasons for termination. Consequently, the tenant has time to seek legal advice and has the opportunity of providing a defence against the grounds as stated in the termination notice. Additionally, under German law, it is required to issue a warning notice in the case of an immediate termination.

95 See W. Hinz, 'Mietrecht und Mietprozess - die häufigsten Fehler', *Neue Zeitschrift für Miet- und Wohnungsrecht* (2004) 681.

96 See Bundesgerichtshof 28-11-2007 (2008) *Neue Juristische Wochenschrift* 508.

97 See Amtsgericht Berlin-Mitte 7-02-2010, (2010) *BecksRS* 08116; Amtsgericht München 7-02-2013, (2013) *BecksRS* 02871.

98 See Amtsgericht Düsseldorf 14-04-2004, Application No 56 C 18402/03; Amtsgericht Hamburg-Altona 26-04-2002, Application No 318 C 327/01.

99 See Amtsgericht Pinneberg 29-08-2002, (2003) *Wohnungseigentum* 32; Amtsgericht München 17-10-2005, Application No 461 C 18919/05; Amtsgericht Münster 28-08-2006, Application No 48 C 1739/06; Amtsgericht Karlsruhe 19-12-2012, Application No Az. 6 C 387/12.

This provision makes sure that the tenant has a chance of avoiding anti-social behaviour in the future.

### 3.2 *Protection against Eviction*

The second stage concerns the legal protection against the actual eviction of the tenant. The protection in this stage is aimed to ensure due process and fairness and may be characterised as procedural protection. It 'ensures that evictions take place in a just and equitable fashion'.<sup>100</sup>

Again, the law may provide different types of protection against the eviction. Firstly, it may be required that the eviction has to be authorised by a court order. Secondly, the law may prescribe when eviction is allowed. Thirdly, the law may require that the interests of the landlord and tenant have to be weighed up in order to issue an eviction order. Fourthly, the law could require that eviction is subject to procedural controls and requirements.

As a general rule eviction is only allowed if the tenancy agreement is terminated. Under Dutch and German law, only the court is authorised to issue an eviction order. In both countries 'self-help' evictions are illegal.<sup>101</sup> Further both the German and the Dutch Civil Codes lay down procedural rules that protect the tenant against illegal and arbitrary evictions. This is similar in intent to the Protection from Eviction Act 1977 in the UK. The courts are entitled to allow the tenant a reasonable period before eviction in order to give the tenant some time to find alternative accommodation and prevent homelessness. Besides, in both jurisdictions the law provides the opportunity to commence an enforcement dispute and request the court to suspend the execution of the eviction order.

Under Dutch law, the court will usually decide whether to terminate the tenancy agreement and to evict the tenant at the same time. As a rule, the court will issue an eviction order if it considers the tenancy agreement to be terminated or when the court has itself terminated the tenancy agreement. The court will usually allow the tenant a reasonable eviction period (e.g. two weeks). Consequently, in most cases there is no need to consider the proportionality of the eviction because the court has already decided whether the tenant's loss of the home is reasonable in determining if the tenancy agreement should be terminated initially.

However, in summary proceedings (*kort geding*) the landlord is entitled to request a summary eviction order from the court. In summary proceedings

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100 Maass, *supra* (n 65) at 3.

101 See Articles 274–282 BW and Bundesgerichtshof 14-07-2010, (2010) *Fachdienst Miet- und Wohnungseigentumsrecht* 308254.

there are very nearly the same requirements that apply as in the ordinary procedure but here the court is not allowed to terminate the tenancy agreement. There are two requirements for a summary eviction. The case has to be of urgent importance and the court should expect that the tenancy agreement will be terminated in substantive proceedings. If the court allows the preliminary eviction order, the landlord has to commence substantive proceedings in which the court has to decide whether or not to terminate the tenancy agreement. However, in the majority of cases, landlords do not initiate these substantive proceedings because they are already satisfied with the eviction having already taken place. At the same time, the tenant tends not to initiate substantive proceedings because there are usually no reasons to expect the results to be different from the summary procedure. Consequently, the tenancy agreement continues to exist but neither the tenant nor the landlord will rely on the agreement anymore.<sup>102</sup>

After the court has issued an eviction order, the tenant may initiate an enforcement dispute (*executiegeschil*) and request the court to suspend the enforcement of this order. However, the court is only entitled to allow the tenant's claim in the case of abuse of authority. According to case law, a court may suspend the enforcement if (i) the eviction order is based on an obvious legal or factual error; (ii) new facts and circumstances result in an acute emergency situation for the tenant; (iii) facts or circumstances have arisen of such nature that the eviction is contrary to the principles of reasonableness and fairness.<sup>103</sup> Subsequently, courts exercise restraint in suspending eviction orders.<sup>104</sup>

Under German law, the tenant has to vacate the premise after the legal termination of the tenancy agreement. In case the tenant does not agree with the termination of the tenancy agreement or does not vacate the premise within time, the landlord has to request the local court (*Amtsgericht*) to issue an eviction order. The court will examine whether the termination of the tenancy agreement complies with the substantive and procedural requirements mentioned above. Moreover, in the ordinary termination procedure the court will consider the tenant's specific defences (*Widerspruchsrecht*). If the court concludes that the termination of the tenancy agreement is justified, it will generally issue an eviction order.

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102 See Kloosterman et al, supra (n 84), at 379.

103 See Hoge Raad 22-04-1983, (1983) *Nederlandse Jurisprudentie* 145.

104 See Rechtbank Alkmaar 9-07-2009, ECLI:NL:RBALK:2009:BJ2122; Rechtbank Limburg 3-07-2013, ECLI:NL:RBLIM:2013:4066. Cf. Gerechtshof's-Hertogenbosch 17-01-2006, ECLI:NL:GHSHE:2006:AZ5048.



According to Article 721 ZPO, the court is entitled to allow the tenant a reasonable eviction period of a maximum of one year. This is clearly a very generous provision and demonstrates the high levels of social protection available to German tenants. Within this period the tenant has the opportunity to find adequate alternative accommodation and make other provisions as necessary. In determining the eviction period, the court will again balance the interest of the landlord and the interest of the tenant. The court has to pay attention to all the circumstances of the case, for example the availability of suitable accommodation,<sup>105</sup> the tenant's physical and mental impairments,<sup>106</sup> the terms of the tenancy agreement,<sup>107</sup> the tenant's conduct after the termination of the tenancy agreement,<sup>108</sup> and the seriousness of the anti-social behaviour.<sup>109</sup>

Lastly, under Article 765a ZPO the tenant may request the court to suspend, prohibit or withdraw the enforcement of the eviction order. However, the court is only allowed to do so, if the eviction will result in unreasonableness that violates public morals, because of very special circumstances. This ground is interpreted restrictively and is only applicable in very distressing situations.<sup>110</sup> Examples in case law that have been successfully argued include when the tenant threatens to commit suicide,<sup>111</sup> when the eviction takes place just a few weeks before the end of the school year,<sup>112</sup> when the eviction will result in the homelessness of disabled children,<sup>113</sup> or in cases where the landlord speaks ill of the tenant as a result of which the tenant cannot find a new home.<sup>114</sup>

To sum up, the Dutch and German Civil Codes provide their respective courts the opportunity to balance the interests of the landlord and tenant in this second stage. However, because Dutch and German law provide robust protection against the termination of the tenancy agreement initially then the

105 See Amtsgericht Berlin-Pankow/Weißensee 22-10-2009, (2010) *BecksRS* 30713.

106 See Amtsgericht Heidelberg 12-11-2010, (2011) *BecksRS* 09687; Amtsgericht Hamburg-Harburg 18-03-2011, (2011) *BecksRS* 2075; Amtsgericht Berlin-Wedding 25-06-2013, (2013) *BecksRS* 15036.

107 See Amtsgericht Bonn 11-12-2008, Application No 5 C 56/08; Amtsgericht Karlsruhe 19-12-2012, Application No 6 C 387/12.

108 See Amtsgericht Bremen 3-03-2004, (2004) *BecksRS* 08315; Amtsgericht Köln 21-10-2010, Application No 210 C 398/09.

109 See Amtsgericht München 17-10-2005, Application No 461 C 18919/05.

110 See Bundesgerichtshof 10-12-2009, (2010) *Neue Juristische Wochenschrift* 1002.

111 See Bundesgerichtshof 30-09-2010, (2010) *BecksRS* 27194.

112 See Oberlandesgerichts Köln 14-06-1995, (1995) *Neue Juristische Wochenschrift-RR* 1163.

113 See Landgericht Magdeburg 17-05-1995, (1995) *BecksRS* 3094661.

114 See Oberlandesgerichts Köln 19-05-1995, (1995) *Neue Juristische Wochenschrift-RR* 1039.

courts do not appear to use this power often. The protection offered in the first stage and the protection in the second stage function as communicating vessels: if the court has already weighed up the various interests of the parties in the first stage and terminated the tenancy agreement, it is usually not necessary to consider the proportionality of the eviction in the second stage. Nonetheless, it is possible at the second stage to consider what is a reasonable eviction period even if the ending of the tenancy agreement was not considered disproportional.

#### 4 Conclusion

This study has analysed whether and how the European minimum level of protection against the loss of the home is implemented in Dutch and German tenancy law with a particular focus on cases concerning anti-social behaviour. It was found that both countries seem to comply with the European requirements that stem from Article 8 ECHR and case law from the European Court. Notwithstanding that the approach towards housing related anti-social behaviour and tenancy law procedures differ substantially, both Germany and the Netherlands provide robust protection against the termination of the tenancy agreement. With the help of the legal comparative analysis this study identified several methods that implement the European minimum level of protection against the loss of the home. Even in the case of extreme anti-social behaviour, under Dutch and German law only a court is entitled to terminate the tenancy agreement against the will of the anti-social tenant. Moreover, the court is entitled to take the personal circumstances of the tenant into account, to balance the interests of landlord and tenant and assess the proportionality of the termination of the tenancy agreement. Sometimes the tenant is entitled to advance a specific proportionality defence and in other procedures the proportionality check is embedded into the statutory termination grounds. Case law suggests that in most of the cases Dutch and German courts do not have to pay considerable attention to proportionality issues while deciding to issue the actual eviction order because of the strong protection against the termination of the tenancy agreement. Contrary to other European jurisdictions (i.e. the United Kingdom), there seem to be no major problems in technically complying with the European minimum level of protection because of the already built-in proportionality checks in Dutch and German tenancy law.

However, it would be interesting to conduct further (empirical) research to assess the impact of the minimum level of protection in practice. There is frequently a 'gap' between 'black letter law' and the reality of the courts and

legal practice.<sup>115</sup> Do courts in practice pay enough of attention to the proportionality issues in cases concerning housing related anti-social behaviour? Moreover, it might be interesting to assess whether the European requirements make it more difficult for landlords to evict problem tenants and, consequently, make it more difficult to help the victims of serious anti-social behaviour? For every non-eviction of an anti-social tenant there is at the very least one upset neighbour. Finally, it would be interesting to expand the comparative analysis to other similar member states of the Council of Europe that have, for example, a considerable rental sectors. With the increase of renting in very many jurisdictions across the continent the issue of tenancy law and its ultimate sanction – eviction – is not going to go away.

Finally, do the European requirements really improve the position of tenants or are they just a relatively meaningless procedural hurdle that the courts have to jump over as some in the UK have argued (as discussed above)? In the UK, for instance, the examination of proportionality issues with regard to evictions typically takes place in the County Court usually in a very short possession hearing. This approach has been confirmed in *Pinnock*. These hearings are not reported and unless there is a successful appeal the various grounds that are accepted or more typically rejected will not see the light of day. Is this short window of opportunity – of making a proportionality defence before a first instance judge – really sufficient in reality to address the substantive goals of Article 8 ECHR or is it merely a procedural nicety? It might be the case that the courts do assess the proportionality of the eviction but always – or almost always – conclude that the eviction is justified. This seems to be the case in the most of the case law examined above. It seems that the margin of appreciation – always present but typically more significant in socio-economic matters of which housing is one – tends to reduce the direct impact of Article 8 ECHR rights provided there is scope for the issues to be at least raised. In the case of The Netherlands and Germany Article 8 ECHR safeguards are in place and this is certainly to be welcomed. Allowing the defence to be raised, be it regarding proportionality or otherwise, after all complies with the principles of natural justice – *Audi alteram partem* (hear the other side)<sup>116</sup> – just as much as it does Article 8 ECHR. Perhaps the key question is then whether these safeguards are truly substantive or at least in part procedural and subsequently whether they do actually improve the well-being of tenants whilst nonetheless balancing their interests with those of their landlords and neighbours.

115 See R. Pound, 'Law in Books and Law in Action' *American Law Review*, 44 (1910) at 12–36; J. Maclean, *Rethinking Law as Process: Creativity, Novelty, Change* (London: Routledge, 2012); Cowan supra (n 19).

116 For a discussion on the term see J.M. Kelly, 'Audi Alteram Partem; Note' *Natural Law Forum* (1964) Paper 84 at 103–110.