

Condominiums facing delinquency: stringent remedies from a comparative perspective

Condominiums
facing
delinquency

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Abstract

Purpose – With the aim of monitoring the existing regulations that are applicable to community of owners facing delinquency, in view of the importance of this issue for the achievement of the Urban Agenda, the present study aims to analyse the most stringent and controversial measures available for the community of owners facing delinquency from a comparative perspective.

Design/methodology/approach – The present work addresses the recent legislative amendments that have taken place at national level in this field in several countries and analyses to what extent they have addressed the delinquency problem faced by community of owners.

Findings – The current paper shows that, in the end, legal certainty, the prospective legal and economic effects on mortgage lending and constitutional concerns are the underlying reasons behind the reluctance to implement some stringent measures to face delinquency. It also shows that recent amendments concerning alternative dispute resolution mechanisms are a missed opportunity.

Social implications – Community of owners plays a key role in cities for the achievement of the Urban Agenda, so the periodical contributions from co-owners are paramount to the proper implementation of urban regeneration, energy efficiency and accessibility policies. To this end, the paper analyses existing regulations that are applicable to community of owners facing delinquency, which may increase in the coming years due to the current socioeconomic context.

Originality/value – This paper builds on existing research and goes one step further by addressing the recent legislative amendments that have taken place recently at national level in this field. These measures may serve as an inspiration to other EU legal systems.

Keywords Housing policies, Condominiums, Multi-unit buildings, Defaulting homeowners, Legal remedies, Urban Agenda

Paper type Research paper

Introduction

According to EUROSTAT, [1] in the EU, 53% of the population lived in a house in 2020, whereas 46% lived in a flat. However, in cities, 72% of the EU population lived in a flat and 28% in a house. Spain is the country with the highest percentage of people living in flats (66.1%). Multi-apartment buildings are organized in different ways (e.g. cooperatives, a



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community of tenants or a community of owners), but the community of owners (also known as a “condominium”) seems to be the dominant legal type of multi-apartment buildings in Southern and other European countries, as well as in many post-communist new member states (Matschoss *et al.*, 2013). Percentages, however, differ from country to country [2]. The community of owners or condominium is characterized by the individual ownership of each apartment, a co-ownership over some common elements of the building and membership of an owner’s association (with the exception of England and Ireland, where an association or a company normally owns the common parts of the building, with the unit holders having a right to the exclusive use of their own apartment), but the community of owners differ from one EU country to another in relation to its governance (i.e. self-governance or professional management) whether or not the primary significance is placed on the owners’ co-ownership of the common parts (unitary systems, in which the exclusive rights of use of specific parts of the building are regarded as ancillary, e.g. The Netherlands, Greece, Germany, Estonia, Austria, Norway or Switzerland) rather than on the individual ownership of the unit (dualistic system, e.g. Spain, Belgium or France) (Van der Merwe, 2016 and 2015; Królikowska, 2017).

The community of owners plays a key role in cities in terms of energy efficiency, [3] urban regeneration (Webb and Webber, 2017), demographic ageing, [4] right to the city and smart cities, [5] inclusivity and equality and tourist apartments (Lambea Llop, 2016). In fact, proper community management and effective homeowners associations are key to complying with the 2030 Agenda for Sustainable Development, the New Urban Agenda and the United Nations Charter on Sustainable Housing in Geneva (UNECE, 2019) [6]. From this perspective, periodical contributions from co-owners and the existence of a homeowner association to enforce payment collection are relevant to the improvement of energy efficiency (European Commission, 2018); [7] financial contributions are also relevant as far as housing accessibility is concerned [8]. This implies that the non-payment of the ordinary instalments of common and extraordinary expenses by individual owners from the community of owners is a potential barrier to the maintenance of the common areas, which may deteriorate, causing accessibility and habitability problems, thus hindering the contribution of multi-unit buildings to the proper implementation of urban regeneration, energy efficiency and accessibility policies. With a relevant percentage of condominiums facing delinquency in some countries (e.g. 38.43% in Spain or 20% in France), [9] something which may increase in the coming years due to the current socioeconomic context (e.g. 12.3% of EU citizens face housing cost overburden and 8.6% live in households with arrears on mortgage, rent or utility bills in 2020; [10] about 35 million EU citizens – approximately 8% of the EU population – were unable to keep their homes adequately warm in 2020; [11] and the annual inflation rate was 10.6% in October 2022 in the euro area, which may lead to an increase in the costs of energy or gas supplies) [12].

With the aim of monitoring the existing regulations that are applicable to community of owners facing delinquency, in view of the importance of this issue for the achievement of the Urban Agenda, the present work seeks to analyse the legal remedies available for the community of owners facing delinquency from a comparative perspective. Existing literature on the topic (Van der Merwe and Muñoz-Argüelles, 2006; Lujanen, 2010; Van der Merwe, 2015) has shown that European legal systems already provide legal actions, which are available to the community of owners to claim outstanding debts. The present work builds on existing research and goes one step further by addressing the recent legislative amendments that have taken place at national level in this field in Spain (2022), [13] Portugal (2022), [14] France (2021), [15] Austria (2021), [16] Denmark (2020), [17] Germany (2020), [18] Belgium (2018) [19] or Norway (2017), [20] and verifying to what extent they have addressed

the delinquency problem faced by homeowners' associations. Even though the imposition of fines by the community of owners, [21] and the prohibition of the use of common parts of the multi-unit building, implemented by Spanish law 10/2022, [22] which follows the Italian example, [23] together with the deprivation of the right to vote [24] or the general prohibition that prevents delinquent owners from challenging any agreement reached by the community of owners (Art. 18.2 LPH and 553-31.3 CCCat), the paper focuses on some of the most stringent and controversial measures adopted at the EU level, such as the existence of statutory or privilege liens, the forced sale of the delinquent owner's apartment, the implications of the transfer of the apartment unit or the compulsory duty to follow alternative dispute resolution mechanisms when conflicts arise within the community of owners. These measures may serve as an inspiration to other EU legal systems.

1. Statutory or privilege liens

A number of EU Member States provide community of owners' claims with statutory or preferential liens, which may go into effect either when the homeowners' association is created [25] or when the debtor's apartment is the subject of a forced sale. In the latter case, Art. 9.1.e) LPH and Art. 553-4.3 of the Catalan Civil Code (CCCat) establish that the community of owners' claims arising from the obligation to contribute to the payment of general expenses corresponding to the overdue part of the current annuity and the previous three years (four years in the CCCat, in which the contributions to the sinking fund are also included) enjoys a preferential status (Art. 1923 Spanish Civil Code), even over already existing registered mortgage loans. For its part, the Belgian law of 8 June 2018 has implemented a similar provision in Art. 27.7 of the Mortgage Act of 16 December 1851 (Willemot, 2020), but it only includes the contributions that correspond to the present and the preceding year. The underlying reason for this limitation is to prevent prospective legal and economic effects on mortgage lending [26]. Denmark, pursuing a liberal economy, is also reluctant to introduce such a preference (Van der Merwe, 2015). Reasons of legal certainty also led the Austrian lawmaker to establish some limitations to the statutory preferential lien in §27 of the Austrian condominium law 2002, [27] which has not been amended by the WEG-Novelle in 2021. To, as far as possible, ensure the continued suitability of residential properties as security for liabilities, the preferential lien was limited in two ways (Lenk, 2012). The preferential lien only applies if the secured claim together with the lien is asserted by way of legal action within six months of the due date and an application is made to have the action recorded in the land register [§27.(2) WEG]. The second limitation is that according to §216.1 *Executionsordnung*, [28] secured claims are those that have become overdue in the last five years; however, they have priority over existing security rights. Finally, the debt due to the community already has a privileged status in case of execution over the mortgagee in Germany (§10.1.2 *Gesetzes über die Zwangsversteigerung und die Zwangsverwaltung* 1897), [29] but it only encompasses both current amounts and amounts in arrears from the year of the seizure and the past two years, and it is limited to amounts not larger than 5% of the taxable value of the unit (§74a.5). Following the pre-legislative work of the *Wohnungseigentums-modernisierungsgesetz* – WEMoG 2020, an objection was raised in relation to an extension of the privilege, claiming that it would be at the expense of the mortgagee, so a reform like this could therefore weaken and impact mortgage lending on residential property [30].

As it may be seen, the Catalan and Spanish approaches better protect the interests of the community of owners in terms of the length of time covered by the privilege (the current and the previous four years – Catalonia – or three years – Spain) and the amount covered (without any limitation in Spanish and Catalan law, the latter including not only common

and extraordinary expenses due, but also contributions due to the sinking fund), but legal systems are reluctant to reinforce the privilege position of the homeowners' association as it is seen as a potential barrier to mortgage lending.

Regarding the regulation of such preferential claims, it is true that in the legal framework for security interests, the existence of statutory liens prevailing over registered security rights makes the functioning and enforcement of secured credit less predictable in terms of priority among creditors. Exceptions, then, to the "first in time, first in right rule" (which means that a security right constituted earlier enjoys precedence over a later one) should be limited, e.g. by overriding social policies such employee wages or tax preferences (de Boeck and Laryea, 2005). In the case of claims for common expenses due to the homeowners' association, as pointed out above, the non-fulfilment of financial obligations by its members hinders the contribution of multi-owner buildings to the proper implementation of urban regeneration, energy efficiency and accessibility policies. As a result, social reasons may justify the implementation of a statutory lien or privilege for the benefit of the homeowners' association.

In relation to the extent thereof in terms of time and amount, of course, limitations should be put in place, and the privilege must be interpreted narrowly (Spanish Supreme Court decision 4 May 2022) [31]. However, the limitation of secured creditors' rights is not necessarily worst *per se* in terms of legal policy, as creditors are going to lend more responsibly and monitor the activity of the debtor more intensively and effectively, without credit becoming necessarily more expensive [32]. For this reason, the Catalan and Spanish regulations could be an example to follow.

Notwithstanding the existence of such statutory privilege, it is under discussion whether it can be considered a property right for the benefit of the community of owners, i.e. whether the community would be entitled to foreclose the apartment unit or whether legislation only contains privileges for the claims under the law of obligations, both in foreclosure and insolvency proceedings [33]. In the CCCat, the wording of Art. 533–5 ("afección real") clearly implies the right to foreclose the apartment unit by the community of owners based on the existence of a land charge ("carga real"). Despite the different wording of Art. 9.1.e) LPH, the same should be applied to the LPH [34]. To safeguard the debt due to the community of owners by the delinquent owner, regulations may be further strengthened as follows:

- The first possibility is the extension of the privilege to movable property. For example, Art. 19.5 of the French condominium law 1965 [35] stipulates that the debt due to the community of owners also benefits from the privilege provided for in Art. 2332.1 *Code Civil* in favour of the landlord. This privilege extends (since the entry into force of Art. 18 of the *Ordonnance* 2019/1101, of 20 October) [36] to the furniture that furnishes the property belonging to the owner (furniture, silverware, paintings, books, etc.), as well as the amounts owed by the tenant to his/her landlord [37]. In practice, the community of owners will order the preventive seizure of the furniture of the defaulting owner, and if they have been moved without their consent, they will retain the privilege if they file a claim within the following 15 days (Art. 2102.1.5 *Code*). If it is an unfurnished rental, the privilege is specified to the rents collected by the delinquent owner (Monniez, 2006). However, there are certain movable assets that are excluded, such as those that cannot be considered to furnish the property, such as jewellery (it would include, for example, works of art) (Piédelièvre, 2022). A recurring problem was the scope of the privilege, given that French case law [38] had admitted that it extended to all the furniture that furnished the rented property, even if it belonged to a third party unless the landlord knew the origin of the furniture when it was introduced. Since the reform of the French

Condominium Law 1965 introduced in 2019, the privilege covers only the furniture that furnishes the premises and that belongs to the tenant [39].

- The second option available to lawmakers to help ensure payment of the debt due to the community of owners is to expressly regulate it as a legal mortgage following the French and Spanish (“land charge”, even though this is under discussion) models. Indeed, Art. 19.1 of French law 1965 provides that the debts of the owner with the community relating to the current year, as well as to the last four previous years (Art. 2402.3 *Code Civil*), are guaranteed with a legal mortgage (*hypothèque légale*) since the reform introduced by Ordonnance 2021/1192, which eliminated the previously existing real estate privileges for mortgages. Even though Art. 2418 of the *Code Civil* requires registration of legal, judicial and conventional mortgages; an exception is established for the legal mortgage in favour of the community of owners (Art. 2418.3 *Code*). Norway also regulates a lien (limited in its amount) in §31 of the *Lov om eierseksjoner (eierseksjonsloven)* 2017 that arises by operation of the law for the benefit of the community, which may foreclose the apartment unit.

The configuration of the community of owners’ claim as a legal mortgage would help to grant it a privilege in bankruptcy proceedings involving the delinquent homeowner, who may have also defaulted on repayment of the mortgage loan. It is true that tacit legal mortgages enjoy a privilege status in bankruptcy proceedings in the Spanish Royal Legislative Decree 1/2020, of 5 May, which approves the consolidated text of the Bankruptcy Law (LC) [40]. This, in our opinion, should be the case, but the legal nature of the community of owners’ privilege is a matter of discussion, as pointed above. As a result, case law may reject such privilege in bankruptcy proceedings, as took place in the Judgement of the Provincial Court of Pontevedra 19 February 2014, [41] based on the fact that the debt due to the community does not enjoy a privileged character under Art. 270 LC, nor can its inclusion be accepted by analogy because the privileges have a *numerus clausus* nature (Art. 269.2 LC). The community of owners, therefore, could be forced to compete with the rest of the creditors in the bankruptcy proceedings without enjoying any privilege. Conversely, the statutory preferential lien is not affected by the opening of insolvency proceedings over the apartment unit in Austria (§11.1 *Insolvenz Ordnung* [42]; decision OGH 19 May 2020 [43]) or Germany, in which the community of owners enjoys a right of preferential treatment [44]. This is as a result of the reference contained in §49 *Insolvenz Ordnung* to §10.1.2 ZVG. The explanation is that a personal creditor also has a right to satisfaction from the sale of the property in insolvency proceedings, although contrary to other rights *in rem*, the community of owners’ right is only insolvency-proof if the seizure was ordered before the opening of insolvency proceedings and before the setback period (Nidenführ *et al.*, 2010).

2. The prohibition of using the apartment unit and its forced sale

Some jurisdictions allow the community of owners to prohibit the use of the apartment by the owner in some circumstances, such as Spain [45] or The Netherlands [46]. Other jurisdictions, though, went one step further by providing that if the owner of an apartment seriously breached his/her obligations to the other owners, the community of owners is entitled to demand her/him to dispose of the apartment. This is the case in Germany in §18 WEG [47] when the homeowner, despite warnings, seriously and repeatedly failed to comply with his obligations (e.g. legal or statutory duties) under §§14.(1) and (2) WEG, i.e. s/he has been in arrears for more than three months with respect to his/her obligation to assume the expenses provided for in §16.(2) WEG (i.e. those related to the administration and use of the

common elements in proportion to their participation) and said arrears amounted to more than three percent of the cadastral value of the home.

The application of this measure is seen as a last resort to resolve major conflicts between owners as it constitutes a serious interference in property rights. Therefore, it could only be considered if the less drastic measures had not been successful, such as a warning issued by the president or administrator stating the willingness of the community of owners to resort to this remedy or a request by the community for the implementation of precautionary measures [48]. The adoption of this course of action generally requires the community to pass a resolution by a majority of quotas (Niedenführ *et al.*, 2010; Froese, 2015), and the interested owner may challenge this decision in accordance with §43 *et seq.* WEG.

In 2020, the WEG was amended by the *Wohnungseigentumsmodernisierungsgesetz* (WEMoG), whose aim is to promote electromobility in Germany, so works on modernization and rehabilitation of residential buildings are facilitated. In addition, the law removed the possibility of confiscation in the event of late payment by the owners, although the Bill of the Law (23 March 2020) [49] does not explain this modification. However, new §17 WEG continues to provide for the alienation of the property if an owner is guilty of such a serious violation of his obligations to other owners or to the community of owners that they are no longer expected to continue in the community. Case law [50] has considered the deprivation of housing to be equally applicable in cases of late payment (for a debt of EUR 12,500) when an owner constantly fails to comply with his payment obligations, resulting in a considerable liability. As a result, the confiscation is still possible (it goes, therefore, from an objective criterion provided for in the WEG to something that must be assessed and interpreted by the court).

For its part, Estonia maintains a similar provision, stipulating that if the owner has been late in paying at least six months of management fees for more than three months, the community may require, by majority vote, the forced transfer of the defaulting owner's home [51]. The same provision was legislated by Norway in § 26 of its 1997 Property Law, if an owner, despite warnings, materially breached his/her obligations. Said obligation has been maintained in §38 of the *Lov om eierseksjoner (eierseksjonsloven)* 2017, which repealed the previous law. In Denmark, §10 of the new law enacted in 2020 establishes that the homeowners' association, with favourable votes from at least two-thirds of the owners, can force an owner guilty of a particularly serious breach of his/her duty towards the owners' association to sell the apartment unit, or in the event that the owner commits repeated gross breaches of contract despite written notifications demanding that he/she comply. The owner must transfer his/her owner-occupied flats in the community of owners within six months of the time when there is a final court decision on the justification of the exclusion (the owners' association must submit its application for to the courts no later than six weeks after the general meeting has been held).

In these unitary systems (in which the primary significance is placed on the owners' co-ownership of the common parts), the implementation of such a measure is less problematic. For instance, the German Constitutional Court (Judgment of 14 July 1993) [52] has admitted the constitutionality of forced confiscation if an owner seriously and consciously violates his obligations with respect to the rest of the owners (which did not happen in the case prosecuted because the owner suffered from an illness), without the need for a fear that the action is likely to be repeated if the conduct was serious enough [53]. From the perspective of dualistic systems, where the prevalence is placed on the ownership of the apartment unit, implementing a measure of this nature could raise constitutional doubts. For instance, the Spanish Constitutional Court has argued that 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 (decision 301/1993, of 21 October), [54] so legal or statutory restrictions to the rights of use and enjoyment of the apartment may be put in place [55] (Spanish Supreme Court decision 3 December 2014) [56]. Nevertheless, the forced sale of the property, as a civil sanction that pursues a punitive function, must be expressly provided for by law, be subject to a restrictive interpretation (as is the case, for example, with deprivation of parental authority or disinheritance) and be proportionate to the seriousness of the act [57]. The requirement of proportionality raises greater doubts as the absolute loss of economic utility or the guarantee of a minimum return on the property by the forced sale initiated by the community of owners as it might affect the essential content of the right to private property (Art. 33.1 Spanish Constitution; see Nasarre Aznar and Simón Moreno, 2013) in both its institutional and individual (as subjective right) aspects (Spanish Constitutional Court decision 111/1983, of 2 December) [58].

3. *The in rem or personal liability in case of transfer of the apartment unit by the delinquent owner*

In the event of the transfer of the apartment unit to a third party by the delinquent owner, the question is whether and to what extent the buyer may be held liable for the debts of the seller. Legal systems provide for different solutions:

- In our opinion, in both Spanish (Art. 9.1.e LPH) and Catalan law (Art. 553-5.1 CCCat), the community of owners may foreclose the apartment based on a tacit legal mortgage. Consequently, both legal systems foresee that the seller of an apartment remain personally liable for the outstanding debts owed to the community of owners, but the owner of the apartment is legally and tacitly charged for the payment of the current year and the previous three (Spain) or four years (Catalonia). Conversely, in Germany, the apartment unit will be subjected only to the statutory privilege already pointed out. There is no assumption of personal liability by the buyer unless otherwise agreed with the seller, so the liability is placed on the apartment unit (SC decision 22 April 2015) [59]. The *in rem* liability of the apartment unit for non-payment of the community of owners' expenses is an example of a "propter rem" obligation, which is connected to certain property rights in the sense that the subject of such obligations is determined by the fact of being the title-holder of a right upon an asset (González Pacanowska and Diez Soto, 2011). To protect the buyer, Spanish and Catalan law imposes a duty on the seller to provide evidence that no debts are owed to the community of owners once the deed of sale is concluded.
- A similar "propter-rem" obligation also exists in Art. 63.2 of the Italian *Disposizioni di attuazione del Codice civile* [60]. However, while the Spanish and Catalan legislations allow the community of owners to foreclose the apartment, the Italian law stipulates that anyone who becomes the owner of the apartment unit of a community of owners is jointly and severally obliged to pay the contributions relating to the current year and the previous one. Therefore, the obligation follows the right and is transferred as a result of its transmission (Decisions from the Italian Supreme Court – *Corte di Cassazione* – 25 June 2020 (*n.* 12580), 22 June 2017 (*n.* 15547) and 18 April 2003 (*n.* 6323)).
- On the basis of such legal systems, Portuguese Law 8/2022 has implemented the obligation to issue a certificate gathering the outstanding debts when the owner wishes to transfer the apartment to a third party, which must be incorporated into the public deed (Art. 1424.A.1 CCP). However, no *in rem* liability of the apartment has been implemented. As in Spanish and Catalan law, the buyer is entitled to waive

the delivery of such a certificate by the seller in Portugal, but the consequence is that the buyer becomes personally liable for any debt owed by the seller to the community of owners (Art. 1424.A.1 CCP) [61].

The Spanish and Catalan solutions are more respectful of contract law principles, requiring the formal acceptance of the acquirer, who must agree to bear the seller's debt. In fact, in the recent amendment of Belgian condominium law in 2018, the personal liability of the acquirer was not preferred as it would go against contract law principles, such as the privacy of the contract [62]. Instead, in Belgium, the proceeds of the sale are transferred first to the Notary's account, who first distributes the money among the creditors (Art. 3.95 Civil Code), following the French example (Art. 20 *Loi* 1965; in France, the failure to deliver the certificate of the outstanding debts implies that the notary must then send a notice of transfer to the president of the community of owners). This may be the best way of ensuring that the community of owners is reimbursed (Van der Merwe and Muñiz-Argüelles, 2006).

4. Mediation procedures

A study [63] reveals that only a very small percentage of the conflicts that take place in Spanish community of owners are resolved through arbitration or mediation: only 7% in the case of late payment and 5.9% when there are conflicts that affect the cohabitation of residents. This is consistent with the low relevance of mediation in Spain and, in general, in the European Union, where less than 1% of disputes on civil and commercial matters are resolved by this means. It is not surprising, then, that mandatory mediation models ("opt-out") have been proposed instead of the existing voluntary models ("opt-in") (De Palo, 2018).

In comparative law, the success of the Italian model, provided for in the Legislative Decree of March 4, 2010, is often highlighted [64]. The law obliges the parties to resort to the mediation procedure in a variety of matters (including community of owners), which is a condition of admissibility of the judicial request (Art. 5). The duration of the procedure is three months (Art. 6.1). Statistics show that disputes related to community of owners were fourth in importance in 2021 (accounting for 12.9% of new cases), behind disputes related to property and tenancy. The success rate (where the parties reached an agreement) was 25% of the cases [65].

Recent amendments at the EU level have dealt with mediation in the community of owners' issues. The recent amendment of Art. 21.6 LPH by Spanish Law 10/2022 establishes that community of owners' issues may also be subject to mediation or arbitration procedures, but there is no legal duty to follow such alternative procedures. Accordingly, the community of owners may hold a meeting to decide whether to include such a provision in the bylaws, which would require a unanimous vote from the co-owners (Art. 17.6 LPH). In a similar vein, Portuguese law (Art. 1434 CCP) has established this possibility (regarding arbitration) since 2018. Conversely, Belgium law 2018 provides that any clause which entrusts one or more arbitrators with the jurisdictional power to settle disputes which may arise concerning the application of this section is deemed to be unwritten. At least in Ireland, Art. 23 of the Irish Multi-unit Developments Act 2011 [66] entitles the court to order the parties in conflict to meet to discuss and try to resolve the matter through a mediation procedure (*mediation conference*). In practice, however, there is no statistical evidence of such provisions and the outcome of cases referred to mediation, and there are concerns about the inconsistent provisions in the law regarding the definition of mediation or the provisions on confidentiality (Walsh, 2017).

The mandatory mediation procedures prior to judicial proceedings have been accepted by the Court of Justice of the European Union (CJEU) in the Judgments 18 March 2010 (in

relation to disputes related to electronic communications) and 14 June 2017 [67] (Herrera de las Heras, 2017), as the procedure did not result in a substantial delay for the purposes of bringing legal proceedings, the period for the time-barring of claims was suspended, and there were no fees for the settlement procedure. As a result, recent community of owners laws' amendments are a missed opportunity.

Discussion

The community of owners plays a key role in cities in terms of energy efficiency, urban regeneration, demographic ageing, right to the city and smart cities, inclusivity and equality and tourist apartments. The non-payment of the ordinary instalments of common and extraordinary expenses by individual owners from the community of owners is a potential barrier to the maintenance of the common areas, which may deteriorate, causing accessibility and habitability problems, thus hindering the contribution of multi-unit buildings towards compliance with the 2030 Agenda for Sustainable Development, the New Urban Agenda and the United Nations Charter on Sustainable Housing in Geneva.

Focusing on the recent legislative amendments that have taken place at national level and on the most stringent and controversial measures adopted at the EU level, the paper shows that reasons of legal certainty and the prospective legal and economic effects on mortgage lending are the underlying reasons behind the reluctance to implement statutory or privilege liens for the benefit of the community of owners. Notwithstanding the necessary limitations, either in terms of the duration or in terms of the claims covered, this type of privilege does not have such a strong impact *per se*, so it could be an option for other legal systems to follow. The extension of the privilege to movable property or opting to expressly regulate it as a legal mortgage may further optimize the privilege. As for the forced sale of the delinquent owner's apartment, it raises constitutional concerns as it implies the loss of homeownership over the apartment unit. This may particularly be the case in those legal systems following dualistic models, but further research is needed in this regard as it touches the very essence of the right of ownership: to what extent the community of owners' regime implies a change in the ordinary conception of the right to private property. For its part, the transfer of the proceeds from the sale to the notary's account, who in turn distributes the money among the creditors owed debts related to the apartment unit, seems to be a better solution for the community of owners due to the fact that it will not be longer necessary (as would be the case for both Spanish and Catalan legal systems) to start a court procedure to foreclosure the apartment. Furthermore, the creation of a tacit charge on the apartment is more respectful of contract law principles as opposed to the notion of the buyer agreeing to take on the seller's debt. As for the compulsory duty to follow alternative dispute resolution mechanisms when conflicts arise within the community of owners, recent amendments are a missed opportunity considering the decisions from the CJEU.

Notes

1. Source: <https://ec.europa.eu/eurostat/cache/digipub/housing/bloc-1a.html?lang=en> (accessed 13 December 2022).
2. For instance, whereas it is estimated that almost 70% of the population live in multi-unit apartments organized as a community of owners in Spain (Nasarre Aznar, 2016), in Italy it amounts to 60% of the population (source: <https://blog.condomani.it/quante-persone-vivono-in-condominio/>, accessed 13 December 2022) and in Portugal it reaches 40% of the population (source: Associação Portuguesa de Empresas de Gestão e Administração de Condomínios, quoted by www.idealista.pt/news/imobiliario/habitacao/2016/10/31/31929-ha-quatro-milhoes-de-portugueses-a-viver-em-condominios,

accessed 13 December 2022). In Germany, 23% of people lived in a condominium scheme in 2011 (source: <https://ergebnisse2011.zensus2022.de>, accessed 13 December 2022); in Sweden, the most common type of multi-unit apartment buildings are in the form of a residential tenancy and buildings where tenants own dwellings in co-operative housing associations (the community of owners are then almost residual; source: www.statistikdatabasen.scb.se, accessed 13 December 2022). In Ireland, the population residing in flats amounts to 8%, but apartments and multi-unit developments have increased by 85% between 2002 and 2016 (source: Census of Population 2016, available at: www.cso.ie).

3. Buildings are responsible for approximately 40% of energy consumption and 36% of CO₂ emissions in the EU (European Commission, 2020). The EU has published pieces of legislation on this topic, such as Directive 2012/27/EU of the European Parliament and the Council of Europe, dated 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.
4. According to EUROSTAT, more than one fifth (20.8%) of the EU population was aged 65 and over in 2021, and the share of people aged 80 years or above in the EU's population is projected to have a two-and-a-half-fold increase between 2021 and 2100, from 6.0% to 14.6%. Source: https://ec.europa.eu/eurostat/statistics-explained/index.php/Population_structure_and_ageing (accessed 13 December 2022). For its part, the Eurobarometer on accessibility of 2012 (available at: <https://ecommons.cornell.edu/handle/1813/87370> (accessed 13 December 2022)) showed that 38% of the citizens interviewed or a member of their families had at some time experienced difficulties entering a building or an open public space. Accordingly, housing accessibility is a key challenge for the coming years.
5. The UN Urban Agenda 2016 (available at: <https://habitat3.org/the-new-urban-agenda/>, accessed 13 December 2022) does not refer to the community of owners or multi-unit buildings, even though they are very common in cities. However, there are references in some paragraphs (e.g. in paragraphs 11, 13, 14, 15, 36 or 37) that are clearly related to the community of owners and their role in cities.
6. This guide recommends that national legislators should specify and support the application of measures that penalize owners for not carrying out the necessary repairs in their own exclusive areas and for not paying the costs associated with the maintenance of the common elements.
7. Following Matschoss *et al.* (2013), financial issues are a potential barrier for implementing energy renovations.
8. About 35% of the EU's buildings are over 50 years old and almost 75% of the building stock is energy inefficient, while only 0.4%–1.2% (depending on the country) of the building stock is renovated each year; see a legal comparison at Nasarre Aznar and Simón Moreno (2020).
9. In Spain, the study “Estudio Global sobre la morosidad en Comunidades de Propietarios 2017” (www.cgcafe.org/wp-content/uploads/2018/06/comunicado-de-prensa-informe-morosidad-2017.pdf, accessed 13 December 2022), drafted by the General Council of Associations of Property Administrators –CGCAFE – estimated that 38.43% of condominiums were delinquent (source www.elperiodicodearagon.com/aragon/2020/11/29/morosidad-comunidades-vecinos-crece-supera-46480131.html, accessed 13 December 2022). In France, the total debt amounted to 2 billion euros in 2022. This represents an unpaid rate of 20% (source: Agence nationale de l'habitat, quoted by https://immobilier.lefigaro.fr/article/chaque-copropriete-a-une-dette-de-pres-de-8000-euros-en-france_2f77b740-daa2-11ec-ab8a-90de21d9d6fb/, accessed 13 December 2022). In Ireland, a study showed that “nearly 20 per cent of the accounts analysed showed a debtors' level between 51 per cent and 100 per cent”, so debtors' levels are a growing problem, see McKeown and Sirr (2018).
10. Source: *Housing in Europe*, 2021. Available at: https://ec.europa.eu/eurostat/cache/digipub/housing_2021/index.html?lang=en (accessed 13 December 2022).
11. Source: https://energy.ec.europa.eu/topics/markets-and-consumers/energy-consumer-rights/energy-poverty-eu_en (accessed 13 December 2022).

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21. The community of owners is entitled to establish pecuniary sanctions for non-compliance with the provisions of the CCP, the deliberations of the assembly or the decisions of the administrator (Art. 1434 CCP, which has not been affected by Law 8/2022). See Acórdão do Tribunal da Relação de Coimbra 5 May 2020, Procedure 2065/18.0T8VIS.C1. These fines are made more legitimate by an external factor, the coexistence and sociability resulting from the unit structure of the building (Passinhas, 2006). A similar provision has been implemented by Spanish law 10/2022 (see below) allowing the community of owners to establish interest rates that are higher than the legal interest rate, provided that they are not disproportionate or abusive (Art. 21.1 LPH).
22. As pointed out above, in Spain (since Law 10/2022, see about this reform Fuentes-Lojo Rius, 2022) the community of owners may agree upon or include in the bylaws any dissuasive measures against delinquency, such as the temporary deprivation of the use of services or facilities. To assess the proportionality, such measures are deemed acceptable provided that they affect common elements that are not essential for the use and enjoyment of the private unit, such as swimming pools, gyms or paddle tennis courts by requiring mechanical (e.g. a key) or digital (password) means of access (Nasarre Aznar, S., Lessons on tenement law from Europe: how to enforce payment for tenement maintenance, Scottish Law Commission) so that it could not affect elements that are common areas by nature, inherent to property rights, such as the elevator, which are relevant in terms of accessibility.
23. Art. 63 of the Italian *Regio decreto* of 30 March 1942 (n. 318 Disposizioni per l'attuazione del Codice civile e disposizioni transitorie). Available at: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:regio.decreto:1942-03-30:318 (accessed 13 December 2022) provides that the delay of an owner in the payment of contributions for more than a semester legitimizes the community administrator to suspend the use of common services that can be enjoyed separately, such as the use of the swimming pool, the elevator by means of an access key or other sports facilities, as well as the

supply of gas, water or electricity. This power has been tempered by the Decree of 29 August 2016 (*Disposizioni in materia di contenimento della morosità nel servizio idrico integrato*, available at: www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2016-10-14&atto.codiceRedazionale=16A07390 (accessed 13 December 2022)), that guarantees a minimum supply of 50 liters per day even to those who are in default in fulfilling their obligations, which has already been corroborated by a judicial resolution (Auto del Tribunale Bologna sez. III Data: 15/09/2017, Available at: www.revisionieconsulenzecondominiali.it/sites/default/files/servizi/field_allegati/MorosiSospensioneServiziSentenzaTribunale%20Bologna.pdf (accessed 13 December 2022)). Beyond this provision, the judge, in application of Art. 32 of the Italian Constitution, which guarantees the right to health, can adopt this measure provided the delayed payment requirements are met, and it is possible to separate the use of common services without having to distinguish between essential and non-essential services (Tribunale di Perugia, with ruling 5113/21 of 20 December 2021). Therefore, the adoption of this measure can be avoided if it threatens the right to health, safety and physical integrity of private owners (Scarpa *et al.*, 2021).

24. Both Spanish (Spanish Condominium Law 49/1960, of 21 July -LPH-, available at: www.boe.es/eli/es/l/1960/07/21/49/con (accessed 13 December 2022) and Catalan law (Catalan Civil Code -CCCat; *Ley 5/2006, de 10 de mayo, del libro quinto del Código Civil de Cataluña, relativo a los derechos reales* (DOGCn. 4640, 24.5.2006). Available at: www.boe.es/eli/es-ct/l/2006/05/10/5/con, accessed 13 December 2022) provide for the deprivation of the right to vote (Art. 15.2 LPH and 553-24 CCCat). The Belgium reform from 2018 has implemented the Spanish approach with a slight difference following the French example (Art. 24) (Willemot, 2020): only the owners who participate in the financial consequences of a decision may participate in the decision-making, so there is no general prohibition (“Payer decides”). The underlying reason is the constitutional doubts about the implementation of such stringent measures (Sagaert, cit.). In a similar vein, the BGH hold that the withdrawal of the right to vote and the exclusion from the meeting of the apartment owners would represent a serious breach of elementary membership rights (BGH 10.12.2010 – V ZR 60/10).
25. This is the case in Slovenia, where the priority is restricted to five times the debtor’s contribution to the reserve fund (Van der Merwe) 2015, pp. 360-361.
26. According to Sagaert, V. (2022), Conference *Lessons on tenement law from Europe: how to enforce payment for tenement maintenance*, Scottish Law Commission. Available at: www.youtube.com/watch?v=rss2WYtak2Q (accessed 13 December 2022).
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32. According to Kasak (2019), “an amount of twenty per cent taken from the secured creditors and distributed over the unsecured and secured creditors’ remaining claims under *pari passu* is an appropriate proportion to have the above-mentioned effect of motivating the secured creditor to take interest and participate more in the activities of the debtor”.
33. For Catalonia, see Valle Muñoz (2008), who argues that the community of owners would not be entitled to foreclosure the apartment; for Spain, the Spanish Supreme Court decision 4 May 2022 held

- that the privilege foreseen in the LPH cannot be deemed to be a “tacit legal mortgage”. For Germany, see the German Supreme Court (BGH) decision 8 December 2017 (V ZR 82/17) and 13 September 2013 (V ZR 209/12), and [Smid \(2021\)](#). Here, the *numerus clausus* principle plays a key role.
34. In favour of considering such privilege a legal mortgage, [Zurilla Gariñana \(2010\)](#).
 35. *Loi n° 65-557 du 10 juillet 1965 fixant le statut de la copropriété des immeubles bâtis*. Available at: www.legifrance.gouv.fr/
 36. *Ordonnance n° 2019-1101 du 30 octobre 2019 portant réforme du droit de la copropriété des immeubles bâtis*. Available at: www.legifrance.gouv.fr/.
 37. See in this sense the Rapport au Président de la République relatif à l’ordonnance n° 2019-1101 du 30 Octobre 2019 portant réforme du droit de la copropriété des immeubles bâtis. Available at: www.legifrance.gouv.fr/eli/rapport/2019/10/31/JUSC1920054P/jo/texte (accessed 13 December 2022).
 38. Cour d’appel de Fort-de-France, 14 September 2012, 09/00482; and Cour de cassation, civile, Chambre civile 3, 24 June 2009, 08-14.357; Cour de cassation, civile, Chambre commerciale, 16 November 2010, 09-70.765.
 39. These kinds of privileges are not exclusive to French law. For example, in Slovenia, Art. 119.6 Law of Property Code 2002 (Stvarnopravni zakonik (SPZ), available at: www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO3242, accessed 13 December 2022) provides that if the owner does not pay his contribution to the reserve fund, the administrator must request it in writing and, where appropriate, may proceed against the movable or immovable property of the owner.
 40. Available at: www.boe.es/eli/es/rdlg/2020/05/05/1/con (accessed 13 December 2022).
 41. ECLI:ES:APPO:2014:281.
 42. Available at: www.jusline.at/gesetz/io (accessed 13 December 2022).
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 44. Federal Court of Justice NJW-RR 2009, 923 para. 7; judgment of July 21, 2011 – IX ZR 120/10, NJW 2011, 3098 para. 24). et seq.
 45. According to Art. 7.2 LPH and Art. 553-40 CCCat, the community of owners may apply for an injunction against an owner who carries out activities that are in breach of the statutes, urban planning regulations or the law. The judge, if appropriate conditions are met, has the power to deny the right to use the apartment for a period not exceeding three years (LPH), depending on the seriousness of the offence and the damage caused to the community or two years (CCCat) if the prohibited activities continue.
 46. This option may be exercised in accordance with the provisions of the homeowners’ association regulations (arts. 5:106 et seq. of the *Burgerlijk Wetboek* (Dutch Civil Code) 1992 (English version available at: www.dutchcivillaw.com/civilcodegeneral.htm, accessed 13 December 2022) of the Netherlands (*Vereniging van Eigenaren*, available at: www.vvebelang.nl/kennisbank/juridisch/modelreglement/, accessed 13 December 2022); English version www.vverecht.nl/wp-content/uploads/2014/06/Engelse-Vertaling-Modelreglement-2006.pdf, accessed 13 December 2022). Art. 39 of this regulation enables the community to warn the owner that, if he does not respect the provisions set forth in the law, the statutes, the resolutions adopted by the community or fails to comply with his obligations of an economic nature, the community will proceed to prohibit the owner from using both his own exclusive elements and the communal sections.
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50. LG Frankfurt/Main, Urteil v. 04.10.21, Az. 2-13 S 9/21).
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52. BVerfG 1st Senate 3rd Chamber Resolution of 07/14/1993, 1 BvR 1523/92.
53. It takes place even if the dwelling belongs to a married couple and only one of them is responsible for the dispute with the community (BGH ruling September 14, 2018, Az. V ZR 138/17. ECLI:DE:BGH:2018:140918UVZR138.17.0).
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