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Balancing tenants' rights while addressing neighbour nuisance in Switzerland, Germany and the Netherlands

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Abstract: Tenants that suffer from neighbour nuisance regularly turn to the owner of the property from which they rent: the landlord. If neighbour nuisance is addressed by landlords, they have to balance the rights of the nuisance tenant and the rights of the suffering neighbours. This paper analyses the way in which Swiss, German and Dutch law deal with the conflicting obligations in case of addressing neighbour nuisance. The following questions are addressed: 1) If tenants are victims of neighbour nuisance can the suffering tenants legally oblige their landlord to comply with his/her positive obligation that arise from the tenants' rights and, consequently, tackle the nuisance? 2) If a tenant causes neighbour nuisance, could that behaviour eventually result in the eviction of the problem tenant? 3) In the case a landlord wishes to evict the nuisance tenant, which substantive and procedural legal requirements protect the tenants from the termination of the tenancy agreement and/or eviction?

Keywords: Neighbour nuisance, tenancy law, positive obligations, negative obligations, eviction

I. Introduction

Millions of European citizens suffer from nuisance caused by their neighbours.[1] If the problem cannot be solved amicably, victims of nuisance often turn to their

1 See B. Randall, *Safe as Houses* (Cecodhas, Brighton 2005); American District Telegraph Europe, *Anti-social behaviour across Europe* (ADT, Middlesex 2006); J. Flint (eds.), *Housing, urban governance and anti-social behaviour* (Policy Press, Bristol 2006).

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landlords.[2] The victims of the nuisance request their landlord to take action because their right to respect for the home is violated by the nuisance neighbour.[3] In several countries (e.g. the United Kingdom,[4] the United States,[5] China[6] and Australia[7]), the most common approach landlords use to address neighbour nuisance is eviction orientated.[8] Landlords force the tenants to leave their home when the situation has become unbearable for the neighbours. Nonetheless, in Europe landlords usually have to request court to authorise the eviction because eviction can be characterised as a most extreme form of interference with the evictees' right to respect for the home.[9]

Consequently, while addressing neighbour nuisance two colliding rights to respect for the home have to be balanced: the right of the nuisance tenant and the right of the suffering neighbours. Moreover, a number of negative and positive obligations arise from these different rights.[10] First, a negative obligation for tenants as well as for other types of residents (e.g. owner-occupiers) arises from their neighbours' rights to use and enjoyment of their home: residents have to abstain from causing nuisance to his neighbours. Second, a negative obligation arises from the right to respect for the home of the tenant that causes nuisance:

2 See A. Peper, Spierings, F.C.P.P., Jong, W. de, Blad, J.R., Hogenhuis, C.F.H.M. & Altena, V.D. van *Bemiddelen bij conflicten tussen buren* (Eburon, Delft 1999); E.G. Ufkes, E. Giebels, S. Otten & K.I. Van der Zee, 'The effectiveness of a mediation program in symmetrical versus asymmetrical neighbor-to-neighbor conflicts' (2012) 23(4) International Journal of Conflict Management 440–457.

3 See D. Cowan, *Housing law and policy* (Cambridge university press, Cambridge 2011).

4 See J. Flint & H. Pawson 'Social Landlords and the Regulation of Conduct in Urban Spaces in the United Kingdom' (2009) 9 Criminology and Criminal Justice 415–435.

5 See N. Strand, 'Restructuring Public Housing, an Examination of the Strict Interpretation of the "One strike and you're out" Policy' (2002) 24 Hamline Journal of Public Law & Policy 111–146.

6 See Y. Yua 'On the Anti-social Behaviour Control in Hong Kong's Public Housing' (2011) 26 Housing Studies 701–722.

7 See C. Hunter, J. Nixon & M. Slatter, 'Neighbours Behaving Badly: Anti-social Behaviour, Property Rights and Exclusion in England and Australia' (2005) 5 Macquarie Law Journal 149–176.

8 See for more examples: M. Vols, 'Neighbors from hell: problem-solving and housing laws in the Netherlands' (2014) 7 The Arizona Summit Law Review.

9 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' (2012) 4 Human Rights Law Review 787; P. Kenna & D. Gailiute, 'Growing coordination in housing rights jurisprudence in Europe?' (2013) 6 European Human Rights Law Review 606.

10 See for the distinction between negative and positive obligations in general: H. Shue, *Basic rights: subsistence, affluence, and U.S. foreign policy* (Princeton University Press, Princeton 1980); J. Akandji-Kombe, *Positive obligations under the European Convention on Human Rights* (Council of Europe, Strasbourg 2007); P. Kenna, 'Housing Rights: positive duties and enforceable rights at the European Court of Human Rights' (2008) 2 European Human Rights Law Review 193–208.

landlords should, in general, abstain from action that interferes in the private life of tenants and should, in principle, not evict them.[11] Third, a positive obligation stems from the rights of the victims of the neighbour nuisance: landlords may have to intervene and help the victims of the nuisance and take action against the neighbours that cause nuisance.[12]

This paper analyses the way in which Swiss, German and Dutch law deal with these conflicting obligations in case of addressing neighbour nuisance. The following questions are addressed: 1) If tenants are victims of neighbour nuisance can the suffering tenants legally oblige their landlord to comply with his/her positive obligation that arise from the tenants' rights and, consequently, tackle the nuisance? 2) If a tenant causes neighbour nuisance, could that behaviour eventually result in the eviction of the problem tenant? 3) In the case a landlord wishes to evict the nuisance tenant, which substantive and procedural legal requirements protect the tenants from the termination of the tenancy agreement and/or eviction?

In order to answer these questions, we will conduct a micro-comparison and apply the functional comparative analysis method, which is one of the 'best-known working tools in comparative law'.[13] According to this method, law responds to society's needs and is created for the purpose of solving human problems.[14] We will describe, juxtapose and identify differences and similarities in the way landlords deal with neighbour nuisance in different legal systems.[15] Furthermore, the functional comparative analysis method requires a concrete social problem as a starting block for the research.[16] In this paper we focus on a concrete societal problem: nuisance caused by 'those unrelated individuals who

11 See C.U. Schmid & J.R. 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); M. Vols, M. Kiehl & J. Sidoli del Ceno, 'Human Rights and Protection against Eviction in Anti-social Behaviour Cases in the Netherlands and Germany' (2015) 2 European Journal of Comparative Law and Governance 156–181.

12 S. Bright & C. Bakalis, 'Anti-social behaviour: local authority responsibility and the voice of the victim' (2003) 2 The Cambridge Law Journal 305–334; J.G. Brouwer & A.E. Schilder, 'De rechten van anderen en de Grondwet' in T. Barkhuysen (ed.), *Geschakeld recht* (Kluwer, Deventer 2009); M. Vols, *Woonoverlast en het recht op priveleven* (Boom Juridische uitgevers, Den Haag 2013).

13 See E. Örücü, 'Developing Comparative law', in E. Örücü & D. Nelken (eds.), *Comparative law. A Handbook* (Hart Publishing, Oxford 2007) 51.

14 See *Örücü* (n 13) 51.

15 See *Örücü* (n 13) 49.

16 See *Örücü* (n 13) 51.

live in the close proximity of each other', also known as neighbours.[17] According to Paquin & Cambrill 'annoyance and conflict between neighbors can diminish individuals' sense of security in the home and compromise their control over their environment'.[18]

The concept of neighbour nuisance is hard to define, because it is a 'contested concept'.[19] Nonetheless, Paquin & Cambrill distinguish twelve specific types of neighbour annoyances: neighbour's dog barking, neighbour's dog or cat messing in yard, neighbour's loud music, arguing neighbours, leaving trash on sidewalks or property, neighbours trees in the way, verbally abusive neighbours, physically abusive neighbours, neighbour's noisy children, children damaging property, neighbour involved in criminal activity, and neighbour parking in the way.[20] Furthermore, the concept of neighbour nuisance is closely connected to another contested concept, namely housing-related anti-social behaviour. Anti-social behaviour 'unreasonably interferes with other people's rights to use and enjoyment of their home and community'.[21] While a variety of definitions of the concept of anti-social behaviour have been suggested, this paper will use the definition suggested by Millie who saw it as behaviour that causes harassment, alarm of distress to individuals not of the same household as the perpetrator. The behaviour requires interventions from the relevant authorities, but criminal prosecution and punishment may be inappropriate because the individual components of the behaviour are not prohibited by the criminal law or in isolation constitute relatively minor offences.[22] Neighbour nuisance is a type of anti-social behaviour, however not the only type (e.g. aggressive begging).[23]

The scope of this paper is limited to Swiss, German and Dutch tenancy law for a number of reasons. First of all, the legal systems of Switzerland, Germany and the Netherlands are comparable. For a comparative analysis the legal systems have alt least share some common characteristics.[24] There is no doubt that several common denominators exists: the three countries are all part of the 'civil law

17 See G.W. Paquin & E. Gambrill, 'The problem with neighbors' (1994) 22 Journal of Community Psychology 21.

18 See *Paquin & E. Gambrill* (n 17) 21.

19 See A. Millie, *Anti-social behaviour* (Open University Press, Maidenhead 2009) 2.

20 See *Paquin & E. Gambrill* (n 17) 25.

21 See E. Burney, *Making people behave. Anti-social behaviour, politics and policy* (Willan Publishing, Cullompton 2009) 8.

22 See *Millie* (n 19) 16–17.

23 Cf. P. Ramsay, 'What is anti-social behaviour?' (2004) Criminal Law Review 908–925.

24 See *Örücü* (n 13) 48. See also M. Siems, *Comparative law* (Cambridge University Press, Cambrigde 2014) 15–16.

tradition',[25] the living conditions and climate are nearly similar and all countries are contracting parties to the European Convention on Human Rights 1950 (ECHR). Moreover, tenancy law plays an important role in the Swiss, Dutch and German society, because a substantial share of the housing stock is rented housing: in Switzerland 57%, in Germany 52% and in the Netherlands over 45%.[26] Nevertheless, the differences between the rental sectors in each country make it interesting to compare the three countries too. Germany and Switzerland have a predominately private rented sector and the Netherlands a public rented sector. Lastly, some research has been conducted to housing-related neighbour nuisance and rights of neighbour nuisance causing tenants and their victims in the Netherlands,[27] Germany[28] and Switzerland,[29] however, no comparative analysis has been made before. Although tenancy law affects the lives of numerous citizens every day, tenancy law 'remains a nearly blank space in the landscape of European private and comparative law'.[30]

The comparative analysis is mainly limited to the use of eviction by landlords to address unruly tenants. We acknowledge that other parties (e.g. the police and the municipality) may be involved in addressing neighbour nuisance and use other instruments than eviction. Besides, neighbours may use other (legal) instruments to address the neighbour nuisance (e.g. mediation or abatement orders based on neighbour law).[31] Nevertheless, we decided to focus on eviction because the use of it has tough consequences for the evictees (i.e. homelessness) and can be characterised as very serious interference with someone's right to respect for

25 See for example H.P. Glenn, *Legal traditions of the world* (4edn, Oxford University Press, Oxford 2010) 165–176.

26 See Eurostat, 'Housing Statistics' http://ec.europa.eu/eurostat/statistics-explained/index.php/Housing_statistics, accessed 2 June 2015.

27 See for example M. Vols, 'Aanpak overlast door private verhuurder', in J.G. Brouwer and A.E. Schilder (eds), *Van een andere orde* (Boom Juridische uitgevers, Den Haag 2014) 159.

28 See U.P. Börstinghaus, 'Verwahrlosung, Lärm und Nachbarstreit im Wohnraummietrecht. Der Umgang mit Beschwerden aus rechtlicher Sicht' (2004) Neue Zeitschrift für Miet- und Wohnungsrecht 48; V. Eick, 'Preventive urban discipline: rent-a-cops and neoliberal localization in Germany' (2006) 33(3) Social Justice 66–84.

29 See for example R. Haefeli & P. Reetz, 'Ansprüche von Mietern und Vermietern bei Störungen durch benachbarte Mieter' (2009) 5 MietRecht Aktuell 153.

30 C.U. Schmid &, J.R. Dinse, 'European dimensions of residential tenancy law' (2013) 9 European Review of Contract Law 204.

31 E.g. A. Peper, F.C.P.P Spierings, W. de Jong, J.R. Blad, C.F.H.M Hogenhuis, C.F.H.M. & V.D. van Altena, *Bemiddelen bij conflicten tussen buren* (Eburon. Delft 1999); J. Gordley (ed), *The development op liabilty between neighbours* (Cambridge University Press, Cambrigde 2010).

the home.[32] Moreover, there are, as yet, no published (comparative) written accounts of the use of eviction in addressing neighbour nuisance in of the three legal systems under scrutiny. This paper attempts to begin to begin to fill that lacuna.

The rest of this paper has been divided into four parts. The first three parts analyse how the conflicting negative and positive obligations that arise from the right to respect for the home are balanced in Swiss, German and Dutch tenancy law. In the fourth and last part, a comparative legal analysis is conducted in order to discover similarities and differences between the three jurisdictions and in order to make an assessment how the different jurisdictions balance the relations between the three parties. This final part presents the conclusions too.

II. Switzerland

In 2012 the Swiss population of approximately 8 million people lived in about 3.5 million houses, whereof nearly 57% were being rented.[33] This makes Switzerland the country with the highest percentage of tenants throughout Europe.[34] The vast majority of all rented dwellings (73%) are owned by private persons, whilst only a small number of landlords fulfil a public task.[35]

1. The landlord's obligation to tackle neighbour nuisance under Swiss law

The Swiss Code of Obligations (*Obligationenrecht*, hereafter: OR) contains a number of fundamental and complex rules regarding tenants.[36] Firstly, under Article 257 f (1) OR, tenants are obliged to use the rented premise with care (*sorgfältiger Gebrauch*). They have to use the rented premise prudently in order to ensure its substance. Moreover, Article 259 OR obliges tenants to avoid damages done to the

32 J. Hohmann, *The right to housing. Law, concepts, possibilities* (Hart Publishing, Oxford 2014) 68–71.

33 See Statistics Switzerland <www.bfs.admin.ch/bfs/portal/de/index/themen/09/03/blank/key/bewohnertypen/entwicklung.html> accessed 2 June 2015.

34 See <www.statista.com/statistics/246355/home-ownership-rate-in-europe> accessed 2 June 2015.

35 See Statistics Switzerland, <www.bfs.admin.ch/bfs/portal/de/index/themen/09/03/blank/key/wohnungen/eigentuemer.html> accessed 2 June 2015.

36 See P. Wessner, 'Sorgfaltspflichten des Mieters von Wohn- und Geschäftsräumen' (2007) Mietrechtspraxis, 127, 197.

rented premise, by maintaining and cleaning it. Secondly, according to Article 257 f (2) OR, tenants are obliged to take into account the neighbours and other residents who live in the same building *(rücksichtsvoller Gebrauch)*. Under Swiss tenancy law, tenants are not allowed to severely interfere with other tenants' or residents' rights of enjoyment of their rented premises. These important obligations, arising from Article 257 f (1) and (2) OR, are also known as the duty of 'care and consideration' *(Pflicht zur Sorgfalt und Rücksichtnahme)*. Over and beyond these obligations, tenants are obliged to use the rented premise as (contractually) agreed upon *(vertragsgemässer Gebrauch)*.[37] Consequently, causing nuisance by, for example, provoking neighbouring residents,[38] harassing and assaulting neighbours,[39] causing extreme noise nuisance[40] or causing pollution[41] may violate the duty of care and consideration and/or may be qualified as behaviour as not agreed upon.[42] Additionally, tenants are obliged to keep up the good reputation of the house, meaning that, for example, landlords do not have to tolerate criminal activities of tenants.[43] Whenever neighbour nuisance is qualified as behaviour that is not agreed upon, it results in the violation of the right of other residents and neighbours to use their premises as agreed upon.

Moreover, under Article 256 (1) OR, landlords are obliged to keep the rented premise in a condition that is suitable for its intended purpose *(vorausgesetzten Gebrauch)*. In the case of (severe) neighbour nuisance, the nuisance can be qualified a defect *(Mangel)* that interferes with the tenant's right that arises from Article 256 (1) OR since the landlord fails to keep the rented premise in the required *(vorausgesetzten)* condition.[44] For the nuisance to be qualified as a legal

37 See P. Higi, *Züricher Kommentar: Die Miete* (Schulthess Juristische Medien, Zürich 1994) Art. 257 f OR no 9; Bundesgericht 27 February 1997, (1998) I Journal des Tribunaux 295; Bundesgericht 9 January 2006, (2006) Mietrechtspraxis 191, (2006) 20 Droit du bail 20.

38 See for example Bundesgericht 18 June 2002, App no 4C.106/2002.

39 See for example Schlichtungsbehörde Giubiasco 22 December 2005, (2011) 3 Mietrechtspraxis 214.

40 See for example Bundesgericht 4 June 1998, (1998) 3 Mietrechtspraxis 130; Bundesgericht 26 November 2001, (2002) 2 MietRecht Aktuell 59; Cour de justice Genf 18 June 2004, (2011) 3 Mietrechtspraxis 214.

41 See for example Cour de justice Genf 17 May 1999, (2000) 1 Mietrechtspraxis 50 (urinating in the stairwell and throwing trash out of the window); Cour de justice Genf 11 September 2006, (2008) 1 Mietrechtspraxis 26 (causing a stench).

42 See *Higi* (n 37) no 39–42; SVIT-Kommentar (Schulthess Juristische Medien, Zürich 2008) Art. 257 f OR no 26–27.

43 See *Higi* (n 37) no 18; *SVIT-Kommentar* (n 35) no 21. See for an illustrative case regarding drug use: Appellationsgericht Basel-Stadt 11 May 1971, (1972) Basler Juristische Mitteilungen 120.

44 See R. Haefeli & P. Reetz, 'Ansprüche von Mietern und Vermietern bei Störungen durch benachbarte Mieter' (2009) 5 MietRecht Aktuell 153, 159–162.

defect, the inconveniences have to exceed the acceptable level of tolerance.[45] The violation of the duty for care and consideration (Article 257 f (1) and/or (2) OR) by an anti-social tenant, will in general qualify as a defect on the side of the tenants suffering from the nuisance.[46] In the case of a defect, tenants suffering from neighbour nuisance may demand their landlords to address the nuisance. According to Article 259a (1a) OR, tenants suffering from defects are entitled to demand the landlord to remedy the neighbour nuisance within a reasonable period of time *(Beseitigungsanspruch)*. Moreover, under Article 259a (1) OR, tenants suffering from defects have the right to demand the landlord to decrease the rent (1b), to compensate for damages (1c) and to start a legal litigation against a third party (i.e. the nuisance tenant).

In the case that suffering tenants have another landlord as the nuisance tenant, landlords are not entitled to apply tenancy law instruments to tackle the nuisance. After all, there is no contractual relationship between the landlord and the nuisance tenant or this tenant's landlord. However, according to Article 679 and 684 Swiss Civil Code (*Zivilgesetzbuch*, hereafter: ZGB), landlords of nuisance tenants are liable for excessive emissions of their tenants, i.e. if they do not ensure that their tenants take their neighbours into consideration (Article 257 f (2) OR).[47] Consequently, landlords of suffering tenants are entitled to act against the liable owner of the neighbouring property, by demanding the nuisance to stop.[48]

The above shows that Swiss law contains numerous obligations for tenants in order to maintain the rented premise and to keep the peace between neighbours. Moreover, it provides a chain of obligations and rights for tenants and landlord. Violation of obligations by tenants may result in a positive obligation for landlords to act against nuisance tenants or their landlords. One possible instrument to fight nuisance under Swiss law is the eviction of tenants causing neighbour nuisance by their landlords. However, before tenants can be evicted in Switzerland, the tenancy agreement needs to be terminated first.

45 See A. Hensch, 'Streitigkeiten zwischen Mietern', (2013) 7 Aktuelle Juristische Praxis 985, 993.
46 See *Hensch* (n 45) 994.
47 See Bundesgericht 23 February 1978, Entscheidungen des Schweizerischen Bundesgericht 104 II 15.
48 See *Haefeli & Reetz* (n 29) 153.

2. Tackling neighbour nuisance and protection of tenants under Swiss law

If landlords wish to terminate the tenancy agreement because of the neighbour nuisance, two types of termination can be distinguished in Swiss tenancy law: the ordinary termination *(ordentliche Kündigung)* and the extraordinary termination *(ausserordentliche Kündigung)*. In principle, the ordinary termination procedure does not require landlords to state a reason for the termination. The termination comes into effect if all the formal requirements are met. The most important formal requirement is giving a statutory notice period (Article 266a OR), which is three months for tenancy of residential space (Article 266c OR).

The extraordinary termination procedure requires the existence of an extraordinary reason *(wichtiger Grund)* for the termination to be justified. With regard to neighbour nuisance, this extraordinary reason is related to the above-mentioned duty of care and consideration. According to Article 257 f (3) OR, landlords are entitled to terminate the tenancy agreement if tenants violate their obligations that stem from Article 257 f OR and, subsequently, the continuation of the tenancy agreement cannot reasonable be required by the landlord or other residents *(unzumutbare Vertragsfortzetzung)*. With regard to this criterion, an objective and equitable assessment has to be made in which all circumstances have to be taken into account: e.g. the duration, frequency, intensity and gravity of the neighbour nuisance, the conduct of both parties, the standards of decency and the contractual agreements.[49] Furthermore, the landlord must have issued a warning notice before; the period between warning notice and notice of termination is a decisive factor for the question whether or not the continuation of the tenancy agreement is reasonable.[50] Over and beyond that, the extraordinary termination is only justified in the case tenants severely violate their obligations that arise from their duty of care and consideration.[51]

49 See *Higi* (n 37) no 59–61; *Hensch* (n 38) 989. For a comprehensive discussion of case law and the doctrine of the Swiss courts, see: A. Maag, 'Die Bundesgerichtspraxis zur ausserordentlichen Kündigung nach Art. 257 f OR bei Vertragsverletzungen (2006) 4 MietRecht Aktuell 127; *SVIT-Kommentar* (n 35) 59; A. Koller, 'Ausserordentliche Kündigung der Wohnungs- und Geschäftsmiete wegen vertragswidrigen Verhaltens des Mieters – Ungeschriebene Kündigungstatbestände und Rechtsfolgen einer ausserordentlichen Kündigung' (2010) Aktuelle Juristische Praxis 845; U. Hullinger, 'Kündigung aus wichtigen Gründen, Überblick über Lehre und Rechtsprechung' (2011) 1 MietRecht Aktuell 1.

50 See Bundesgericht 8 August 2001, App no 4C.118/2001; Bundesgericht 26 November 2001, (2002) 2 MietRecht Aktuell 59.

51 See Bundesgericht 18 February 2008, (2008) 1 MietRecht Aktuell 30.

In the extraordinary termination procedure, landlords still have to observe a statutory notice period of at least thirty days to the end of the month (Article 257 f (3) OR). However, no statutory notice period has to be observed in the case that tenants violate deliberately and severely the above-mentioned obligations.[52] In the case the landlord violates the requirement of the statutory notice period, the legal effects of the termination are postponed until the next possible termination date (Article 266a (2) OR).

After the termination of the tenancy agreement, tenants have to vacate the rented premise (Article 267 and 267a OR). In the case they do not vacate the premise, landlords have to request the court to issue an eviction order. In that case the court will assess whether the termination of the tenancy agreement meets all the above mentioned substantive and formal requirements. If that is the case, the court will issue an eviction order.

Nonetheless, before landlords can go to court, they are obliged to try to settle the dispute with their tenants in front of a joint conciliation board *(Schlichtungsbehörde)*. According to Article 197 of the Swiss Civil Procedure Code *(Zivilprozessordnung*, hereafter: ZPO), all disputes will, in principle, in the first instance be settled by the joint conciliation board. It has to make an attempt to conciliate a dispute between parties. The proceedings at the joint conciliation board are free of formal requirements and free of charge. Its goal is to achieve a friendly settlement between the parties. If the parties do not settle the conflict amicably, the joint conciliation board has the discretionary power to propose a judgement between tenant and landlord *(Urteilsvorschlag)*. If both parties do not refuse the proposal, the settlement becomes legally binding. In the case that the proposal is refused, there will be no settlement and the board will permit plaintiffs to bring the dispute before court.[53] Although it is not clear how many cases concerned a breach of contract by tenants, the joint conciliation board processes a considerable number of cases. In the second half of 2013, it dealt with 14.407 cases, whereof 19.5% concerned the termination of the tenancy agreement.

However, if the facts are undisputed or immediately proven and the legal situation is clear, landlords are, under Article 257 (1) ZPO, entitled to initiate summary proceedings *(summarisches Verfahren)* directly, for example in the case that tenants do not challenge the termination nor request the extension of the tenancy agreement. In that case the joint conciliation board does not have to be involved in the proceedings. If the court rules that the eviction is legitimate, it will

52 In that case landlords are likewise not required to issue a warning notice and are not required to prove that the continuation of the tenancy agreement would be unreasonable. See *Hensch* (n 45) 989–990.

53 See P. Winter, 'Anträge an die Schlichtungsbehörde' (2013) Mietrechtspraxis 177.

set a deadline for the eviction and it is entitled to order the police to vacate the premise.

In principle, landlords are not required to state a reason for the termination of the tenancy agreement and the termination is still valid if no reason is stated.[54] However, in the case of an extraordinary termination, landlords have to make clear that they give an extraordinary notice of termination and they have to indicate the circumstances that resulted in the termination.[55] Over and beyond that, tenants always have the right to demand their landlord to state the reason that led to the termination (Article 271 (2) OR). The reason of the termination is of great importance in the case that tenants want to challenge the termination of the tenancy agreement *(Anfechtung)*. In that case, the court will assess the landlord's interest in the termination, which is embodied in the reason for termination. Consequently, under Swiss law the landlord eventually has to state a reason for the termination, because in the case of a groundless termination, the termination is abusive *(rechtsmissbräuchlich)*, and therefore challengeable.[56] For the termination to be legitimate, the reason stated has to be clear, valid and complete.[57]

To challenge the notice of termination, tenants have to prove that the termination is abusive. Under Article 271 (1) OR, every notice of termination is challengeable if it violates the principles that are laid down in Article 2 ZGB. This provision incorporates two legal principles: the principle of good faith *(Treu und Glauben)* and the principle that abuse of rights is not legally protected *(Rechtsmissbrauchsverbot)*. Consequently, an assessment has to be made with regard to these principles. Generally, a violation of Article 271 OR becomes more obvious when landlords terminate the tenancy agreement without any interest that is worth being protected, for example, in the case landlords take revenge on tenants, or if the landlord's behaviour is in contradiction to his/her own previous conduct.[58] Moreover, exemplary reasons of abusive termination by landlords are listed in Article 271a (1) OR. The most relevant reasons are the criteria under subparagraph d and e of this provision. Article 271a (1) sub d OR contains a statutory restriction on notice for landlords during joint conciliation or litigation

54 See Bundesgericht 4 May 2002, App no 4C.400/2001; Bundesgericht 27 August 2004, (2004) 4 MietRecht Aktuell 135.

55 See Bundesgericht 3 October 1995, (1996) 5 MietRecht Aktuell 228.

56 See Bundesgericht 27 August 2004, App no 4C.170/2004. If the landlord is delayed in stating the reason, a justification for this delay has to be given. See Bundesgericht 3 August 2004, App no 4C.167/2004.

57 See Bundesgericht 13 April 1999, Entscheidungen des Schweizerischen Bundesgericht 123 II 231.

58 SVIT-Kommentar (Schulthess Juristische Medien, Zürich 2008) Art. 271 OR no 20.

proceedings. Article 271a (1) sub e OR contains a statutory restriction on notice for landlords during a period of three years after the conclusion of a court- or joint conciliation proceeding in which the landlord lost the case or reached a settlement. However, in the case of neighbour nuisance that results in a serious violation of the duty of care and consideration, the protection offered by this provision is not fully applicable: the criteria (sub d and e) of Article 271a (1) OR do not apply (Article 271a (3) sub c OR). Consequently, landlords do not have to take the three-year barrier into account and they are entitled by statute to terminate the tenancy agreement during joint conciliation- and litigation proceedings.

Articles 271 and 271a OR do not prescribe an explicit balance of interests of the tenant and landlord. However, an assessment has to be made whether the execution of the termination corresponds to the landlords' legitimate interest.[59] The possibility to challenge a termination is restricted to a 30-days period after receiving the notice of termination (Article 273 (1) OR). Until the court has decided, the termination has no legal effects and landlords cannot evict tenants during this time. However, if a tenant challenges the termination, the landlord is not restrained from requesting an eviction order. This speeds up the eviction procedure without interfering with the rights that protect tenants against the termination of the tenancy agreement. After all, the court still has to assess whether the termination of the tenancy agreement meets all the requirements and eviction is not allowed within this timeframe. Consequently, an 'early' eviction order does not lead to immediate eviction. It gives landlords the right to evict directly after the court has ruled that the termination was valid. If the termination is revoked, the above-mentioned time-barrier is applicable (Article 271a (1 sub e) OR), which means that new terminations are specifically challengeable within the three-year period. If tenants do not challenge the ordinary termination within the 30-day period, the termination is valid, even if it is contrary to the principle of good faith.[60]

To give tenants extra time to find a new home, Article 272 OR gives tenants the possibility to extend the tenancy agreement *(Erstreckung)*, if a valid termination would cause a hardship *(Härte)* to them or their family.[61] If the court, after examining the tenant's claim, acknowledges the existence of a hardship, this has to be weighed up against the landlords' interests. According to Article 272 (2) OR,

59 See Bundesgericht 8 May 1998, (1999) 2 MietRecht Aktuell 46; *SVIT-Kommentar* (n 51) no 729.

60 See Bundesgericht 27 February 2007, Entscheidungen des Schweizerischen Bundesgericht 133 III 175.

61 See Bundesgericht 19 August 1976, Entscheidungen des Schweizerischen Bundesgericht 102 II 254; Bundesgericht 19 September 1990, Entscheidungen des Schweizerischen Bundesgericht 116 II 446; B. Roher, 'Die Erstreckung des Mietverhältnisses' (2008) 5 MietRecht Aktuell 185.

specific aspects have to be considered when weighing the interests: e.g. the duration of the tenancy agreement (sub b), the personal, family and financial circumstances of tenants and the tenants' behaviour (sub c) and the characteristics of the local housing market (sub e). The possibility to request an extension of the tenancy agreement is restricted to a 30-days period after receiving the notice of termination (Article 273 (2) OR). However, in case tenants challenged the termination unsuccessfully, the court has to examine the extension *ex officio* (Article 273 (5) OR). The court is entitled to grant two extensions maximum, whilst the maximum duration of extension is four years (Article 272b (1) OR). During the first extension tenants have to make real efforts to find new residential space, which must be taken into the court's consideration when granting an extension term (Article 272 (3) OR). In the case of neighbour nuisance that results in a serious violation of the duty of care and consideration, however, the protection offered by this provision is not applicable. According to Article 272a sub b OR, tenants cannot request the extension of the tenancy agreement in this type of cases.

III. Germany

The nearly 80 million people that live in the Federal Republic of Germany reside in approximately 41 million houses. The German housing market can be characterised as a private rental orientated market. It features a significant share of rental dwellings (52%), whereof private persons constitute as the main group of landlords (67%).[62] The German rental market is very free market orientated, due to the fact that, in 2010, 92% of the rented dwellings belong to landlords without a public task.[63] These figures emphasize the important role of tenure security provisions, as they limit the landlord's freedom of contract in order to ensure the importance of rented residential space as the centre of the human existence.[64]

62 See Statistics Germany, 'Zensus 2011: Gebäude und Wohnungen sowie Wohnverhältnisse der Haushalte Bundesrepublik Deutschland am 9. Mai 2011' (Wiesbaden 2013), no 6 and 14 <www.destatis.de/DE/PresseService/Presse/Pressekonferenzen/2013/Zensus2011/gwz_zensus2011.pdf?__blob=publicationFile> accessed 2 June 2015.

63 See J. Cornelius and J. Rzeznik, 'National report for Germany' in TENLAW, *Tenancy Law and Housing Policy in Multi-level Europe 2014*, 14 <www.tenlaw.uni-bremen.de/reports.html> accessed 2 June 2015.

64 See M. Häublein and Lehmann-Richter, 'Mieterschutz in der Bundesrepublik Deutschland' (2009) 22 Wohnrechtliche Blätter 361; M. Häublein, *Münchener Kommentar zum BGB* (C. H. Beck, München 2012), Vorbemerkung zu § 535, no 48.

1. The landlord's obligation to tackle neighbour nuisance under German law

The German Civil Code *(Bürgerliches Gesetzbuch*, hereafter: BGB) lays down both positive and negative obligations for tenants as well as landlords. They are mainly stipulated in Article 535 and 541 BGB. Firstly, under Article 541 BGB, tenants are obliged to use the rented premise as agreed upon *(vertragsgemäßer Gebrauch)*. Secondly, under Article 535 BGB landlords are obliged to keep the rented premise in the state as it is (contractually) agreed upon. Causing neighbour nuisance may, under circumstances, qualify as using the rented premise as not agreed upon *(vertragswidriger Gebrauch)*.[65] Consequently, under German tenancy law, causing neighbour nuisance may result in the violation of the right of enjoyment of the rented premises of tenants suffering from neighbour nuisance. In that case, the rented premise of the tenants suffering from neighbour nuisance does not exist in a state that is agreed upon *(vertragswidriger Zustand)* and, moreover, the nuisance caused can be qualified as a defect *(Mangel)*. In the case of a defect the tenant is entitled to demand the fulfilment of the landlord's obligation, arising from Article 535 BGB and the provisions regarding defects (Article 536 and further BGB).[66] As a result, a positive obligation for landlords exists to address the tenants causing the nuisance by demanding the fulfilment of the tenancy agreement *(Unterlassungsklage)* or even the eviction of the rented premise.[67] In other words: landlords have to protect other tenants from any kind of neighbour nuisance that violates their rights to the contractual use *(vertragsgemäßer Gebrauch)* of the rented premises.

In the case that nuisance tenants do not have the same landlord as the suffering tenants, landlords of suffering tenants cannot use instruments based on tenancy law to address the neighbour nuisance, because there is no contractual relationship between the landlord of the suffering tenants and nuisance tenants. However, nuisance produced by a neighbour can be qualified as a defect in case that the nuisance is of such a significant level that it reduces the suitability of the

65 See H.R. Horst, 'Grenzen des zulässigen Wohngebrauchs' (1998) Neue Zeitschrift für Miet- und Wohnungsrecht 647; H.J. Bieber, *Münchener Kommentar zum BGB* (6edition, C. H. Beck, München 2012), § 541, no 9; D. Ehlert, *Beck'scher Online-Kommentar BGB* (online 2012), § 541, no 4–5.

66 See U.P. Börstinghaus, 'Verwahrlosung, Lärm und Nachbarstreit im Wohnraummietrecht. Der Umgang mit Beschwerden aus rechtlicher Sicht' (2004) Neue Zeitschrift für Miet- und Wohnungsrecht 48.

67 See Landgericht Hamburg 21 October 1986, (1987) Wohnungswirtschaft und Mietrecht 218; Bundesgerichtshof 10 December 1986, (1987) Neue Juristische Wochenschrift 831; Amtsgericht Bad Segeberg 5 October 1999, (2000) Wohnungswirtschaft und Mietrecht 601.

dwelling as it was contractually agreed upon.[68] In that case, landlords of suffering tenants are entitled to act against the nuisance neighbour, based on their property rights as owners of the dwelling the suffering tenants live in. According to Article 906 BGB, owners are entitled to prohibit emissions from neighbouring properties if the substantive threshold is exceeded, which, in the case of neighbour nuisance, will often be the case if the rent of suffering tenants is reduced due to the nuisance.[69]

2. Tackling neighbour nuisance and protection of tenants under German law

If landlords wish to terminate the tenancy agreement because of neighbour nuisance, German law distinguishes two methods of termination: the ordinary termination *(ordentliche Kündigung)* and the extraordinary termination *(außerordentliche Kündigung)*.

With regard to the ordinary termination of a tenancy agreement, it is required for landlords to have a justified interest *(berechtigtes Interesse)* in the termination. According to Article 573 (2) BGB, a justified interest exists particularly in case tenants breach culpably and non-insignificantly *(nicht unerheblich)* their contractual duties. The exact meaning of this criterion remains unclear and is assessed by courts on a case-by-case basis. According to the German legislator, a breach of contract does not have to be significant (as it must be in case of an extraordinary termination) to be characterised as non-insignificantly; minor breaches of contractual duties can justify the termination of a tenancy agreement, as long as they are not insignificant.[70] With regard to the significance of the contractual breach, the seriousness of all contractual breaches[71] and the possibility of reoccurrence[72] are determinative factors. Furthermore, in the German ordinary termination pro-

68 See Bayerisches Oberstes Landesgericht 04 February 1988, (1987) Neue Juristische Wochenschrift 1950.

69 See *Börstinghaus* (n 66) II. 2.; Bayerisches Oberstes Landesgericht 04 February 1988, (1987) Neue Juristische Wochenschrift 1950.

70 See Deutscher Bundestag, 6. Wahlperiode. Drucksache VI/1549, 8.

71 See for example Landgericht Berlin, 7 May 1999, (1999) BeckRS 30988071 (multiple minor breaches serious enough); Kammergericht Berlin, 18 October 2004, (2005) Neue Zeitschrift für Miet- und Wohnungsrecht 524 (one minor breach not serious enough).

72 See for cases that emphasize the importance of the possibility of reoccurrence of the neighbour nuisance, for example Amtsgericht Gelsenkirchen, 20 September 1994, (1994) BeckRS 11623; Amtsgericht Berlin-Pankow/Weißensee, 22 October 2009, (2010) BeckRS 30713; Amtsgericht Berlin-Wedding, 29 September 2010, (2010) BeckRS 28205.

cedure landlords are not required to issue a warning notice.[73] Article 573c BGB, however, compels landlords to observe a statutory notice period of three months, which will be extended by three months when tenants have rented the premise for five years and by another three months if tenants have rented the premise for eight years or more.

According to Article 569 (2) BGB, landlords are allowed to terminate the tenancy agreement immediately if a tenant breaches the domestic peace permanently *(nachhaltige Störung des Hausfriedens)* 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 from the landlord. Domestic peace *(Hausfrieden)* refers to the obligation of residents to take each other into account in order to make it possible to live together in one building *(Gebot der gegenseitiger Rücksichtnahme)*.[74]

Because the extraordinary termination of a tenancy agreement requires a compelling reason *(wichtiger Grund)*, the termination grounds in this procedure are very strict: the *Gebot der gegenseitiger Rücksichtnahme* has to be breached seriously and continually and there should be a possibility of the breach reoccurring.[75] On the other hand, in the case of an extraordinary termination of the tenancy agreement landlords do not have to observe a statutory notice period. According to Article 543 (3) BGB, landlords are required to issue a warning notice in which they describe the neighbour nuisance in detail and in which they make clear that they will take action if the nuisance does not cease.[76]

After the legal termination of the tenancy agreement, tenants have to vacate the premise. If they do not do so, landlords have to request the local court *(Amtsgericht)* to issue an eviction order. The court will then examine the validity of the termination and, if it rules that the termination is valid, the court will most likely issue an eviction order. If necessary, the court will order law enforcement to

73 See Bundesgerichtshof 28 November 2007, (2008) Neue Juristische Wochenschrift 508.

74 See Kammergericht Berlin, 1 October 2003, (2003) BeckRS 30326902. Article 569 (2) BGB is, however, only applicable in cases in which a tenant causes nuisance to residents of the same building. See Amtsgericht Merzig 5 October 2005, App no 23 C 1282/04; Amtsgericht Berlin-Lichtenberg 15 April 2009, (2009) BeckRS 21510.

75 See Oberlandesgericht Düsseldorf, 29 November 2007, App no I-10 U 86/07.

76 No warning notice is required in cases where it would clearly have no effect or in cases where the nuisance is of a very serious degree, for example in the case of a criminal offence. See for example Amtsgericht Pinneberg 29 August 2002, (2003) Wohnungseigentum 32 (drug dealing); Amtsgericht Karlsruhe 19 December 2012, App no 6 C 387/12 (assault and battery).

vacate the premise. Under German law, landlords are not allowed to evict the premise themselves.[77]

In the case of an ordinary termination of a tenancy agreement, tenants are entitled to put forward a specific defence *(Widerspruchsrecht)*. This statutory defence right allows them, according to Article 574 (1) BGB, to challenge the termination of the tenancy agreement if the termination causes an unjustifiable 'social' hardship *(soziale Härte)*. After the tenant advances this defence, the court should balance the landlord's and tenant's interests.[78] If the court decides in tenant's favour, the tenancy agreement can be extended for a reasonable period of time or, according to Article 574a (2) BGB, for an indefinite period of time if it is uncertain whether the hardship is expected to cease. Case law demonstrates that successful arguments may, for example, concern tenants' personal circumstances, or, as specifically stated in Article 574 (2), the impossibility to find a new and adequate home.[79]

In the case of an extraordinary termination, or an ordinary termination that meets the conditions that would justify the extraordinary termination, no specific statutory defence right is applicable. However, this is negligible due to the strict substantive requirements of Article 569 (2) BGB. For an extraordinary termination it is required that the permanent breach of domestic peace is of such a degree that continuing the tenancy agreement cannot reasonably be required of the landlord, under the given circumstances and after balancing all the landlords' and tenants' interests. Consequently, the court has to balance the interests of both tenant and landlord too. When balancing the interests, a higher level of tolerance will be required from landlords and other residents with regard to, for example, neighbour nuisance caused by children, tenants that have mental health issues or elderly people.[80] However, if the neighbour nuisance is ongoing

77 See Bundesgerichtshof 14 July 2010, (2010) Fachdienst Miet- und Wohnungseigentumsrecht 308254.

78 In the case that tenants and landlords cannot settle amicably the court is, according to Article 574a (2) BGB, entitled 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.

79 See for example Landgericht Stuttgart 6 December 1990, (1990) BeckRS 07813 (pregnancy); Landgericht Hamburg 19 December 1996, (1997) Neue Juristische Wochenschrift 2761 (disease of partner); Bundesverfassungsgericht 14 April 1998, (1998) Neue Zeitschrift für Miet- und Wohnungsrecht 431 (risk of suicide).

80 See for example Landgericht Bad Kreuznach 3 July 2001, (2001) BeckRS 309 (nuisance caused by child); Bundesgerichtshof 8 December 2004, (2005) Neue Zeitschrift für Miet- und Wohnungsrecht 300 (mentally ill tenant); Amtsgericht München 18 October 2006, (2006) BeckRS 18182 (old tenant in need of care).

and serious enough, the interests of landlords and other residents will usually prevail.[81]

If a German court has to decide whether or not to issue an eviction order, it has to assess the legality of the termination of the tenancy agreement. Generally, the court will issue the eviction order if it considers the termination legitimate. However, according to Article 721 German Civil Procedural Code (*Zivilprozessordnung*, hereafter: ZPO), the court is entitled to allow tenants a reasonable eviction period of a maximum of one year, in which they should find adequate alternative housing. Again, in determining whether or not tenants have a right for such an eviction period, the court will balance the tenant's and landlord's interests and will take all the circumstances into account.[82]

Lastly, under Article 765a ZPO tenants 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 due to very special circumstances. This ground is interpreted restrictively and will be applicable rarely,[83] for example in case of suicidal tenants[84] or in case the eviction will result in homelessness of (disabled) children.[85]

IV. The Netherlands

In 2012 the Dutch population (nearly 17 million people) lived in 7.3 million homes. Compared with most European countries, the Netherlands have a high percentage of rented housing. Over 45% of all the premises were rented from housing associations (*woningcorporaties*) and private landlords. The non-profit housing associations are powerful players and own a big percentage of the total housing stock: in 2012 they owned 31% of all the houses in the Netherlands.[86]

81 See for example Amtsgericht Bonn 11 December 2008, (2009) BeckRS 87329 (mentally ill son); Amtsgericht Berlin-Schöneberg 16 June 2009, (2010) BeckRS 00150 (compulsive hoarder); Amtsgericht Berlin-Wedding 25 June 2013, (2013) BeckRS 15036 (old mentally ill tenant).

82 See for example Amtsgericht München 17 October 2005, App no 461 C 18919/05 (the gravity of the nuisance); Amtsgericht Köln 21 October 2010, App no 210 C 398/09 (tenant's conduct after the notice of termination); Amtsgericht Heidelberg 12 November 2010, (20122) BeckRS 09687 (tenant's mental/physical impairments).

83 See Bundesgerichtshof 10 December 2009, (2010) Neue Juristische Wochenschrift 1002.

84 See Bundesgerichtshof 30 September 2010, (2010) BeckRS 27194.

85 See Landgericht Magdeburg 17 May 1995, (1995) BeckRS 3094661.

86 See 'Woningvoorraad naar eigendom', Statistics Netherlands <www.statline.cbs.nl> accessed 2 June 2015.

Although the housing associations are considered to be private enterprises,[87] they are still statutory obliged to provide affordable housing to the public and are regulated by government. The Government Regulation on the Social Housing Sector (*Besluit Beheer Sociale Huursector*) obliges the housing associations to provide housing to people with a relatively low annual income (up to € 34.911 in 2015) and vulnerable persons like elderly and/or handicapped people. Moreover, Article 12(a) of the Government Regulation on the Social Housing Sector compels housing associations to improve the quality of life in the neighbourhoods in which they are active. Because of this statutory obligation, housing associations work together with other agencies (e.g. local government and police authorities) to address neighbour nuisance and other housing-related anti-social behaviour.[88]

1. The landlord's obligation to tackle neighbour nuisance under Dutch law

As in Swiss and German law, the Dutch Civil Code *(Burgerlijk Wetboek*, hereafter: BW) contains both positive as negative obligations for landlords and tenants. On the one hand, under Articles 7:213 and 7:214 BW, tenants have to act as prudent tenants *(goed huurder)* with regard to the rented premise and use this premise as agreed upon. Based on established case law, causing neighbour nuisance may be in conflict with the obligations that stem from Articles 7:213 and 7:214 BW.[89] For example, tenants breach their statutory obligations if they cause noise nuisance,[90] are involved in criminal activity,[91] are verbally/physically abusive towards neighbours[92] or use their home for compulsive hoarding.[93]

On the other hand, under Articles 7:203 and 7:204 BW landlords are obliged to keep the rented premise in the state as it is contractually agreed upon and have to make sure that it is free of any defects. In the case *Van Gent v. Wijnands* the Dutch Supreme Court (*Hoge Raad*) made clear that suffering from nuisance

87 See W. Beekers, *Het bewoonbare land. Geschiedenis van de volkshuisvestingsbeweging in Nederland* (Boom, Amsterdam 2012).

88 See for example M. Vols, 'Aanpak overlast door private verhuurder', in J.G. Brouwer and A.E. Schilder (eds), *Van een andere orde* (Boom Juridische uitgevers, Den Haag 2014) 159.

89 See 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 (2015) 7(2) International Journal of Law in the Built Environment.

90 E.g. Rechtbank Rotterdam 26 March 2010, ECLI:NL:RBROT:2010:BM0967.

91 E.g. Rechtbank Breda 29 February 2012, ECLI:NL:RBBRE:2012:BV8562.

92 E.g. Rechtbank Groningen 17 July 2012, ECLI:NL:RBGRO:2009:BJ3829.

93 E.g. Rechtbank Arnhem 30 August 2011, ECLI:NL:RBARN:2011:BW4421.

caused by a neighbour that is a tenant of the same landlord qualifies as a defect within the meaning of Article 7:204 (2) BW. According to the Supreme Court, reasonableness and fairness (*redelijkheid en billijkheid*) imply that the landlord is legally obliged to do whatever is legally possible to tackle the neighbour nuisance.[94] In the case that the neighbours suffering from the nuisance do not rent from the same landlord or are owner-occupiers, the nuisance does not qualify as a defect within the meaning of Article 7:204 (2) BW. However, in *Van Gent v. Wijnands* the Supreme Court made clear that generally accepted standards (*hetgeen in het maatschappelijk verkeer betamelijk is*) oblige landlords to address neighbour nuisance caused by tenants even if the suffering neighbours are not the landlord's tenant.[95] If the landlord refuses to address the nuisance, this will be an unlawful act and Article 6:162 BW obliges the landlord to compensate damages.[96]

Consequently, Dutch landlords do have a positive obligation to act against tenants that cause neighbour nuisance. There is extensive case law on this subject: Dutch tenants are successful in forcing landlords to address tenants that cause nuisance.[97] According to the Dutch Supreme Court, the termination of the tenancy agreement and the subsequent eviction are 'effective' legal instruments to tackle neighbour nuisance.[98] Consequently, the most common approach to neighbour nuisance in the Netherlands is orientated towards the termination of tenancy agreements and eviction.[99]

2. Tackling neighbour nuisance and protection of tenants under Dutch law

Under Dutch law, landlords have two options to terminate the tenancy agreement in case of neighbour nuisance. Landlords may send tenants a written notice of termination *(opzegging)* or request the court to terminate the tenancy agreement *(ontbinding)*.

94 See Hoge Raad 16 October 1993, (1993) Nederlandse Jurisprudentie 167 *(Van Gent v. Wijnands)* para 3.2.3.

95 See *Hoge Raad 16 October 1993* (n 94) para 3.2.3.

96 See A. De Jonge, *Huurrecht* (Boom Juridische uitgevers, Den Haag 2013) 119–122.

97 E.g. Gerechtshof Leeuwarden 17 August 2005, ECLI:NL:GHLEE:2005:AU1324; Gerechtshof Amsterdam 21 August 2008, ECLI:NL:GHAMS:2008:BG6056; Gerechtshof 's-Gravenhage 23 August 2011, ECLI:NL:GHSGR:2011:BT1712; Gerechtshof 's-Hertogenbosch 06 March 2012, (2012) WR, Tijdschrift voor huurrecht 72 para 4.2.1.

98 See *Hoge Raad 16 October 1993* (n 94) para 3.2.3.

99 See *Vols* (n 88).

According to Article 7:274 (1) BW, landlords may give a notice of termination if tenants do not behave as prudent tenants (*goed huurder*). Neighbour nuisance is, consequently, a ground for giving notice.[100] Still, according to Article 7:271 (5) BW, landlords have to observe a statutory notice period of three months. This period is extended with one month for each year that tenants have resided in the premise, up to a total of six months. After receiving the notice, tenants have six weeks to agree with the termination notice. If they do not agree or do not respond at all, the tenancy agreement is not terminated; it has to be terminated by court and landlords have to request court to do so. However, if the court dismisses landlords' claims, the tenancy agreement will be extended for a fixed or indefinite period of time.[101] If the agreement is extended for an indefinite period of time, a time barrier will be applicable, meaning that landlords are not allowed to give tenants a notice of termination within three years after the court decision.

Because of this time-consuming notice procedure,[102] landlords prefer the termination of the tenancy agreement by court, as laid down in Article 6:265 BW. This general provision states that any failure *(elke tekortkoming)* of tenants in the performance of one of their obligations justifies the termination of the tenancy agreement.[103] To terminate the tenancy agreement, landlords have to prove decisively that the tenant caused neighbour nuisance and, consequently, failed to comply with his or her statutory and/or contractual obligations. In the case that the termination notice procedure is used, the court will issue an eviction order on the basis of Article 7:273 (3) BW if it concludes that tenants did not behave as a prudent tenants. In the case of termination by court, landlords have to request the court to issue an eviction order. If the court terminates the tenancy agreement, it will usually allow tenants a reasonable eviction period (e.g. two weeks). In cases of urgent importance (*spoedeisend belang*), it is possible for landlords to request a summary eviction in summary proceedings *(kort geding)*. The court may issue an eviction order in the case it has reason to believe that the tenancy agreement will be terminated in the substantive proceedings. Nonetheless, the court is not entitled to terminate the tenancy agreement and landlords will have to initiate substantive proceedings to terminate the tenancy agreement.

Although under Dutch law *any* failure of tenants in the performance of one of their obligations justifies the termination of the tenancy agreement, courts are

100 See Rechtbank North Netherlands 17 October 2013, ECLI:NL:RBNNE:2013:6673. See also Rechtbank Utrecht 9 September 2009, ECLI:NL:RBUTR:2009:BJ7364.

101 See Rechtbank Zutphen 6 October 2010, ECLI:NL:RBZUT:2010:BO0453.

102 See A.S. Rueb, H.E.M. Vrolijk and E.E. Wijkerslooth-Vinke, *De huurbepalingen verklaard* (Den Haag, Kluwer 2006) 183; *De Jonge* (n 96) 306–307.

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

entitled to check whether the eviction complies with the principle of proportionality in both the termination notice procedure as well as the procedure in which the tenancy agreement is terminated by court.[104] According to Article 6:265 BW, the court has the discretion not to terminate the tenancy agreement if the tenants' failure to perform their obligations, given its specific nature or minor importance, does not justify it overall. The court may, for example, conclude that the neighbour nuisance does 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 and the subsequent eviction have disproportional consequences (e.g. homelessness) for the evictees.[105] However, according to the Dutch Supreme Court the court may only assess the proportionality of the termination and eviction if tenants advance a proportionality defence.[106]

After a court has issued an eviction order, tenants may initiate an enforcement dispute (*executiegeschil*) and request the court to suspend the enforcement of the eviction order. In practice, Dutch courts exercise restraint in suspending eviction orders.[107] Under Dutch law, a court is only entitled to 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 tenants; or (iii) facts or circumstances have arisen of such nature that the eviction is contrary to the principles of reasonableness and fairness.[108]

V. Comparative analysis

In this last paragraph we will juxtapose and identify differences and similarities in the way landlords deal with neighbour nuisance in the three legal systems under review. The most obvious similarity of Swiss, German and Dutch law is that all systems provide specific statutory provisions that contain obligations for tenants to omit causing neighbour nuisance. For example, under Swiss law (Article 257 f OR), tenants are obliged to comply with their duty of care and

104 See P. Abas, *Huur* (Deventer, Kluwer 2007) 193; A.M. Kloosterman, H.J. Rossel and M. Rozeboom, *Hoofdlijnen in het huurrecht* (Deventer, Kluwer 2014) 245.

105 See *Vols* (n 88).

106 See Hoge Raad 22 October 1999, (1999) Nederlandse Jurisprudentie 179.

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

108 See HR 22 April 1983, (1983) Nederlandse Jurisprudentie 145.

consideration, under German law (Article 569 BGB) should not disturb the domestic peace and under Dutch law (Article 7:213 BW) tenants have to act as prudent tenants. More important, however, is another common denominator: in all the three legal systems tenants have to use the rented premise as agreed upon. Moreover, in all of the jurisdictions, causing severe neighbour nuisance is qualified as behaviour that is not agreed upon and may result in eviction of the unruly tenant.

1. Negative and positive obligations concerning neighbour nuisance

Under Swiss, German and Dutch law, landlords are legally obliged to protect tenants against behaviour that interferes with their right to use the rented premise as agreed upon. In all three jurisdictions tenants that are suffering from neighbour nuisance have the right to demand the elimination of the nuisance by their landlords and their landlords have the obligation to tackle the nuisance. Under all three legal systems, neighbour nuisance can be qualified as a defect and, moreover, as a violation of the intended contractual purpose of the suffering tenant's premises. This entitles the suffering tenant to demand the fulfilment of the landlord's obligations; the obligations to keep the rented premise in the state as agreed upon and to keep it free of defects. Under Swiss law, these obligations arise from Articles 256 (1) and 259a OR. Under German law these obligations arise from Articles 535 and 536 and further BGB and under Dutch laws these obligations arise from Articles 7:203/7:204 and 7:213/7:214 BW. Even in the case that the tenants suffering from neighbour nuisance do not have the same landlords as the tenants causing neighbour nuisance, all three jurisdictions lay upon the landlords positive obligations to act against the nuisance causing tenant.

Furthermore, a number of negative and positive obligations lay upon both tenants and landlords. First, tenants are obliged to abstain from behaviour that can be qualified as neighbour nuisance. They have, however, the right to live without the interference of neighbour nuisance too. Second, landlords have a obligation to tolerate any use of the propert that corresponds to the tenancy agreement. They should, in general, abstain from action that interferes in the tenant's private life and should, in principle, not evict them. However, as stated above, they have a positive obligation to protect the tenant's right and address tenants causing neighbour nuisance. In principle, tenants have the right to live freely in their premises in any form and in any way they want to. However, that right of enjoyment ends where the rights of other tenants begin. Consequently, tenants are not bound to tolerate serious neighbour nuisance and they have, under all three legal systems, the right to request the landlord to address his or

her anti-social tenant. In that case landlords do not only have the *right*, but, moreover, have the *obligation* to tackle the housing-related anti-social behaviour.

2. Neighbour nuisance and termination of tenancy agreements

In all three legal systems, landlords use the instrument of eviction to tackle neighbour nuisance caused by tenants. However, tenants are protected by law against eviction. To evict tenants, the Dutch, German and Swiss jurisdictions all require the landlord to terminate the tenancy agreement before an eviction order can be issued by court.[109] Although neighbour nuisance is a ground for termination of the tenancy agreement and the subsequent eviction in all three legal systems, both the grounds and the proceedings differ. Furthermore, when comparing the three different legal jurisdictions with regard to the termination of the tenancy agreement because of neighbour nuisance, two main types of proceedings can be distinguished: 1) the 'standard proceedings' that takes a considerable amount of time, but has lenient requirements and 2) the 'rapid response proceedings' that offers a more quick fix, but has stricter substantive and procedural requirements.

First, when we compare the substantive requirements (i.e. the statutory termination grounds) regarding the 'standard proceedings', it is clear that the grounds for the termination of the tenancy agreement differ gradually in the three legal jurisdictions. Swiss law does, at first sight, not require a termination ground at all. According to Article 266L OR, the Swiss landlord has to give a written termination notice by using a form that is approved by the local Kanton authority. The termination of a tenancy agreement does, in principle, not require a reason for the termination. If all the formal procedural requirements are met, the termination comes into effect and the landlord is entitled to request the eviction of his/her tenant. Consequently, landlords may, in principle, terminate the tenancy agreement because of neighbour nuisance without the termination having to be tested against any criterion. However, under Swiss law landlords are obliged to bring their dispute in front of a joint conciliation board first. Because the joint conciliation board opeates free of charge and formal requirements, it offers some protection to tenants at the stage before the tenancy agreement will be terminated. A third party will assess the case objectively and will give the tenant the chance to settle the dispute with landlords, without the need to go to court. Under

109 Cf. A.J. Van der Walt, *Property in the margins* (Oxford & Portland: Hart publishing 2009) 82–114.

Dutch law, the termination procedure (termination by notice (7:274 BW) and the termination by court (7:231 BW & 6:265)) only require the existence of *any failure* of the tenant. Consequently, there are some substantive requirements that have to be fulfilled. Compared to Swiss law, the Dutch proceedings do contain a stricter substantive requirement for the termination of the tenancy agreement, but still it is not very strict. Lastly, under German law (Article 573 (2) BGB), the termination of a tenancy agreement is only valid if landlords have a justified interest in the termination of the tenancy agreement. With regard to neighbour nuisance, this justified interest exists in the case of a tenant's *failure that is non-insignificant*. Compared to Swiss and Dutch law, the German termination ground is stricter, because it not only requires the existence of a failure but it also requires the failure to be of a certain grade of severity. Therefore, at this point, it seems that it is the most difficult to terminate the tenancy agreement due to neighbour nuisance in Germany. Under German tenancy law, the neighbour nuisance itself constitutes a failure, however, it does not automatically constitute a failure that is non-insignificant.

Secondly, under all three tenancy law systems proceedings are applicable that can be used in cases in which the neighbour nuisance is so serious that a rapid response is required. Both Swiss and German tenancy law provide special rapid response proceedings. The Swiss extraordinary termination procedure (Article 257 f (2 and 3) OR) and the German extraordinary termination procedure (Article 569 (2) BGB) entitle landlords to rapidly terminate the tenancy agreement in the case of a *compelling reason*. In the case of neighbour nuisance, under Swiss law, a compelling reason exists when tenants severely violate their duty of care and consideration. Under German law, a compelling reason exists when tenants permanently breach the 'domestic peace'. Moreover, both legal systems require the continuation of the tenancy agreement, under the given circumstances, to be unreasonable for landlords and other residents. Consequently, both rapid response proceedings require a severe violation of tenants' obligations and, moreover, they require a certain degree of unreasonableness for the continuation of the tenancy agreement. It is clear that the requirements in both proceedings are formulated very strictly and require that the tenant misbehaved very seriously. In practice, case law in both Germany and Switzerland demonstrates that courts demand strict requirements for the termination to be justified. They, therefore, assess both the interests of tenants and the interests of landlords. Although the strict formulation of the requirements in German and Swiss tenancy law results in a restrictive application of the rapid response proceedings, neighbour nuisance often qualifies as a serious failure that occurs over a long period of time. Therefore, the rapid response proceedings are not an uncommon instrument to tackle neighbour nuisance.

Under Dutch law, there is no special rapid response proceedings in tenancy law. Nevertheless, Dutch landlords are – like in Switzerland – entitled to initiate summary proceedings and request for a summary eviction of the anti-social tenant. To evict Dutch and Swiss tenants in summary proceeding, however, a number of special additional requirements are applicable. Both systems require the case to be of urgent importance. Furthermore, Dutch law requires that the court has reason to believe that the tenancy agreement will be terminated in the substantive proceedings. Under Swiss law the facts have to be so undisputed, immediately proven or clear that the court has, without a doubt, reason to believe that the tenancy agreement will be terminated in the substantive proceedings.

3. Protection against eviction of nuisance neighbours

All three legal systems offer nuisance tenants protection against the eviction. First of all, all three systems require landlords to request court for an eviction order. Landlords are not allowed to evict tenants themselves. Second, the termination grounds analysed above provide some substantive protection to tenants in the legal stage before the actual eviction. In some of the statutory termination grounds a proportionality check or required balancing of interests is embedded. For example, the German ordinary and extraordinary termination procedures and the Swiss extraordinary termination procedure require courts to analyse the seriousness of the neighbour nuisance and to conduct an assessment of interests of tenants and landlord. Third, in all three systems some procedural requirements offer protection to tenants against eviction: under Dutch, German and Swiss law landlords, in principle, need to issue a warning notice before terminating the tenancy agreement and to observe a statutory notice period. However, the need and duration of the observation of a notice period and the issuing of a warning notice depends on a) the type of the proceedings that is being used and b) the seriousness of the nuisance. No or a shorter notice period is required in the case of rapid response proceedings and in the case of severe and/or deliberate neighbour nuisance.

Moreover, when compared, all three jurisdictions offer tenants the opportunity to advance a specific defence right against the termination of a tenancy agreement. Under Swiss law (Articles 271 and 271a OR), tenants have the right to challenge the termination notice and demand landlords to state their reason(s) for terminating the tenancy agreement. When a tenant challenges a termination notice, the court will assess the landlords' interests in the termination. If landlords do not have a legitimate interest in the termination, the termination will be revoked and a time-barrier prohibits landlords to terminate the tenancy agree-

ment within a three-year period. Furthermore, in Switzerland, Article 272 OR gives tenants the right to claim that the termination of the tenancy agreement would cause a hardship. If the tenant advances this specific defence, the court will have to balance the landlord's and tenant's interests. If the tenant's interests prevail, the court will extend the tenancy agreement for the purpose of finding new residential space. Nonetheless, in the case of serious neighbour nuisance, Swiss law offers less protection against the termination, by restricting the scope of the possibility to challenge the termination and by excluding the possibility to extend the termination. Under German law (Article 574 BGB), tenants have the right to challenge the termination of the tenancy agreement if it would cause an unjustifiable hardship. In that case the court has to balance landlords' and tenants' interests and decide if the hardship weighs up against the reason for terminating the tenancy agreement. However, this specific defence does not apply to the extraordinary termination, but only to the ordinary termination procedure. Dutch law entitles tenants to put forward a proportionality defence during the proceedings in which the court assesses whether it will have to terminate the tenancy agreement and evict the tenant or not. Under Article 6:265 BW, the court is entitled not to terminate the tenancy agreement if the tenant's failure in performing his or her obligations, given its specific nature or minor importance, does not justify the termination of the tenancy agreement overall. In the case of such a defence, the court has to make an assessment whether or not the termination itself or its consequences (i.e. the eviction) comply with the proportionality principle.

In the case of rapid response proceedings, Swiss, German and Dutch law (in the case of a summary proceeding) provide less procedural protection for tenants. This, however, is reasonable, because the substantive requirements applicable in rapid response proceedings are stricter. For example, under Swiss and German law, in the case of severe neighbour nuisance, it is required that it cannot be asked from landlords and/or other tenants to bear the nuisance for a very long time. This means that the termination grounds themselves have an embedded proportionality check. In the case that the check leads to the conclusion that the nuisance is of an unbearable degree, the rights of the victims consequently prevail. The same conclusion applies to the Dutch summary proceeding. It has embedded very strict substantive requirements: the case should be of urgent importance and the court has to expect the termination of the tenancy agreement in substantive proceeding.

With regard to the eviction period itself in rapid response cases, there are some differences between the countries under investigation. These differences, however, do not result in unreasonable results for tenants. German law offers the strongest protection in rapid response proceedings, by offering the possibility to

extend the eviction for a reasonable period of time. Under Swiss law, landlords have to observe a statutory notice period and under Dutch law (summary proceedings) the court is entitled to give tenants a reasonable eviction period.

4. Concluding remarks

In cases regarding neighbour nuisances, national legislators and courts have to balance the rights and interest of all stakeholders, i.e. nuisance tenant, suffering neighbours, landlords and the community as a whole.[110] This is, of course, a difficult task. If tenancy law is too protective against action of landlords, i.e. protects the anti-social tenant excessively, the nuisance behaviour cannot be addressed effectively and the rights of neighbours cannot be protected. If tenancy law enables landlords to tackle the nuisance immediately and evict the anti-social tenant directly, this will of course result in abuse and social problems such as homelessness and social exclusion.

With regard to the questions that are being addressed in this paper, the analysis in this paper has found that in all three legal systems: 1) Victims of neighbour nuisance have the power to legally oblige their landlord to address the nuisance tenant, 2) neighbour nuisance will eventually result in the eviction of the nuisance tenant and 3) substantial legal protection against the loss of the nuisance tenant's home is offered. Nonetheless, the comparative analysis has found that there are some differences between the analysed legal systems with regard to these three key aspects. These differences however, make sense given the different types of housing markets.

Although all of the analysed countries have in common that they feature a significant share of rental dwellings, there is an important difference between the Swiss/German and the Dutch rental market.[111] The Dutch rental market is mainly owned by semi-public housing associations, thus, making the tackling of neighbour nuisance a *public* issue. On the contrary, the Swiss and German rental markets are very free market orientated, due to the fact that the vast majority of premises are owned by private landlords. Only a very small percentage of Swiss and German landlords fulfil a public task making the tackling of neighbour nuisance primarily a *private* issue. This important difference between the Swiss/

110 C.U. Schmid & J.R. Dinse, 'European dimensions of residential tenancy law', (2013) 9 European Review of Contract Law 219.

111 See Eurostat, 'Housing Statistics' http://ec.europa.eu/eurostat/statistics-explained/index.php/Housing_statistics, accessed 2 June 2015.

German and Dutch rental market results in some differences in the tenancy law systems regarding the three addressed questions.

Regarding the first aspect, this paper has shown that in all three jurisdictions suffering tenants have quite similar rights to oblige their landlords to address and tackle neighbour nuisance. We expected that landlords with a public task were held to be more easily liable for nuisance tenants, because of their larger budgets and organisational capabilities. Contrary to this assumption, we have found that under the jurisdictions under review all landlords, with or without a public task, are legally required to address their nuisance tenants. However, in our analysis of case law we found primarily Dutch ligtigation regarding tenants that requested the court to oblige their landlord to address their nuisance neighbour.[112] Of course, it can be the case that the Swiss and German case law regarding these types of disputes is not published and we, therefore, did not find it. However, we believe there is another possible explanation for this difference. The Dutch landlords are predominantly large bureaucratic and formal organisations that take a quite formal approach toward their tenants. In this context it makes sense that tenants need to use formal – legalistic – procedures to ensure that the landlords address the neighbour nuisance. Swiss and German landlords are predominantly private persons that often live in the same building as their tenants. In these jurisdictions, there is a clearer incentive for the landlord to address the nuisance, because he/she probably is a fellow victim of the nuisance. Consequently, it makes sense that suffering tenants in Germany and Switzerland do not have to use formal procedures to ensure that the landlord addresses the nuisance: they have to discuss informally with their landlord-neighbour how to deal with the problem tenants.

With regard to the second and third questions that are addressed in this paper, we found two key differences between Swiss/German and Dutch law. First, under both Swiss and German tenancy law, statutory provisions contain 'rapid response proceedings' for landlords to rapidly terminate tenancy agreements in the case of severe neighbour nuisance. Dutch law does not contain such a provision with the exception of the summary proceedings. However, summary proceeding exist in all three legal systems and they cannot be qualified as special proceedings to tackle neighbour nuisance. Secondly, Swiss and German tenancy law provide more substantive and procedural protection against the loss of the home of the nuisance tenant when compared to Dutch law. Again, we believe these differences make sense given the different types of housing markets. There is a clear need for rapid intervention against nuisance in the case a private

112 See the case law mentioned in n 97.

landlord is involved. Neighbour nuisance often results in damage to property that results in a lower property value. This will especially affect private landlords that do not own multiple properties. This type of landlords dominates the Swiss and German housing market. Moreover, unlike in the Netherlands landlords in Germany and Switzerland often live in the same building as their tenants, so this legitimates an early and quick intervention too. So, the German/Swiss rapid response proceedings entitle the private landlords to easily protect their property and the community as a whole by evicting the nuisance tenant relatively quickly. On the other hand, this possibility for a quick fix causes the risk that there will be a misbalance between the interests of the landlord and tenant. Therefore, Swiss and German tenancy law offer some more substantive protection against eviction in the rapid response proceedings. To sum up: Swiss and German law offer the possibility to evict nuisance tenants very swiftly, but it also provides extensive protection against this possibility. Dutch law does not offer a rapid procedure to quickly terminate tenancy agreements and evict tenants. Consequently, under Dutch law there is a less clear need for robust substantive protection of tenure.