



The Spanish Constitutional Court declares certain squatter-protection rules in Catalonia null

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Summary

On 28 January 2021 the Spanish Constitutional Court (the **SCC**) published a ruling that declares null several articles¹ of the DL 17/2019 on the basis, among others, that annulled provisions affect basic elements of the constitutional right to private property. The Court also considered the breach of article 86.1 of the Spanish Constitution that prevents from using a decree law (instead of a law) to affect the property (ownership) constitutional right.

The approval of Catalanian Decree Law 17/2019, of 23 December 2019², in force since 31 December 2019 (the **DL 17/2019**) was controversial. It included several measures that were perceived by the market as protective of situations against the Law. Indeed, the DL 17/2019 somehow granted to illegal occupants of properties tools to legalise their situation in favourable conditions. These tools included, for instance, the obligation of large dwellings holders (corporates) to offer social leases for a term of at least 7 years (or any longer term set out in the applicable law on urban leases) to individuals or households who did not have an alternative residence and

¹ The SCC has declared unconstitutional and null articles 2.2, 2.3, 2.4, 2.5, 2.7, 2.10, part of 2.11, 2.12, 4.2, part of 4.5, 5.5, 5.6, 5.7, 6.3 y 6.6 and the first transitional disposition of DL 17/2019.

² Catalanian Decree Law 17/2019, of 23 December 2019, on urgent measures to improve the access to dwellings, amended by the Catalan Decree Law 1/2020, dated 21 January.

met the residential exclusion risk parameters³. The social rent payable under such social leases depends on the income of the individual/household but, in any event, such social rent would be well below the market standard, affecting the generation of cash flows from REOs or NPLs secured with collaterals located in Catalonia.

In addition to this recent ruling on the DL 17/2019, the SCC has recently admitted an appeal against Catalan Law 11/2020, of 18 September, which approved maximum thresholds for payable rents under residential leases in certain areas and municipalities of Catalonia (**CL 11/2020**). Part of the reasoning in the ruling of 28 January 2021 on DL 17/2019 in relation to the Catalan rental index could be read as an anticipation of the potential protective position (of the State's exclusive power to rule on this area) that the SCC may have when reviewing the limitations on rent imposed by Catalonia. Note, however, that the admission of the appeal does not entail that the SCC will uphold the appeal or that the provisions of CL 11/2020 are suspended. They will continue to be in force until, and if, the SCC rule out their validity

We summarize below the main provisions of DL 17/2019 that have been declared null and, therefore, are no longer effective:

Measures regarding dwellings

Definition of large dwelling holders obliged to offer social leases

DL 17/2019 amended and expanded the concept of "large dwelling holder" that should offer social leases, to include all asset holders (individuals and legal entities) holding more than 15 residential properties (i.e., regardless of the surface area). Additionally, DL 17/2019 included venture capital funds and asset securitisation funds in the list of entities which became large dwelling holders automatically (i.e., regardless of the amount of dwellings they have in their portfolios). The foregoing has been declared null by the SCC.

Consequently, "large dwelling holders" having to offer social leases are now (i) financial entities, their real estate subsidiaries, investment funds and asset management entities, (i.e., regardless of the amount of dwellings they have in their portfolios); and (ii) legal entities holding more than 15 residential properties (i.e., regardless of the surface area), with certain exceptions.

Mandatory offer of social leases

One of the most relevant aspects of DL 17/2019 was the inclusion of two new scenarios under which large dwellings holders were required to offer social

leases to those individuals considered to be under risk of residential exclusion:

- Before initiating legal actions seeking the eviction of a tenant on the basis of the termination of the rental agreement (only applicable until 31 December 2022); and
- Before initiating legal actions seeking the eviction of illegal occupants (e.g., squatters) when certain conditions were met.

The above scenarios have been declared null by the SCC and are no longer applicable. Therefore, the obligation to offer social leases to squatters in Catalonia under DL 17/2019 has been declared null. This is relevant since squatters may have lost, in Catalonia, one of the tools that were used by some of them to negotiate higher "cash for keys" arrangements.

The obligation to offer social leases remains in place with regard to vulnerable debtors in the context of mortgage foreclosures/ deeds *in lieu*, and vulnerable tenants in breach of rental payment obligations.

Extension of social lease term

DL 17/2019 set out that the minimum duration of the social lease to be offered had to be at least that

³ Those parameters were set out by Catalan Law 24/2015, of 29 July, on urgent measures to address the emergency within the housing and energy poverty field.

foreseen in the law on urban leases⁴ and in any event a minimum of 5 years (if the landlord is an individual) or of 7 years (if the landlord is a legal entity). Additionally, DL 17/2019 regulated that:

- Upon expiry of the initial term of the social lease, the tenant is entitled, only once, to formalize a new social lease (i.e., 5-7 years lease), provided that they still meet and can evidence the parameters of residential exclusion.
- Until 31 December 2022, the landlord (“large dwelling holder”) must offer a social lease upon the expiry of the term of a market lease -prior to commencing eviction proceedings-, in the event that the affected individual/household does not have an alternative dwelling and meets the residential exclusion risk parameters.

The SCC has declared null that new regulation. Therefore, according to the applicable law after the annulment, the duration of the social lease to be offered now must be of, at least, 3 years⁵.

Measures regarding vacant residential units

Empty dwelling and breach of the social function

Under the Catalan law, the social function of housing is related to the use of the dwelling as permanent residence of individuals. Vacancy of dwellings was already considered a breach of the social function of housing under previous regulations. The SCC has declared null most of the main changes introduced by DL 17/2019 in this regard, in particular:

- Under the previous regulations, an “*empty dwelling*” was a dwelling that remained unoccupied *permanently*, without justification⁶, for more than 2 years. DL

17/2019 extended the definition to work-in-progress residential buildings when they remain unfinished for that 2 year period at the final phase of their development (i.e., when more than 80% of construction is completed). This extension has been declared null.

- DL 1/2020 modified the concept of “*empty dwelling*” included in DL 17/2019 (which in turn modified Law 18/2007), so that an illegal occupancy over a dwelling did not impede it from being considered vacant, even if the owner of the property had already initiated judicial actions to evict the illegal occupants. In other words, if the dwelling had been occupied by squatters for 2 years, it would be considered as an “*empty dwelling*”, regardless of whether the owner has taken legal actions aimed at recovering possession of the dwelling. Also, the transfer of the dwelling did not affect the 2 year period (i.e., the new owner inherits the time period during which the dwelling has been unoccupied). This new concept of empty dwelling has now been declared null.

DL 17/2019 opened the door to the possibility of imposing fines to owners who breach obligations in respect of “*vacant properties*”. Fines may be up to EUR 1,000 for each vacant month with the limit of 50% of the estimated value of the property and provided that a request to the owner is sent warning about the imposition of such fine if the dwelling is not occupied within the corresponding period. This has also been declared null.

Expropriation

Under DL 17/2019, the Catalan Administration’s authority to expropriate may affect the ownership of the dwelling and not only its temporary use (as was the case prior to DL 17/2019). So if certain requirements were met, then the authorities could

⁴ The Spanish Law on Urban Leases currently in force sets out at least 5 years (if the landlord is an individual) or 7 years (if the landlord is a legal entity)

⁵ The 3-year term was included, for social leases in Catalonia, in 2015, when the Spanish law on leases provided for a minimum duration of 3 years. Now, Spanish law foresees a minimum duration (in favour of the tenant) for lease of dwellings of 5 years (when the landlord is a natural person) or 7 years (when the landlord is a company).

⁶ According to article 3.d) of Law 18/2007, justified cause includes job relocation, change of domicile due to a dependency situation, dwelling abandonment in a rural region in the process of a population declining and the fact that the ownership of the dwelling is subject of a pending court case.

expropriate the title to the property. The right to expropriate ownership has been declared null.

Therefore, after this annulment, the Catalanian Administration will only have, under certain

circumstances, an expropriation right of the use of the dwelling for a minimum of 4 years and a maximum of 10 years, as per the provisions of the Catalanian Law 4/2016, 23 December.

Although this ruling is good news for the protection of private property in Catalonia, the SCC has not expressly rendered a judgment on whether the exclusive competence of the State on the development of the regulation of the private property has been breached. It is also uncertain if the articles that have just been declared null would also be considered so if they were provided for in a “law” or whether they affect the essential constitutional content of the private property constitutional right, which would require a constitutional amendment. Consequently, if the Catalanian Parliament approved a law (instead of a decree law) with the same measures, a new appeal before the SCC would have to be filed so the SCC examines constitutionality of the adopted measures under different –and more substantive- grounds.

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