

Social housing in France and European law

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The right to housing is recognised in several European Union Member States as well as in European instruments for human rights, such as the European Social Charter. The EU treaties recognise common values, including human dignity, fighting exclusion, and promoting social cohesion. The Charter of Fundamental Rights of the European Union – article 34§3 – states: *“In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.”* EU law and jurisprudence also recognises the existence of fundamental rights that are absent from the Treaties but recognised in various Member States. The right to housing benefits from this recognition under EU Treaty law.¹

In France, social housing bodies (hereafter HLM) play an important role in making the right to housing a reality. Article L. 411 of France's Construction and Housing Code (CCH) states that *“building, planning, allocation, and management of rented social housing aims to improve the living conditions of people on low incomes and disadvantaged sections of the population. These activities play a role in the implementation of the right to housing and contribute to the necessary social mix in cities, towns, and neighbourhoods.”*

Fulfilling this goal – which national authorities consider to be in the general interest – can sometimes conflict with the fundamental freedoms of community law and the establishment of the common market.

A balance must therefore be found between the diverse objectives of the European Union and the implementation of fundamental rights, such as the right to housing. This is achieved in stages by calling on different concepts (such as Services of General Economic Interest, or *“overriding reasons relating to the public interest”*) which can (I) ensure the legal context for French social housing is compatible with community law and (II) support the development of social housing, thus contributing to the effectiveness of the right to housing.

1. Under Article 6 TFEU which states: The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. sources of those provisions. of the Lisbon Treaty. Article 34 (recognises a right to social and housing assistance.

I. The compatibility of French social housing with EU community law

The roles, organisation, and financing of social housing producers (hereafter “HLM bodies”) are regulated by the French legislature.² This legal framework can conflict with some provisions of EU law and, as such, complicate implementation of the right to housing. However, recognising that HLM agencies are responsible for a service of general economic interest (SGEI) makes the required adaptation possible and creating specific provisions ensures compatibility with EU law.

A. Services of general economic interest (SGEI) and HLM bodies

The EU Treaties recognise the role of services of general interest. Their implementation guarantees citizens’ legal rights, particularly the right to housing.

Article 14 of the Treaty on the Functioning of the European Union (TFEU) states that, “*without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions.*”

Protocol 26 of the TFEU treaty also deals with this issue.³

In France, as long ago as 1992, the Council of State recognised that the HLM bodies “*taking into account the mission invested in them in the field of social housing, enter into the scope of the above-mentioned stipulations of article 90⁴ of the Treaty of Rome*”⁵ in their provision of a service of general interest.

Article L. 411-2 CCH states [in French] that “*the HLM bodies mentioned in the previous paragraphs benefit - in accordance with Commission Decision 2012/21/EU of 20 December 2011, on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest - from tax exemptions and specific state aid for general interest services [...]*.”⁶

2. France’s Construction and Housing Code, Book IV.

3. Protocol (No. 26) on Services of General Interest: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-%3A12012E%2FPRO%2F26>.

4. “1. *In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 7 and Articles 85 to 94 inclusive.*

2. *Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.*

3. *The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.*”

5. Council of State, France, 24 April 1992, 116489.

6. “[...] defined as:

- the construction, acquisition, improvement, allocation, management, and sale of rent-controlled housing [...];
- carrying out initiatives enabling people with incomes below the threshold to access home-ownership [...];
- management and acquisition for the purpose of reselling [...] housing units within apartment buildings with significant problems [...].”

This important qualification aligns the regulatory framework of HLM bodies with European fundamental freedoms and principles and enables the creation of a national legal framework – defining the legal forms, competencies, and obligations of public service as well as how it is financed – which could otherwise be incompatible with EU rules on competition and the internal market.

B. An exemption framework that is compatible with EU community law

In the event of a conflict between fulfilling the goals of SGEIs and respecting EU law provisions, the TFEU provides a resolution method in article 106(2):

“Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.”

1. Competition rules

This provision was used with regard to state aid granted to HLM bodies. Public funding or State Aid which distorts competition is, in principle, forbidden under community law (article 107 TFEU⁷).

On foot of several community case law rulings,⁸ a financing framework for certain SGEIs, including social housing, was adopted by the European Commission in 2005,⁹ and renewed in 2011,¹⁰ in order to bring legal security to those responsible for this mission, such as HLM bodies.

The exemption framework resulting from Decision 2012/21/EU of 20 December 2011¹¹ does not give *carte blanche* to States regarding granting public funding to the undertakings concerned, but rather defines – under certain conditions – an *a priori* compatibility of this aid, which is exempted from notification. These conditions include: the existence of a clear mandate defining the obligations of public service; the prior identification of any compensation and overcompensation in this respect; as well as the application of transparency rules.

The French national framework, having been tested a few times, seems respectful of this exemption and thus compatible with EU law.

7. “1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.”

8. See the “Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest”, European Commission, Brussels, 29 April 2013, SWD(2013) 53 final/2, https://ec.europa.eu/competition/state-aid/overview/new-guide_eu_rules_procurement_en.pdf.

9. European Commission Decision 2005/842/EC of 28 November 2005, on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32005D0842>

10. Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012D0021>.

11. *Ibid.*

Financing social housing in France is regulated and organised¹² through a combination of subsidised bank loans, subsidies, social contributions provided for by law, and tax exemptions, classified as state resources in community law. Without this specific financial organisation, the mission of HLM bodies, which includes implementing the right to housing, could not be achieved.

2. The internal market

This mediation of legal frameworks, to facilitate the EU's shared values and rights, was also sought within the internal market and free movement rules during adoption of the Services Directive,¹³ as the organisational forms of HLM bodies could be considered contrary to the freedom of establishment. Due to the “*overriding reason relating to the public interest*”, applicable in this case, an exemption framework was created enabling services related to social housing to be excluded from the Directive's text.

The search for legal co-existence between community law and the effectiveness of fundamental rights, such as the right to housing, has been supported at European level by other policies also.

II. European support for social housing to ensure the right to housing

Public financing plays a fundamental role in the effectiveness of the right to affordable, decent, adapted, energy efficient housing, and is a key condition when it comes to social housing.

The European institutions, conscious of this issue, adopted in 2017 the European Pillar of Social Rights, principle 19 of which stipulates that “*Access to social housing or housing assistance of good quality shall be provided for those in need.*”¹⁴ This pillar does not create new rights but obliges European institutions to support all its principles in their own policies and competencies. In 2018, the Task Force report on investing in social infrastructure in Europe, chaired by Romano Prodi and Christian Sautter, noted a shortfall of EUR 57 billion per year for housing.¹⁵

Thus European economic governance plays an essential role in State's capacity to invest in social housing, while at the same time, the coherence and coordination of European policies is vital to support HLM bodies in their mission.

12. “*Financing social housing. Once the decision to build social housing has been made by the community, the State or by a HLM body, the operation can be financed by different stakeholders depending on the objectives of the housing. (...) Social housing can be financed by: the State (mainly through fiscal aid); local communities (at the level of région, département, agglomération, commune, etc.); the CDC (French Fund for Deposits and Consignments) which grants very long-term loans backed by popular savings schemes such as Livret A. Loans of 30-70 years constitute almost 75% of the financing; Action Logement (a social landlord funded by a 1% levy on employers); landlords themselves with their own funds. Depending on the financing that they have provided (land, subsidies, etc.), the financiers have quotas of reserved apartments, for which they suggest tenant applicants, depending on the applicant's family situation, income, and level of instability. These financiers are called the “grantees” and have a quota. The State also has a quota per prefecture.*” In French at <https://www.ecologie.gouv.fr/logement-social-hlm-definition-categorie-financement-attribution-acteurs>

13. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

14. The 20 key principles of the European Pillar of Social Rights: https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-20-principles_en.

15. Directorate-General for Economic and Financial Affairs, Fransen, L., Bufalo, G., Reviglio, E., Boosting investment in social infrastructure in Europe: report of the High-Level Task Force on Investing in Social Infrastructure in Europe, Publications Office, 2018, <https://data.europa.eu/doi/10.2765/794497>.

A. Economic and political governance of housing: public deficits versus investment

Following the 2009 economic crisis, the establishment of European economic governance,¹⁶ and particularly the European Semester,¹⁷ has had a tangible impact on Member States' capacity to invest in housing policies. Much of the EU institutional analysis is based on a narrow analysis of public spending, ignoring its goals and the social and economic benefits that flow from the effective implementation of rights.

The social housing sector in France, since 2016, has suffered the consequences of this narrow vision of investment. One European Commission Report in 2016 on macroeconomic imbalances stated that:

“France spends significantly more on housing than its European peers. (...) More specifically, the 2.3 % of GDP expenditure on housing are split between housing benefits seeking to improve access to housing rental or ownership and targeting housing demand and representing 40 % of public spending for housing (0.9 % of GDP) and subsidies to housing supply and renovation as well as to the social rental sector (1.4 %). (...) Despite higher spending than other European countries the housing market situation in France has not improved significantly since the years 2000. (...) The objective of the housing policy in France to ensure decent housing to all according to their means is only partially achieved. The French housing policy is not progressive as well-off families can benefit both from social transfers for working-age dependent children (students) and tax deductions. Not all the housing benefits are means-tested and this creates a bias in the redistribution role of the housing policy in France. Moreover, the housing supply issue remains unsolved and is aggravated by the definition of the housing policy objectives at the national level, while their implementation is delegated to the lowest administrative level (commune), which grants building permits and takes the decisions to build.”¹⁸

In 2017, the European Semester Report for France concluded that:

“ (...) the criteria for accessing social housing leads to suboptimal outcomes. Turnover of tenants in the social housing sector is low at between 10 and 15 years, compared to around three years in the private rental sector. The financial situation of social housing tenants is not periodically reassessed to verify if the tenants still qualify for such lower-cost housing (Cour des Comptes, 2017f). Since 70 % of the population can claim access to social housing, waiting lists are long (1.7 million people in 2014) and only some particular situations lead to priority treatment of files (Agence Nationale pour l'information sur le logement). As a consequence, housing supply remains locked in the hands of insiders and access is not always granted to those most

16. “Economic governance refers to the system of institutions and procedures established to achieve Union objectives in the economic field, namely the coordination of economic policies to promote economic and social progress for the EU and its citizens. The financial, fiscal and economic crises that began in 2008 showed that the EU needed a more effective model of economic governance than the economic and fiscal coordination in force until then. Developments in economic governance, still ongoing, include reinforced coordination and surveillance of both fiscal and macroeconomic policies and the setting-up of a framework for the management of financial crises.” <https://www.europarl.europa.eu/factsheets/en/sheet/87/gouvernance-economique>

17. “The European Semester provides a framework for the coordination of economic policies across the European Union. It enables EU countries to discuss their economic and budgetary plans and to monitor their progress at specific times in the year.” https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester_en

18. Country Report France 2016, Including an In-Depth Review on the prevention and correction of macroeconomic imbalances, European Commission staff working document, SWD(2016)79 final, 26 February 2016.

*in need.*¹⁹

These EU institutional analyses contributed to the establishment of reforms that led to substantial budget cuts of EUR 1.3 billion per year and have in turn led to a significant drop in the production of social housing in France.²⁰

B. European policies supporting social housing: a need for coherence and coordination

The adoption in 2017 of the European Pillar of Social Rights introduced a new factor into EU institutional approaches on housing expenditure at national level, informing Semester Reports in a different way on how housing expenditure could be analysed at EU level.

In 2018, the European Semester report on France stated that the reforms undertaken had led to a fall in housing investment, despite this investment being necessary – particularly with regard to affordable housing – in order to reduce inequalities. The supply of social housing in some regions was considered insufficient, and the Report suggested that “*stronger investment in social housing, especially in areas with high demand, could reduce social distress and foster labour mobility.*”²¹ The Elan Act²² had made it easier to privatise HLM housing, however, and the European Commission Report had called in 2019 into question, as it could lead “*to the privatisation of up to 40,000 social housing units per year (compared to the current 8,000 units per year) with potential risks for social housing shortages.*”²³

The European Commission Semester Report for 2019 noted that “*the French Social protection system performs well in comparison to the rest of the world*”, even though problems around the disposable income of specific sections of the population remain (for example, households on less than 60% of median income) with this being largely due to housing costs.²⁴

The European Commission in 2019 stated, for all of Europe, that:

*“developments in the housing market can affect financial stability and thereby require action in some Member States. Housing is often the main asset held by households, and, at the same time, housing-related lending accounts for a large share of total lending in the economy. Moreover, scarcity of adequate and affordable housing is a growing problem in several Member States.”*²⁵

Since then, the COVID pandemic, the war in Ukraine and its consequences on energy prices have wreaked havoc on European economic governance and public investment, suspending the Stability and Growth Pact. Investment in housing policy (with the exception of energy efficiency) has

19. 2018 European Semester: Country Report – France, p. 25, https://commission.europa.eu/publications/2018-european-semester-country-reports_en.

20. *Le livre noir de la réforme des APL* [The Black Book of APL (personal housing allowance) Reform], Union sociale de l’Habitat, 2019; Loi Elan, *La modernisation du logement social*, Direction générale de l’Aménagement, du Logement et de la Nature [Elan Law, the modernisation of social housing, Directorate-General for Planning, Housing, and Nature], 2019.

21. 2019 European Semester: Country Report – France, p. 48, https://commission.europa.eu/publications/2019-european-semester-country-reports_en.

22. French Law n°2018-1021 of 23 November 2018 on the evolution of housing, land management, and digital technology.

23. 2019 European Semester: Country Report – France, p. 48.

24. 2019 European Semester: Country Report – France, p. 46.

25. Commission Recommendation, European Semester 2019, COM(2019) 500 final, 6 June 2019, p. 16, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019DC0500>

taken a backseat and cutbacks on expenditure are being reintroduced. One European Commission Report in 2022 for France identified housing as a sector in which savings were possible, yet 2.2 million people are on waiting lists for social housing and housing production by HLM bodies is decreasing.²⁶

In the context of the link between housing and climate change challenges, especially regarding energy efficiency, it is important to note that European policy has demonstrated a capacity to evolve in order to reach common objectives. Since 2009, through EU cohesion policy,²⁷ energy renovation of social housing is eligible for European Regional Development Funds (ERDF). As part of a partnership established by the regional associations of HLM bodies and the French regional authorities that manage the ERDF, more than EUR 1 billion in European funds has been used to support local-level projects by social housing bodies. Of all Member States, France has been most successful at using structural funds for the period 2021-2027 (more than EUR 500 million are programmed). Added to this is the EUR 550 million allocated to the sector as part of the COVID-19 recovery plan (the recovery plan amounts to a total of EUR 40 billion). Finally, since 2020, the European Investment Bank and the CDC (French Fund for Deposits and Consignments) have established an “*Alliance for Social Housing*”,²⁸ which is a new financing line for eco-loans with the goal of mass deployment of home energy renovations.

Conclusion

The European Union and community law has legal and financial tools at its disposal to support implementation of the right to housing as well as the operators responsible for it (which in France are mainly the HLM bodies). This support requires a coherence between different European policies, along with innovation in how they are implemented. There are always barriers to overcome²⁹ but the issue of housing and social housing is becoming better understood today by the EU institutions. Support is thus possible – and is increasing – because the worsening effects of the housing crisis are visible across all of Europe, making the European Union a key stakeholder in implementing the right to housing.

26. Council Recommendation on the 2022 National Reform Programme of France and delivering a Council opinion on France’s Programme for Stability for 2022, SWD(2022)612 final, 23 May 2022, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022SCo612>.

27. <https://www.europarl.europa.eu/factsheets/en/sheet/93/cohesion-economique-sociale-et-territoriale>

28. <https://www.caissedesdepots.fr/actualites/alliance-europeenne-pour-un-logement-social-durable-et-inclusif>

29. Such as economic governance of public expenditure in Member States, the weight of decisions regarding competition rules, the complexity of using EU funds, etc.