THE FUTURE OF FAMILY PROPERTY IN EUROPE

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NON-INSTITUTIONAL CARE FOR SENIORS FROM A CIVIL LAW PERSPECTIVE

A comparative study of housing with services and adult placement in France and Germany

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1. INTRODUCTION

Europe is getting older. Due to increased life expectancy but also to a decreased birth rate, the proportion of seniors in the overall population is constantly rising.\(^1\) Seniors may no longer be seen as forming a homogeneous group. Distinctions have been proposed between the “young old”, the “old”, and the “oldest old” or between persons of the third and of the fourth age.\(^2\) The definitions of the people who fall within these groups may vary.\(^3\) In any case, there is little doubt that the seniors belonging in the last of these categories, meaning the “oldest old” or the “fourth age”, constitute the fastest growing segment of the population.\(^4\) This increase is coupled with a rise in the number of people with declining health, be it their physical, psychological and/or mental state.

Under these conditions, elder law is evolving as a new area of law. Apart from issues regarding inheritance, legal ability to enter contracts and legal representation in cases of incapability, health insurance and pension schemes, which have been discussed at length in the traditional legal literature, elder law also pertains to questions of everyday care of older people.\(^5\) This last issue gains more relevance, the less the family are able to assume elder care responsibilities, as is nowadays the case.\(^6\) Due to increased life expectancy, the children of older seniors are often seniors themselves. Moreover, because of the decreased birth rate, the responsibility of caring for older relatives rests upon the shoulders of fewer family members, while an increase in female employment has led to a further reduction of care resources within the family.\(^7\) Finally, given the increased mobility of

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\(^{2}\) For a brief survey of this literature see J. Smith, ‘The fourth age. A period of psychological mortality?’ in Max-Planck-Gesellschaft (ed), Biomolecular aspects of aging: The social and ethical implications, Munich, 2002, pp 75–88, esp pp 76–77, with further references.

\(^{3}\) Ibid.


persons within a country, or even internationally, children often no longer live in the vicinity of their parents.

For many decades, the common response to the inability of an older person to live independently was his admission to a care or nursing home. Thus, the provision of care and services came together with a significant compromise of his autonomy. This unsatisfactory trade-off of independence for care, on the one hand, and the realisation that the scarce supply of places in nursing homes could not cope with the expected increase in demand in the near future, on the other hand, made evident the need to seek other creative and cost-efficient solutions. Hence, over the years, a whole range of flexible long-term housing alternatives has developed, which combine both accommodation and support in a non-institutionalised setting, thus filling the gap between the two extremes of living at home or in a care or nursing home.

The aim of the paper is to examine the advantages and weaknesses of the two main alternatives to institutionalised care, namely specialist housing with services and adult placement, and to identify areas where measures for the protection of older people are needed. The focus lies on civil law issues and are specific to these care arrangements. I thus do not consider the general discussion of legal representation of seniors who are unable to enter into legal transactions. Emphasis is given to cases where care is rendered by private providers. For the purpose of this study, issues of social policy which pertain purely to the financing of the schemes are immaterial. I approach the topic in the following way: in sections 2 and 3 I discuss specialist housing for seniors and adult placement schemes respectively, drawing on experience mainly in France and in Germany. In section 4, I evaluate the results of the analysis and proceed to some concluding remarks.

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8 It is worth noting that, according to a number of surveys, the psychological status of elderly people who live in nursing homes deteriorates compared with persons who live in more independent settings. On this issue see among others J. Reinardy/R.A. Kane, 'Choosing an adult foster home or a nursing home. Residents' perception about decision making and control', Social Work 1999 (Vol 44), 571–585; S.M. Cummings, 'Predictors of psychological well-being among assisted living residents', Health and Social Work 2002 (Vol 27), 293–302.

2. SPECIALIST HOUSING FOR SENIORS COUPLED WITH SERVICES

2.1. GENERAL REMARKS

The generic and descriptive term “specialist housing for seniors coupled with services” is used in this paper to cover all forms of accommodation, usually in an individual apartment, where protective supervision and necessary assistance is provided to seniors with limiting conditions, who live either alone or as a couple. Typically, but not necessarily, the property is reserved for older people and has communal lounges, where social activities may be organised. These “senior friendly dwellings” can be bought or, more often, rented. Their conveniences may vary from simple comforts, like walk-in showers and the absence of stairs or steps, to sophisticated technological devices, like sensitive floors which activate an alarm in the event of a fall. The scope of the services which may be provided is also wide, ranging from the reassurance guaranteed by the mere presence of an in-house warden and the organisation of social events, to help with household tasks and errands, or even medical assistance. Depending on the intensity and nature of the support provided, different technical terms are used, such as “sheltered housing” or “retirement housing”, when the services do not go much beyond supervision and emergency assistance, treating mainly the insecurity of the residents, or “very sheltered housing”, “extra care housing” or “assisted living”, when the services also include actual personal care of the older person.

Historically, notwithstanding sporadic small-scale initiatives in the past, sheltered housing for seniors has been expanding rapidly especially in the UK since the 1960s, and in the Netherlands since the 1970s. Gradually, together with the general spreading out of “de-institutionalisation” of care in the 1970s and 1980s, the level of available services increased, and extra care housing evolved for frail seniors. Experience of these developments has generally been positive as seniors, while feeling secure, also enjoy the freedom of having their own front door.

14 Cf also supra note 8.
Moreover, sheltered living is seen as a remedy against the isolation of older people. This model of intermediate accommodation has been promoted in many other European countries, like Germany, where it is known as “betreutes Wohnen” or “Wohnen mit Service”,15 and France where, depending on its configuration, it is named “résidence services” or “logement-foyer pour personnes âgées”.16

While in the UK the vast majority of sheltered housing schemes are provided by local councils, non-profit housing organisations, and voluntary initiatives,17 in France and Germany, the private sector is much more involved with the supply of specialist housing with services, thus giving rise to civil law issues. These issues pertain mainly to the protection of the senior as a consumer, during both the pre-contractual stage and the time after the conclusion of the contract. At the negotiation stage, problems arise due to the lack of transparency as to the bundle of services provided in each facility, as well as their cost. After the conclusion of the contract, problems arise in the case of breach of contract, revision of its terms or its termination, due to the uneven distribution of bargaining power between the provider of the housing and the seniors. In what follows, we take a closer look into the way these issues are dealt with in the German and French legal systems.

2.2. SPECIALIST HOUSING WITH SERVICES IN GERMANY

Specialist housing with services in Germany is a relatively new development, dating from the 1990s.18 The term “betreutes Wohnen” is not defined in law and covers all types of specialist housing with services.19 As to the legal provisions which govern this form of living arrangement for seniors, there is a crucial distinction between facilities which offer only “general support services”20 (such as help with

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15 See infra, section 2.2.
16 See infra, section 2.3.
17 See the information sheet provided by the charity organisation “Help the aged”, available at: www.firststopcareadvice.org.uk/downloads/resources/sheltered-housing-6-2008_92.pdf (last accessed: 11.07.2010), pp 5 et seq.
18 See U. Kremer-Preiiss/H. Stolarz, supra note 9, p 72. Cf BFW-Studie, supra note 1, p 12.
19 This is mentioned in the information provided by the Federal Consumer Protection Association (Verbraucherzentrale Bundesverband), in its text entitled Betreutes Wohnen für Senioren (December 2008), available at: www.verbraucherbildung.de/projekt01/media/Pflegetagung2009/Betreutes%20Wohnen/Service/Wohnen_mit_Service.pdf (last accessed: 11.07.2010), p 1. See also U. Kremer-Preiiss/H. Stolarz, supra note 9, pp 75–76 and 90. Cf the information provided by the county of Coesfeld, available at: www.kreis-coesfeld.de/menschen-und-pflege/Bewohnung.htm (last accessed 11.07.2010), where there is a list of different types of “betreutes Wohnen”, based on the number and type of the services offered, as well as information provided by the Lobby of elderly persons ‘BAGSO’ (Bundesarbeitsgemeinschaft der Senioren-Organisationen), in its document on Betreutes Wohnen: Information und Checkliste, available at: www.bagso.de/fileadmin/Themen/Wohnen/ChecklisteBetreutes_Wohnen.pdf (last accessed: 11.07.2010).
20 In German, “allgemeine Unterstützungsleistungen”, in the sense of § 1 1 3 of the Law on the regulation of contracts on housing with services of care or assistance (Gesetz zur...
housekeeping, procurement of care and assistance from external providers, as well as emergency services), and those providing “care and assistance in order to cover needs arising from old age, care dependency or disability”, which are in fact rather similar to care homes where seniors rent individual apartments.

2.2.1. Housing with general support services

There are no special legal provisions regarding “housing with general support services”, which could be characterised “betreutes Wohnen in a narrow sense”. This form of living arrangement for seniors is thus regulated contractually by two interconnected agreements: a lease or a sales contract, depending on whether the senior rents or buys the property, and a service contract. If the lessor and the provider of the services is the same person, the lease and the agreement for provision of services may be united in one mixed contract.

More concretely, the object of the service contract is the supply of assistance and care to the senior. It lies on the parties to specify the content of this agreement. In practice, the supplier sets forth a “package of basic services”, which is mandatory and usually comprises technical support for the household, emergency and counselling services as well as information and support for the organisation of social events. Further services, such as help with housekeeping, care and paramedical treatment, may be provided upon request, at an additional price. In the absence of a contrary agreement, the service contract is in principle regulated by §§ 611 et seq. of the German Civil Code (Bürgerliches Gesetzbuch – BGB). According to these provisions, no form is required for the validity of the service contract. If the services in question are normally provided for remuneration, it is considered that it has been implicitly agreed that remuneration will be provided, and the amount due is assessed on the basis of the sum usually owed in such circumstances. If the supply of services is faulty, the senior may demand the proper fulfilment of the services insofar as this is possible. If their fulfilment has...

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*Regulierung von Verträgen über Wohnraum mit Pflege- oder Betreuungsleistungen (Wohn- und Betreuungsvertragsgesetz – WBVG).*

21 These last cases fall within the scope of application of WBVG (See § 111 WBVG). See in more detail infra, section 2.2.2.

22 See § 311 I of the German Civil Code (Bürgerliches Gesetzbuch – BGB) on contractual freedom. On this issue see also in more detail H. Pauly, ‘Betreutes Wohnen – notwendige Problembehandlung einer neuen Wohinorm’, Zeitschrift für Miet- und Raumrecht (ZMR) 2008, 864–865. Cf also M. Häublein, Münchener Kommentar zum BGB, 2008 (5th ed), Vor § 535, nr 38. However, according to the rules of the German Regulatory Institute (Deutsches Institut für Normung – DIN) on “Quality requirements for providers of assisted living for the elderly”, the lease contract and the service contract shall be separate (see DIN 77800, esp section 4.4.1.2).

Cf DIN 77800, under section 4.2.1.

Cf DIN 77800, under section 4.2.2.

See § 612 BGB.
become impossible, he is relieved from the obligation to pay for them. Moreover, if the senior suffered any losses due to a culpable breach of contract by the service provider, he may claim compensation.\textsuperscript{26} As to the termination of the contract, if it had been concluded for an indefinite time, each party may terminate it at any time, by giving notice to the other party in advance.\textsuperscript{27} The immediate termination of the contract is possible where there is a compelling reason, e.g., substantial breach of duty by one party.\textsuperscript{28} Notice of termination of contract must be given in writing.\textsuperscript{29}

If the senior rents the apartment, the lease agreement is mainly regulated by §§ 549 \textit{et seq.} BGBl on “leases for residential space”.\textsuperscript{30} According to these provisions, the agreement does not necessarily have to be in writing.\textsuperscript{31} The parties are in principle free to set the due amount of rent. The law permits the lessor to demand an increase in rent or operating costs of the apartment under restrictive conditions.\textsuperscript{32} In addition, the lessees are granted protection in the event of the contract being terminated: if the contract is concluded for indefinite time, as is the usual case in a housing with services plan,\textsuperscript{33} the lessor may only terminate if he has justifiable cause to do so, for instance in the event of substantial breach of contract by the lessee or if the lessor needs the premises as a dwelling for himself or for members of his family.\textsuperscript{34} It is forbidden for the lessor to terminate the contract merely because he wishes to rent the residential space to a third party at a higher price.\textsuperscript{35} The contract is not terminated immediately, but only after the expiration of a notice period, set by law.\textsuperscript{36} The lessor may however terminate the lease without notice for a compelling reason.\textsuperscript{37} In any case, the lessee should be informed of the termination of the contract in writing.\textsuperscript{38}

The interdependency of the lease and the services is evident in cases where both agreements are united in the same contract. Even if the contracts are separate,

\begin{itemize}
\item\textsuperscript{26} See esp § 326 I BGBl.
\item\textsuperscript{27} See §§ 280 I, 283 BGBl.
\item\textsuperscript{28} See § 620 II BGBl in combination with § 621 BGBl. If the contract had been concluded for a definite period of time, it is terminated by the end of this period (§ 620 I BGBl).
\item\textsuperscript{29} See § 626 BGBl.
\item\textsuperscript{30} See § 623 BGBl.
\item\textsuperscript{31} §§ 535 \textit{et seq} BGBl on the “general provision on leases” apply to leases for residential space, to the extent it is not otherwise stipulated by §§ 549–577a BGBl.
\item\textsuperscript{32} This is derived by § 550 BGBl according to which “a lease agreement for a period longer than one year is considered as a lease for an indefinite period of time, unless it is concluded in writing”.
\item\textsuperscript{33} See §§ 558–560 BGBl.
\item\textsuperscript{34} See also the restrictions as to the conclusion of a lease contract for definite time set by § 575 BGBl.
\item\textsuperscript{35} In cases of “betreutes Wohnen” the parties usually rule out this possibility of termination of the contract.
\item\textsuperscript{36} See § 573 II nr 3 BGBl.
\item\textsuperscript{37} See § 573c BGBl.
\item\textsuperscript{38} See § 569 BGBl.
\item\textsuperscript{39} See § 568 I BGBl.
\end{itemize}
this interdependency may be achieved through a contractual clause according to which the continuation of one contract is conditional upon the continuation of the other. In practice problems arise in cases where the seniors, realising that they do not actually need the services, wish to terminate the service contract, while keeping the lease. If the other party agrees to this new arrangement, the issue is resolved. If, however, this is not the case, it has been disputed whether the other party may respond to the termination of the service contract by terminating the lease.\textsuperscript{40} This issue has been, at least partially, resolved by the decision of the Federal Court of Justice (\textit{Bundesgerichtshof – BGH}) of 23.2.2006.\textsuperscript{41} In this case, the lessor and the provider of the services were the same person. The Court stated that the clause on the interconnection of the lease and the service agreement does not constitute a disproportionate disadvantage for the senior, and therefore it may not be considered void on the basis of either § 138 BGB or § 307 II BGB.\textsuperscript{42} More concretely, according to the opinion of the Court, this contractual arrangement is meant to serve the interests of both parties to the contract; the possibility of each individual resident terminating the service contract while continuing to live in the apartment would endanger the whole concept of “betreutes Wohnen”. The Court also added that in the case of breach of the service contract, the senior is sufficiently protected.\textsuperscript{43} If, however, the lessor and the provider of services are different persons, it remains unclear whether § 309 nr 9a BGB on long term contracts shall apply. If so, the senior shall not be bound to a specific service provider for more than two years.\textsuperscript{44}

If the senior decides to buy the apartment where the services will be provided, the sales contract is governed by the relevant provisions of the German Civil Code.\textsuperscript{45} As to the rights and duties of the apartment owners, the Law on condominiums (\textit{Wohneigentumsgesetz – WoEigG}) applies. According to § 15 I of this law, the co-owners may regulate by contract the use of individual apartments and of the common parts of the building. This agreement may be incorporated in the legal act by which the condominium is established.\textsuperscript{46} In this framework, restrictions can be imposed on the use of apartments, which are also binding on future

\textsuperscript{40} See H. Pauly, supra note 22, at 865.
\textsuperscript{41} \textit{Zeitschrift für Miet- und Raumrecht (ZMR)} 2006, 443.
\textsuperscript{42} § 138 BGB refers to usury contracts, whereas § 307 II nr 1 BGB refers to standard form contractual terms which lead to the unreasonable disadvantage of one of the parties.
\textsuperscript{43} See supra note 29.
\textsuperscript{44} See the decision of the Court of first instance (\textit{Landgericht – LG}) of Lüneburg of 18.7.2001, \textit{Neue Juristische Wochenschrift Rechtsprechungs-Report (NJW-RR)} 2001, 1637. See also the Note (\textit{Praxishinweis}) on BGH 23.2.2006, \textit{NJW Spezial} 2006, 290 and cf \textit{infra} note 49.
\textsuperscript{45} See §§ 433 et seq BGB.
\textsuperscript{46} This act is called in German "\textit{Teilungserklärung}". According to § 2 WoEigG, a condominium may be established either by means of a contractual arrangement between co-owners ("Vertragliche Einräumung von Sondereigentum" [§ 3]) or by the sole owner on his own ("Teilung durch den Eigentümer" [§ 8]). See H. Pauly, supra note 22, at 866.
owners.\textsuperscript{47} In this context, these restrictions pertain to the use of apartments only by seniors, in the framework of a “housing with services” plan.\textsuperscript{48} Hence, it is through this constellation that the interdependence of the sales and the service contract may be achieved: the owners of such apartments have an obligation to conclude contracts for the procurement of services. Nevertheless, according to the decision of the Federal Court of Justice of 13 October 2006,\textsuperscript{49} the owners may not be bound to a specific service provider for a period longer than two years.\textsuperscript{50}

2.2.2. Housing with major care and assistance services for dependent seniors

In housing with major care and assistance, although seniors rent their own apartment, the level of care provided is similar to that of a care or nursing home. Due to the great vulnerability of seniors who are in need of such enhanced care, the contracts concluded between those individuals and these facilities are subject to special legal provisions. More concretely, since October 2009, these contracts are governed by the new Law on the regulation of contracts of housing with services of care or assistance.\textsuperscript{51}

The new law aims to protect the seniors as consumers.\textsuperscript{52} It provides extensive pre-contractual information duties (§ 3). It stipulates, further, that the contracts between the seniors and the facilities shall be concluded in writing (§ 6) and, at least in principle, for an indefinite period of time (§ 4 I). In addition, it specifies the rights and duties of the parties (§ 7) as well as the consequences of breach of contract (§ 10), and regulates the amendment of terms in the event of a change in circumstances in a change in the senior’s needs (§ 8). An increase in the fee owed is only permitted under restrictive conditions (§ 9). Finally, special provisions are set regarding termination of the contract. The facility may terminate the contract with the senior-consumer only in the case of a compelling reason. Thus, the fact that a third party would be prepared to pay a higher rent for the same facility does not constitute a lawful reason for the termination of the contract (§ 12 I). If the

\textsuperscript{47} See esp § 10 III WoEigG; W. Niedenführ, ‘Note to the decision of BGH of 13.10.2006’ in Lindenmaier-Möhring Kommentierte BGH-Rechtsprechung (LMK), 12/2006, 97 (nr 204532). See also J. Heinemann, supra note 13, at 71.


\textsuperscript{49} Neue juristische Wochenschrift (NJW) 2007, 213.

\textsuperscript{50} See § 309 nr 9a BGB, which applies by analogy, in combination with § 242 BGB on good faith. See W. Niedenführ, supra note 47, at 98. Cf also note 44.

\textsuperscript{51} In German "Gesetz zur Regulierung von Verträgen über Wohnraum mit Pflege- oder Betreuungsleistungen (Wohn- und Betreuungsvertragsgesetz – WBVG)". Before the enactment of this law, the relevant provisions of the Law on the care and nursing homes applied (Heimgesetz – HeimG).

\textsuperscript{52} The provisions set the minimum protection of the elderly, so deviation from these rules is possible only to the advantage of the consumer (§ 16 WBVG).
reason of the termination is a result of the conduct of the facility, the latter may have to compensate the senior and cover his moving costs (§ 13).

2.3. SPECIALIST HOUSING WITH SERVICES IN FRANCE

Developments regarding specialist housing with services in France have been parallel to those in Germany. The first generation of housing with services, for rent or purchase, started expanding in the 1990s. Initially, the services provided were limited. However, as the seniors who lived there grew older and had to move to care or nursing homes, a new concept of housing with services, with more assistance, developed. Nowadays two types of housing with services may be distinguished: the “logements-foyers” for older people and the “résidences services”. There exist significant differences in the organisation of these facilities.

2.3.1. Logements-foyers

The term “logement-foyer” denotes a special type of social housing,54 as the majority of these residences (around 70%) are still run by the state and local authorities.55 The notion of “logement-foyer” is defined as a type of housing which consists of private apartments, furnished or not, and of common areas dedicated to collective activities.56 The residents of “logements-foyers” may be provided with meals, if they wish, or enjoy, at an extra cost, other basic services, regarding mostly housekeeping and the organisation of social activities,57 while some facilities also offer paramedical services.58 “Logements-foyers” fall within the definition of social or socio-medical establishments, in the sense of Article L 312–1 I nr 6 of the Code de la construction et de l’habitation – CCH.

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55 This information is also mentioned in the positioning paper of UNCCAS (Union nationale des Centres Communaux d’Action Sociale) of 25.5.2007, entitled ‘Logements-foyers pour personnes âgées : enfin des perspectives claires pour les CCAS/CIAS gestionnaires !’, available at www.unccas.org/positionnements/docs/070525-logements-foyers.pdf (last accessed: 11.07.2010).
57 See Article R 633–1 CCH.
58 See Article R 633–1 CCH, according to which “logements-foyers” may provide care services.
of Social Action and Families (Code de l’action sociale et des familles – CASF), and are thus subject to the relevant quality and organisation provisions.\(^{59}\)

The Code of Construction and Housing includes a whole chapter dedicated to the protection of persons residing in “logements-foyers”.\(^{60}\) As to the contract concluded between the residents and the scheme managers, the law stipulates that it should be in writing\(^{61}\) and include all significant rights and duties of the parties, especially the amount due for rent and for services, which should be detailed.\(^{62}\) Some of the services may be “obligatory”, in the sense that the resident has to pay for them regardless of whether he uses them or not.\(^{63}\) The senior shall also agree to the internal regulation of the housing plan, which is annexed to his contract.\(^{64}\) Moreover, protection is granted to the senior as to the termination of the contract. The manager of the scheme may terminate the contract of the senior only in one of the following three situations:\(^{65}\) a. if the senior does not comply with his contractual obligations or repeatedly violates the internal regulation of the plan; b. if the housing plan closes down; and c. if the senior no longer fulfils the conditions of admission in the specific housing plan. In any event, notice of termination shall be given to the resident in advance.\(^{66}\) Finally, it is of particular interest that Article L 633–4 CCH grants rights to the residents to participate in the administration of the scheme.\(^{67}\)

2.3.2. Résidences services

Like “logements-foyers”, the “résidences services” also provide housing coupled with services. However, the “résidences services” are private establishments that lack the social character of the “logements-foyers”. The apartments in “résidences services”, which are often adapted to the special needs of seniors, may be rented or bought. Due to the increased cost of this type of housing, this living arrangement is currently confined to the middle and upper middle classes.\(^{68}\) Nevertheless, in anticipation of future need for such facilities, the state is providing incentives for

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\(^{59}\) See Articles L 313–1 to 313–9 CASF. It is worth noting that according to Article L 313–1 CASF these establishments are subject to licensing.

\(^{60}\) See Articles L 633–1 to L 633–5 CCH.

\(^{61}\) See Article L 633–2 par 1 CCH.

\(^{62}\) See Articles L 633–2 par 2 and R 633–2 CCH.

\(^{63}\) Cf Articles R 633–2 and R 633–4 CCH.

\(^{64}\) See Article L 633–2 par 3 CCH.

\(^{65}\) See Article L 633–2 par 4 CCH.

\(^{66}\) See Article R 633–3 par 2 CCH. This notice should be given (at least) one month in advance if the termination of the contract is due to the breach of duties by the resident and (at least) three months in advance in any other case.

\(^{67}\) See Articles L 633–4 par 2 and R 633–5 et seq CCH.

\(^{68}\) Cf B. Herbert, supra note 54, p 104–105.
the further development of this model, granting tax benefits to persons investing in such housing plans.69

The organisation of “résidences services” is subject to Law 65–557 of 10.7.1965 on the regulation of condominiums,70 as amended by Law 2006–872 of 13.7.2006. According to Article 41–1 of that law, the “syndicate of co-owners”71 may include in the contractual arrangement of the condominium72 the provision that certain services will be offered to residents of the building, be they owners or tenants. The services pertain mainly to the preparation of meals, supervision and general support, such as laundry facilities, or entertainment. The provision of these services may also be assigned by contract to a third party. The costs of providing each service and its maintenance costs are borne by all co-owners, whether they make use of the service or not.73 In addition, each resident bears the cost of any individualised service he receives.74 In all other respects, the “résidences services” do not differ from other residences, where the owners or tenants live an independent life.

According to this law, the “résidences services” shall not provide additional services aimed at the care, assistance or attendance of a specific person.75 In practice, however, such services are often provided.76 As the Ministry of Health and Sports responded to a relevant parliamentary question, the law does not prohibit the operation of an office of nurses in the building, provided that the latter perform their services independently and not exclusively to the residents of the specific building.77 If, however, the provision of medical or paramedical services goes further, the “résidences services” may be assimilated to socio-medical facilities, in the sense of Article L 312 I nr 6 of the Code of Social Action and Families (Code de l’action sociale et des familles – CASF) and so be subjected to the provisions regarding the operation of such facilities.78

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69 See the “Scellier Law” ("loi Scellier"), that modified the General Code on Taxes (Code general des impôts), esp Article 199-septvicies. For more information on this issue see: www.scellier.org/ or www.loiscellier-info.org (last accessed: 11.07.2010).
70 In French “Loi fixant le statut de la copropriété des immeubles bâtis”.
71 In French “syndicat des copropriétaires”, meaning a legal person in which all co-owners of an immovable property participate as members, and whose aim is to manage the building.
72 In the sense of Article 8 of Law 65–557.
73 See Article 41–3 in combination with Articles 10 and 14–1 of Law 65–557.
74 See Article 41–3 of Law 65–557.
75 See Article 41–1 of Law 65–557 in fine.
76 See B. Herbert, supra note 54, p 105.
2.4. EVALUATION OF THE RESULTS

Given the increased vulnerability of older people for whom living at home is no longer an option, it becomes evident that there is a need for special consumer protection provisions. Emphasis should be given to the duty of the housing and services provider to inform the senior adequately of his rights and obligations before the conclusion of the contract. The conclusion of the contract in writing provides further guarantees that the decision is thought through, as well as a clear point of reference in case of future disputes. Special provisions as to termination of the contract would also be useful, although the guarantees provided by the general law could be seen as satisfactory. Both the German and the French legislators have to a certain degree taken into account these issues. However, it is only in the cases which fall within the new German law on housing with major care and assistance services that the older people are granted full protection.79

As to the rest, the relevant legal framework both in Germany and in France is far from comprehensive.

The situation is aggravated by the lack of transparency as to the supply of housing alternatives. The market provides a variety of service packages under varying conditions.80 No matter how extensive the duty to inform the senior may be, it is doubtful whether the individual will be able to assess this quantity of information. Under these circumstances, the role of standardisation of contracts and certification of services becomes evident. The German Institute for Standardisation (deutsches Institut für Normung – DIN) published in September 2006 the standard nr 77800 on “Quality requirements for providers of assisted living for the elderly”. However, until now few providers of such accommodation for seniors seem to have gone through the DIN certification procedure.81 Nevertheless, there are other certification procedures in Germany, at a regional level, which seem to be catching on.82 The situation in France is similar, where the Association of Standardisation (Association française de Normalisation – AFNOR) issued rules (NF X 50–058) on specialist accommodation for seniors

79 See supra, section 2.2.2.
80 See U. Kremer-Preiss/H. Stolarz, supra note 9, p 90.
82 For an overview of these initiatives see Verbraucherzentrale Bundesverband, supra note 19, at 10–11.

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in February 2003. Realising the need to help clarify this area, the European Committee for Standardisation (CEN) is also working on such a project, which is expected to be completed by 2012. Until standardisation and certification takes on, state authorities as well as private associations provide checklists in order to facilitate the older people in their decision-making process.

3. ADULT PLACEMENT

3.1. GENERAL REMARKS

“Adult placement of seniors” as a long-term housing alternative is the equivalent to “foster care of minors”: the person in charge assumes the daily care of the senior, who lives under the same roof in a family-like setting. Hence it falls within the general concept of living with services, with the special characteristic that both the housing space, usually a room, and the services are provided by the carer at the carer’s home. This alternative is especially suitable for dependent seniors. Their dependence may be either physical, mental, or even psychological, due to the insecurity and loneliness they feel, especially after experiencing the death of a close family member or friend.

The roots of this institution can be traced back for centuries. In fact, adult placement can be seen as the precursor of modern care homes. However, it was not until the 1990s that renewed interest was shown in it, as a remedy against the defamilisation of elder care and the resulting isolation of older people. Accordingly, provided that the match between the senior and the carer is a successful one, adult placement presents significant advantages for seniors: the obvious benefit of individualised care is coupled with the feeling of stability, as the people who provide services to the senior do not constantly change. Furthermore, the senior may derive satisfaction from forming part of a family, participating in its everyday activities.

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83 This regulation is entitled ‘Établissements d’hébergement pour personnes âgées – Cadre éthique et engagements de service’.
84 The relevant draft has already been published (see Pr EN 16118:2010 Sheltered housing – Requirements for services for elderly people provided in a sheltered housing scheme).
85 See eg the check lists of BAGSO, supra note 19 and of U. Kremer-Preiss/H. Stolarz, supra note 81.
life and contributing to it, according to his capabilities. From the perspective of the carer, there is no doubt that his occupation may be rewarding, even if his burden is heavy, given that responsibility for the senior is continuous.

Nonetheless, the vulnerability of the older person and his dependence on the carer gives rise to problems in protecting the former’s personality right, in all respects, such as his well-being and security, his privacy, his freedom to make choices etc. It is especially crucial to prevent mistreatment of every form, such as physical, psychological, as well as financial abuse, like the extraction of pecuniary benefits from the older person, other than the sums due for the services provided. Legal provisions on adult placement have gradually been adopted in a number of European countries, such as Greece and Portugal. As before, however, in the following sections we focus on the way German and French law have faced these challenges.

3.2. ADULT PLACEMENT IN GERMANY

Adult placement for seniors in Germany is still in a rather embryonic state. The relevant programs, usually entitled “Gastfamilien für Senioren”, are run by local communities and non-profit organisations. They were first developed for

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88 See A. Bertrand, supra note 87; Cf C. Baudson, supra note 7, p 30.
89 See A. Bertrand, supra note 87, section II E 2. Cf C. Baudson, supra note 7, p 28.
90 See Article 9 par 3 of Law 2082/1992 as amended by Article 65 par 1 of Law 2447/1996. According to this provision adult placement is allowed. A presidential decree shall further regulate the specifics of this institution, but no such decree has yet been issued. Despite the absence of a precise legal framework, adult placement is practised in an informal way, often with the encouragement of local communities. See A. Amira, ‘Anadochi kai triti ilikia’ (Foster care and third age) in: T. Kallinikaki (ed) Anadochi Frontida (Foster Care), Ellinika Grammata, Athens, 2001, pp 219–225; P. Stathopoulos, Koinoniki Pronoia. istoriki exelixi – nees Katefthinseis (Social Welfare. Historical development – New directions), Papazisis, Athens 2005, esp pp 343 et seq.
92 See for instance the project “Senioren leben in Gastfamilien” in the county of Minden-Lübbecke, which is run by the associations “Paritätischer Verein für freie Sozialarbeit” and “Diakonischen Werk – Innere Mission e.V” (information on this project is available at: www.familie-malanders.de/Kurzkonzept-Gastfamilien.pdf); the project “Gastfamilien für Senioren” in the country of Gütersloh which is run by the association AWO of the Ost Westfallen-Lippe area, sponsored by Stiftung Wohlfahrtspflege (for information see www.pflege-gt.de/index.php?page_id=148 and http://www.awo-owl.de/pages/angebote/seniorinnenundsenioren/gastfamilienfuersenioren.html?res=1280); the new project of the association “Arkade für Senioren” with the support of the counties of Ravensburg and Bodensee (for information see www.schwaebische.de/lokales/ravensburg/rund-um-ravensburg_artikel,-Neues-Projekt-bietet-Gastfamilien-fuer-Senioren,-arid,2470402.html); the gerontopsychiatric pilot-project “Pflegefamilien für Senioren” for the whole of Bayern, which is run by the Hospital of Kaubeuren and is financed by the “Zentrum Bayern Familie und Soziales” (for information see www.pflegen-online.de/nachrichten/ambulante_pflege/betreutes-wohnen-in-gastfamilien-
persons with physical disabilities or mental and psychological conditions, and it was not until recently that they started extending to seniors.

The specific rules governing adult placement differ from programme to programme. In principle, the administrators of the adult placement scheme, ie the communities or the non-profit organisations, set the conditions under which a carer can be admitted. The latter should fully understand the obligations deriving from adult placement and be considered able to deal with the pressure and responsibilities associated with taking care of the senior. Moreover, the whole family should be stable, and should agree to the placement. An additional condition for the eligibility of a person as a carer in such a scheme is that he should be able to support himself and his family without relying on the additional income received for the support of the senior. Each carer may be assigned the support of up to two seniors.

Once these basic conditions are fulfilled, the carer and the senior or, in some cases the carer, the senior and the administrator of the adult placement scheme, conclude a contract, usually in writing. The contract specifies the rights and duties of the parties and, among other issues, sets the remuneration of the carer. Social security may cover these costs to the extent that the senior, given his income, is entitled to social benefits. The remuneration consists typically of a sum paid as rent for the provision of housing, an allowance for the maintenance of the senior and an amount for the support provided. In total, it rarely exceeds...
800 euro per senior. This remuneration is therefore mainly thought to cover the costs of the carer and does not turn the provision of care into a profit earning activity. Moreover, it is not subject to tax. The proper performance of the contract is constantly supervised by the administrator of the adult placement programme, who is entitled to pay regular visits to the family and carry out any further controls that are deemed necessary.

Given these conditions, it seems that the occupation of carer is seen as a “vocation”, where the carers are expected to act out of more or less selfless concerns.

3.3. ADULT PLACEMENT IN FRANCE

Adult placement in France has a longer tradition than in Germany. The first law referring to “placement familial”, or as it is more commonly known “accueil familial”, dates back to 1905, while further relevant provisions were enacted in the 1950s and 1960s. This legal framework approached the institution from a purely contract law perspective, without providing any supervision or other safeguards for the quality of the services. Hence many instances of abuse of the older people were recorded. In response to this situation, Law 89–475 of 10.7.1989, as complemented by the decrees 90–504 of 22.6.1990 and 90–635 of 18.7.1990, comprehensively regulated the institution. In an effort to expand the use of adult placement, further laws and decrees have been enacted since then, gradually leading to the full professionalization of a caring occupation. In this spirit, the most recent legal texts no longer refer to regulation of the institution of “accueil familial”, but rather to the exercise of the profession of the carer (“accueillant familial”).

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102 This is so for the projects of the association “Arkade für Senioren” in Ravensburg and “Senioren leben in Gastfamilien” of the county of Minden-Lübbecke (see supra note 92), whereas in the gerontopsychiatric pilot-project “Pflegefamilien für Senioren” of the hospital of Kaufbeuren, the remuneration is set at 700 euros. Cf U. Hellmann, ‘Fiskus lässt Betreuungsgeld für Gastfamilien ungetastet’, Lebenshilfe-Zeitung 1/2009, where it is taken as granted that the remuneration of a carer is set at around 800 euros.

103 This conclusion may also be drawn from the fact that the remuneration of the carer is often referred to as “reimbursement of expenses” (in German: Aufwandserschaedigung). See esp M. Siegel, supra note 94.


105 This is explicitly mentioned in the projects “Senioren leben in Gastfamilien” of the county of Minden-Lübbecke and “Gastfamilien für Senioren” of the AWO association, supra note 92 Cf R. Eisenhut, supra note 95.

106 Cf J.S. Oktay/P.J. Volland, supra note 86, at 1506.


108 Ibid. See also A. Bertrand, supra note 87, section II B 1.

More concretely, the legal provisions on adult placement have been codified in the Code of Social Action and Families (CASF). The basic characteristics of the current legal framework for adult placement are the following: The occupation of the carer is subject to licensing. The license is valid for 5 years, but may be renewed. A carer may be licensed to care for up to three seniors. In order to become licensed, the carer must provide guarantees for the well-being of the senior and ensure his continuous support, by appointing a substitute carer, in case (for whatever reason) he is not in a position, permanently or temporarily, to take care of the older person. He must provide for him an individual room with heating and sanitary facilities. The carers must declare themselves willing to participate in a special training. Due to the lack of further provisions regulating the training, it is usually short and of varying quality among different regions of France. The local authorities follow up on the senior and control the carer. If they realise that the carer no longer fulfils the abovementioned conditions, they may deprive him of his licence. To act as a carer without a license constitutes a criminal offence.

The carer and the senior, or his legal representative, conclude a contract in writing, the minimum contents of which are regulated by law. The contract provides the rights and duties of the parties. Moreover, it should specify a trial period, and the conditions under which the parties may revise or terminate the contract. The contract should further spell out the material and financial conditions of the adult placement. The total remuneration of the carer has the following components: a sum for the rent of the room, a sum for the maintenance of the senior, and an amount of money for his services. This last component is treated like a normal salary, so it is taxed as a salary, is subject to social security contributions, and may

110 See Article L 441–1 et seq in combination with Article R 441–1 et seq CASF.
111 See Articles L 441–1 to L 441–3 as well as R 441–1 CASF.
112 See Articles R 441–5 and R 441–7 CASF.
113 See Article L 441–1 par 3 in combination with Article R 441–5 par 2 CASF. Due to the professionalization of the institution, these laws do not apply in cases where the person taken care of is a relative of the carer. (see L 441–1 par 1 CASF).
114 See Article L 441–1 par 4 CASF. However, the legal framework as to the way this replacement may be effectuated is not clear. V. Rosso-Debord addresses this problem in her report Vers un nouvel accueil familial des personnes âgées et des personnes handicapées, of 2008 (esp at p 10) and proceeds to the proposition of solutions (p 14–15, proposition nr 4), available at: http://lesrapports.ladocumentationfrancaise.fr/BRP/084000724/0000.pdf (last accessed: 11.07.2010).
116 See Article L 441–1 par 4 CASF.
117 See A. Villez, supra note 86, p 188. See also the report of V. Rosso-Debord, supra note 114, p 8–9 and her propositions nr 7 and 8 (p 16–17).
118 See Article L 441–1 par 4 in combination with Article R 441–1 par 5 CASF.
119 See Article L 443–9 in combination with Article L 321–4 CASF.
120 See Article L 442–1 CASF.
not fall below the minimum wage. Furthermore, the carer is entitled to holiday allowance. An extra amount of money is due if the carer provides additional services owing to a serious disability of the senior. Thus in practice the total amount due to the carer ranges from 1100 to 1800 euro per month, depending on the needs of the particular senior.

Further provisions organise the specific aspects of the relationship between the carer and the senior. It is particularly interesting to mention that neither the carer himself nor his family may benefit from transactions with the senior or be appointed as his heir. This does not apply if the senior disposes of a specific asset to one of these persons in exchange for services they supplied to him.

Finally, as to the legal position of the carer, it is worth noting that, since 2007, carers may work as employees of legal persons, whether public or private. All aforementioned provisions apply in this case as well. Thus, this possibility has no real impact on the senior, but instead provides greater job security to the carer. Namely, if adult placement is suspended, eg because the senior spends some time with his natural family or because he has been admitted to the hospital, the carer is entitled to an allowance, paid by his employer. Moreover, the employer is obliged to provide employment to the carer, according to the labour contract which has been concluded. Hence, if the employer has not assigned any senior to the carer for at least four consecutive months, the carer is entitled to demand either his full salary, meaning the remuneration he would get for the care of a

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121 For more details on the calculation of the carer’s remuneration, see also Article D 442–2 CASF. For a concrete calculation of the minimum remuneration of the carer, see the information provided by the French administration at http://vosdroits.service-public.fr/particuliers/F253.xhtml (last accessed: 11.07.2010). See also A. Villez, supra note 86, pp 191–192.
122 See supra notes 120 and 121.
123 See also supra note 121. The minimum sum provided for the services of the carer and the maintenance of the senior is around 950 euros, excluding both the rent for the room, which may vary, and additional amounts due owing to any serious disabilities of the senior. In practice, according to the information provided by the association of carers and their partners “Famidac” (at: www.famidac.fr/article10.html) which was last updated on March 2010, remuneration starts from 1,340 euros per month. See also I. Palacin, ‘Choisir devenir famille d’accueil’ (3.9.2007) available at www.seniorplus.fr/maison/maison-de-retraite/choisir/devenir-famille-d-acceuil, who refers to a salary between 1200 and 2000 euro per month and C. Baudson, supra note 7, p 18 referring to an amount between 1150 and 1700 euro.
124 See Article L 443–6 CASF.
125 See Article L 443–6 CASF in combination with Article 909 of the French Civil Code (CC). The second exception provided by Article 909 CC refers to the case where the recipient is a relative (see supra note 113). However, in these cases the provisions on adult placement do not apply. Cf also Article 911 CC.
126 See Article L 444–1 CASF. It is worth noting that this possibility had been already introduced by Law 2002–73. However, owing to the lack of further provisions, in practice it never applied. A. Villez, supra note 86, p 192.
127 See Article L 444–5 par 1 CASEF.
3.4. EVALUATION OF THE RESULTS

Both in Germany and France the interest in adult placement is increasing. In view of the vulnerability and dependency of seniors, it is common understanding that purely contractual arrangements do not suffice for their protection. Thus in all such schemes measures are adopted for the supervision of the carer, which focus mainly on the physical and psychological well-being of the senior. As to the financial abuse of seniors, given the difficulties of detecting it, additional prevention measures are needed. Thus special provisions, such as those in French law which restrict the grant of gifts or succession rights to the carer, are required.

Regarding the specific organisation and implementation of adult placement schemes, Germany and France follow different patterns. The German approach, which is the more traditional one, is somehow idealistic, as it presupposes more or less selfless motives of the carer. France on the other hand has clearly proceeded to the professionalization of the institution and makes further steps in this direction. There can be little doubt that this last development favours the expansion of the institution. Moreover, although the incentives of the carer may be less noble, professionalization could be expected to lead to an improvement in the quality of the services provided as, knowing that his living depends on his activity, the carer has more incentive to invest in it.

4. COMPARATIVE CONCLUSIONS

Both specialist housing with services and adult placement constitute significant alternatives to institutionalised care of seniors, representing a more modern response to the increasing de-familisation of care. In the case of specialist housing with services, seniors are provided with a range of comforts, which enable them to keep their own household for as long as possible, while adult placement provides a substitute for the natural family of the senior in providing care.

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128 See Article L 444–5 par 2 CASF.
129 See supra note 108.
131 See supra note 106.
132 See V. Rosso-Debord, supra note 114, proposition 1 (p 12).
A common element of both options is that the senior enjoys individualised care, while preserving, as much as possible, his autonomy. This development is in line with the new concept of human rights of disabled persons, as expressed in the United Nations Convention on the Dignity of Persons with Disabilities of 2006. More concretely, according to this Convention persons with disabilities shall be enabled to develop their own capabilities to the full, rather than passively rely on the receipt of assistance, as the paternalistic approach of the past would suggest. Moreover, both specialist housing with services and adult placement provide a remedy against the isolation of older people, though in different ways. Specialist housing with services allows for the socialisation of the tenants of the individual apartments among themselves, whereas in the case of adult placement, socialisation takes place within a multi-generational framework.

When a senior is called on to choose between these two alternatives, a first criterion is in fact the nature and extent of his own limiting conditions. For elders who are particularly frail, specialist housing with services may no longer be an option. As to the others, the choice would depend on personal preferences; a senior who values independence and privacy over reassurance would most probably opt for specialist housing with services, while a senior who places constant company over autonomy would be expected to opt for adult placement.

Hence, despite the common characteristics of these non-institutional alternatives, both options need to be further developed, as they do not address the same needs. The source of the problem is on both occasions the same, namely the quasi-monopolistic position of the care-provider following the conclusion of the contract, given the high, often prohibitive, costs for the seniors to switch to another provider. However, due to the differences in the nature of the alternatives, the ways of confronting it differ. In the case of specialist housing with services, special consumer protection provisions together with increased transparency in this field, mainly through standardisation and certification procedures, would

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133 On the relation between Elder law and Disability law, see D. Surtees, supra note 12. Cf also Article 1 of the German Charta on the rights of persons who need help and care (Charta der Rechte hilfe- und pflegebedürftiger Menschen).

134 The Convention marks a “paradigm shift” from the social welfare approach, according to which persons with disabilities are considered objects of charity, social protection and medical treatment, to the human rights approach, according to which these persons are subjects of human rights, able to make decisions about their life and future as well as to claim rights on their own behalf. On this issue see in more detail R. Kayess/P. French, ‘Out of darkness into light? Introducing the Convention on the rights of persons with disabilities’, Human Rights Law Review 2008 (Vol 8), 1–34. It is worth noting, that according to Article 1 of this Convention, “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others”. Hence seniors may fall within its scope of application.

135 These observations could perhaps shed some light to the reasons why specialist housing with services is prevalent in Germany, whereas adult placement is more popular in France.
yield satisfactory results. In the case of adult placement, the dependence of the senior on his carer is more intense. Thus the assurance of quality of care demands the adoption of measures which go well beyond the field of private law, such as the monitoring of the carer by a public authority.