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## LAW AND ECONOMICS ANALYSIS OF HOUSING POLICY

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## ANALIZA PRAWNA I EKONOMICZNA POLITYKI MIESZKANIOWEJ

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DOI: 10.15611/pn.2020.1.07

JEL Classification: R1, R3, R5

**Summary:** The main aim of this paper is to verify the possibility of law and economics analysis in the field of housing policy. The object of the research is a housing policy model defined as the entirety of the legal acts regulating the actions of the state in reference to housing policy. The research is based on the new institutional economy, and law and economics analysis method. The theoretical part provides an overview of the main definitions of law & economics (LE), e.g. institution, contracts, transactions, property rights theory, transactions costs, with reference to the housing policy issues. Additionally, the criterions for efficiency ratings are presented (Pareto, Kaldor-Hicks, Coase claim, Posner) and the author's proposal of defining housing policy is given. The empirical part is a comparative analysis of selected social housing policy programmes from the USA (LIHTC), the Netherlands (woningcorporaties) and Poland (TBS) at the viewpoint of the efficiency criteria.

**Keywords:** housing policy, law and economics, new institutional economy, housing policy model.

**Streszczenie:** Celem opracowania jest empiryczna weryfikacja możliwości zastosowania podejścia ekonomii prawa do analizy uwarunkowań prawnych w zakresie polityki mieszkaniowej. Badanie przeprowadzono z wykorzystaniem nowej ekonomii instytucjonalnej metodą ekonomicznej analizy prawa. W części teoretycznej zaprezentowano przegląd głównych definicji właściwych dla nowej ekonomii instytucjonalnej oraz ekonomicznej analizy prawa wraz z odniesieniem ich do uwarunkowań polityki mieszkaniowej, takich jak: instytucje, kontrakty, transakcje, teoria praw własności, koszty transakcyjne. Dodatkowo przedstawiono kryteria oceny efektywności (efektywność Pareto, kryterium Kaldora-Hicksa, teoremat Coase'a, Posnera) oraz zaproponowano autorską definicję modelu polityki mieszkaniowej. W części teoretycznej zaprezentowano relacje między strukturą własnościową a jakością zasobu mieszkaniowego oraz porównanie wybranych programów mieszkaniowych z USA (LIHTC), Holandii (Woningcorporaties) oraz Polski (TBS).

**Słowa kluczowe:** polityka mieszkaniowa, prawo i ekonomia, nowa ekonomia instytucjonalna, mieszkalnictwo.

## 1. Introduction

Law and economics analysis<sup>1</sup> can be considered as a research method which has its source in new institutional economy<sup>2</sup>. It is a visible example of the phenomenon of economic imperialism – utilization of methods of economic research to explore non-economic areas reserved so far to other social sciences. A. Marshall defines it as study of mankind in everyday economic existence (Marshall, 1925).

LA can be placed between law and economics. The aim of this approach is to study law and describe institutions and phenomena using methods known from the economy (Chrupczalski, 2008). It has to be noted that law & economics is an interdisciplinary field of knowledge and uses the results of other social sciences such as sociology or psychology (Chrupczalski, 2008). The main criterion of LA refers not so much to the justice of the law but to its economic efficiency (Tyc and Schneider, 2017). This does not mean that normative aspects of LA are not undertaken. In the neoclassical trend of law and economics, fair law is synonymous with economically efficient law.

There are some methodological differences between the neoclassical Chicago school of economics and the Austrian school. This results from the different social and economic conditions and legal systems in countries where these approaches arise. The neoclassical approach takes its roots from Anglo-Saxon culture and is based on the common law system which consists of two integral fields: legislation and its supplement – law certification. The Austrian school elaborated separate assumptions which were the result of a different environment – the continental legal system and the visible weaker condition of the economy in Austria at the turn of the 19th and the 20th century. Either subject, the unit taking economic actions, and the basic paradigms are defined differently. In the neoclassical approach the subject is a human – homo economicus – understood as a theoretical concept created by J.S. Mill (Mill, 1959). There is an assumption that people make rational decisions considering all the for and against arguments. This concept refers to human nature described by A. Smith (Smith, 1954); according to this idea, people considered as a research unit, are free and egoistic. The sum of all egoisms adds up to general welfare. Based on this, the neoclassical approach considers the economy at the viewpoint of decisions made by the unit directed to maximizing the usability in conditions of limited resources (Tyc and Schneider, 2017). This assumption eliminates the possibility of a priori mistake, because every decision can be explained in the category of efficiency; otherwise it can be called methodological individualism (Chrupczalski, 2008). Making an optimal decision, in the economic sense, is based on the occurrence of complete, objective and constant information about the aims and means (Chrupczalski, 2008). The most important is the perspective of law – there is a visible division into primary

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<sup>1</sup> Further called law & economics or LA.

<sup>2</sup> Further called NIE.

positive law and secondary common-law rules (de Soto, 2010). The construction of the efficiency of law is crucial in this approach.

In the Austrian school approach, the elementary research unit is also human, but defined as a creative entrepreneur (Chrupczalski, 2008), whose actions are interpreted in the praxeological approach as dynamic and purposeful (von Mises, 2018). The main difference between the neoclassical and Austrian approaches is the perspective on information. The Austrian school defines knowledge and information as subjective, diffused, and constantly changing (Chrupczalski, 2008). This assumption implies that the rate of economic events is subjective by its nature and the decisions made can be wrong. This perspective is the substructure of the *homo oeconomicus* paradigm criticism as it does not considering information asymmetry, and it was an impulse to develop new theories in law and economics and a new institutional economy. Another difference is the definition of law as a collection of rules resulting from human actions and evolution, and law based on private property is efficient and ethical (de Soto, 2010). This definition points to continental law system's roots and top-down linkage of private property with efficiency and ethics.

## 2. Defining housing policy in the law & economics approach

The empirical application of LA to evaluate housing policy<sup>3</sup> needs to set some basic definitions such as the housing policy model, designate its participants<sup>4</sup>, institutions, transaction costs which may affect choices made by households, types of property rights, present efficiency criteria as a base for rating law solutions adopted in housing policy programs.

The main concept of the LA research method is *institution*. According to D.C. North, it can be defined as the rules of the social game, or the limitations which affect human interactions (North, 2004), divided into formal and informal. It can be also set as a unit of some pattern of conduct which shapes the actions of individuals and economic results (Balcerowicz, 1993). It is necessary to emphasize the division between institution and organization. Institutions can realize their functions through organizations (Chotkowski, 2010). Informal institutions are behavioural patterns persisting in tradition and culture which shape human actions. According to housing policy informal institutions can be historical, political and economic determinants which affect the mentality and ownership structure, adopted in the community attitude to ownership and tenancy. Essential elements of informal institutions are accepted in local market practices, which are not contradictory with formal institutions<sup>5</sup> but its clarification, e.g. period of tenancy which is shorter than maximum specified in legal regulations or lower level of deposit. Formal institutions can be classified mainly as:

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<sup>3</sup> Further called HP.

<sup>4</sup> Agents.

<sup>5</sup> Rules.

obligatory law acts, economic system and state sector policy, finance and tax system, formalized administrative procedures, institutions of authorities, state agendas etc. (Chotkowski, 2010). At macro level the formal institutions which regulate housing policy are: bills of law and the state and the local authorities, at micro level the example can be specific legal norms such as property rights.

The cooperation of units in the market is realized through contracts, transactions and organizational relationships (Commons, 1990). The main function of the market is the exchange or allocation of resources. The neoclassical perspective focuses on the effect of this exchange, while in the NIE approach the basic level of analysis is a transaction (Commons, 1937) realized in the form of a contract (Kowalska, 2005). A contract can be defined as voluntary agreement about mutual commitments regarding exchange of goods between sides (Jensen and Meckling, 1976). According to another definition a contract is transaction with a visible outlined structure in which the partners accept defined commitments (Masten, 2000). They can be divided into open and implicit. The first are formal, result from conscious negotiations with execution based on the adopted rule of law. The implicit contract is based on non-formal regulations and prevailing customs (Tyc and Schneider, 2017). In reference to housing policy, the best example of a contract is the realization of demand for housing by households. It can be fulfilled by an implicit contract – as the accepted in some cultures co-habitancy of adult children with their parents, or an open contract through a wide variety of property rights.

The overriding goal of housing policy is fulfilling the housing demand of households. To fully understand the concept of transactions on the housing market, an explanation of the property rights theory in the area on the new institutional economy is necessary. The starting point is the definition of property. It can be set as a collection of normalized authorizations which an owner has and can dispose with regard to the specified property object (Tyc and Schneider, 2017). According to another, it is the total mastery of applications where the owned good can be used (Ignatowicz and Stefaniuk, 2003). In the field of LA, property is defined as formed by the law, traditions and moral permissions which define and limit the range of appropriation and usage of economic resources and goods (Dąbrowski and Staniek, 2015). The concept of property proposed by the Austrian school is set as a bundle of owners' permissions and corresponding to it the responsibilities of other individuals (Chrupczalski, 2008).

The form of property right is a determinant of the economic individuals' behaviour, because the type of property right allows to make a priori assumptions towards the transaction. The fulfilment of housing needs can be analyzed from the perspective of the type of property right or its economic function. According to the first criterion households can realize their housing needs by:

- ownership,
- limited property laws.

The second criterion used by public statistics distinguishes the following forms (Głuszak, 2010):

- defective,
- market,
- non-market.

The defective form of fulfilling housing need is the inability of realizing it on one’s own, e.g. co-habitation of adult children with their parents. In order to make a holistic presentation of property rights, below there are provided their characteristics (Table 1).

**Table 1.** Characteristics of property laws

Group of property law type	Form of property law	Exclusiveness (#1)	Total possession (#2)	Private property (#3)	Protection against principal interference (#4)
Ownership	ownership	yes	yes	yes	yes
Limited property laws	cooperative ownership	yes	yes	yes	yes
	cooperative	yes	no	yes	no
	tenancy	yes	no	no	no
	social/municipal tenancy	no	no	no	no
	lent/with the family	no	no	no	no

Sources: own elaboration.

Limited property rights is a category of property laws different than a full ownership. Due to the differentiation of each form the authors suggest its division into strong and weak. The first criterion refers to competition in access to resource meaning giving empowerment to one person is equivalent to the exclusion of others from the consumption of this good. Private goods are used only by its owner or another unit based on the transfer of authorization of the right to consumption (Chrupczalski, 2008). The second criterion means the ability of full mastery upon goods in the civil law meaning. Entitlements towards goods were formulated according to the group of entitlements defined in Roman law: *ius possendi*<sup>6</sup>, *ius utendi, fruendi, abutendi*<sup>7</sup> (Chrupczalski, 2008). The practical meaning of these rules is the ability to sell goods and charging it with limited property laws of other persons. The third criterion is in reference to the postulate formed by the Austrian school which claims that law based on private property is efficient and ethical. The last criterion relates to the master-agent relation. Strong and stable market institutions supporting fulfilling

<sup>6</sup> Right to possess.

<sup>7</sup> Right to using, receiving benefits, exploitation.

housing needs, e.g. tenancy institution and informal institutions adopted on the local market are crucial to housing market's efficiency. In other words specific forms<sup>8</sup> supporting fulfilling housing needs should ensure the balance of interests in relation master-agent or, in the housing market, landlord and tenant. This leads to reduction of transaction costs related to limited trust, additional contract securities and costs of court proceedings. The above characteristics show that in a group of limited property laws one can distinguish two groups – strong and weak property rights. In the first group cooperative-ownership and cooperative right can be included. According to art. 3 Act on housing cooperatives, the assets of housing cooperatives it the private property of its members, therefore the condition of efficiency and ethics formed by the Austrian school is fulfilled. In the second group of weak property rights, there are tenancy-free market and social and defective forms.

Concluding contracts on real estate market implies the appearance of transaction costs defined as the cost of measurement and experiencing attributes of transaction, receiving information about the product, client, supplier and features of the resource (North, 2004) and costs emerging in human relations (Hardt, 2005). Arrow describes them as the costs of maintaining economic system on the move (Arrow, 1969), while Eggerton draws attention to costs caused by the exchange of property rights of resources between individuals, and the necessity of the execution of these rights (Eggerton, 1990). A supplement of the above definitions is the division into *ex-ante* and *ex-post* transaction costs (Williamson, 1998). *Ex-ante* costs are related to the preparation and conclusion of the contract, and *ex-post* refers to the monitoring and execution of the contract. The idea of transaction costs is strictly related to the new institutional economy and is an impulse to the polemic with elementary paradigms of the neoclassical economy. In reference to the homo oeconomicus concept, the individual has full access to complete, objective and constant information, denied by the Austrian approach. The replacement of homo oeconomicus by the information asymmetry concept caused the necessity of adopting costs of information search and optimal solutions by the parties to the contract and the transfer of risk to organizations with less risk aversion (Tyc and Schneider, 2017). Accommodation is one of the most basic human needs, therefore the assumption can be made that households aiming for the minimization of risk related with concluding a contract<sup>9</sup> will show a tendency to increase the transaction cost. Its size and type will depend mainly on the chosen type of the property law. The main challenge of housing policy is to ensure as much as possible the options of fulfilling housing needs and taking actions directed at minimizing level of transaction costs. Table 2 provides a comparison of the forms of the housing demand fulfilment by criterion of transaction costs that are generated, with examples and quality features<sup>10</sup> assigned:

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<sup>8</sup> Law institutions.

<sup>9</sup> Fulfilling housing need.

<sup>10</sup> Scale: 1 – low, 2 – medium, 3– high.

**Table 2.** Examples of transaction costs by property laws' form

Form of property right	<i>Ex-ante</i> transaction costs	Quality feature	<i>Ex-post</i> transactional costs	Quality feature
Ownership; cooperative ownership; cooperative	<ul style="list-style-type: none"> <li>• cost of finding information (realtor, lawyer)</li> <li>• cost of concluding contract (notary, civil law transactions tax)</li> </ul>	medium (2)  high (3)	<ul style="list-style-type: none"> <li>• dwelling maintenance (utilities)</li> <li>• external financing cost</li> <li>• property tax</li> <li>• dwelling maintenance (renovations and modernizations)</li> </ul>	low (1) high (3) low or high (1 or 3)* medium (2)
Free market tenancy	<ul style="list-style-type: none"> <li>• cost of concluding contract (time, notary)</li> </ul>	low (1)	<ul style="list-style-type: none"> <li>• rent</li> <li>• dwelling maintenance (media)</li> </ul>	<ul style="list-style-type: none"> <li>• high (3)</li> <li>• low (1)</li> </ul>
Social tenancy	<ul style="list-style-type: none"> <li>• cost of concluding contract (time, notary)</li> </ul>	low (1)	<ul style="list-style-type: none"> <li>• rent</li> <li>• dwelling maintenance (media)</li> </ul>	<ul style="list-style-type: none"> <li>• high (3)</li> <li>• low (1)</li> </ul>

\* Depending on the country's tax system.

Source: own elaboration.

The visible discrepancy in the rating of property tax is the result of differences in the tax systems adopted in other countries. Whilst in many countries of Western Europe, real estate are burdened with cadastral tax dependent on the house value, in Poland property tax is set at a low level therefore impact of this cost is entirely different. The level and the type of transaction costs matter crucial in the process of concluding contracts between agents on the market. Bearing in mind the non-speculative nature of transactions on the housing market, the assumption has to be made that households will aspire to minimize the risk of what will affect the level of transaction costs. A separate category involves costs related to usage of property rights. This can differ depending on the examined market – factors like cadastral tax or the efficiency and stability of tenancy determines the preferences of households and the influence on the efficiency of the housing policy.

The last element which has to be defined is the housing policy model. Due to the interdisciplinarity and versality of NIE, and the derived from it LA method, it seem to be the most appropriate approach to the analysis of different housing policy models. This allows to find common ground to compare alternative markets designed in different legal systems. The simplest definition of the HP model can be set as a collection of legal acts that regulate the functioning of the housing market. However, this can be difficult if not impossible due to the multiplicity of bills of

law related to the subject, directly and indirectly. For the purposes of this study, the author's definition is set for housing policy model as a group of formal and informal institutions regulating, influencing and increasing the efficiency of fulfilling housing demand and reducing transaction costs.

### 3. Housing policy efficiency rating criteria

In the theory of law & economics, the main goal of law is efficiency measured in economic criteria. The basic issue is to designate measurable efficiency-rating criteria of the enacted law. In the area of LA there were a few concepts of efficiency rating.

The starting point to efficiency analysis is the Pareto optimum. This concept took its name from its creator – the Italian economist Vilfredo Pareto. The main thesis is that the increase of individual well-being should not be done at the expense of the someone else (Tyc, 2007). The notion *maximization of usability* in reference to law can be understood as an increase in the scope of rights or statutory protection. The main application limitation of the Pareto optimum is the lack of reference to the wider social context. The analyses are provided at the level of individual, specified as consumer or good. The assumption that allocation is optimal when one side loses nothing while the other gains everything with the distribution of usability from 100% to 0%, cannot be found optimal in the social and legal context. The concept nearest to Pareto optimum is marginal analysis which assumes that the implementation of law by institutions should continue until the maximization of the usability level with the social costs of the goal's realization (Tyc and Schneider, 2017). One of the most popular examples of the Pareto optimum is called prisoner's dilemma, borrowed from game theory. It is a non-zero sum game in which the increase of one's usability is not equal to the others' decrease, which fully represents the nature of relations of law.

Due to the limited abilities of the Pareto optimum application in law and economics and its social influence, other methods are used, like Kaldor Hicks compensation criterion, which claims that specific institutions of law can be implemented only when social change determines improvement. This logical process results from a compensation test – the claim that change is efficient when the welfare of the whole community increases even at the expense of the others whose position decreased (Tyc, and Schneider, 2017). An integral part of this idea is the transfer of earned growth to the coverage of loss for individuals whose usability decreased, ipso facto the marginal advantages and incurred costs levels are up. According to a more expanded definition proposed by M. Araszkievicz (Araszkievicz, 2015), a specific state of affairs can be recognized as efficient<sup>11</sup> – when and only then – when any other improvement is possible and the result of the transformation from an *ex-ante* to an *ex-post* state causes the generation of a surplus to compensate for the incurred costs of a diminished position of the other side.

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<sup>11</sup> Optimal.



The next concept referring to efficiency is the Coase theorem, which is a theoretical solution of internal costs in the field of the new institutional economy. Internal costs, also called externalities, are defined as the transfer of costs or benefits of specific organization to others, without any recompense. Usually these are side effect of business entities' activity in which the negative consequences are borne by the surroundings independently of their will (Buchanan and Stubblebine, 1962). The Coase theorem can be explained in the following way – if these criteria are fulfilled: low transaction costs (1), property rights are well defined (2), redistribution of income is neutral to marginal costs (3), external authority exists and guards the execution of the contracts (4), access to freely exchangeable value measure is provided (5) it means that: allocation of resources will be the same independently of allocation of property rights. The allocation will be Pareto-optimal, ipso facto the problem of externalities will be minimized (Acocella, 2002). The main idea of the Coase theorem is that top-down regulations are inefficient due to the fact of ignoring cooperation between sides. The postulated form of solving ineffective property rights' allocation are contracts.

All of the presented ideas refer to the postulate of economic efficiency of law. Its common feature is the determination of general demands and descriptive solution suggestions, whereas the main disadvantage is the lack of strictly specified parameters of efficiency measurement. LE undertakes this problem and defines, besides abstract and immeasurable terms like usability, prosperity and welfare, and proposes money as an indicator of efficiency level (Araszkievicz, 2015). One of the best known proponents of monetary measures is R. Posner – the author of wealth maximization criterion, defined as the value of all tangible and intangible goods in society converted into dollars (Posner, 1979). The goods do not have to be traded (Posner, 2004). An example of an indicator based on Posner's criterion is *willingness to pay*<sup>12</sup>, which means readiness to receive an amount of money not less than 1000 USD in exchange for withdrawal of the possession of the specific good. The maximization of wealth in Posner's meaning is achieved when resources belong to persons with the highest WTP level.

#### 4. Comparison of housing policy programs

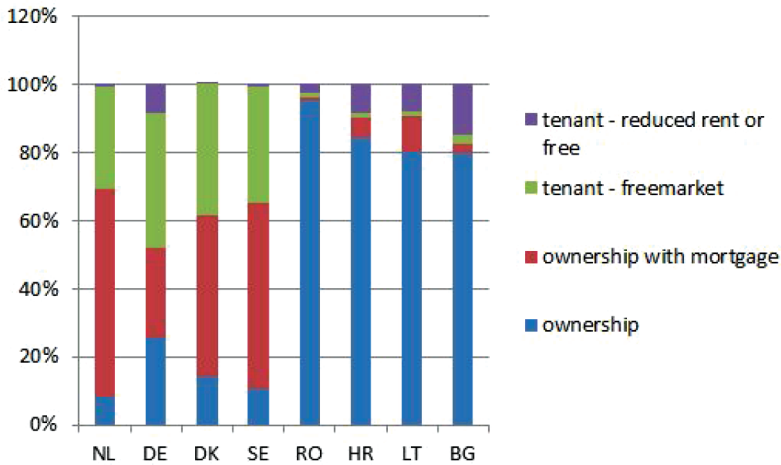
The property rights presented in the theoretical part of this paper points out that entire ownership is the main way of fulfilling housing needs that households should aspire for. In order to further the research, some additional questions should be introduced. Does ownership determine the effectiveness of housing policy? Should an effective housing policy be based on the pursuit of the household to achieve ownership? Analysis of the tenancy structure distribution in the EU indicates a dependency between the wealth of society and the number of options of fulfilling

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<sup>12</sup> Further called WTP.

housing demand. The analysis provided in this paper was conducted in two stages. The first was a wider analysis of six countries characterized by extreme indications of housing market ratios – three of the most and three the least developed in the EU. The aim of this part it to show the background of further research. The second stage in the main comparative analysis of Poland and two other HP models is to emphasize the differences between them.

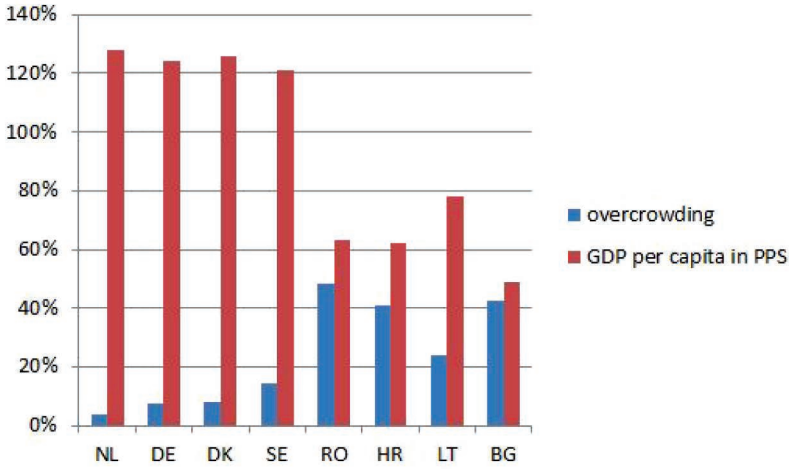
The distribution of tenure status shown in Figure 1 was compiled with overcrowding rate and country development rate showing that ownership, as a category of housing demand fulfillment, is not equivalent with welfare in society and housing policy efficiency. HP effectiveness needs to be examined from different perspectives. A comparison of Figures 1 and 2 leads to the conclusion that a quantitative approach shows only a particular section of the examined problem. It has to be deepened with qualitative analysis which may reveal other problems resulting in inadequate ownership relations instead of the complete lack of accommodation.



**Fig. 1.** Distribution of population by tenure status in 2016

Source: own elaboration based on Eurostat: table symbol: ilc\_lvho02.

The characteristic features of housing policy in the most developed countries in the EU are the balance of the available housing demand fulfillment options and the better quality of housing resources, as can be seen in Figure 2. This may be caused by the better quality of the law institutions that regulate the housing policy and the active attitude of the organisations realising tasks in this area. Due to the limitation of this paper, further analysis was shortened to the presentation of different programmes targeted to support the realisation of the housing demand of limited income households, provided in Table 3. The different perspective and



**Fig. 2.** Overcrowding rate compared to GDP *per capita* in PPS in 2016

Source: own elaboration based on Eurostat: table symbol: ilc\_lvho05a; tec00114.

**Table 3.** Housing policy programmes comparison

Criterion/Programme	Low Income Housing Tax Credit (USA)	Woningcorporaties (NL)	Towarzystwa Budownictwa Społecznego (PL)
State involvement	indirect	indirect – convergence with public interest verification	direct – ownership management of local authorities
Type of involvement	non-returnable public financing	returnable public financing	returnable public financing
Type of support	tax credit	low interest loan	low interest loan
Form of property right	private – tenancy	private – tenancy	private – tenancy (ownership option)
Additional budget burden	yes	no	no
consumption exclusion	no	no	possible

Source: own elaboration based on (Eriksen and Rosenthal, 2010; Needham and Verhage, 1998; Polak, 2007).

the adopted solutions between the analysed countries should be noted. Such a wide range of different programs can be explained by the different social and economic background which shapes HP.

## 5. Conclusions

Law and economics analysis (LA) of housing policy efficiency is a complex and a multithreaded issue. The carried out research allows to draw the following conclusions:

- The application of property rights theory in isolation from informal institutions – social, political determinants and qualitative evaluation of housing resources – can lead to the false conclusion that ownership as the main method of fulfilling housing demand is crucial for an effective housing policy.
- Significant share of ownership with no outstanding mortgage or loan in tenure distribution is typical for countries characterized by relatively weak market institutions and low quality of housing resources which is the result of historical and political determinants e.g. post-communist countries.
- The ownership preference is caused by the low level of trust towards the tenancy institution and typical for countries where informal institutions e.g. the mentality and consumer preferences, answer for weakness of formal institutions.
- Limited possibilities of fulfilling housing needs with more efficient cheaper forms increases the level of the transaction cost, which ipso facto reduces the efficiency of housing policy.

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