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## TENLAW: Tenancy Law and Housing Policy in Multi-level Europe

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### National Report for

# GERMANY

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# National Report for Germany

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## 1. Housing situation

### 1.1. General features

### 1.2. Historical evolution of the national housing situation and housing policy

- Please describe the historic evolution of the national housing situation and housing policies briefly.
  - In particular: Please describe briefly the evolution of the principal types of housing tenures from the 1990s on. Explain the growth and decline of the different tenures and the reasons why that happened (e.g. privatization or other policies).

The market-based character of the German housing sector has its origins in the era of the Weimar Republic (1918-1933). At that time, the driving principle was to provide good housing at affordable prices, contrary to the capitalist system, where only either the constellation “poor and affordable” or “good and expensive” seemed achievable.<sup>1</sup> After the Second World War (1939-1945) a shortage of dwellings constituted one of the major problems to be faced by post-war Germany.<sup>2</sup> Even though this major problem was common to both West and East Germany, the respective developments in the two German states took different paths.

In post-war West Germany, the Federal Republic of Germany (*Bundesrepublik Deutschland*, BRD), there was a shortage of millions of dwellings in the housing market. Given this situation, the housing sector was considered an issue of national importance. What was created in response to this massive shortage was a well-functioning system of social housing, in particular extensive construction of rental dwellings for a broad majority of households and a market-orientated housing supply. This system was characterized by both contribution of private investment as well as high standards of quality. The main task of the housing sector was reconstruction of the ruined housing stock. The target group was the whole society and not the particularly disadvantaged classes. Beyond that, the state regulated the housing market, in particular the distribution of available living space (*Wohnungszwangswirtschaft*) which was abolished only during the 1960s.<sup>3</sup> Local authorities, i.e. local housing offices (*Wohnungsamt*), were empowered to register available dwellings, to decide who may use them, to determine if a termination is valid and also to control and prohibit rent increases.<sup>4</sup> Moreover, the rents in the whole housing sector were fixed due to the Price Freeze Regulation enacted even before the Second World War in 1936.<sup>5</sup> In 1950 and in 1956, two Housing Acts<sup>6</sup> were enacted. They constituted the basis for the promotion of social housing policy by making public funds available for the construction of rented housing for anybody wishing to invest. Furthermore, the First Housing Act of 1950 already abolished the rent control for free financed newly built dwellings.<sup>7</sup>

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<sup>1</sup> Cf. H. Häußermann & W. Siebel, *Soziologie des Wohnens. Eine Einführung in Wandel und Ausdifferenzierung des Wohnens* (Weinheim: Beltz Juventa, 2000) 145.

<sup>2</sup> Cf. R. Sotelo & K. Hähndel, *Niedrige Eigentumsquote als Wohlstandsindikator – Theorie und empirische Evidenz*, WuM 2009, 567 (570).

<sup>3</sup> Gesetz über den Abbau der Wohnungszwangswirtschaft of 23-06-1960 (BGBl. I 389).

<sup>4</sup> Cf. i.a. Kontrollratsgesetz no. 18 of 8-03-1946 (KR Abl. 117) and Wohnraumbewirtschaftungsgesetz of 31-03-1953 (BGBl. I 97).

<sup>5</sup> Preisstoppverordnung of 26-11-1936 (RGBl. I 371).

<sup>6</sup> I. WoBauG of 24-04-1950 (Federal Law Gazette (*Bundesgesetzblatt*, BGBl.) I 83); II. WoBauG of 27-06-1956 (BGBl. I 523).

<sup>7</sup> s. 23 I. WoBauG.

Already at that time one could differentiate three important pillars in housing policy:

- (1) construction of social housing,
- (2) promotion of ownership,
- (3) financial support to weaker households by the means of direct subsidization in the form of a housing allowance (*Wohngeld*) and
- (4) market-oriented rents within the free financed rental housing sector.<sup>8</sup>

Housing construction volume increased considerably from 220,000 units in 1949 to 460,000 units in 1952; until the mid-1960s it stayed stable at the level of 550,000 units and achieved its maximum of 620,000 units in 1964.<sup>9</sup> In total, there were about 9 million housing units built from 1949-1965.<sup>10</sup> About the half of them (51%) were constructed as social dwellings.<sup>11</sup> Since the commitments<sup>12</sup> for social housing in Germany have always been temporary, these dwellings passed after a specific period of time into the private rental market connected with a gradual transition into market-oriented rents. Due to this privatization process the broad offer of private rental housing, which still remains characteristic for Germany, came into existence.

However, the promotion of social housing was not the only approach regarding housing policy after the war. Housing policy has also always focused on privately-financed construction of rental properties as well as construction of owner-occupied houses.<sup>13</sup> Advantageous tax laws and a liberal rent system were the first measures put in place towards this aim. In this period the promotion of adequate housing was a common effort of the Federal Government (*Bundesregierung*), states (*Länder*) and municipalities under the auspices of the Federal State (*Bund*).

Parallel to these developments in West Germany, housing policy in East Germany was administered by the East German government for about forty years. Initially, in the eastern part of the country, the housing sector did not seem to be understood as a main priority, possibly because the shortage was also less striking.<sup>14</sup> New constructions as well as assignment of living space were the exclusive competence of the central government of the Socialist Unity Party of Germany. The stock of existing buildings became state-owned. The building volume in the German Democratic Republic (*Deutsche Demokratische Republik*, DDR) was at about one half or one third of the West German level; only since 1976 the building volume of the both German states has been similar.<sup>15</sup> The increase in the construction of new dwellings was reached only through the promotion of prefabricated block housing estates (*Plattenbau*). The idea was that through the mass fabrication, housing shall no longer represent a means of social differentiation, the leitmotiv was to build better, quicker and cheaper.

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<sup>8</sup> Cf. Häußermann & Siebel, *Soziologie des Wohnens*, 146.

<sup>9</sup> Cf. M. Melzer & W. Steinbeck: *Wohnungsbau und Wohnungsversorgung in beiden deutschen Staaten: Ein Vergleich* (Berlin: Duncker und Humblot, 1983) 55.

<sup>10</sup> Cf. K.-H. Peters, *Wohnungspolitik am Scheideweg* (Berlin: Duncker & Humblot, 1984) 318.

<sup>11</sup> Ibid.

<sup>12</sup> Regarding the amount of rent which has to be cost-based and the possibility to rent such dwellings which is limited to persons in need.

<sup>13</sup> Cf. O. Bischoff & W. Maennig, *Rental housing market segmentation in Germany according to ownership*, Journal of Property Research 2011, 134.

<sup>14</sup> Cf. Melzer & Steinbeck, *Wohnungsbau und Wohnungsversorgung in beiden deutschen Staaten*, 55.

<sup>15</sup> Ibid, 12, 13.

The table below shows divergences between the two German states based on selected indicators in year 1967.<sup>16</sup>

Indicators	DDR	BRD
Dwelling surface	50,80 square metre (sqm)	80,00 sqm
Bath or shower	99 %	98.8 %
Central heating	57.5 %	83.8 %
1 room dwelling	14.7 %	6.4 %
4 room dwelling	7.0 %	42.1 %
Detached houses	0.9 %	46.7 %
Multi-family houses	99.1 %	52.3 %

In the 1990s, after the Iron Curtain had come down, the West German market economy and the East German planned economy were merged.<sup>17</sup> In the mid-1990s, the Federal Government started to slowly withdraw from the housing sector. In this period the promotion of new buildings (*Wohnbauförderung*) was replaced with promotion of living space (*Wohnraumförderung*).

After the German reunification, important changes concerning the ownership structure were noted. On the one hand, “public property” (*Volkseigentum*) was given back to their original previous owner (*Restitution*).<sup>18</sup> This applied to almost 606,000 dwellings in East Germany.<sup>19</sup> On the other hand, part of the housing stock owned by the municipalities in East Germany was privatized in order to promote the formation of individual home ownership.<sup>20</sup>

At the end of the 1990s, the former East German territories experienced a substantial decrease in the population due to decreasing birth rate as well as mass migration to ex-West German states. This brought about a shrinking housing demand. Automatically the number of vacancies in the post-communist territories increased and visibly affected the landlords.

Since the 1990s the trend towards increased number of owner-occupied dwellings was distinguishable but not very dynamic. In the last two decades, home ownership has increased but only slowly. This development can be attributed only mostly to the former East German territories as the ownership rate increased from 26.1% in 1993 to 34.4% in

<sup>16</sup> Ibid.

<sup>17</sup> Cf. Bischoff & Maennig, *Journal of Property Research* 2011, 134.

<sup>18</sup> s. 3 (I 1) of the Property Act (*Vermögensgesetz*) in its version of 9-02-2005 (BGBl. I 205).

<sup>19</sup> Cf. B. Sander, *Anpassungsprozesse in der ostdeutschen Wohnungswirtschaft: Analyse und Bewertung*, (Kiel: Institut für Weltwirtschaft Kiel, 1994) available at:

[http://www.econstor.eu/bitstream/10419/791/1/147819075.PDF?origin=publication\\_detail](http://www.econstor.eu/bitstream/10419/791/1/147819075.PDF?origin=publication_detail), 14 (last retrieved: 10-03-2014).

<sup>20</sup> Art. 22 (IV 4,5) of the Unification Treaty of 31-08-1990 (BGBl. II 889).

2010.<sup>21</sup> As for West Germany a less strong development can be observed. The ownership ratio rose only slowly from 41.7% in 1993 to 48.8% in 2010.<sup>22</sup>

As a result of the constitutional reform of 2006 (so-called *Föderalismusreform*), the *Länder* are primarily responsible for the housing policy in Germany,<sup>23</sup> except for the law on housing allowance and housing construction allowance (*Wohnungsbauprämie*).<sup>24</sup> Although the *Länder* have also assumed the financing of the social housing system, the *Bund* pays an annual compensation of EUR 0.52 billion up to and including 2019.<sup>25</sup> In 2010, the *Länder* themselves spent EUR 0.53 billion on the promotion of housing with the result that the total expenditures amounted to EUR 1.05 billion.<sup>26</sup> But in the same year eight of the sixteen *Länder* have used these federal funds almost entirely for the existing housing stock,<sup>27</sup> although new construction is absolutely necessary due to the expiration of the temporary commitments of social dwellings. Prior to the constitutional reform, they spent about EUR 2.8 billion in 2002, whereas the *Bund* granted financial support in the amount of EUR 0.3 billion.<sup>28</sup>

- In particular: What is the role of migration within the country, immigration or emigration from/towards other countries inside and outside the EU (including war migration as in Ex-Yugoslavia)

#### (1) External migration

The distribution of foreigners in Germany varies according to nationality. This phenomenon has its origins in the 1950s and 1960s, in the era of so-called workers immigration (*Gastarbeiterimmigration*), so that Italians, Greeks and immigrants from former Yugoslavian countries are represented primarily in Baden-Württemberg and Bavaria, whereas in the city-states – Berlin, Bremen and Hamburg – a relatively high proportion of Poles and Turks is represented.<sup>29</sup>

In the mid-1990s, especially the former West Germany could note a shortage of housing which was due to movements of immigrants, repatriates and asylum seekers who found

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<sup>21</sup> Cf. Federal Ministry of Transport, Building and Urban Development (Bundesministerium für Verkehr, Bau und Stadtentwicklung, BMVBS), *Wohnen und Bauen in Zahlen 2012/2013*, 2013, available at: [http://www.bmvbs.de/SharedDocs/DE/Publikationen/BauenUndWohnen/wohnen-und-bauen-in-zahlen-2012-2013.pdf?\\_\\_blob=publicationFile](http://www.bmvbs.de/SharedDocs/DE/Publikationen/BauenUndWohnen/wohnen-und-bauen-in-zahlen-2012-2013.pdf?__blob=publicationFile), 41 (last retrieved: 20-12-2013).

<sup>22</sup> Ibid.

<sup>23</sup> For explanations regarding the responsibilities in housing policy within the German federal system please refer to '3.2. Governmental actors'.

<sup>24</sup> S. 74 (I no. 18) of the German Basic Law (*Grundgesetz*, GG) in its version of 28-08-2006 (BGBl. I S. 2034).

<sup>25</sup> S. 3 (II) of the Unbundling Law (*Entflechtungsgesetz*) in its version of 15-07-2013 (BGBl. I 2401) as well as Art. 143c (I) GG; cf. also the Federal Budget (*Bundeshaushalt*) of 2013, available at: <http://www.bundeshaushalt-info.de/startseite/#/2013/soll/ausgaben/einzelplan/122588202.html>, 230 (last retrieved: 21-03-2014).

<sup>26</sup> Cf. BMVBS, *Fortführung der Kompensationsmittel für die Wohnraumförderung*, 2011, available at: <http://www.bbsr.bund.de/BBSR/DE/WohnenImmobilien/RahmenbedInstrumente/ProjekteFachbeitraege/Wohnraumfoerderung/Veroeffentlichungen.html;jsessionid=C8B72A6A61B28F55D1CEDF0025CD7360.live1042?nn=446662>, 7 (last retrieved: 21-03-2014).

<sup>27</sup> Ibid, 35.

<sup>28</sup> Ibid, 6.

<sup>29</sup> Cf. C. B. von Gostomski, *Basisbericht: Repräsentativbefragung „Ausgewählte Migrantengruppen in Deutschland 2006/2007“: Zur Situation der fünf größten in Deutschland lebenden Ausländergruppen*, 2010, available at: [http://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Forschung/Forschungsberichte/fb08-basisbericht-berichtsband.pdf?\\_\\_blob=publicationFile](http://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Forschung/Forschungsberichte/fb08-basisbericht-berichtsband.pdf?__blob=publicationFile), 140 (last retrieved: 22-03-2014).

their way to Germany in the aftermath of the collapse of communism and especially during the Balkan wars of the 1990s.<sup>30</sup>

Based on the National Integration Plan of 2007,<sup>31</sup> the Federal Ministry of Transport, Building and Urban Development (*Bundesministerium für Verkehr, Bau und Stadtentwicklung*, BMVBS) has published a guide for the municipalities, which provides practice-orientated recommendations for the creation of integration concepts.<sup>32</sup>

## (2) Domestic migration

According to the data concerning the period from 1991 to 2006, about 2.45 million people migrated from DDR to BRD and 1.45 million people moved in the other direction. However, compared to the overall population, these movements concerned almost 17% of the East German population and only 2.5% of the West German population.<sup>33</sup>

In 2012<sup>34</sup>, with regard to migration on the national level only, there were 1,096,922 cases reported. The two German states which enjoyed the highest positive balance (about 14,000) were Berlin and Bavaria. On the other hand the most negative balance (about 15,800) was noted for North Rhine-Westphalia. Among the states with the negative balance are all former DDR states (Brandenburg, Mecklenburg-Western Pomerania, Saxony-Anhalt and Thuringia) except for Saxony.<sup>35</sup> The former BRD states whose emigration numbers are higher than immigration numbers are Bremen, Hesse, Rhineland-Palatinate and Saarland.<sup>36</sup>

### 1.3. Current situation

- Give an overview of the current situation.
  - In particular: What is the number of dwellings? How many of them are rented vs. owner-occupied? What would be the normal tenure structure (see summary table 1)? What is the most recent year of information on this?

The most recent numbers concerning the dwelling stock in Germany date from the *Zensus 2011*. The following table presents the number and classifications of dwellings in Germany:<sup>37</sup>

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<sup>30</sup> Cf. M. Peucker, A. Bochmann & R. Heidmann, *Housing Conditions of Sinti and Roma – Germany* (Vienna: RAX-EN Thematic Study, 2009), available at: [http://fra.europa.eu/sites/default/files/fra\\_uploads/581-RAXEN-Roma%20Housing-Germany\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/581-RAXEN-Roma%20Housing-Germany_en.pdf), 24 (last retrieved: 27-03-2014).

<sup>31</sup> National Integration Plan of the Federal Government, available at: [http://www.bundesregierung.de/Content/DE/Archiv16/Artikel/2007/07/Anlage/2007-10-18-nationaler-integrationsplan.pdf;jsessionid=C97BFC15744A5FF378E6EEFF70635743.s1t1?\\_blob=publicationFile&v=2](http://www.bundesregierung.de/Content/DE/Archiv16/Artikel/2007/07/Anlage/2007-10-18-nationaler-integrationsplan.pdf;jsessionid=C97BFC15744A5FF378E6EEFF70635743.s1t1?_blob=publicationFile&v=2), 111 (last retrieved: 10-03-2014).

<sup>32</sup> Cf. BMVBS, *Stadtteilkonzepte für Integration*, Berlin: 2012, available at: [http://www.bmvi.de/SharedDocs/DE/Anlage/StadtUndLand/stadtteilkonzepte-fuer-integration.pdf?\\_blob=publicationFile](http://www.bmvi.de/SharedDocs/DE/Anlage/StadtUndLand/stadtteilkonzepte-fuer-integration.pdf?_blob=publicationFile) (last retrieved: 10-03-2014).

<sup>33</sup> Cf. N. Fuchs-Schündeln & M. Schündeln, *Who stays, Who goes, Who returns? East-West Migration within Germany since Reunification*, *Economics of Transition* 2009, 703 (704).

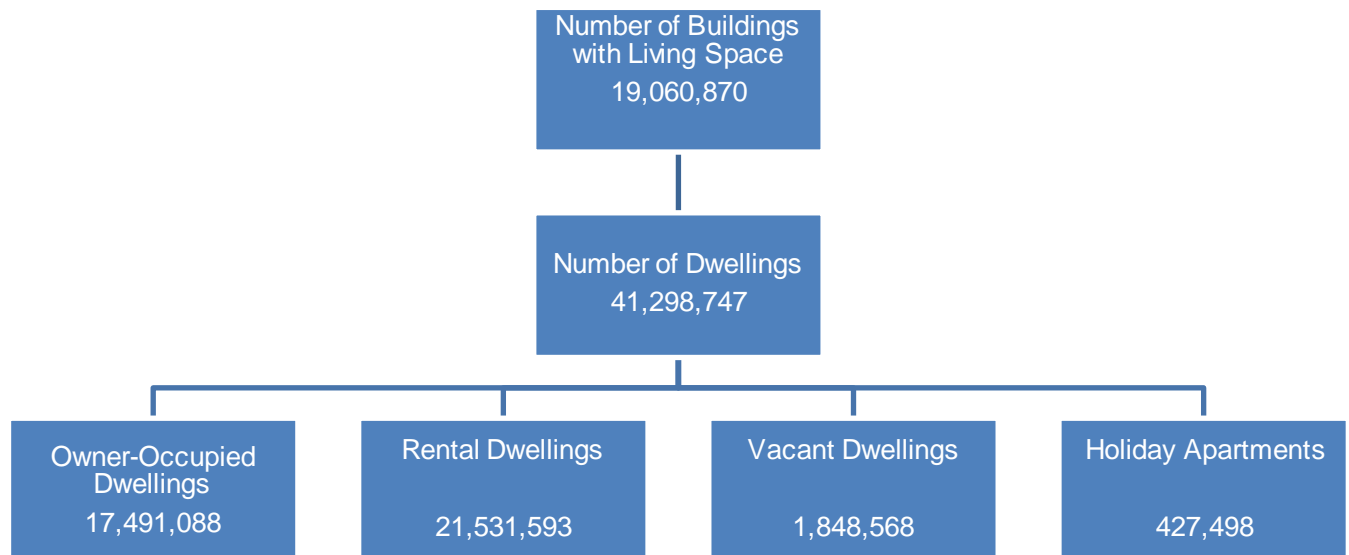
<sup>34</sup> Cf. Statistical Offices of *Bund* and *Länder*, *Gebiet und Bevölkerung*, 2012, available at: [http://www.statistik-portal.de/Statistik-Portal/de\\_jb01\\_jahrta5a.asp](http://www.statistik-portal.de/Statistik-Portal/de_jb01_jahrta5a.asp) (last retrieved: 27-03-2014).

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Cf. Federal Statistical Office, *Zensus 2011: Gebäude und Wohnungen Bundesrepublik Deutschland am 9. Mai 2011* (Wiesbaden: 2013), available at: [https://www.destatis.de/DE/PresseService/Presse/Pressekonferenzen/2013/Zensus2011/gwz\\_zensus2011.pdf?\\_blob=publicationFile](https://www.destatis.de/DE/PresseService/Presse/Pressekonferenzen/2013/Zensus2011/gwz_zensus2011.pdf?_blob=publicationFile), 15, 16 (last retrieved: 27-12-2013).





According to the German Federal Statistical Office (*Statistisches Bundesamt*), in 2011 there were ca. 41.3 million dwellings in Germany. About 21.5 million of them were used for the purpose of renting, which represented 52.1% of the whole dwelling stock (EU-average: 29.4%)<sup>38</sup>, while owner-occupied dwellings numbered 17,5 million. This accounted for 42.4% of the whole dwelling stock (EU-average: 70.6%)<sup>39</sup>. During the last 20 years, the ownership rate increased by almost 4%<sup>40</sup> and it is estimated that it will increase by another 4% until 2025<sup>41</sup>. Although this rate increased even faster in East Germany than in West Germany after the reunification, there are still strong regional differences.<sup>42</sup> Whereas in Saarland, in the Western part of the country, the ownership ratio amounted to 58.1%, it remained at 15% in Berlin and below the national average in Saxony-Anhalt (37.7%), Mecklenburg-Western Pomerania (35.7%) and in Saxony (29.7%).<sup>43</sup> Furthermore, 1.85 million dwellings, that are 4.5% of the whole dwelling stock, were vacant and 430,000 dwellings (1%) were used as holiday apartments.

A slight majority of the existing dwellings (54.4%) are found in multiple dwelling units with more than two dwellings, whereas 45.6% are found in residential buildings with just one or two dwellings.<sup>44</sup>

#### 1.4. Types of housing tenures

- Describe the various types of housing tenures.

In Germany one can distinguish two main forms of housing tenure, home ownership and renting, with the category of renting further divided into renting on the private market and social renting with a public task. While condominiums are classed as home ownership,

<sup>38</sup> <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do> (last retrieved: 10-03-2014).

<sup>39</sup> [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc\\_lh002&lang=de](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc_lh002&lang=de) (last retrieved: 10-03-2014).

<sup>40</sup> Cf. BMVBS, *Wohnen und Bauen in Zahlen 2012/2013*, 41.

<sup>41</sup> Cf. Federal Institute for Research on Building, Urban Affairs and Spatial Development (*Bundesinstitut für Bau-, Stadt- und Raumforschung*, BBSR), *Wohnungsmärkte im Wandel. Zentrale Ergebnisse der Wohnungsmarktprognose 2025* (Bonn: January 2010), available at: [http://www.bbsr.bund.de/BBSR/DE/Veroeffentlichungen/BerichteKompakt/2010/DL\\_1\\_2010.pdf;jsessionid=4C21022AFB04188C8DD964A782F262E0.live1043?\\_blob=publicationFile&v=2](http://www.bbsr.bund.de/BBSR/DE/Veroeffentlichungen/BerichteKompakt/2010/DL_1_2010.pdf;jsessionid=4C21022AFB04188C8DD964A782F262E0.live1043?_blob=publicationFile&v=2), 4 (last retrieved: 08-01-2014).

<sup>42</sup> Cf. BMVBS, *Wohnen und Bauen in Zahlen 2012/2013*, 41.

<sup>43</sup> Cf. Federal Statistical Office, *Zensus 2011: Gebäude und Wohnungen Bundesrepublik Deutschland am 9. Mai 2011*, 17.

<sup>44</sup> *Ibid*, 6.

the possibility to occupy a dwelling due to the membership in a cooperative is rated among the rental housing sector. Since there is no special law for the contract of use apart from the charter of the cooperative, this form of tenure is mainly subject to the same rules as the renting of dwelling is. Furthermore, there are special types of tenure, these are the heritable building right (*Erbbaurecht*) according to the Law on the Heritable Building Right (*Erbbaurechtsgesetz*)<sup>45</sup>, the right of residence (*dingliches Wohnrecht*) according to section 1093 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*)<sup>46</sup>, the usufruct (*Nießbrauch*), which is laid down in sections 1030 et seq., 1048 BGB and the permanent residential right (*Dauerwohnrecht*) in accordance with sections 31 et seq. of the Law on Apartment Ownership (*Wohnungseigentumsgesetz, WEG*)<sup>47</sup>. However, there are no statistical data available on these types of tenure.<sup>48</sup>

- Home ownership

- How is the financing for the building of homes typically arranged (e.g. own equity, mortgage based loan, personal loan, mix, other)

Residential property accounts for around half of German private assets. However, the preference for ownership does not seem obvious. An interesting observation is that on the one hand, according to the opinion polls, Germans wish to live in their own dwellings. However, this attitude is not sufficiently reflected in their purchasing behaviour.<sup>49</sup> Partially it is due to the character of the housing market and its historical and actual specificities, like the extensive construction of (social) rental dwellings after the Second World War.<sup>50</sup> On the other hand a part of responsibility for the low home ownership ratio is attributed to real estate finance in Germany. In Germany, the households that show credit risk – or would have to bear a higher interest charge in any event – have a genuine alternative to home ownership which is renting on the base of unlimited contracts with high security of tenure.<sup>51</sup> Also, social commitment and home ownership are correlated. However, since renting is for some people a real option for their whole life time they normally do care about their rented households. Nevertheless, the commitment to ownership is reflected in increased investment in the quality of construction and maintenance.<sup>52</sup>

A long-term analysis proves that private financing of real estate became easier over the years. In 1994, the average household with one child needed to spend about 38% of their

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<sup>45</sup> Gesetz über das Erbbaurecht of 15-01-1919 (RGBl. 72, corr. 122).

<sup>46</sup> BGB in its version of 2-01-2002 (BGBI. I 42, corr. 2909; corr. 2003, 738); an official English translation of the current German Civil Code is available at: [http://www.gesetze-im-internet.de/englisch\\_bgb/](http://www.gesetze-im-internet.de/englisch_bgb/) (last retrieved: 12-12-2013).

<sup>47</sup> WEG of 15-03-1951 (BGBI. I 175, corr. 209).

<sup>48</sup> For explanations, please refer to 4.2. 'Regulatory types of tenures without a public task'.

<sup>49</sup> Cf. R. Sotelo & K. Hähndel, WuM 2009, 567.

<sup>50</sup> Cf. C. Rottwilm, *Immobilien in Deutschland: Ein Volk von Mietern*, SPIEGEL of 04-07-2009, available at: <http://www.spiegel.de/wirtschaft/immobilien-in-deutschland-ein-volk-von-mietern-a-633636.html> (last retrieved: 06-03-2014).

<sup>51</sup> Cf. BMVBS, *Finanzierungsstrategien wohnungswirtschaftlicher Akteure unter veränderten Rahmenbedingungen auf den Finanzierungsmärkten*, February 2011, available at: [http://www.bbr.bund.de/BBSR/DE/Veroeffentlichungen/BMVBS/Online/2011/DL\\_ON042011.pdf?\\_\\_blob=publicationFile&v=2](http://www.bbr.bund.de/BBSR/DE/Veroeffentlichungen/BMVBS/Online/2011/DL_ON042011.pdf?__blob=publicationFile&v=2), 12 (last retrieved: 22-03-2014).

<sup>52</sup> Cf. J. Frick & P. Droß, *Wohnverhältnisse und Wohnkosten, Auszug aus Datenreport 2011. Ein Sozialbericht für die Bundesrepublik Deutschland* (Bonn: Bundeszentrale für politische Bildung, 2011) 208, available at: [https://www.destatis.de/DE/Publikationen/Datenreport/Downloads/Datenreport2011.pdf?\\_\\_blob=publicationFile](https://www.destatis.de/DE/Publikationen/Datenreport/Downloads/Datenreport2011.pdf?__blob=publicationFile) (last retrieved: 01-03-2014).

income for financing of their property projects. By 2008, this was down to 17% and in 2010 only 13%.<sup>53</sup>

In 2010, almost half of all loans in Germany were housing loans usually secured by a land charge (*Grundschuld*) pursuant to section 1191 BGB, which is unlike the accessory mortgage (*Hypothek*) not accessory to the secured claim.<sup>54</sup> The properties are for the most part financed by fixed-term loans with subsequent renegotiation permitted regarding interest periods of longer than 5 years.<sup>55</sup>

The main German-based institutions offering building financing are the following:

- (1) Non-specialized institutions, such as the former *Pfandbrief* banks (*Pfandbriefbanken*), local saving banks (*Sparkassen*), corporative banks

Since the enactment of the new German *Pfandbrief* Act in 2005,<sup>56</sup> the exclusive privilege of the *Pfandbrief* banks to issue covered bonds was abolished.<sup>57</sup> According to its Article 14 mortgages may be used to cover only up to the first 60% of the value of the property (mortgage lending value) established by the mortgage bank on the basis of an evaluation in accordance with section 16 of this Act. However the former loan banks persevered in their business model of being specialized real estate financing institutes.<sup>58</sup>

- (2) Specialized institutions: Building societies (*Bausparkassen*)

The building societies are so-called specialized institutions since they deal exclusively with financing of housing.<sup>59</sup> According to Article 1 of the German Building Society Act (*Bausparkassengesetz*),<sup>60</sup> *Bausparkassen* are credit institutions, whose business objective is to accept deposits (*Bauspareinlagen*) from customers (*Bausparer*) and to grant loans (*Bauspardarlehen*) from these aggregate savings to other customers for housing finance activities. Only these building societies are authorized to conduct the aforementioned business (*Bauspargeschäft*).

- (3) Life insurance (*Lebensversicherung*) companies

Traditionally, also the life insurance companies offer financing instruments, combining both life insurance and real estate financing.<sup>61</sup> According to this model, the whole repayment is supposed to be conducted at once at the end of the contract. As the life insurance is meant to offer a sort of financial protection in the case of death, even in case of death of the principal wage earner the financing was not at risk. The advantages of this

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<sup>53</sup> Cf. Landesbausparkassen, *Markt für Wohnimmobilien 2013* (Berlin: 2013) 54.

<sup>54</sup> Cf. BMVBS, *Finanzierungsstrategien wohnungswirtschaftlicher Akteure unter veränderten Rahmenbedingungen auf den Finanzierungsmärkten*, 12, 48.

<sup>55</sup> *Ibid.*, 18.

<sup>56</sup> *Pfandbriefgesetz* of 22-05-2005 (BGBl. I 1373); an unofficial English translation of the German *Pfandbrief* Act is available at: [http://www.foeb.de/de/publikationen/fachpublikationen/publikation\\_pfandbriefgesetz-allenoverly.pdf](http://www.foeb.de/de/publikationen/fachpublikationen/publikation_pfandbriefgesetz-allenoverly.pdf) (last retrieved 01-03-2014).

<sup>57</sup> Cf. translation of Bundesverband Öffentlicher Banken Deutschlands & Allen&Overy: [http://www.foeb.de/de/publikationen/fachpublikationen/publikation\\_pfandbriefgesetz-allenoverly.pdf](http://www.foeb.de/de/publikationen/fachpublikationen/publikation_pfandbriefgesetz-allenoverly.pdf), 7, 8 (last retrieved 01-03-2014).

<sup>58</sup> Cf. M. Bachofner, *Analyse von Systemen der Wohneigentumsfinanzierung in Europa und die Beurteilung ihrer Effizienz*, (Karlsruhe: Universitätsverlag, 2008) 69.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Bausparkassengesetz* of 15-02-1991 (BGBl. I 454).

<sup>61</sup> Cf. M. Bachofner, *Analyse von Systemen der Wohneigentumsfinanzierung in Europa und die Beurteilung ihrer Effizienz*, 71.

system have been radically reduced as the *Bund* cut down on the respective tax privileges in 2005.<sup>62</sup>

The credit institutions in Germany offer the following products:

- Fixed loans: loans with fixed interest periods of 5, 10 or maximum 25 years. The entire term of the loan secured by a land charge normally amounts to 25 or 30 years.
- Flexible/referenced loans: these loans are much less popular, and the interests are adjusted either according to the discretion of the financial institution or according to the Euro Interbank Offered Rate (EURIBOR) Index.
- Mixed products: i.e. combinations of life insurance and final maturity loan.
- Building loan contract (*Bausparvertrag*): the customer and the building society agree on a savings agreement, by which the customer is obliged to pay instalments in part (or in total) into the savings program at a fixed rate for a period of average 8 years; after that time the customer has a right to receive the balance from the savings program; if its amount cannot cover the financing costs for a building, the building society grants the customer a building loan (by using the money from other building loan contracts which are still in progress). This type of financing is very popular in Germany (in 2012, the private building societies and those of the savings banks recorded together new building loan contracts with a size of about EUR 103 billion),<sup>63</sup> especially because the *Bund* promotes it by granting a building subsidy (*Wohnungsbauprämie*) in the amount of 8.8% on the sum paid on the savings account.<sup>64</sup>

Another financing option is the so-called hire and purchase plan (*Mietkauf*), which may be interesting especially for those whose creditworthiness does not convince the banks and for those who are not able to come up with the 20% to 30% of the own equity. According to the respective tenancy contract, the tenant has a right to purchase the rented dwelling after a decided period of time, usually 5 up to 20 years. This contractual solution can apply both to already existing dwellings and to prospective dwellings yet to be built.

However, this model is considered, especially by the consumer protection associations, to be controversial.<sup>65</sup> In general, the following arguments are being raised: According to financial figures, the option of hire and purchase plan is normally more expensive than a regular loan by a bank. Moreover, it is necessary to be very cautious, as far as the contractual obligations of the tenant are concerned, since very often the landlords seek already in advance of the purchase to transfer all the ownership-obligations onto the tenant. Moreover, according to the consumer protection associations, very often the rents

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<sup>62</sup> Gesetz zur Neuordnung der einkommensteuerrechtlichen Behandlung von Altersvorsorgeaufwendungen und Altersbezügen nach dem Alterseinkünftegesetz of 05-07-2004 (BGBl. I 1427).

<sup>63</sup> Cf. Handelsblatt of 05-02-2013, *Bausparen ist wieder angesagt*, available at: <http://www.handelsblatt.com/finanzen/vorsorge-versicherung/ratgeber-hintergrund/landesbausparkassen-bausparen-ist-wieder-angesagt/7737696.html> (last retrieved: 08-03-2014).

<sup>64</sup> Cf. s. 3 of the Wohnungsbau-Prämiengesetz in its version of 30-10-1997 (BGBl. I 2678).

<sup>65</sup> Cf. B. Gräber, *Mit nichts ins Eigenheim*, Focus Online of 5-02-2008, available at: [http://www.focus.de/immobilien/finanzieren/tid-8757/mietkauf\\_aid\\_236092.html](http://www.focus.de/immobilien/finanzieren/tid-8757/mietkauf_aid_236092.html); L. Klaaßen, *Mietkauf: Teuer nach Plan*, Berliner Mieterverein-Mietermagazin of July/August 2007, available at: <http://www.berliner-mieterverein.de/magazin/online/mm0707/hauptmm.htm?http://www.berliner-mieterverein.de/magazin/online/mm0707/070722.htm>; Verbraucherzentrale Sachsen of 19-11-2005, *Immobilien-Mietkauf mit Vorsicht genießen*, available at: <http://www.verbraucherzentrale-sachsen.de/Immobilien-Mietkauf-mit-Vorsicht-geniesen>; Handelsblatt of 23-04-2005, *Verbraucherschützer sehen Mietkauf kritisch*, available at: <http://www.handelsblatt.com/finanzen/immobilien/nachrichten/ohne-bank-zum-eigenen-heim-verbraucherschuetzer-sehen-mietkauf-kritisch/2497044.html> (last retrieved: 01-03-2014).

required under this model are much higher than the regular market rents concerning this type of dwelling.

- Restituted and privatized ownership in Eastern Europe

After the German reunification, almost 606,000 dwellings which had been converted into “public property” (*Volkseigentum*) in DDR times had to be returned to their original owner.<sup>66</sup> Beyond that, many dwellings owned by the municipalities in East Germany were privatized by selling them to their tenants at that time in order to promote the formation of individual home ownership.<sup>67</sup>

- Intermediate tenures:

- Are there intermediate forms of tenure classified between ownership and renting? e.g.
  - Condominiums (if existing: different regulatory types of condominiums)

As stipulated in the German Civil Code (BGB), ownership of a plot of land covers also the ownership of buildings built there on (*superficies solo cedit*; section 94 BGB). Nevertheless, it is possible to acquire ownership of a dwelling under the provisions of the Law on Apartment Ownership (WEG). The Law allows to establish individual ownership of a certain dwelling and fractional ownership of the commonly used parts. It also includes rules on relations between the particular dwelling owners. From the common ownership flow certain duties that may put limits on the use of the property. The co-owners are also free to set up resolutions governing their relations.

The analysis of the most recent data from the *Zensus 2011*, published in May 2013, revealed that there are about 9,341,366 of such dwellings which constitute around 23% of the total dwelling stock.<sup>68</sup> This number is significant, encompassing about 2.8 million more than had been previously assessed.<sup>69</sup> There is a strong upward tendency in this sector in the conglomerations with low vacancy rates. The motives for purchase differ, but the most important ones are capital investment and retirement planning.<sup>70</sup> Concerning this type of housing tenure, similar to the general dwelling stock, around 75% of the residential buildings owned by associations of condominium owners date back to the period before 1990.<sup>71</sup>

- Company law schemes: tenants buying shares of housing companies

No data was found with regard to this question.

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<sup>66</sup> Cf. B. Sander, *Anpassungsprozesse in der ostdeutschen Wohnungswirtschaft: Analyse und Bewertung*, 14; s. 3 (I 1) of the Property Act.

<sup>67</sup> Ibid, 15; Art. 22 (IV 4,5) of the Unification Treaty of 31-08-1990 (BGBl. II 889).

<sup>68</sup> Cf. Federal Statistical Office, *Zensus 2011: Gebäude und Wohnungen*, 6.

<sup>69</sup> Cf. Dachverband Deutscher Immobilienverwalter e.V. of 12-06-2013, *43% mehr Eigentumswohnungen als angenommen – Bedarf an qualifizierten und professionellen Immobilienverwaltern steigt*, available at:

<http://www.ddiv.de/presse/pressemitteilungen-2013/43-mehr-eigentumswohnungen-als-angenommen-bedarf-an-qualifizierten-und-professionellen-immobilienverwaltern-steigt.html> (last retrieved: 01-01-2014).

<sup>70</sup> Ibid.

<sup>71</sup> Cf. Federal Statistical Office, *Zensus 2011: Gebäude und Wohnungen*, 8.



## - Cooperatives<sup>72</sup>

The use of real estate on the basis of cooperative instruments has a long tradition.<sup>73</sup> The oldest cooperatives in Germany are over 130 years old.<sup>74</sup> The number of cooperatives in Germany amounts to almost 2000,<sup>75</sup> having altogether about 2.05 million dwellings which accounts for ca. 5% of all dwellings in Germany.<sup>76</sup>

Cooperatives represent a compromise between property and rent. Co-determination and solidarity continue to be key principles up to this day. The tenants are not only “clients”, but “owners” of the cooperative’s shares, so that their interests are represented on both sides, on the landlord as well as on the tenant side.<sup>77</sup> Furthermore, they offer their members a life-long right to use their dwellings. The “renting” of dwellings within the cooperative legal scheme has no specific legal basis and is therefore mainly subject to the rules that are applicable to the general rental market.<sup>78</sup> However, if the specific cooperative dwelling was promoted by public funds, the rules for housing with a public task (in particular: cost rent and housing certificate) are applicable. The Law on Cooperatives (*Genossenschaftsgesetz*)<sup>79</sup> stipulates only the contractual relationship between the cooperative and its members in terms of their membership and not the contract of use.

In case of too low occupancy or only temporary use of a specific dwelling, the tenant may be at least relocated if the dwelling is needed for a bigger family.<sup>80</sup> Hence, the aim of cooperatives is not to provide people with inexpensive leaving space, but to provide them with the necessary leaving space.

Other intermediate forms of tenure, such as the heritable building right, usufruct or the right of residence will be dealt with in 4.2. ‘Real rights of habitation’.

### o Rental tenures

- Are rental tenures with and without a public task distinguished? If so, how are they called and what is their share in the housing stock?

The rental market structure is characterized by private landlords constituting about 64% of the rental sector.<sup>81</sup> Thus, the core of rental objects is in private hands either of single persons or communities of heirs (joint beneficiaries under a will). Rents are higher in private housing in comparison to public housing, whereas the average duration of accommodation in private accommodation (5-6 years) is shorter than in case of public landlords or housing associations (9-13 years).<sup>82</sup>

German housing policy distinguishes between rental tenures with and without a public task. Public task means any kind of housing promotion by public funds. As already men-

<sup>72</sup> Cf. BMVBS, *Wohnungsgenossenschaften – Potenziale und Perspektiven* (Berlin: 2004), available at: [http://www.bbsr.bund.de/BBSR/DE/FP/ReFo/Wohnungswesen/2004undFrueher/ExpertenkommissionWohnungsgenossenschaften/DL\\_Kurzfassung.pdf?\\_\\_blob=publicationFile&v=3](http://www.bbsr.bund.de/BBSR/DE/FP/ReFo/Wohnungswesen/2004undFrueher/ExpertenkommissionWohnungsgenossenschaften/DL_Kurzfassung.pdf?__blob=publicationFile&v=3) (last retrieved: 10-03-2014).

<sup>73</sup> Cf. M. Drasdo, *Genossenschaftliches Wohnen*, NZM 2012, 585.

<sup>74</sup> That is the Housing Cooperative Munich of 1871 e.G.

<sup>75</sup> <http://web.gdw.de/der-gdw/unternehmenssparten/genossenschaften> (last retrieved: 01-03-2014).

<sup>76</sup> Own calculation based on BMVBS, *Wohnen und Bauen in Zahlen 2012/2013*, 28.

<sup>77</sup> Cf. S. Roth, *Die Miete in Genossenschaftsform: “Ungeliebtes” oder nur „unerkanntes“ Kind? – Ein Zwischenruf*, NZM 2009, 850.

<sup>78</sup> Higher Regional Court (*Oberlandesgericht*, OLG) Karlsruhe, WuM 1985, 77.

<sup>79</sup> *Genossenschaftsgesetz* in its version of 16-10-2006 (BGBl. I 2230).

<sup>80</sup> OLG Stuttgart, NJW-RR 1991, 1226.

<sup>81</sup> Own calculation based on BMVBS, *Wohnen und Bauen in Zahlen 2012/2013*, 28.

<sup>82</sup> Cf. Bischoff & Maennig, *Journal of Property Research* 2011, 136.

tioned above, about 52.1% of the whole dwelling stock were used for rental purposes in 2011. In 2010, 92.3% of the rented dwellings belonged to the category tenures without a public task, which can be described as housing that is mainly exposed to the free market forces. Regarding the amount of rent, the landlord is free to determine it at the time of concluding the tenancy contract, although this is subject to some limits under criminal law. During the tenancy, however, the landlord is bound to the reference rent customary in the locality (*ortsübliche Vergleichsmiete*) if he wants to increase the rent. The remaining 7.7% are assigned to the rental tenures with a public task.<sup>83</sup> This category can be defined as housing that is on the one hand subject to rent control which the owner has to accept in return for subsidization and on the other hand is subject to access restrictions which limits the prospective tenants.<sup>84</sup> However, the commitments for the landlord are limited in time, and after the time limit (of usually 15-20 years) expires, the rents can be raised step by step over a longer period to market level and the housing unit can become part of the private rental sector. The subsidization is not restricted to special types of owners so that all kinds of owners can become landlords of housing with a public task. A majority of cities and communities offer their citizens a number of inexpensive flats (so-called *council flats*). However, it should be noted that not all dwellings in the hands of municipalities are social ones, but only those which are subject to subsidy-related commitments.

As this accommodation is subsidized by public funds, the landlord may only demand a rent whose amount is regulated by law and as an access requirement a qualification certificate (*Wohnberechtigungsschein*) to be obtained at the municipal housing office need to be presented by the prospective tenant. This certificate is issued either for a specific dwelling or for all subsidized dwellings located within the area of a *Land*. It requires that the tenant cannot secure adequate accommodation for himself because of low income or other financial circumstances. In general, the income ceilings amount to EUR 12,000 for a single person household and EUR 18,000 for a two-person household plus EUR 4,000 for every further household member.

In recent years, public housing stocks have frequently been sold. According to the research of the Federal Institute for Research on Building, Urban Affairs and Spatial Development (*Bundesinstitut für Bau-, Stadt- und Raumforschung*, BBSR)<sup>85</sup>, from 1999 to 2011 approximately 385,000 flats were sold by municipalities and 532,000 by the federal government or states.<sup>86</sup> That accounts for 45% of all portfolio sales dealt within this period.<sup>87</sup> The sales by the municipalities were accomplished mainly by selling entire municipal housing corporations and to a much lesser degree by selling single flats. The most striking example is the city of Dresden. In 2006, the city of Dresden sold all its shares of the company WOBA Dresden GmbH (= private limited company) to the investor group Fortress.<sup>88</sup> In this manner the city of Dresden covered its debts. Having sold about

<sup>83</sup> Own calculation based on BMVBS, *Wohnen und Bauen in Zahlen 2012/2013*, 28 and Pestel Institut, *Bedarf an Sozialwohnungen* (Hannover: August 2012), available at: <http://www.pestel-institut.de/images/18/Studie%20Sozialer-Wohnungsbau%2008-2012.pdf>, 12 (last retrieved: 03-03-2014).

<sup>84</sup> Cf. J. Kirchner, *The declining social rental sector in Germany*, European Journal of Housing Policy 2007, 88.

<sup>85</sup> Homepage of the BBSR in English: [http://www.bbsr.bund.de/BBSR/EN/Home/homepage\\_node.html](http://www.bbsr.bund.de/BBSR/EN/Home/homepage_node.html) (last retrieved: 01-03-2014).

<sup>86</sup> Cf. BBSR, *Transaktionen großer Wohnungsbestände 2011, 2012*, available at: <http://www.bbsr.bund.de/BBSR/DE/Raumbeobachtung/AktuelleErgebnisse/WohnenImmobilien/Transaktionen/Tabelle.html>, 7 (last retrieved: 22-03-2014).

<sup>87</sup> Ibid.

<sup>88</sup> Cf. T. Lenk, A. Grüttner & M. Hesse, *Verkäufe kommunaler Wohnungsbestände – ein geeignetes Instrument zur Konsolidierung kommunaler Haushalte?*, Informationen zur Raumentwicklung 2011, available at:

48,000 dwellings, there are now no more municipal housing units in Dresden. In order to avoid possible negative consequences, the sales agreement with Fortress contains some kind of “social charter” which provides *inter alia* regulations on the protection of the tenants living in these dwellings. Another example is the city of Berlin. In 2004, the city of Berlin sold its housing association GSW, which held about 65,700 dwellings, to the investment companies Whitehall and Ceberus.<sup>89</sup> As well as in case of Dresden, the investors committed themselves to continue the objectives of the social and housing policy of GSW.

The biggest problem on the social rental market is the shortage of the supply side. In 2010, there were 1.66 million social dwellings in Germany which represent only 4% of the whole dwelling stock.<sup>90</sup> In 2002, there were still 2.47 million.<sup>91</sup> This shortage results on the one hand from the small number of new social dwellings (in 2011, only 22,176 new dwellings were constructed)<sup>92</sup> and the expiration of their commitments (every year, about 100,000 dwellings are passing into the free private rental market)<sup>93</sup>. On the other hand social policies are focused on the subject-based funding of housing (*Subjektförderung*), which means granting of housing allowance (*Wohngeld*) and other governmental payments, such as social welfare, called *Hartz IV*. In 2010, EUR 1.5 billion were spent on housing allowance and EUR 15.2 billion on the costs for accommodation and heating as part of the social welfare.<sup>94</sup> In contrast, only EUR 1.05 billion were invested in object-based housing promotion measures (*Objektförderung*) in 2010, which means the subsidization and benefited taxation for the construction and modernization of social dwellings.<sup>95</sup> Considering these data, social housing seems to become more and more an issue of social assistance.

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[http://www.bbsr.bund.de/BBSR/DE/Veroeffentlichungen/lzR/2011/12/Inhalt/DL\\_LenkGruettnerHesse.pdf?\\_\\_blob=publicationFile&v=3](http://www.bbsr.bund.de/BBSR/DE/Veroeffentlichungen/lzR/2011/12/Inhalt/DL_LenkGruettnerHesse.pdf?__blob=publicationFile&v=3), 718 (last retrieved: 03-03-2014).

<sup>89</sup> Cf. Federal State Government of Berlin, press release of 25-05-2004, available at:

<https://www.berlin.de/rbmskzl/aktuelles/pressemitteilungen/2004/pressemitteilung.48073.php> (last retrieved: 23-03-2014).

<sup>90</sup> Cf. Antwort von Jan Mücke (Parlamentarischer Staatssekretärs beim Bundesminister für Verkehr, Bau und Stadtentwicklung) auf eine Parlamentarische Anfrage der Abgeordneten Caren Lay, July 2012, available at:

<http://www.caren-lay.de/article/593.neuauflage-des-sozialen-wohnungsbaus-ist-ueberfaellig.html?sstr=sozialwohnungen>, 2 (last retrieved: 10-03-2014).

<sup>91</sup> Ibid.

<sup>92</sup> Cf. BMVBS, *Fortführung der Kompensationsmittel für die Wohnraumförderung*, 2011, 10.

<sup>93</sup> Cf. Pestel Institut, *Bedarf an Sozialwohnungen in Deutschland*, 12.

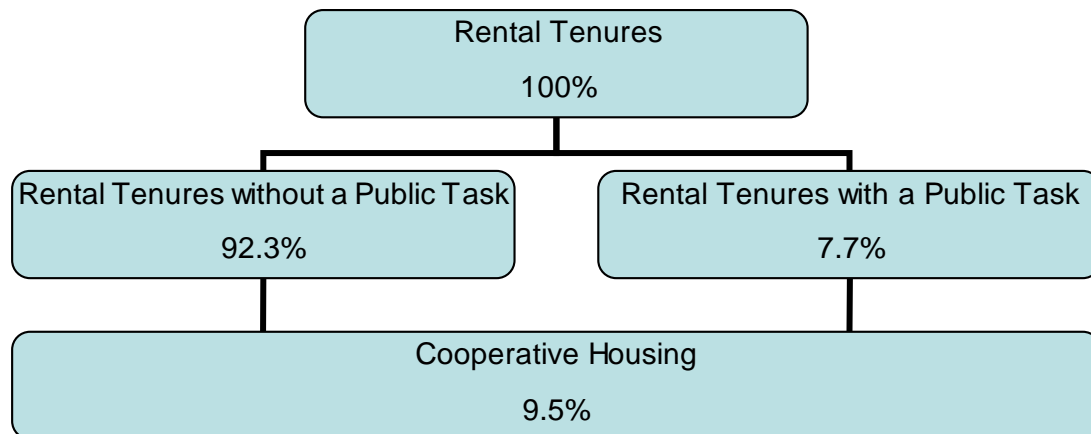
<sup>94</sup> Cf. BMVBS, *Bericht über die Wohnungs- und Immobilienwirtschaft in Deutschland*, 2012, available at:

[https://www.bmvi.de/SharedDocs/DE/Anlage/BauenUndWohnen/immobilien-und-wohnungsmarkt-bericht.pdf?\\_\\_blob=publicationFile](https://www.bmvi.de/SharedDocs/DE/Anlage/BauenUndWohnen/immobilien-und-wohnungsmarkt-bericht.pdf?__blob=publicationFile), 66,67 (last retrieved: 07-03-2014); also published in: Printed Matter of the Federal Parliament (*Bundestagsdrucksache*, BT-Drucks.) 17/11200.

<sup>95</sup> Cf. BMVBS, *Fortführung der Kompensationsmittel für die Wohnraumförderung*, 2011, 7.



For the share of rental tenures see the following table:<sup>96</sup>



- How is the financing for the building of rental housing typically arranged?

There are no data found so far indicating that the financing for the building of rental housing is organized in a structurally different manner than owner-occupied housing. At least, the equity ratio is different. In the case of owner-occupied housing, it usually amounts to over 30%,<sup>97</sup> whereas the acquisition of residential buildings does not require more than the min. equity ratio of 20%.

- What is the market share (% of stock) of each type of tenure<sup>98</sup> and what can be said in general on the quality of housing provided?

Please consider the following criteria: type of building (single family versus multifamily versus high-rise; plus definition); construction period; number of rooms, number of square metres or average number of rooms or average useful floor area per dwelling and per person; availability of bath/shower, hot running water and/or central heating, etc.)

- For EU-countries, Housing Statistics in the European Union would be a possible source, although more updated data would be preferred, if available

#### (1) Type of building

As the ratio of dwellings in one family houses and multifamily houses is concerned, 50.2% of the dwellings in Germany are located in detached houses, 31.6% are located in terraced houses (*Reihenhäuser*), 12% in semi-detached-houses (*Doppelhaushälfte*) and the remaining 6.2% in other types of buildings.<sup>99</sup> Most dwellings (29.7%) are located in buildings with only one dwelling, 15.9% in buildings with two dwellings, buildings with three to six dwellings account for 22.8%, buildings with seven to twelve dwellings for

<sup>96</sup> Own calculation based on BMVBS, *Wohnen und Bauen in Zahlen 2012/2013*, 28 and Pestel Institut, *Bedarf an Sozialwohnungen*, 12.

<sup>97</sup> Cf. Süddeutsche Zeitung of 25-02-2014, *Im Schnitt mehr als ein Drittel Eigenkapital bei Immobilienerwerb*, available at: <http://www.sueddeutsche.de/news/wirtschaft/finanzen-im-schnitt-mehr-als-ein-drittel-eigenkapital-bei-immobilienerwerb-dpa.urn-newsml-dpa-com-20090101-140224-99-04256> (last retrieved: 10-03-2014).

<sup>98</sup> Please refer to the summary table 1 'Tenure Structure in Germany in 2011'.

<sup>99</sup> Cf. Federal Statistical Office, *Zensus 2011: Gebäude und Wohnungen*, 6.

19.1% and buildings with more than twelve dwellings for 12.5%.<sup>100</sup> The average number of dwellings per residential building accounts for 2.2.<sup>101</sup>

## (2) Construction period

Regarding the construction period, 14% of the total stock are dwellings dating from before 1919 and 10.8% from 1919-1948.<sup>102</sup> The majority of dwellings in Germany (43%) were constructed in the post war period from 1949-1978, and the dwellings constructed from 1979-1990 account for 13%. In the period from 1991-2004, 16% were built, and the most recent construction period from 2005 onwards accounts for 3.2% of the total stock. The average age of owner-occupied dwellings amounts to 50.7 years<sup>103</sup> and of rental dwellings to 53.2 years<sup>104</sup>.

## (3) Number of rooms

The majority of dwellings in Germany has three (22.2%), four (25.8) or five rooms (16.8).<sup>105</sup> Only 3.3% of all dwellings are one-room dwellings and 9.4% are two-room dwellings. 22.5% of the dwellings have more than five rooms. The average number of rooms accounts for 4.4.<sup>106</sup>

## (4) Number of square metres

Most dwellings in Germany have a size between 40 and 120 sqm (61.5%).<sup>107</sup> Only 5.5% of the total stock constitutes dwellings of 40 sqm or less, whereas the biggest dwellings of 160 sqm or more account for 6.9%.<sup>108</sup> The average useful floor area per dwelling in general is 90.1 sqm.<sup>109</sup> With regard to owner-occupied dwellings, the average useful floor area accounts for 118.6 sqm per dwelling and 51.1 sqm per person,<sup>110</sup> so that on average 2.3 persons are living in one dwelling. The average useful floor area of rental dwellings amounts however only to 69.9 sqm and every tenant has on average a useful floor area of 38.7 sqm,<sup>111</sup> with the result that these dwellings are inhabited by on average 1.8 persons.

## (5) Availability of bath/shower, hot running water and/or central heating

According to *Zensus 2011*, 98.4% of the dwellings in Germany have bathing or shower facilities as well as indoor flushing toilets.<sup>112</sup> Only in 0.8% of all dwellings both of them are absent, while bathing or shower facilities are missing in 0.6% of the dwellings and an indoor flushing toilet for the sole use of the particular household is missing in 0.3% of all dwellings.

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<sup>100</sup> Ibid, 6.

<sup>101</sup> Ibid, 17.

<sup>102</sup> Ibid, 6.

<sup>103</sup> Cf. Federal Statistical Office, *Mikrozensus - Zusatzerhebung 2010. Bestand und Struktur der Wohneinheiten. Wohnsituation der Haushalte* (Wiesbaden: 2012), available at:

[https://www.destatis.de/DE/Publikationen/Thematisch/EinkommenKonsumLebensbedingungen/Wohnen/WohnsituationHaushalte2055001109004.pdf?\\_\\_blob=publicationFile](https://www.destatis.de/DE/Publikationen/Thematisch/EinkommenKonsumLebensbedingungen/Wohnen/WohnsituationHaushalte2055001109004.pdf?__blob=publicationFile), 20 (last retrieved: 03-01-2014).

<sup>104</sup> Ibid, 22.

<sup>105</sup> Cf. Federal Statistical Office, *Zensus 2011: Gebäude und Wohnungen*, 16.

<sup>106</sup> Ibid, 15.

<sup>107</sup> Ibid, 16.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid, 15.

<sup>110</sup> Cf. Federal Statistical Office, *Mikrozensus - Zusatzerhebung 2010*, 20.

<sup>111</sup> Ibid, 22.

<sup>112</sup> Cf. Federal Statistical Office, *Zensus 2011: Gebäude und Wohnungen*, 16.

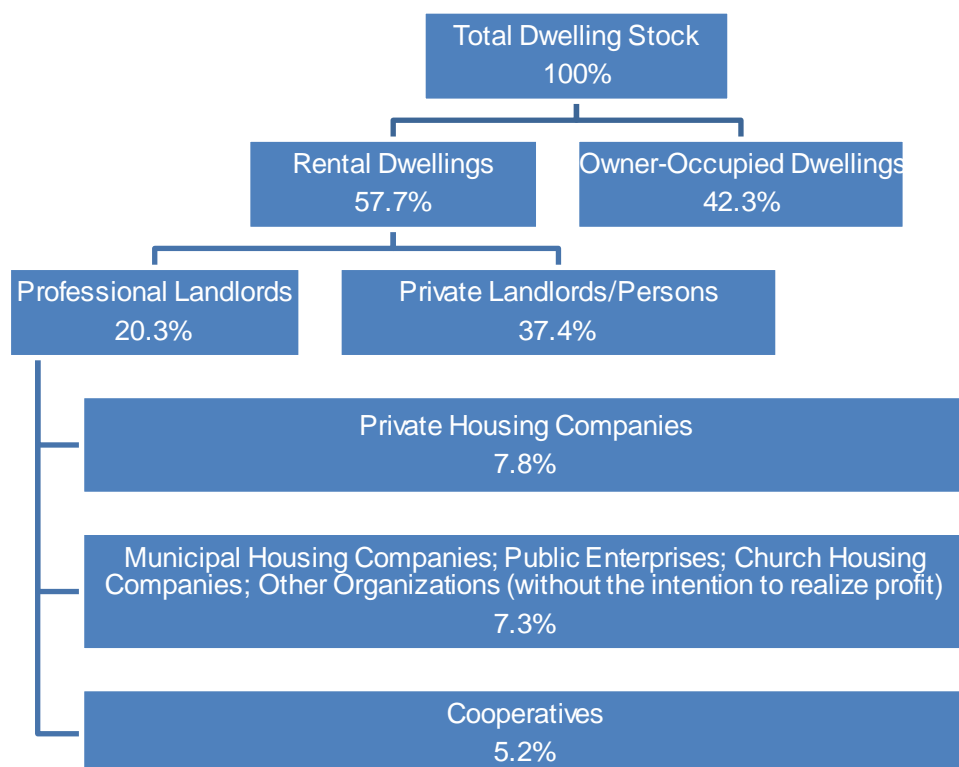
As far as the criteria of hot running water and central heating are concerned, 69.6% of the dwellings are equipped with central heating, 12.3% are equipped with district heating (*Fernwärme*), 9.8% have a self-contained heating system (*Etagenheizung*), 6% are equipped with stove heating units (including night storage heating (*Nachtspeicherheizung*)) and the remaining 1.8% accounts for block heating systems.<sup>113</sup> Finally, 0.5% of all dwellings have neither of these heating systems.

#### (6) Defects

According to the European Union Statistics on Income and Living Conditions (EU-SILC), about 35% of the German households are living in deficient dwellings, whereas the percentage in case of rental households (46.4%) is 20% higher than in case of owner households (26.4%).<sup>114</sup> The mentioned defects concern mainly noise disturbance (26.2%), moisture damages (13.5%) and insufficient daylight (3.9%).<sup>115</sup>

- Which actors own these dwellings (private persons, profit or non-profit organizations, etc.)?

The German housing market is characterized by a high share of rental dwellings which are mainly owned by private persons. The below figure shows the approximate ownership status of the housing units in Germany (the ownership status of vacant dwellings as well as holiday homes is also taken into account):<sup>116</sup>



<sup>113</sup> Ibid, 7.

<sup>114</sup> Cf. Federal Statistical Office, *Leben in Europa (EU-SILC), Einkommen und Lebensbedingungen in Deutschland und der Europäischen Union* (Wiesbaden: 2012), available at: [https://www.destatis.de/DE/Publikationen/Thematisch/EinkommenKonsumLebensbedingungen/LebeninEuropa/EinkommenLebensbedingung2150300117004.pdf;jsessionid=4CE9AC7C01A6EE05A09DF8A0851C6955.cae1?\\_blob=publicationFile](https://www.destatis.de/DE/Publikationen/Thematisch/EinkommenKonsumLebensbedingungen/LebeninEuropa/EinkommenLebensbedingung2150300117004.pdf;jsessionid=4CE9AC7C01A6EE05A09DF8A0851C6955.cae1?_blob=publicationFile), 39 (last retrieved: 06-03-2014).

<sup>115</sup> Ibid.

<sup>116</sup> Cf. BMVBS, *Wohnen und Bauen in Zahlen 2012/2013*, 16.

## 1.5. Other general aspects

- Are there lobby groups or umbrella groups active in any of the tenure types? If so, how are they called, how many members, etc.?

There is a number of umbrella organizations in Germany representing interests of specific groups:

### (1) Housing Companies

The biggest association of housing enterprises in Germany is called the Federal Association of German Housing Associations and Real Estate Companies (*Bundesverband deutscher Wohnungs- und Immobilienunternehmen e.V.*, GdW).<sup>117</sup> Its members are also federations, mostly regional organizations. As an umbrella federation the GdW is the central association of the German housing industry. The 15 member federations of the GdW encompass approximately 3,000 housing enterprises as their members. They represent together approximately 6 million dwellings for ca. 13 million persons, which corresponds to approximately 28% of the entire rental housing stock in Germany.

The second biggest organization of housing enterprises is the Federal Association of Free Real Estate Companies and Housing Associations (*Bundesverband freier Immobilien- und Wohnungsunternehmen e.V.* (BFW))<sup>118</sup>. The 8 regional associations of the BFW encompass around 1,600 housing enterprises which manage about 3 million dwellings for 7 million persons. This represents 14% of the German rental housing sector.

### (2) Real Estate Owners

Real estate and private home owners are organized on a national level in an organization called *Zentralverband der deutschen Haus-, Wohnungs- und Grundeigentümer e.V.* (Haus und Grund Deutschland).<sup>119</sup> The organization engages itself on behalf of the rights of the owners in different aspects:<sup>120</sup>

- Self-determined life in own four walls on own premises,
- Establishment of home ownership instead of renting, especially as a way to provide for one's old age,
- Investment by means of rental real estate.

It includes 22 federal states' associations (*Landesverbände*), 900 associations (*Vereine*) encompassing around 900,000 members. Being a member of the Union Internationale de la Propriété Immobilière (*International Union of Property Owners*),<sup>121</sup> it represents German owners also on the international scene.

### (3) Tenants

The German Tenants' Association (*Deutscher Mieterbund e.V.*, DMB)<sup>122</sup> is a federal umbrella organization uniting around 320 local associations. Whereas the federal organization in particular concentrates on public relations and political projects, the local associa-

<sup>117</sup> Homepage of the GdW: [www.gdw.de](http://www.gdw.de) (last retrieved: 23-03-2014).

<sup>118</sup> Homepage of the BFW: <http://www.bfw-bund.de/> (last retrieved: 23-03-2014).

<sup>119</sup> Homepage of Haus und Grund: [www.hausundgrund.de](http://www.hausundgrund.de) (last retrieved: 23-03-2014).

<sup>120</sup> <http://www.hausundgrund.de/leitmotiv.html>

<sup>121</sup> Homepage of the Union Internationale de la Propriété Immobilière: <http://www.uipi.com/> (last retrieved : 23-03-2014).

<sup>122</sup> Homepage of the DMB: [www.mieterbund.de](http://www.mieterbund.de) (last retrieved: 23-03-2014).

tions conduct the concrete legal assistance to its members especially in as far as tenancy law litigations and disputes are concerned. The direct representation of the tenants' interests is the focus of activity of the local tenants' associations. Another focus of the local tenants' associations is to contribute to municipal housing policy and urban measures. The German Tenants' Associations stands for affordable rents, efficient housing allowance, sufficient housing supply and promotion of social housing construction.

#### (4) Church Housing Companies

Church housing companies comprise just about 1% of the total number of dwellings.<sup>123</sup> Their legal form as well as their profit orientated character makes them regular market participants to whom general rules apply.<sup>124</sup> Both catholic and protestant housing enterprises aim at providing appropriate housing to broad sections of the population in order to create a basis for realization of Christian values; providing housing for socially weak and disadvantaged groups; contributing to social equality through promotion of ownership; and promotion of interpersonal relations.<sup>125</sup> The two most important umbrella associations gathering the church housing companies are the Protestant Federal Association for Real Estate Affairs in Sciences and Practice (*Evangelischer Bundesverband für Immobilienwesen in Wissenschaft und Praxis e.V.*)<sup>126</sup> and the Catholic Housing Estate Service (*Katholischer Siedlungsdienst*)<sup>127</sup>.

- What is the number (and percentage) of vacant dwellings?

Vacancy is an important economic factor. In the worst case scenario, the potential rent losses may lead to financial difficulties, even leading to insolvency of the owner. There are different methods of counting the vacant stock, and accordingly different values can be derived from different sources. For the purpose of the *Zensus 2011*, delivering the most up to date values in this matter, the vacancy rate was expressed as the number of dwellings in residential and non-residential buildings which at the time of reporting were neither rented out nor occupied by an owner nor used as holiday apartments.<sup>128</sup> Dwellings under an existing tenancy contract but not in use due to renovation were not counted as a vacant.

In Germany, about 1.85 million housing units were vacant in 2011.<sup>129</sup> The ratio of vacant dwellings was thus at a level of 4.5%.<sup>130</sup> However, there are still remarkable divergences concerning East and West. The highest ratio was noted in Saxony (10.1%) and Saxony-Anhalt (9.5%) and the lowest in Hamburg (1.6%) and Schleswig-Holstein (2.8 %).<sup>131</sup>

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<sup>123</sup> Own calculation based on the data of the Katholischer Siedlungsdienst ([http://wp10571643.server-he.de/fileadmin/Datenablage/Dokumentationen/KSD\\_Positionspapier.pdf](http://wp10571643.server-he.de/fileadmin/Datenablage/Dokumentationen/KSD_Positionspapier.pdf)) and the Evangelische Siedlungswerke (<http://www.esw-deutschland.de/DE/3032/mitglieder.htm>; <http://www.esw-deutschland.de/grafik/Pressebericht%2030%2009%202011.pdf>) (last retrieved: 10-03-2014).

<sup>124</sup> Cf. L. von Usslar, *Kirchlich-sozialer Wohnungsbau*, WuM 2009, 161.

<sup>125</sup> Declaration of Principles of the Protestant Federal Association for Real Estate Affairs in Sciences and Practice: <http://www.esw-deutschland.de/DE/3032/Satzung.htm>; Statute of the Catholic Housing Estate Service: <http://www.ksd-ev.de/wirueberuns/verbandsarbeit/satzung> (last retrieved: 04-03-2014).

<sup>126</sup> Homepage of the Protestant Federal Association for Real Estate Affairs in Sciences and Practice: <http://www.esw-deutschland.de/DE/start.htm> (last retrieved: 05-01-2014).

<sup>127</sup> Homepage of the Catholic Housing Estate Service: <http://www.ksd-ev.de/> (last retrieved: 05-03-2014).

<sup>128</sup> Cf. Federal Statistical Office, *Zensus 2011: Gebäude und Wohnungen*, 19.

<sup>129</sup> Ibid, 16.

<sup>130</sup> Since *Zensus 2011* was the first data collection of this type, there are no former data to compare with. Other sources, such as the *Mikrozensus*, use another definition of vacancy and record therefore different vacancy rates (e.g. *Mikrozensus*: 8.4% in 2010; 8% in 2006).

<sup>131</sup> Cf. Federal Statistical Office, *Zensus 2011: Gebäude und Wohnungen*, 17.

- Are there important black market or otherwise irregular phenomena and practices on the housing market (especially the rental market)?

Germany does not seem to have a significant black market in the housing sector. However, irregular phenomena based on misuse of housing units can be observed especially in important tourist areas. Many dwellings in cities such as Berlin, Hamburg and Munich are irregularly used as tourist accommodations<sup>132</sup> or accommodations for workers, thus aggravating the already difficult situation on the housing markets in these regions. But Hamburg<sup>133</sup> and Munich<sup>134</sup> have enacted regulations according to which owners may be fined up to an amount of EUR 50,000 for any misappropriation of housing premises (*Zweckentfremdungsverordnungen*).<sup>135</sup>

Summary table 1: Tenure Structure in Germany in 2011<sup>136</sup>

Home ownership	Rented			Intermediate tenure	Other	Total
		Renting with a public task, if distinguished	Renting without a public task, if distinguished		Holiday homes and vacant dwellings	
42.4%	52.1%	Around 4% <sup>137</sup>	Around 48%	- condominiums are included in "home ownership" - cooperative dwellings are included in "renting"	5.5%	100%
		Around 5% of the housing stock constitute cooperative dwellings <sup>138</sup>				

<sup>132</sup> Cf. D. Schüller, *Touristen raus aus den Innenstädten*, Legal Tribune Online of 12-12-2011, available at: <http://www.lto.de/recht/hintergruende/h/mietverbot-touristen-raus-aus-den-innenstaedten/> (last retrieved: 07-03-2014).

<sup>133</sup> HmbWoSchG of 8-03-1982 (HmbGVBl. 4).

<sup>134</sup> WohnraumzweckentfremdungsS of 02-01-2009 (MüABl. 4).

<sup>135</sup> Berlin has enacted a similar regulation in November 2013 which is however not published yet; cf. M. Vetter, *Zweckentfremdungsgesetz ist durch*, Immobilienzeitung of 28-11-2013, available at: <http://www.immobilienzzeitung.de/124391/zweckentfremdungsgesetz-ist-durch> (last retrieved: 07-03-2014).

<sup>136</sup> Cf. Federal Statistical Office, *Zensus 2011: Gebäude und Wohnungen*, 16.

<sup>137</sup> Own calculation based on BMVBS, *Wohnen und Bauen in Zahlen 2012/2013*, 28 and Pestel Institut, *Bedarf an Sozialwohnungen*, 12.

<sup>138</sup> Own calculation based on BMVBS, *Wohnen und Bauen in Zahlen 2012/2013*, 28.



## 2. Economic, urban and social factors

### 2.1. Current situation of the housing market

- What is the current situation of the housing market? Is the supply of housing sufficient/ insufficient and where is this the case (possibly in terms of areas of scarcity of dwellings in growth areas versus shrinkage areas)? What have been the effects of the current crisis since 2007?

According to the German Federal Statistical Office, 48.6% of the German population lives in areas of high population density, 36.7% in areas of medium population density and only 14.7% in areas of sparse population density.<sup>139</sup> The German housing market discloses considerable social and regional differences, however with a strong, Germany-wide discernible tendency for choosing the city centres for living<sup>140</sup> and increasing losses of inhabitants in rural areas<sup>141</sup>. Regarding the preference to live in the cities, there are great differences. While especially the industrial cities in West Germany (in particular the Ruhr area: Gelsenkirchen (-7.4%), Hagen (-7.2%), Herne (-5.6%) and Duisburg (-4.9%)) and some East German cities (Cottbus (-10.1%), Chemnitz (-6.2%) and Halle (Saale) (-6%)) lost inhabitants between 2000 and 2010, many cities in South Germany (Freiburg im Breisgau (+9.3%), Ingolstadt (+8.1%) and Regensburg (+7.8%)) as well as the important conurbations such as Munich (+11.8%) and Frankfurt a. M. (+5.1%) became more and more attractive and recorded therefore a high growth of population.<sup>142</sup>

Due to this trend, there is a massive shortage of affordable rental dwellings in the conurbations of Germany. In 2012, Munich had a housing shortage of about 31,000 dwellings.<sup>143</sup> In Frankfurt this indicator amounted to 17,500 dwellings, and Hamburg had a shortage of about 15,000 dwellings.<sup>144</sup> According to estimates of the DMB, there is currently a shortage in Germany of 250,000 dwellings.<sup>145</sup> The shortage is especially visible in the area of social housing due to the expiration of the commitment clauses following repayment of the financing for subsidized housing.

In order to be able to supply the demand, the BBSR assumes that 183,000 new dwellings have to be built annually until 2025.<sup>146</sup> In 2012, about 205,000 new dwellings were constructed which constitutes 26% more than in 2009, but 20% less than in 2006.<sup>147</sup> In order to promote the construction of new housing, the new governing parties, the Christian

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<sup>139</sup> Cf. Federal Statistical Office, *Leben in Europa (EU-SILC), Einkommen und Lebensbedingungen in Deutschland und der Europäischen Union*, 34.

<sup>140</sup> Cf. Pestel Institut, *Mietwohnungsbau in Deutschland - regionale Verteilung, Wohnungsgrößen, Preissegmente* - (Hannover: April 2012), available at: <http://www.pestel-institut.de/images/18/Mietwohnungsbau%20in%20Deutschland%202012.pdf>, 22 (last retrieved: 06-03-2014).

<sup>141</sup> Ibid, 38.

<sup>142</sup> Cf. BBSR, *Bevölkerungsentwicklung in Großstädten 2000-2010*, available at: <http://www.bbsr.bund.de/BBSR/DE/Raumbeobachtung/AktuelleErgebnisse/Raumentwicklung/Bevoelkerung/bilder/optimierte.pdf?blob=publicationFile&v=2> (last retrieved: 08-03-2014).

<sup>143</sup> Cf. Statista, *Anzahl der fehlenden Mietwohnungen nach Städten in Deutschland im Jahr 2012*, available at: <http://de.statista.com/statistik/daten/studie/223140/umfrage/anzahl-der-fehlenden-mietwohnungen-nach-staedten-in-deutschland/> (last retrieved: 07-03-2014).

<sup>144</sup> Ibid.

<sup>145</sup> Cf. DMB, press release of 06-12-2012, *Mieterrechte stärken, nicht abbauen*, available at: [http://mieterbund.de/index.php?id=325&tx\\_ttnews%5Btt\\_news%5D=18048&cHash=9cc6defb47e4e5b89b9badd2802c7b92](http://mieterbund.de/index.php?id=325&tx_ttnews%5Btt_news%5D=18048&cHash=9cc6defb47e4e5b89b9badd2802c7b92) (last retrieved: 08-03-2014).

<sup>146</sup> Cf. BBSR, *Wohnungsmärkte im Wandel. Zentrale Ergebnisse der Wohnungsmarktprognose 2025*, 8.

<sup>147</sup> Cf. Federal Statistical Office, *Bautätigkeit und Wohnungen 2012* (Wiesbaden: 2013), available at: <https://www.destatis.de/DE/Publikationen/Thematisch/Bauen/BautaetigkeitWohnungsbau/Bautaetigkeit2050100127004.pdf?blob=publicationFile>, 13 (last retrieved: 08-03-2014).

Democratic Union (CDU) and the Social Democratic Party of Germany (SPD), agreed during the coalition negotiations on a “Package for affordable Building and Housing”.<sup>148</sup> For this purpose, the possibility of reducing balance depreciation (*degressive Abschreibung*) should be brought back into use. However, the reintroduction of this depreciation type was deleted from the coalition agreement which has been much criticized by the housing industry.<sup>149</sup>

Unlike in other European countries, the housing market in Germany remained largely unaffected by the effects of the financial market crises.<sup>150</sup> Speculative overshooting as well as a credit crunch had not been noted. In this period, the German housing and real estate market turned out to be a stabilizing element for the economy as a whole.<sup>151</sup> Only trading with residential property has been reduced due to the crisis.<sup>152</sup>

- How is the demand for housing expected to develop? What is the expectation about the growth and decline in number of households in the future in a scenario of average economic development? Is there a year forecasted where growth in number of households will stabilize or will start declining?

As for the demographical development and the number of housing units in the coming years, it is believed that even though the total number of the population is expected to decrease (from 80.5 million in 2012<sup>153</sup> to about 79 million in 2025 and to about 67.5 million in 2060 (according to estimates of the Federal Statistical Office)<sup>154</sup>), the number of households will still be increasing in the next few years.<sup>155</sup> From 1992 to 2012, the number of households in Germany increased by 14% to 40.66 million,<sup>156</sup> and will account for 41.1 million in 2025,<sup>157</sup> according to estimates of the Federal Statistical Office. The assumption, that the number of households will still increase although the population decreases, results basically from the upward tendency to live in one-person households.

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<sup>148</sup> Cf. Frankfurter Allgemeine Zeitung of 05-11-2013, *Vermieter sollen Makler zahlen*, available at: <http://www.faz.net/aktuell/wirtschaft/immobilien/koalitionsverhandlungen-vermieter-sollen-makler-bezahlen-12648807.html> (last retrieved: 23-03-2014).

<sup>149</sup> Cf. R. Büniger, “Das Ende des Mieterlandes Deutschland“, Der Tagesspiegel of 29-11-2013, available at: <http://www.tagesspiegel.de/wirtschaft/immobilien/koalitionsvertrag-das-ende-des-mieterlandes-deutschland/9145096.html> (last retrieved: 23-03-2014).

<sup>150</sup> Cf. BMVBS, *Bericht über die Wohnungs- und Immobilienwirtschaft in Deutschland*, 16, 17; Institut der Deutschen Wirtschaft Köln, *Immobilienfinanzierung – Regulierungsgefahren*, 2011, available at: <http://www.iwkoeln.de/de/infodienste/immobilien-monitor/beitrag/53007> (last retrieved: 23-03-2014).

<sup>151</sup> BT-Drucks. 17/6280, *Wohngeld- und Mietenbericht 2010*, 10.

<sup>152</sup> Cf. BMVBS, *Bericht über die Wohnungs- und Immobilienwirtschaft in Deutschland*, 37.

<sup>153</sup> Cf. Federal Statistical Office, *Bevölkerung und Erwerbstätigkeit – Bevölkerungsfortschreibung 2012* (Wiesbaden: 2013), available at:

[https://www.destatis.de/DE/Publikationen/Thematisch/Bevoelkerung/Bevoelkerungsstand/VorlBevoelkerungsfortschreibung5124103129004.pdf?\\_blob=publicationFile](https://www.destatis.de/DE/Publikationen/Thematisch/Bevoelkerung/Bevoelkerungsstand/VorlBevoelkerungsfortschreibung5124103129004.pdf?_blob=publicationFile), 6 (last retrieved: 23-03-2014).

<sup>154</sup> Cf. Federal Statistical Office, *Bevölkerung Deutschlands bis 2060 – 12. koordinierte Bevölkerungsvorausberechnung* (Wiesbaden: 2009), available at:

[https://www.destatis.de/DE/Publikationen/Thematisch/Bevoelkerung/VorausberechnungBevoelkerung/BevoelkerungDeutschland2060Presse5124204099004.pdf?\\_blob=publicationFile](https://www.destatis.de/DE/Publikationen/Thematisch/Bevoelkerung/VorausberechnungBevoelkerung/BevoelkerungDeutschland2060Presse5124204099004.pdf?_blob=publicationFile), 46 (last retrieved: 23-03-2014).

<sup>155</sup> Cf. BMVBS, *Bericht über die Wohnungs- und Immobilienwirtschaft in Deutschland*, 32.

<sup>156</sup> Cf. Federal Statistical Office, *Bevölkerung und Erwerbstätigkeit – Haushalte und Familien 2012* (Wiesbaden: 2013), available at:

[https://www.destatis.de/DE/Publikationen/Thematisch/Bevoelkerung/HaushalteMikrozensus/HaushalteFamilien2010300127004.pdf?\\_blob=publicationFile](https://www.destatis.de/DE/Publikationen/Thematisch/Bevoelkerung/HaushalteMikrozensus/HaushalteFamilien2010300127004.pdf?_blob=publicationFile), 44 (last retrieved: 23-03-2014).

<sup>157</sup> Cf. Federal Statistical Office, *Bevölkerung und Erwerbstätigkeit – Entwicklung der Privathaushalte bis 2030* (Wiesbaden: 2011), available at:

[https://www.destatis.de/DE/Publikationen/Thematisch/Bevoelkerung/HaushalteMikrozensus/EntwicklungPrivathaushalte5124001109004.pdf?\\_blob=publicationFile](https://www.destatis.de/DE/Publikationen/Thematisch/Bevoelkerung/HaushalteMikrozensus/EntwicklungPrivathaushalte5124001109004.pdf?_blob=publicationFile), 10 (last retrieved: 23-03-2014).



In 1992, one-person households constituted 33.7% of the overall household number, and this percentage amounted to 40.5% in 2012.<sup>158</sup> For the future, the Federal Statistical Office estimates that one-person households will even account for 42.5% of all households.<sup>159</sup> These one-person households are young (25% are younger than 35 years old), middle age (35% are between 35 and 60 years old) as well as elderly people (40% are over 60 years old).<sup>160</sup> The reasons for the development that more Germans are living alone are diverse: increase in life expectancy, low birth rate, increase in life partnerships with separate housekeeping, increase in number of divorces and high occupational mobility.<sup>161</sup>

According to the Federal Statistical Office, the number of households will nevertheless reach its climax in 2025. Thus, 2025 is the year forecasted where growth in number of households will start declining.<sup>162</sup>

- What is the number/percentage of families/households depending on rental housing (vs. owner-occupancy and other forms of tenure)? What is the number/percentage of immigrants among them?

The percentage of households depending on rental housing in 2010 was about 55.8%, while the remaining 44.2% of the households were living in their own housing units.<sup>163</sup>

The ownership rate increase continuously with the age of the household members. While almost every person under 30 years rents a dwelling (91%), persons older than 60 years are mainly owners (55.3%).<sup>164</sup>

The ratio of owners among immigrants living in Germany is however much lower (26.2%).<sup>165</sup> But immigrants of different nationalities managed to establish ownership to different extents. The most successful in this respect were Italians at 32.6%, followed by Greeks and Turkish immigrants at about 22%.<sup>166</sup> The immigrants from Bosnia-Herzegovina, Serbia and Montenegro show ownership rates at about 18%. Nevertheless, most immigrants (73.8%) were living in rental dwellings in 2010.<sup>167</sup>

## 2.2. Issues of price and affordability

- Prices and affordability:
  - What is the typical cost of rents and its relation to average disposable income (rent-income ratio per household)? (Explanation: If rent is 300€ per month and disposable household income 1000€ per month, the rent-to-income ratio is 30%)

In 2010, the average monthly rent excluding utilities (*Nebenkosten*) was EUR 376.16 or EUR 5.43 per sqm and the average rent including utilities was EUR 522.21 or EUR 7.56 per sqm.<sup>168</sup> According to the index for rents, published by the Federal Statistical Office, the rents for dwellings from 2002-2012 increased by on average 1% per year, whereas

<sup>158</sup> Cf. Federal Statistical Office, *Bevölkerung und Erwerbstätigkeit – Haushalte und Familien 2012*, 44.

<sup>159</sup> Cf. Federal Statistical Office, *Bevölkerung und Erwerbstätigkeit – Entwicklung der Privathaushalte bis 2030*, 10.

<sup>160</sup> Cf. Federal Statistical Office, *Bevölkerung und Erwerbstätigkeit – Haushalte und Familien 2012*, 44.

<sup>161</sup> Cf. Federal Statistical Office, *Bevölkerung und Erwerbstätigkeit – Entwicklung der Privathaushalte bis 2030*, 4.

<sup>162</sup> Ibid, 10.

<sup>163</sup> Cf. Federal Statistical Office, *Mikrozensus - Zusatzerhebung 2010*, 256.

<sup>164</sup> Ibid, 257.

<sup>165</sup> Ibid, 257.

<sup>166</sup> Cf. C. B. von Gostomski, *Basisbericht: Repräsentativbefragung „Ausgewählte Migrantengruppen in Deutschland 2006/2007“*, 23.

<sup>167</sup> Cf. Federal Statistical Office, *Mikrozensus - Zusatzerhebung 2010*, 257.

<sup>168</sup> Ibid, 22.

the rent excluding utilities raised as well by about 1% and the costs for utilities by about 1.2% every year.<sup>169</sup> Thus, the costs for rent and utilities do not increase more than the Consumer Price Index (*Verbraucherpreisindex*) as a whole. From 2002-2012, the Consumer Price Index increased by about 1.4% per year.<sup>170</sup> At the same time, the number of households at risk of poverty, which are defined as households with a real income lower than 60% of the median equivalence income, increases steadily.<sup>171</sup> In 2007, 15.2% of the households in Germany were at risk at poverty, while this ratio was at 15.6% in 2009 and 16.1% in 2011.<sup>172</sup>

But despite this tendency, as well as the even though slight increase in rent and utilities, the rent burden (seen as the proportion of expenses for housing in relation to household income) remained more or less the same over the last years. In 2002, the average proportion spent for the rent in relation to the disposable household income was 22.7%, while in 2006 this was 22.8%.<sup>173</sup> And in 2010, the financial burden regarding the amount paid for rent accounted for 22.5%<sup>174</sup> (EU-average ca. 16.9%)<sup>175</sup>. However, there are visible inequalities in this respect. For example, households at risk of poverty spent even 38.1% of their average disposable income for the rent excluding utilities,<sup>176</sup> unemployed households 35.3%, pensioner's household discloses a proportion of 26.3% spent for rent and household with an employed person 20.9%<sup>177</sup>. The rent-income ratio decreases with the number of household members, amounting to 26% with one and 20.3% with two household members.<sup>178</sup> The number of households who spend more than 40% of their disposable income on housing is at about 16.2%.<sup>179</sup> For these households, the acquisition of ownership is regularly only possible through inheritance, since there is a strong correlation between the available income pro household and ratio of ownership. Thus, households earning under EUR 900 per month show an ownership rate of only about 16%, whereas 78% of households earning over EUR 6000 per month are real estate owners.<sup>180</sup>

<sup>169</sup> Own calculation based on the Federal Statistical Office, *Preise – Verbraucherpreisindizes für Deutschland, Jahresbericht 2012* (Wiesbaden: 2013), available at:

[https://www.destatis.de/DE/Publikationen/Thematisch/Preise/Verbraucherpreise/VerbraucherpreisindexJahresberichtPDF\\_5611104.pdf?\\_\\_blob=publicationFile](https://www.destatis.de/DE/Publikationen/Thematisch/Preise/Verbraucherpreise/VerbraucherpreisindexJahresberichtPDF_5611104.pdf?__blob=publicationFile), 150-153 (last retrieved: 08-03-2014).

<sup>170</sup> Own calculation based on the Federal Statistical Office, *Preise – Verbraucherpreisindizes für Deutschland*, 150-153.

<sup>171</sup> Cf. S. Deckl, *Armut und soziale Ausgrenzung in Deutschland und der Europäischen Union* (Wiesbaden: December 2013), available at:

[https://www.destatis.de/DE/Publikationen/WirtschaftStatistik/Wirtschaftszeitbudget/ArmutSozialeAusgrenzung\\_12\\_2013.pdf?\\_\\_blob=publicationFile](https://www.destatis.de/DE/Publikationen/WirtschaftStatistik/Wirtschaftszeitbudget/ArmutSozialeAusgrenzung_12_2013.pdf?__blob=publicationFile), 895, 896 (last retrieved: 08-03-2014).

<sup>172</sup> Ibid, 896.

<sup>173</sup> Cf. BMVBS, *Wohnen und Bauen in Zahlen 2012/2013*, 109.

<sup>174</sup> Cf. Federal Statistical Office, *Mikrozensus - Zusatzerhebung 2010*, 344.

<sup>175</sup> [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc\\_lwho08a&lang=de](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc_lwho08a&lang=de) (last retrieved: 10-03-2014).

<sup>176</sup> Cf. BMVBS, *Wohnen und Bauen in Zahlen 2012/2013*, 95.

<sup>177</sup> Cf. Federal Statistical Office, *Mikrozensus - Zusatzerhebung 2010*, 344.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

<sup>180</sup> Cf. BMVBS, *Wohnen und Bauen in Zahlen 2012/2013*, 40.

For the rent-income ratio per household see the following table:<sup>181</sup>

Type of Household	Average Rent-Income Ratio
Households in general	22.5%
Household at risk of poverty	38.1%
Household with unemployed persons	35.3%
Pensioner's household	26.3%
Household with employed persons	20.9%

In contrast, the mortgage-income ratio per household was at 23% in 2012.<sup>182</sup>

- To what extent is home ownership attractive as an alternative to rental housing?

Attractiveness of the home ownership has to be seen against the background of the performance of the rental market. Even though the majority of rental dwellings in Germany are in private hands, the rental sector is not arranged in an arbitrary manner. The rents are based on the reference rent customary in the locality<sup>183</sup> and prices are legally prevented from increasing sharply (in general not more than 20% within 3 years, section 558 (III) BGB). Tenants also have security of tenure as long as they pay the rent and behave well, except on the rare occasion when a member of the landlord's family needs the accommodation or when the building is going to be replaced or used differently.<sup>184</sup> Beyond that, most tenancy contracts are concluded for an unlimited time.<sup>185</sup> Considering this protection of tenants in Germany, home ownership takes just an important role with regard to the formation of capital and the provision for old age.<sup>186</sup> Concerning the latter, the establishment of home ownership seems to be the perfect financial security in view of low interest rates and the widespread fear of inflation.<sup>187</sup> Whereas the average share of home ownership was at 44.2% in 2010, this rate has amounted to 54.6% for owners older than 50 years.<sup>188</sup> The age when home ownership is established for the first time averages 42 years.<sup>189</sup>

<sup>181</sup> Cf. Federal Statistical Office, *Mikrozensus - Zusatzerhebung 2010*, 344; BMVBS, *Wohnen und Bauen in Zahlen 2012/2013*, 95.

<sup>182</sup> Cf. T. Hofer (Verband deutscher Pfandbriefbanken), *Strukturen der Eigenheimfinanzierung 2012*, (Berlin: 2012), available at:

[http://www.pfandbrief.de/cms/\\_internet.nsf/0/5DDDCB5DFF18E564C1257ACC003AA9F2/\\$FILE/Anlage%20zur%20vdp-Meldung%20Nr.%2014.pdf?OpenElement](http://www.pfandbrief.de/cms/_internet.nsf/0/5DDDCB5DFF18E564C1257ACC003AA9F2/$FILE/Anlage%20zur%20vdp-Meldung%20Nr.%2014.pdf?OpenElement), 3 (last retrieved: 10-03-2014).

<sup>183</sup> The current lists of representative rents are available at: <http://www.mietspiegelportal.de/> (last retrieved: 12-12-2013).

<sup>184</sup> Cf. s. 573 (II) BGB.

<sup>185</sup> Reason: Fixed-term tenancies are only allowed in special cases prescribed in s. 575 (I) BGB.

<sup>186</sup> Cf. BMVBS, *Bericht über die Wohnungs- und Immobilienwirtschaft in Deutschland*, 43.

<sup>187</sup> Cf. S. Littmann, *Warum Immobilien nicht immer die perfekte Altersvorsorge sind*, *Wirtschaftswoche* of 14-11-2013, available at: <http://www.wiwo.de/finanzen/vorsorge/betongold-warum-immobilien-nicht-immer-die-perfekte-altersvorsorge-sind/9072590.html> (last retrieved: 10-03-2014).

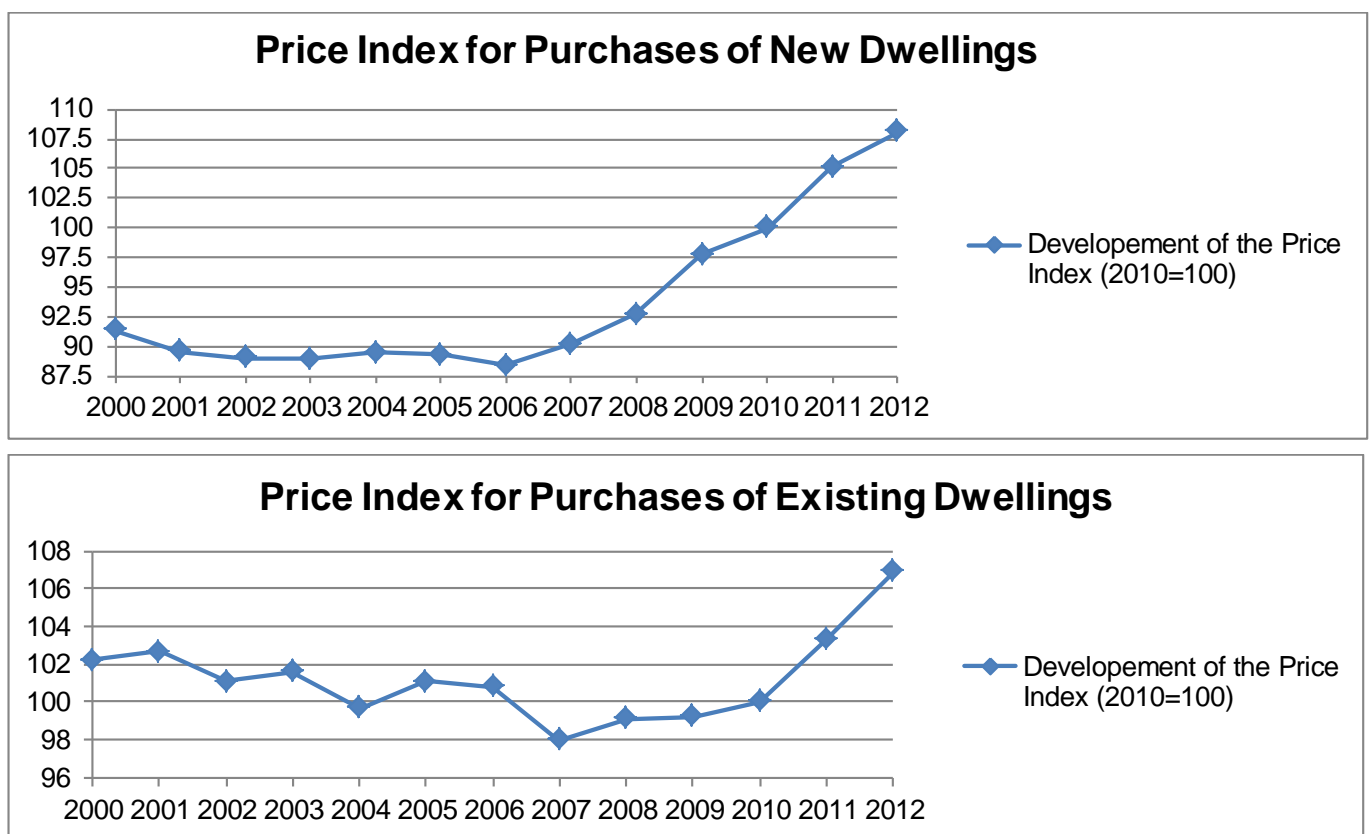
<sup>188</sup> Own calculation based on Federal Statistical Office, *Mikrozensus - Zusatzerhebung 2010*, 256, 257.

<sup>189</sup> Cf. Landesbausparkassen, *Markt für Wohnimmobilien 2013*, 47.

- What were the effects of the crisis since 2007?

As already mentioned above, the German housing sector remained largely unaffected by the financial crises as well as the subsequent recession.<sup>190</sup> According to a study of the BMVBS, the financing conditions had not been impaired very much by the crisis,<sup>191</sup> in particular with regard to housing credits granted to private households.<sup>192</sup> The much criticized conservative manner of granting credit in Germany (no speculative system; long credit periods; fixed rate products; high equity ratio) proved less risky and shielded Germany against the housing bubble.<sup>193</sup> Another important aspect that helped to avoid a housing bubble was the strict legal framework of granting credit. Unlike in some states of the US, the German borrowers bear full liability – that is, to the extent of their own private assets, including their actual and future income – so that in case of lasting financial difficulties, they resort to personal insolvency.<sup>194</sup>

The prices of dwellings, both existing and new, reacted to the crises. The tables below show the development:<sup>195</sup>



<sup>190</sup> Please refer to 1.3. 'Current situation'.

<sup>191</sup> Cf. BMVBS, *Finanzierungsstrategien wohnungswirtschaftlicher Akteure unter veränderten Rahmenbedingungen auf den Finanzierungsmärkten*, 50, 51.

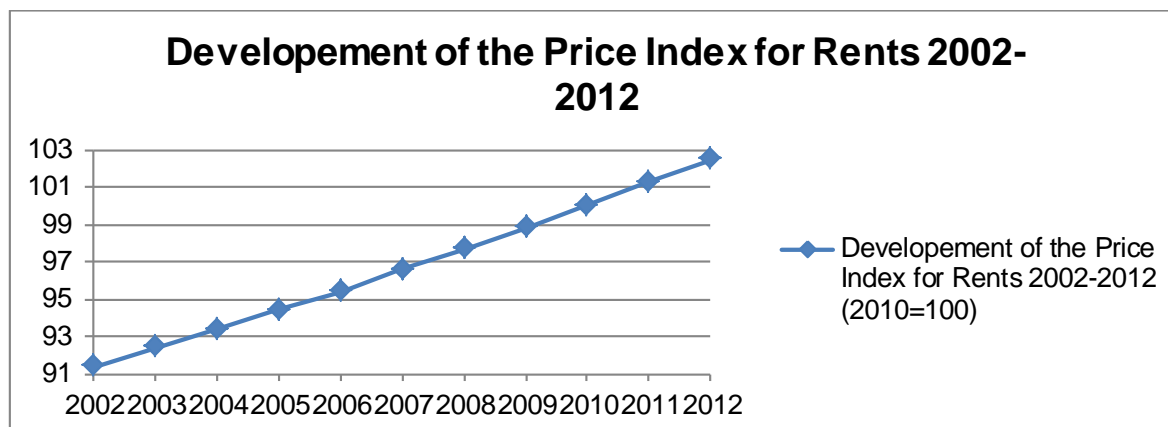
<sup>192</sup> Ibid.

<sup>193</sup> Cf. Bayern LB, *Germany up to 2040 – Long-term Trends and their Significance for the Real Estate Market* (Munich: March 2010), available at: [https://www.bayernlb.de/internet/media/en/internet\\_4/de\\_1/downloads\\_5/0300\\_immobilien\\_oeffhand\\_sparkassen\\_5/immobilienstudie2040\\_1/LongTermTrends\\_RE\\_Market\\_en\\_full.pdf](https://www.bayernlb.de/internet/media/en/internet_4/de_1/downloads_5/0300_immobilien_oeffhand_sparkassen_5/immobilienstudie2040_1/LongTermTrends_RE_Market_en_full.pdf), 56 (last retrieved: 10-03-2014).

<sup>194</sup> Ibid, 58, 59.

<sup>195</sup> Cf. Federal Statistical Office, *Preisindizes für Wohnimmobilien*, available at: [https://www.destatis.de/DE/ZahlenFakten/GesamtwirtschaftUmwelt/Preise/Baul Immobilienpreise/Tabellen\\_/HaeusepreiseBauland.html?cms\\_gtp=469922\\_slot%253D2%2526469936\\_list%253D1&https=1](https://www.destatis.de/DE/ZahlenFakten/GesamtwirtschaftUmwelt/Preise/Baul Immobilienpreise/Tabellen_/HaeusepreiseBauland.html?cms_gtp=469922_slot%253D2%2526469936_list%253D1&https=1) (last retrieved: 10-03-2014).

As far as the rents are concerned, the crises in 2007 did not constitute an extraordinary turning point. From 2002-2012, the rents increased by on average 1% per year,<sup>196</sup> while the Consumer Price Index as a whole increased by about 1.4% per year.<sup>197</sup> The development of the rent for accommodation is shown below:<sup>198</sup>



### 2.3. Tenancy contracts and investment

- Is the return (or Return on Investment (RoI)) for rental dwellings attractive for landlords-investors?

Real estate is considered – especially in the times of crises – as a stable investment option. Investment in rental objects is considered as reasonable under the aspects of personal retirement arrangements and tax deductions. For investors, the idea is that the tenants pay the vast part of the interest and credit instalments. However, according to the estimates of the BMVBS and BBSR, around 20% of private landlords make losses.<sup>199</sup> The further 40% of the landlords compensate their spending with their income, and only 40% of privately rented dwellings are profitable.<sup>200</sup>

It is normal that in the first years after the purchase, the expenditure on investment exceeds the profits by far. On average, around 10 years are required before the profits commence to overshadow the expenses.<sup>201</sup> Because of the losses that occur in these ten years, another 8 to 10 years are required before the investment really pays off, assuming that the rental demand is given over the whole period.<sup>202</sup> In the last decade, this amortization period turned out to be too long for many investors. This is why the self-financed

<sup>196</sup> Own calculation based on the Federal Statistical Office, *Preise – Verbraucherpreisindizes für Deutschland, Jahresbericht 2012* (Wiesbaden: 2013), available at: [https://www.destatis.de/DE/Publikationen/Thematisch/Preise/Verbraucherpreise/VerbraucherpreisindexJahresberichtPDF\\_5611104.pdf?\\_\\_blob=publicationFile](https://www.destatis.de/DE/Publikationen/Thematisch/Preise/Verbraucherpreise/VerbraucherpreisindexJahresberichtPDF_5611104.pdf?__blob=publicationFile), 150-153 (last retrieved: 08-03-2014).

<sup>197</sup> Own calculation based on the Federal Statistical Office, *Preise – Verbraucherpreisindizes für Deutschland*, 150-153.

<sup>198</sup> Cf. Federal Statistical Office, *Preise – Verbraucherpreisindizes für Deutschland, Jahresbericht 2012*, 149-153.

<sup>199</sup> Cf. BMVBS & BBSR, *Investitionsprozesse im Wohnungsbestand – unter besonderer Berücksichtigung privater Vermieter* (Bonn: 2007), available at: [http://www.bbsr.bund.de/BBSR/DE/Veroeffentlichungen/BMVBS/Forschungen/2007/Heft129\\_DL.pdf?\\_\\_blob=publicationFile&v=2](http://www.bbsr.bund.de/BBSR/DE/Veroeffentlichungen/BMVBS/Forschungen/2007/Heft129_DL.pdf?__blob=publicationFile&v=2), 79; Haus und Grund, press release of 07-04-2008, *Mehrheit der Wohnungen erwirtschaftet keinen Gewinn*, available at: [http://www.hausundgrund.de/presse\\_582.html](http://www.hausundgrund.de/presse_582.html) (last retrieved: 10-03-2014).

<sup>200</sup> Ibid.

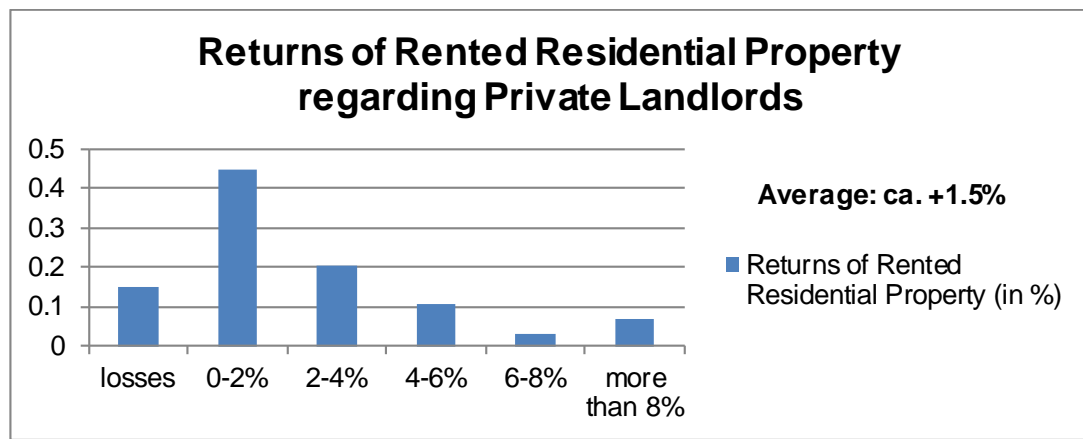
<sup>201</sup> Cf. V. Eichener, *Wohnungsbau in Deutschland – Zuständigkeiten von Bund, Ländern, Kommunen und Europäischer Union?* (Bochum: 2012), available at: <http://www.impulse-fuer-den-wohnungsbau.de/w/files/studien-etc/eichener-studie-wohnungsbau-zustaendigkeiten-kurzfassung-27aee.pdf>, 13 (last retrieved: 11-03-2014).

<sup>202</sup> Ibid., 14.

construction of rental dwellings decreased dramatically since 2006, when also the declining-balance method of depreciation for investment (*degressive Abschreibung für Anlagen*) was abolished in tax law.<sup>203</sup> Up to this time, it was possible to make higher tax deductions in the first years of the investment so that the investment turned out to be rentable earlier.<sup>204</sup> Since the abolition of this tax shifting effect, the linear method of depreciation causes so high initial losses, that such construction activities are often considered unattractive.<sup>205</sup>

Mathematically, investment in the social housing construction business still proves rentable.<sup>206</sup> However, it can at the same time be stated that market based construction business – especially in mid- and well-situated locations – proves much more rentable.<sup>207</sup>

The following table shows the returns of rented residential property with regard to private landlords (rental income less operating and maintenance costs before deduction of debts):<sup>208</sup>



- In particular: What were the effects of the crisis since 2007?

The crisis itself had no major impact on returns. However, according to the German Central Bank (*Bundesbank*), there is a correlation between rent prices, real estate prices and returns.<sup>209</sup> In the years from 2005 to 2009, tenancy revenues increased moderately, given the stable real estate prices and slightly growing rents.<sup>210</sup> Since 2010, real estate prices are increasing at a higher rate than rents, thus decreasing rental revenues.<sup>211</sup>

<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid.

<sup>206</sup> Cf. BMVBS, *Werkstattgespräch – Wohnungsmarktpolitik in Wachstumsregionen*, 2012, available at: [http://www.bmvi.de/SharedDocs/DE/Anlage/BauenUndWohnen/werkstattgespraech-wohnungsmarktpolitik-in-wachstumsregionen.pdf?\\_\\_blob=publicationFile](http://www.bmvi.de/SharedDocs/DE/Anlage/BauenUndWohnen/werkstattgespraech-wohnungsmarktpolitik-in-wachstumsregionen.pdf?__blob=publicationFile), 21 (last retrieved: 10-03-2014).

<sup>207</sup> Ibid.

<sup>208</sup> Cf. Deutsches Institut für Wirtschaftsforschung Berlin, *Politikberatung kompakt 59* (Berlin: 2010), available at: [http://www.diw.de/documents/publikationen/73/diw\\_01.c.366543.de/diwkompakt\\_2010-059.pdf](http://www.diw.de/documents/publikationen/73/diw_01.c.366543.de/diwkompakt_2010-059.pdf), 40 (last retrieved: 10-03-2014).

<sup>209</sup> Cf. Deutsche Bundesbank, *Finanzstabilitätsbericht 2012 – Deutscher Wohnimmobilienmarkt in Bewegung* (Frankfurt: 2012), available at: [http://www.bundesbank.de/Redaktion/DE/Downloads/Veroeffentlichungen/Finanzstabilitaetsberichte/2012\\_finanzstabilitaetsbericht.pdf?\\_\\_blob=publicationFile](http://www.bundesbank.de/Redaktion/DE/Downloads/Veroeffentlichungen/Finanzstabilitaetsberichte/2012_finanzstabilitaetsbericht.pdf?__blob=publicationFile), 61 (last retrieved: 10-03-2014).

<sup>210</sup> Ibid.

<sup>211</sup> Ibid.



- To what extent are tenancy contracts relevant to professional and institutional investors?
  - In particular: may a bundle of tenancy contracts be included in Real Estate Investment Trusts (REITS) or similar instruments?

REITS are fairly new instruments in Germany.<sup>212</sup> They were created in accordance with the Act of 2007<sup>213</sup> on that instrument. According to its sections 1 and 16, they are special forms of listed public limited companies (*börsennotierte Aktiengesellschaft*) which enjoy tax advantages regarding corporate and trade tax, unlike general public limited companies. The main requirement is that 75% of their assets as well as their revenues come from real estate (section 12 (II, III) REIT-Act). The focus of the business activities of REITS is property management, whereas trading with real estate is legally excluded (section 14 (I) REIT-Act). Additionally, existing residential properties may not be subject of their business (section (I no. 1a) REIT-Act). Since their introduction in 2007, REITS have not played a major role on the real estate market due to the bad conditions for a stock market launch as a result of the financial crisis (from 2007-2012, only 4 REITS and 2 Pre-REITS have been founded).<sup>214</sup> Their role as far as tenancy contracts are concerned is even less expressed.<sup>215</sup>

- Is the securitization system related to tenancies in your country? Are commercial (or other) landlords allowed to securitize their rental incomes? If yes: Is this usual and frequent?

The idea to securitize the cash flow on future rental income in form of Commercial Mortgage Backed Securities (CMBS) or Residential Mortgage Backed Securities (RMBS) without bringing in a bank was first introduced in fall 2007.<sup>216</sup> The new financing instrument was proposed by the business enterprise Debenham Thouard Zadelhoff (DTZ)<sup>217</sup>, an international provider of property services.<sup>218</sup> The effective introduction was scheduled for March 2008. However, no relevant data has been traced since then, thus securitization of rental income does not seem to play any relevant role up until now.<sup>219</sup>

## 2.4. Other economic factors

- What kind of insurances play a role in respect to the dwelling (e.g. insurance of the building, the furniture by the landlord; third party liability insurance of the tenant?)?

In Germany, there is a variety of insurances which are usual with regard to dwellings. The most important kinds of insurances concluded by the tenant are:

<sup>212</sup> Cf. BMVBS, *Bericht über die Wohnungs-und Immobilienwirtschaft in Deutschland*, 21.

<sup>213</sup> Gesetz über deutsche Immobilien-Aktiengesellschaften mit börsennotierten Anteilen (REIT-Gesetz) of 28-05-2007 (BGBl. I 914).

<sup>214</sup> Cf. BMVBS, *Bericht über die Wohnungs-und Immobilienwirtschaft in Deutschland*, 21.

<sup>215</sup> Cf. Frankfurter Allgemeine Zeitung of 19-10-2012, *Eine neue Chance für deutsche REITS*, available at: <http://www.seiten.faz-archiv.de/FAZ/20121019/fd1201210193661579.html> (last retrieved: 10-03-2014).

<sup>216</sup> Cf. Handelsblatt of 02-10-2007, *Bei Investoren zur Miete*, available at: <http://www.handelsblatt.com/finanzen/immobilien/nachrichten/dtz-vorschlag-zur-falschen-zeit-bei-investoren-zur-miete/2868452.html> (last retrieved: 10-03-2014).

<sup>217</sup> Homepage of DTZ: <http://www.dtz.com/Germany> (last retrieved: 10-03-2014).

<sup>218</sup> Cf. Immobilienwirtschaft of 20-09-2007, *DTZ: Verbriefung von Mietforderungen unabhängig von Banken*, available at: <http://www.nordhues.com/cms/de/nordhues-cie-llp-in-den-medien/articles/nordhues-cie-llp-in-den-medien.html> (last retrieved: 10-03-2014).

<sup>219</sup> Cf. BMVBS, *Finanzierungsstrategien wohnungswirtschaftlicher Akteure unter veränderten Rahmenbedingungen auf den Finanzierungsmärkten*, 24.

### (1) Private third party liability insurance

The legal framework for third party liability insurance is regulated in sections 100-124 of the Insurance Contract Act (*Versicherungsvertragsgesetz*, VVG)<sup>220</sup>. Section 100 VVG stipulates that the insurance company concerned is responsible for the claims raised by the injured party in the consequence of the liability of the insured person.

### (2) Household insurance (*Hausratsversicherung*)

The household insurance protects the property of the insurance policy holder in case of destruction, damage or loss. Almost all personal property in the household – such as furniture, electronics and household appliances, clothes, food and bicycles – may be covered by this type of insurance. Initially, also glass damages were included into the scope of the protected goods.

### (3) Glass

This kind of insurance offers protection against the breakage of glass and building vitrification, such as exterior and interior window panes, doors and furniture glass. Most often, this kind of insurance is however contained in the residential building insurance (*Wohngebäudeversicherung*) contracted by the owner.

### (4) Legal protection insurance (*Rechtsschutzversicherung*)

The purpose of this kind of insurance is to cover the costs of solicitors, expert witnesses, expenses of court and travel. This type of insurance does not however require that the dispute at stake is a housing-related one. The legal basis is laid down in section 125-129 VVG.

In Germany in a legal sense, the owner cannot require a tenant to conclude respective private third-party liability insurance, the household insurance or building insurance.<sup>221</sup> A respective obligation would anyway be hard to enforce in practice, since the owner is not entitled to demand from the tenant to provide actual proof of insurance. It should also be noted that in case of rental of an unfurnished dwelling, the danger of damage is reduced to only floors, heating and walls. At least part of those damages is normally covered by the residential building insurance contracted by the owner.

Apart from that, the insurance options for the owners include legal protection insurance, the building insurance (*Gebäudeversicherung*), the building liability insurance (*Gebäudehaftpflichtversicherung*) as well as an independent household insurance.

The building liability insurance protects the owners against damage claims of third parties, while the building insurance provides protection against damage to the building itself caused by fire, water or storm. The costs for these insurances are usually borne by the tenant, since they are defined as apportionable operating costs (*Betriebskosten*).<sup>222</sup>

- What is the role of estate agents? Are their performance and fees regarded as fair and efficient?

Real estate agents in Germany are engaged in both renting and selling of dwellings. The image of the real estate agent in German society is not very clear. On the one hand, according to the own data of the German Real Estate Association (*Immobilienverband Deutschland*, IVD)<sup>223</sup>, 76% of the clients (84% of the sellers, and 68% of the buyers) are

<sup>220</sup> *Versicherungsvertragsgesetz* of 23-11-2007 (BGBl. I 2631).

<sup>221</sup> District Court (*Amtsgericht*, AG) Düsseldorf, NJW-RR 1990, 1429.

<sup>222</sup> Cf. s. 2 no. 13 of the Regulation on Operating Costs (*Betriebskostenverordnung*, BetrKV).

<sup>223</sup> Homepage of the IVD in English: <http://ivd.net/der-bundesverband/english> (last retrieved: 10-03-2014).



satisfied with the services of their agent.<sup>224</sup> However on the other hand, there is a visible strong discontent in the society concerning this professional group.<sup>225</sup> There is little understanding for why tenants and buyers pay for real estate agency services, which are actually ordered by landlords and sellers. Prospective tenants especially do not profit from real estate agency services at all. Access to this profession as such is not regulated, so that no specific education or qualification is required.

Besides the respective provisions contained in the German Civil Code,<sup>226</sup> the rules regarding agency contracts concerned with renting are contained in the Law on Housing Agency (*Wohnungsvermittlungsgesetz*, WoVermittG)<sup>227</sup>. The agency fee charged can be no higher than two times the monthly rent amount excluding taxes (section 3 (II) WoVermittG). This means that for a rent of EUR 1000, a commission of EUR 2380 would be due to the estate agent, which would be normally at the charge of the tenant. According to the draft amendment<sup>228</sup> to this law proposed by the *Länder* and recently adopted by the draft law of Federal Minister of Justice, the party who commissions the agent should pay him (*Bestellerprinzip*), i.e. the tenant should be obliged to pay the fee only if he ordered the services of the agent.

Regarding agency contracts concerning the purchase of real estate, there is no single approach in Germany. On average the agent's commission in real estate transactions amounts to between 3% and 6% of the purchase price, excluding taxes, so that in fact this agent fee amounts to between 3.57% and 7.14%.

For the purchase of real estate, there is also no regulation on who has to pay the fee and beyond that there is no limit regarding its amount. Determining whether the agency fee is legitimate in a particular case is left to the courts and jurisprudence. The Higher Regional Court in Frankfurt a. M. (*Oberlandesgericht*, OLG) in its judgement of 5 February 2008 criticized an agency fee of 12% as exceeding by far the fees present on the market.<sup>229</sup> If the agent demands more than the usual 3%-5%, he or she must be able to provide special grounds for the fee. In case of ordinary residential premise, an agency fee of over 12% is way too high.<sup>230</sup>

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<sup>224</sup> Cf. IVD, *Forsa-Umfrage: Die meisten Kunden sind mit ihrem Makler zufrieden*, 2009, available at: [www.ivd.net/der-bundesverband/nachrichtendetail/archive/2010/november/article/forsa-umfrage-die-meisten-kunden-sind-mit-ihrem-makler-zufrieden.html](http://www.ivd.net/der-bundesverband/nachrichtendetail/archive/2010/november/article/forsa-umfrage-die-meisten-kunden-sind-mit-ihrem-makler-zufrieden.html) (last retrieved: 10-03-2014).

<sup>225</sup> Cf. D. Scherf, *Die neue Macht der Makler*, Frankfurter Allgemeine Zeitung of 29-04-2013, available at: <http://www.faz.net/aktuell/finanzen/meine-finanzen/wohnungssuche-immer-aerger-mit-den-maklern-wohnungsmarkt-faz-12164736.html>; C. Frank, *Wer anschafft soll auch zahlen*, Süddeutsche Zeitung of 23-10-2012, available at: <http://sz.de/1.1503384>; T. Rübke, *Schnelles Geld, Schlechtes Image*, Die Zeit of 28-11-2011, available at: <http://www.zeit.de/2011/48/C-Immobilienmakler-Weiterbildung>; M. Fabricius & N. Schwaldt, *Die Schattenwelt der Makler*, Die Welt of 20-02-2011, available at: [www.welt.de/12597604](http://www.welt.de/12597604) (last retrieved: 10-03-2014).

<sup>226</sup> ss. 552-555 BGB.

<sup>227</sup> WoVermittG of 4-11-1971 (BGBl. I 1747).

<sup>228</sup> Printed Matter of the Federal Council (*Bundesratsdrucksache*, BR-Drucks.) 17/14361.

<sup>229</sup> OLG Frankfurt a. M., NJOZ 2008, 2000.

<sup>230</sup> Ibid.

The table shows the percentage of agent fees based on regional practice:<sup>231</sup>

<i>Länder</i>	Agent fee in total	Seller participation	Purchaser participation
Baden-Württemberg	7.14%	3.57%	3.57%
Bavaria	7.14%	3.57%	3.57%
Berlin	7.14%	0%	7.14%
Brandenburg	7.14%	0%	7.14%
Bremen	5.95%	0%	5.95%
Hamburg	6.25%	0%	6.25%
Hesse	5.95%	0%	5.95%
Mecklenburg-Western Pomerania	5.95%	2.38%	3.57%
Lower Saxony	7.14% or 4.76%-5.95%	3.57% or 0%	3.57% or 4.76%-5.95%
North-Rhine-Westphalia	7.14%	3.57%	3.57%
Rhineland-Palatinate	7.14%	3.57%	3.57%
Saarland	7.14%	3.57%	3.57%
Saxony	7.14%	3.57%	3.57%
Saxony-Anhalt	7.14%	3.57%	3.57%
Schleswig-Holstein	7.14%	3.57%	3.57%
Thuringia	7.14%	3.57%	3.57%

## 2.5. Effects of the current crisis

- Has mortgage credit been restricted? What are the effects for renting?

The German real estate markets remained resistant to the US crises. The rents are increasing at a regular pace while the number of vacancies is decreasing. The risk as far as mortgage credit in Germany is concerned has always been fairly low. Accordingly, even during the first years of the crises, there was no need to restrict mortgage credit, especially as the process of real estate purchase in Germany does not follow the US pat-

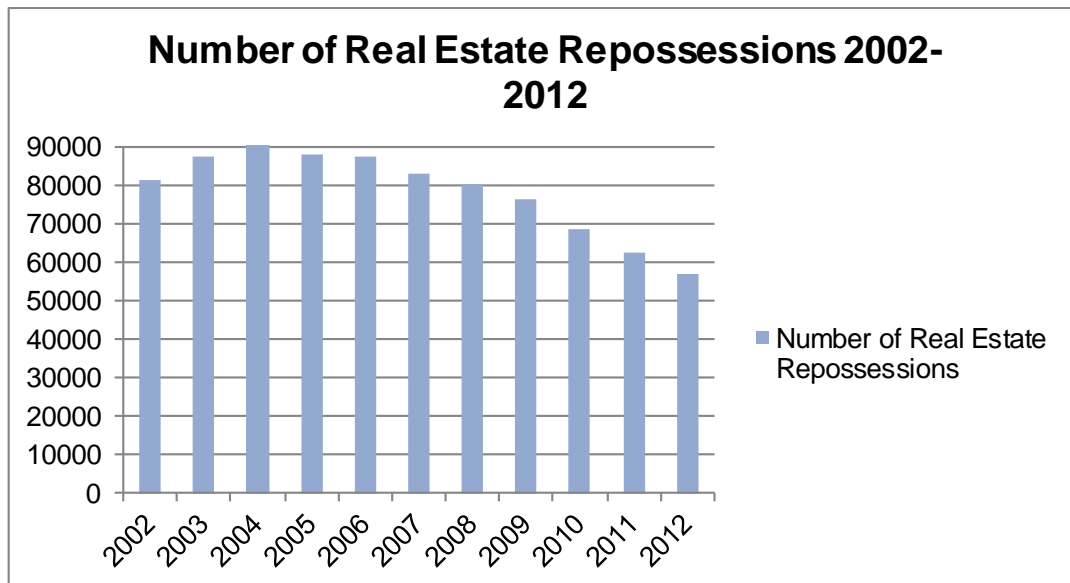
<sup>231</sup> <http://www.immoverkauf24.de/immobilienmakler/maklerprovision/> (last retrieved: 23-03-2014).

tern at all.<sup>232</sup> Specifically, financing 100 or more per cent of the purchase price is only possible if the interested person or entity possesses satisfactory securities/collaterals.

According to the Institute of German Economy in Cologne, the mortgage credit volume remained at nearly the same level from 2002 to 2008.<sup>233</sup> The analysis of the aggregated banking data proved that the volume of real estate credit stagnated already before the crises came as a response to fairly weak investment activities. However, what changed is the affinity of different financial institutions to grant credit and, thus, the shares in the credit market of different types of institutions. Whereas the central banks of the *Länder* (*Landesbanken*) decided to reduce the credit volume during the crisis, the smaller banks – such as regional banks and credit unions – increased the volume of granted credits.<sup>234</sup> This situation led to a deterioration of the situation in the market for large volume credits for institutional housing actors.<sup>235</sup>

- Indicate the current figures on repossession (seizures of houses in case of mortgage credit default of the buyer)? Have repossessions affected the rental market?

In the field of repossessions, the crisis did not seem to have a remarkable impact either. The table below shows the number of repossessions in the years from 2006 to 2013, and proves that no massive increase in repossessions occurred in response to the financial crises:<sup>236</sup>



#### - Prognosis

These statistics cover both residential and commercial premises. The following table shows the shares of the respective objects in 2012.<sup>237</sup>

<sup>232</sup> Cf. BMVBS, *Bericht über die Wohnungs- und Immobilienwirtschaft in Deutschland*, 17.

<sup>233</sup> Cf. Institut der Deutschen Wirtschaft Köln, *Immobilienfinanzierung Regulierungsgefahren*.

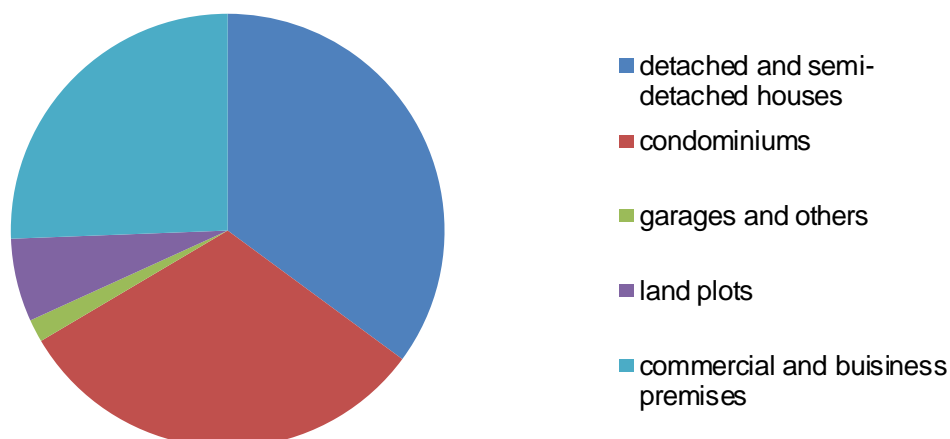
<sup>234</sup> Cf. BMVBS, *Finanzierungsstrategien wohnungswirtschaftlicher Akteure unter veränderten Rahmenbedingungen auf den Finanzierungsmärkten*, 3.

<sup>235</sup> Ibid.

<sup>236</sup> Cf. Federal Statistical Office, *Zivilgerichte 2012* (Wiesbaden 2013), available at: [https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Zivilgerichte2100210127004.pdf?\\_\\_blob=publicationFile](https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Zivilgerichte2100210127004.pdf?__blob=publicationFile), 12, 13 (last retrieved: 10-03-2014).

<sup>237</sup> Cf. Argetra GmbH, *Zwangsversteigerungsmarkt in Deutschland – Jahresbericht 2012* (Ratingen: 2013), available at: <https://www.argetra.de/file/ae23f6bb38cb10bf0138ed167ac3125d.de.0/argetra+jahresbericht+2012+presse.pdf>, 4 (last retrieved: 10-03-2014).

### Repossessions: Shares of Different Types of Real Estate Objects in 2012



- Has new housing or housing-related legislation been introduced in response to the crisis?

There was no specific housing-related legislation introduced in response to the crisis. The REITS Act in 2007 was introduced parallel to and not in response to the crisis.

#### 2.6. Urban aspects of the housing situation

- What is the distribution of housing types in the city scale (e.g.: are rented houses mainly in the city centres and owner occupied in the suburbs?) vs. the region scale (e.g.: more rented houses in the big cities, less in the villages?)

An important characteristic of housing in Germany is the different housing structure in the rural areas as compared to the cities. While rural areas continue to lose their inhabitants, the shortage of dwellings in the urban areas becomes more and more dramatic. This is underpinned by strong regional differences. In all of the bigger cities, the ownership share is much lower than the already low national average of about 42.4%. For details in respect of major cities, please see the table below:<sup>238</sup>

Ownership Rate in the Major Cities	
Bremen	33%
Hamburg	23%
Munich	21%
Frankfurt a. M.	19%
Berlin	15%
Leipzig	13%

<sup>238</sup> Cf. <http://de.statista.com/statistik/daten/studie/260129/umfrage/eigentums-und-leerstandsquote-von-wohnmobilien-in-deutschen-staedten/> (last retrieved: 10-03-2014).

National Average	42.4%
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Regarding the purchase ratio in the new construction sector, a clear tendency has been observable for a long time: the smaller the municipality, the higher the ownership rates. The main reason for this is the strong difference in the prices of the building plots in the rural areas and in the cities.<sup>239</sup>

This trend seemed to be actually changing in the last years: from 2004-2011, about 70% of the bought dwellings – both new and used – were bought in the German agglomeration areas, which represents an increase of about 10% compared to the years 1998 to 2003.<sup>240</sup>

- Are the different types of housing regarded as contributing to specific, mostly critical, “socio-urban” phenomena, e.g. ghettoization and gentrification?

In principle, recipients of housing subsidies live in a wide spectrum of different dwellings and districts mixed with those not receiving public money.<sup>241</sup> However, according to the expert opinion of the Institute for Urban Affairs and Politics as well as of the German Institute for Economic Research in Berlin concerning the trend and the extent of polarization in the German cities, households in need – almost exclusively tenants – are normally concentrated in certain, ghettoized districts.<sup>242</sup> These are usually characteristic part of the existing stock, especially large housing estates dating back to the 1960s and 1970s in the old western federal states and the prefabricated settlements in the eastern part of the country.<sup>243</sup> Because of the poor living conditions – which often include multi storey prefabricated buildings, unsatisfactory provision of infrastructure, high environmental burden (air, noise, scarcity of green spaces) – these areas are being avoided or left by the socially better-off.<sup>244</sup> According to the German Federal Government, the relatively low rents and the small surface of the dwellings have led in many East German cities to increased influx of socially weak households.<sup>245</sup> However, through urban reconstruction measures such as the programme Urban Redevelopment East (*Stadtumbau Ost*)<sup>246</sup>, the stigmatization as well as so-called banlieue-effect could have been avoided.<sup>247</sup> According to section 171a (III) of the Federal Building Code (*Baugesetzbuch*, BauGB)<sup>248</sup>, urban reconstruction

<sup>239</sup> Cf. BBSR, *Wohneigentum – Fachbeitrag*, 2009, available at:

[http://www.bbsr.bund.de/BBSR/DE/Wohnen/Immobilien/Immobilienmarktbeobachtung/Projekte/Fachbeitraege/Wohneigentum/01\\_start.html?nn=446450#doc446256bodyText1](http://www.bbsr.bund.de/BBSR/DE/Wohnen/Immobilien/Immobilienmarktbeobachtung/Projekte/Fachbeitraege/Wohneigentum/01_start.html?nn=446450#doc446256bodyText1) (last retrieved: 10-03-2014).

<sup>240</sup> Cf. Immobilienzeitung of 20-08-2012, *Wohneigentumskäufe zu 70% in Ballungsgebieten*, available at:

<http://www.immobilienz-zeitung.de/1000010301/wohneigentumskaeufe-zu-70-in-ballungsgebieten> (last retrieved: 10-03-2014).

<sup>241</sup> Cf. BMVBS, *Fortführung der Kompensationsmittel für die Wohnraumförderung*, 22.

<sup>242</sup> Cf. Institut für Stadtforschung und Stadtpolitik & Deutsches Institut für Wirtschaftsforschung Berlin, *Trends und Ausmaß der Polarisierung in deutschen Städten*, 2009, available at:

[http://www.bbsr.bund.de/BBSR/DE/FP/ReFo/Staedtebau/2006/Polarisierung/01\\_Start.html?nn=395966&notFirst=true&docId=438754](http://www.bbsr.bund.de/BBSR/DE/FP/ReFo/Staedtebau/2006/Polarisierung/01_Start.html?nn=395966&notFirst=true&docId=438754) (last retrieved: 10-03-2014).

<sup>243</sup> Cf. BMVBS, *Fortführung der Kompensationsmittel für die Wohnraumförderung*, 22.

<sup>244</sup> Cf. Bundesministerium für Arbeit und Soziales, *Lebenslagen in Deutschland – Der vierte Armuts- und Reichtumsbericht der Bundesregierung* (Bonn: 2013), available at:

[http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen-DinA4/a334-4-armuts-reichtumsbericht-2013.pdf?\\_\\_blob=publicationFile](http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen-DinA4/a334-4-armuts-reichtumsbericht-2013.pdf?__blob=publicationFile), 134 (last retrieved: 10-03-2014).

<sup>245</sup> BT-Drucks. 17/12305, 3, 4.

<sup>246</sup> BT-Drucks. 17/10942.

<sup>247</sup> BT-Drucks. 17/12305, 4.

<sup>248</sup> BauGB in its version of 23-09-2004 (BGBl. I 2414); an official English translation of the current Building Code is available at: <http://www.iuscomp.org/gla/statutes/BauGB.htm> (last retrieved: 23-03-2014).

measures are those measures by means of which urban deficits areas are getting sustainable urban development structures. Inversely, the process of gentrification can be observed in the attractive city centres, often in the luxuriously renovated old building districts, architecturally attractive and located in the city centres.<sup>249</sup> There, the usually better educated and richer people are able either to pay much higher rents or finance the real estate.<sup>250</sup>

- Do phenomena of squatting exist? What are their – legal and real world – consequences?

The phenomenon of squatting used to be very present in Germany's history. For example, at the apex of the squatters' movement during the eighties, there were more than 200 squatted houses only in Berlin.<sup>251</sup> It has not disappeared completely yet, but it has however become less significant.<sup>252</sup> Plus, the aim of the remaining squatters is often the organization of independent culture centres and not necessarily the provision of housing.<sup>253</sup> There are also no official statistics concerning this trend. According to the press, one of the last squatted houses in Berlin was vacated in 2011<sup>254</sup> and the last squatted houses in Frankfurt a. M. were vacated in April 2013<sup>255</sup>. At present, the entire state of North Rhine-Westphalia has only one squatted house on record.<sup>256</sup>

The German legal order does not provide for property acquisition through squatting. In order to acquire property of real estate by the means of adverse possession, section 900 BGB requires that factual possession has been performed for 30 years and that the occupier has been unlawfully registered in the Land and Mortgage Register for 30 years also.

Squatting in Germany is penalized under section 123 of the German Criminal Code (*Strafgesetzbuch*, StGB)<sup>257</sup> as trespass to the home. Since this crime is only perused upon the owner's motion, in many cases no proceedings are at stake, since the owners are not aware of the situation. Only if the object of the squatters is a public building or the squatters resorted to heavy vandalism, the state authorities can intervene *ex officio*. The so-called action for eviction in section 885 of the Code of Civil Procedure (*Zi-*

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<sup>249</sup> Cf. D. Thomas, *Akteure der Gentrification und ihre Ortsbindung: Eine empirische Untersuchung in einem ost-deutschen Sanierungsgebiet*, 2009, available at: [http://edoc.bibliothek.uni-halle.de/servlets/MCRFileNodeServlet/HALCoRe\\_derivate\\_00003053/dirtthomas.pdf](http://edoc.bibliothek.uni-halle.de/servlets/MCRFileNodeServlet/HALCoRe_derivate_00003053/dirtthomas.pdf), 20 (10-03-2014).

<sup>250</sup> Ibid., 11.

<sup>251</sup> Cf. Bundeszentrale für Politische Bildung, *Hausbesetzer II*, 03-03-2010, available at: <http://www.bpb.de/gesellschaft/kultur/jugendkulturen-in-deutschland/36244/hausbesetzer-ii> (last retrieved: 10-03-2014).

<sup>252</sup> Cf. N. Möller, *Hausbesetzungen in Deutschland: Am Beispiel der Mainzer Straße in Berlin*, (Norderstedt: Grin Verlag, 2010) 3.

<sup>253</sup> Ibid.

<sup>254</sup> Cf. P. Elsbrock, *High noon an der Liebig 14*, STERN of 02-02-2011, available at: <http://www.stern.de/panorama/letztes-besetztes-haus-von-berlin-high-noon-an-der-liebig-14-1649988.html> (last retrieved: 23-03-2014).

<sup>255</sup> Cf. Frankfurter Allgemeine Zeitung of 22-04-2013, „Institut für Irrelevanz“ geräumt, available at: <http://www.faz.net/aktuell/rhein-main/besetztes-haus-institut-fuer-irrelevanz-geraeumt-12157912.html> (last retrieved: 23-03-2014).

<sup>256</sup> Cf. J. Weimer, *Erste Hausbesetzung vor 40 Jahren*, Der Westen of 20-09-2010, available at: <http://www.derwesten.de/panorama/erste-hausbesetzung-vor-40-jahren-id3736230.html> (last retrieved: 10-03-2014).

<sup>257</sup> StGB in its version of 13-11-1998 (BGBl. I 3322); an official English translation of the current German Criminal Code is available at: [http://www.gesetze-im-internet.de/englisch\\_stgb/](http://www.gesetze-im-internet.de/englisch_stgb/) (last retrieved: 23-03-2014).



*vilprozessordnung*, ZPO)<sup>258</sup> is a procedural instrument to enforce the expulsion of squatters.

## 2.7. Social aspects of the housing situation

- What is (are) the dominant public opinion(s) towards certain forms of rental types or tenure forms? (e.g. is renting considered as socially inferior or economically unsound in the sense of a “rental trap?”) In particular: Is only home ownership regarded as a safe protection after retirement?

Despite slowly changing ownership rates, the fact of owning real estate is still considered to be a sign of wealth in Germany. Especially the wealthier social groups disclose high ownership ratios. In 2010, about 70% of the households with a disposable monthly income of more than EUR 3000 were owners.<sup>259</sup> The Germans also recognize the high importance of home ownership as a provision for old age. Owner-occupied dwellings have been integrated into the system of tax deductions in private pension plans. The legal basis is the Home Ownership and Pensions Act (*Eigenheimrentengesetz*) from 29 July 2008,<sup>260</sup> which entered into force retrospectively to 1 January 2008. Subsidized are the owner's houses, condominium units, cooperative dwellings, and other owner-like households.<sup>261</sup>

- What is the typical attitude of tenants towards different forms of tenure (e.g. owners of privatised apartments in former Eastern Europe not feeling and behaving as full owners)

According to a recently published study on the satisfaction of tenants, 85% of the tenants are contented with their current housing situation.<sup>262</sup> More than 70% are even pleased with the amount of rent.<sup>263</sup>

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<sup>258</sup> ZPO in its version of 05-12-2005 (BGBl. I 3202; corr. 2006, 431; 2007, 1781); an official English translation of the current Code of Civil Procedure is available at: [http://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html](http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html) (last retrieved: 23-03-2014).

<sup>259</sup> Cf. Federal Statistical Office, *Mikrozensus - Zusatzerhebung 2010*, 256.

<sup>260</sup> *Eigenheimrentengesetz* of 29-07-2008 (BGBl. I 1509).

<sup>261</sup> The subsidization procedure is as follows: Entitled persons (civil servants, all persons who are compulsorily injured in the legal pension fund or in the old-age security for farmers as well as the spouses of these persons) receive an allowance to their financial contributions made upon a certified pension plan contract (minimum allowance: EUR 154 per year; limit of the allowance: EUR 2100 per year); cf. Bundesfinanzministerium, *Das Eigenheimrentengesetz*, 2009, available at: [http://www.bundesfinanzministerium.de/Content/DE/Monatsberichte/Standardartikel\\_Migration/2009/01/analysen\\_und\\_berichte/B02-Eigenheimrentengesetz/Eigenheimrentengesetz.html#doc211550bodyText7](http://www.bundesfinanzministerium.de/Content/DE/Monatsberichte/Standardartikel_Migration/2009/01/analysen_und_berichte/B02-Eigenheimrentengesetz/Eigenheimrentengesetz.html#doc211550bodyText7) (last retrieved: 10-03-2014).

<sup>262</sup> Study “*Bezahlbarer Wohnraum*” of Immobilienscout24 and GdW, available at: <http://web.gdw.de/pressecenter/pressemeldungen/1905-grossteil-der-mieter-ist-mit-der-wohnsituation-zufrieden-aktuelle-repraesentative-studie-von-immobilienscout24-und-gdw> (last retrieved: 10-03-2014).

<sup>263</sup> Ibid.

Summary table 2: Urban and Social Aspects of the Housing Situation

	Home ownership	Renting <b>with a public task</b>	Renting <b>without a public task</b>
Dominant public opinion	The most desired form of tenure	To some extent considered inferior to other forms of tenure	The widely accepted, traditional form of tenure, considered as a good alternative to home ownership
Contribution to gentrification?	Possible, especially in well situated high quality new housing estates, and luxurious renovated historic city centre apartments	None	Possible, especially in well situated high quality new housing estates, and luxurious renovated historic city centre apartments
Contribution to ghettoization?	None	Not to be excluded, especially in the large housing estates ( <i>Großwohnsiedlung</i> )	Not to be excluded, especially in the large housing estates

### 3. Housing policies and related policies

#### 3.1. Introduction

National housing policy constitutes a policy sector of crucial importance, as it has to make a reasonable contribution to one of the most basic human needs – housing. At the same time, national housing policy relates to a vast range of political challenges, for example retirement policy by promoting owner-occupied housing, energy policy by reducing energy consumption, family policy by improving the living conditions for families with children in cities and labour policy by stabilizing the labour market through a highly-accessible housing market.

- How is housing policy related to the structure and concept of the (national) welfare state, to other welfare policies and the tax system?

In Germany, social housing policy is based on an understanding that households with lower income, especially in growing cities characterized by bottlenecks on the supply side, struggle with considerable problems in finding appropriate housing. According to the typology of *Esping-Andersen*, Germany is as well as Austria classified as a conservative welfare state in an international context.<sup>264</sup>

<sup>264</sup> Cf. G. Esping-Andersen, *The three worlds of welfare capitalism* (New Jersey: Princeton University Press, 1990) available at: <http://isites.harvard.edu/fs/docs/icb.topic1134169.files/Readings%20on%20Social%20Democracy/Esping%20Andersen%20-%20The%20Three%20Worlds%20of%20Welfare%20Capitalism.pdf>, 27 (last retrieved. 10-03-2014).



According to the jurisprudence of the German Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG), care for those in need is one of the most obvious obligations of the German welfare state.<sup>265</sup> Its aim is to provide for the minimum standards allowing for a life in dignity.<sup>266</sup> Article 1 (I) of the German Basic Law (*Grundgesetz*, GG)<sup>267</sup> in conjunction with the welfare state imperative contained in Article 20 (III) GG (*Sozialstaatsgebot*) forms a claim for state aid in order to ensure the subsistence level.<sup>268</sup> This is where the social housing policy finds its origins and legitimization. The judgement of the BVerfG of 9 February 2010 concretized this principle insofar as the provision of the subsistence level aid is supposed to cover both the need to secure the physical existence, thus the accommodation, as well as the possibility to cultivate interpersonal contacts.<sup>269</sup> The BVerfG stated that already the failure to meet these indispensable needs in a comprehensive, realistic, transparent and verifiable manner constitutes a breach of constitutional law.<sup>270</sup>

The social housing policy is a kind of compromise and balance between the “market-good” character of housing and its importance as a social good, and it consists in ensuring the balance between property policy (*Vermögenspolitik*) and supply policy (*Versorgungspolitik*).<sup>271</sup>

The issues of tax law in context of housing policy will be dealt under 3.7. ‘Taxation’.

- What is the role of the constitutional framework of housing? (in particular: does a fundamental right to housing exist?)

The German constitutional system does not explicitly provide for an enforceable right to housing. In Germany, an already established home is protected by Article 13 GG, which guarantees its inviolability. According to the German constitutional doctrine, the content of the right contained in Article 13 GG constitutes a so-called “defence right” (*Abwehrrecht*) against violations of an existing home, whereas the stage of establishing housing is not protected. Similar to this is the scope of protection under Article 14 GG, which for its part guarantees protection of ownership within the limits that are defined by the laws. In the line with the settled case-law of the German Constitutional Court, the right of possession of a tenant is also protected under Article 14 GG, as its social functions are comparable to those typical for ownership.<sup>272</sup>

Some of the *Länder* have provisions going even further in the protection of the home. For example, according to Article 106 (I) of the Constitution of the State of Bavaria<sup>273</sup>, every resident of Bavaria is entitled to housing appropriate to their needs. This is also stipulated in the same manner in Article 28 (I) of the Constitution of Berlin<sup>274</sup> and in Article 14 (I) of

<sup>265</sup> Cf. BVerfG, NJW 1975, 1691 (1692); NJW-RR 2004, 1657 (1662); NJW 2009, 2267 (2275).

<sup>266</sup> Ibid.

<sup>267</sup> GG of 23-05-1949 (BGBl. I 1); an official English translation of the current German Basic Law is available at: [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html) (last retrieved: 23-03-2014).

<sup>268</sup> Cf. BVerfG, NJW 2005, 1927 (1930); NJW 2010, 505.

<sup>269</sup> Cf. BVerfG, NJW 2010, 505 (508).

<sup>270</sup> Ibid.

<sup>271</sup> Cf. F. Jetter, *Wohnungsnot als Schlüsselproblem der Sicherung des sozialen Friedens – Subjektförderung, Objektförderung und das Drei-Phasen-Modell des Dritten Wohnungsmarktes als wohnungspolitische Instrumente* (Cologne: 1995), available at: <http://www.sozialpolitik.de/dritterwohnungsmarkt.htm> (last retrieved: 10-03-2014).

<sup>272</sup> BVerfG, NJW 1993, 2035.

<sup>273</sup> BayVerf in its version of 15-12-1998 (GVBl. 991).

<sup>274</sup> BlnVerf of 23-11-1995 (GVBl. 779).

the Constitution of the Hanseatic City of Bremen<sup>275</sup>. The insertion of these provisions in the respective *Land* constitution (*Landesverfassung*) and their systematic position among other basic law provisions – which for their part constitute enforceable rights – could suggest the enforceable character of these provisions. However, according to the jurisprudence of the Constitutional Courts of Bavaria and Berlin, these provisions do not include subjective rights.<sup>276</sup> They should rather express the obligation for the *Land* and the municipalities to invest in the construction projects.<sup>277</sup> However, this position was not the only interpretation presented by the court,<sup>278</sup> as it had indeed pronounced this right's enforceable character in one of its previous judgements.<sup>279</sup>

Notwithstanding the legal discussion about the necessity and the costs of enforcing a potential right to housing, Article 1 GG, protecting human dignity, allows for the assumption that such a right could be derived from the dignity-based need for living space and the welfare state principle.<sup>280</sup> However, this would not guarantee effective enforcement.

Even in the social housing sector, in case of insufficient supply on the housing market, an individual still has no enforceable right to housing. The competent local welfare authority can, within its discretion, decide to apply the means of direct aid, of financial support or benefits in kind (*Sachleistung*).

Thus, a fundamental enforceable right to housing is not guaranteed by German law.

### 3.2. Governmental actors

- Which levels of government are involved in housing policy (national, regional, local); what are they called; how many are there of each?

According to its constitution Germany is a federal state, in which all levels of government – including the federation (*Bund*), the states (*Bundesländer*) and the counties, municipalities and associations of municipalities at the local level – are players in the field housing policy.<sup>281</sup>

In order to better understand the division of competences in the domain of housing policy, a very short overview of Germany's constitutional bases shall be provided in the following.

As far as the general distribution of competences is concerned, the main rule is contained in Article 30 GG. According to this provision “*except as otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the Länder*”.

This general rule is further concretized by the Articles 70 et seq. and 83 et seq. dealing with legislative and administrative competences respectively.

According to Article 70 GG, “*the Länder shall have the right to legislate insofar as this Basic Law does not confer legislative power on the Bund*”. Article 73 GG provides a list of matters which are objects of the federal exclusive legislative competences (*ausschließliche Gesetzgebungskompetenz*), and Article 74 GG lists the matters that are objects of

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<sup>275</sup> BremVerf of 21-10-1947 (GBI. 251).

<sup>276</sup> BayVerfGH 15, 49 (56); 42, 28 (32); 58, 94 (104); BerlVerfGH, NVwZ-RR 1997, 202.

<sup>277</sup> Ibid.

<sup>278</sup> Cf. P. Derleder, *Die Notwendigkeit eines Grundrechts auf Wohnen*, WuM 2009, 615 (616).

<sup>279</sup> BayVerfGH 5, 122 (125).

<sup>280</sup> Cf. Derleder, WuM 2009, 615 (621).

<sup>281</sup> Cf. [http://www.bmvi.de/DE/BauenUndWohnen/Wohnungswirtschaft/wohnungswirtschaft\\_node.html](http://www.bmvi.de/DE/BauenUndWohnen/Wohnungswirtschaft/wohnungswirtschaft_node.html) (last retrieved: 20-03-2014).

concurring legislative competences (*konkurrierende Gesetzgebungskompetenz*). If according to these provisions, the laws are to be enacted by the federation, the legislative process is managed together by the Federal Government (*Bundesregierung*), the Federal Parliament (*Bundestag*) and the Federal Council (*Bundesrat*) in a common legislative procedure. Otherwise, the bills are passed by the Parliaments of the *Länder*.

Article 83 GG describes executive competences: The execution of the federal laws by the federal government constitutes an exception, hence “*the Länder shall execute federal laws on their own right insofar as this Basic Law does not otherwise provide or permit*”.

On the local level, the Basic Law provides that the counties, municipalities and associations of municipalities “*must be guaranteed the right to regulate all local affairs on their own responsibility, within the limits prescribed by the laws*” (Article 28 GG).

- Which level(s) of government is/are responsible for designing which housing policy (instruments)?
- Which level(s) of government is/are responsible for which housing laws and policies?

It is within the above outlined framework, that the different levels of government in Germany pursue their housing policy priorities and aims in accordance with their competences.

#### (1) Federation (*Bund*)

On the federal level the main tasks in housing policy are the design of the general political framework in a line with a scheme for a functioning subsidy system (i.e. co-financing of housing allowances) designed also to support subsidy programmes run by the states and municipalities (*Förderprogramme der Länder und Kommunen*). In accordance with the constitutional division of competences, the federation is responsible for drafting laws concerning tenancy and tax law.

Within the executive branch, the ministry most closely linked to issues of housing is the Federal Ministry of Transport, Building and Urban Development (*Bundesministerium für Verkehr, Bau und Stadtentwicklung*, BMVBS) which is after the federal election in autumn 2013 part of the new Federal Ministry of Transport and Digital Infrastructure (*Bundesministerium für Verkehr und digitale Infrastruktur*, BMVI)<sup>282</sup>.

According to its organigram, the Directorate-General for Spatial Planning, Urban Development, Housing Law within that ministry (*Abteilung Raumordnung, Stadtentwicklung, Wohnen*) is in charge of “*urban development and spatial planning, building and housing law, and rent law. One of its main priorities is to ensure the provision of housing that meets the needs of public welfare, especially given the current demographic trends. This directorate-general also has responsibility for the urban development assistance programmes, especially those relating to urban restructuring and the "Social City" programme. It also devotes special attention to the development of rural infrastructure*”.<sup>283</sup>

The Directorate-General for Building, Construction Industry and Federal Buildings (*Abteilung Bauwesen, Bauwirtschaft, Bundesbauten*) is responsible for building policy issues, improving the energy efficiency of buildings, public procurement, *Baukultur* (improving the quality of the built environment), civil engineering and the construction industry. In

<sup>282</sup> Homepage of the BMVI: [http://www.bmvi.de/DE/Home/home\\_node.html](http://www.bmvi.de/DE/Home/home_node.html) (last retrieved: 23-03-2014).

<sup>283</sup> Cf. [http://www.bmvi.de/DE/DasMinisterium/das-ministerium\\_node.html](http://www.bmvi.de/DE/DasMinisterium/das-ministerium_node.html) (last retrieved: 23-03-2014).

addition, it has technical responsibility for federally owned civil buildings in Germany and abroad.<sup>284</sup>

Important policies managed by the federation with a strong impact on housing are the climate policy, regional planning, and urban development promotion.

- Climate and energy policy

The previous federal government chose climate protection and energy issues as one of its priorities. With regard to housing, especially the energy concept of 2010<sup>285</sup> and the turnaround in energy policy in 2011<sup>286</sup> have to be mentioned in this context. The aim of these programmes as well as of their corresponding laws<sup>287</sup> consists in creating a climate-neutral building stock until 2050 by promoting energy renovation measures referring to existing buildings as well as by determining energy standards regarding new constructed dwellings. At the same time, these regulations shall implement the provisions of the EU-Directive 2012/27/EU<sup>288</sup> on energy efficiency and the EU-Directive 2010/31/EU<sup>289</sup> on the energy performance of buildings. According to the Directives, all new buildings shall be nearly zero-energy buildings (*Niedrigstenergiegebäude*) by the end of 2020. That means that these buildings must have a very high energy performance, and that the nearly zero or very low amount of energy required should be covered to a significant extent by energy from renewable sources. In addition, every owner of new and also of existing residential buildings is required to have an energy performance certificate (*Energieausweis*). This certificate assesses a building according to energy criteria either on the basis of its energy required (new buildings or building repairs) or on its energy consumption (existing buildings).

- Regional planning policy

The idea of a successful regional planning policy<sup>290</sup> is to ensure well-balanced settlement and open space structures, taking into consideration the existing natural environment, cultural aspects and economy in the whole area of the German Federal Republic. Its main aims are to avoid urban sprawl and to provide effective infrastructure. The focus shall be on the development of countryside areas and promotion of the recreation areas. One of the concerns of the Federal Spatial Planning Act (*Raumordnungsgesetz*) is to ensure that the services of general interest and thus *inter alia* the demand for housing is satisfied (section 2 (II no. 1)).

- Urban development promotion

According to Article 104b GG, the federal government grants financial assistance to the states in order to support them in promoting urban development, the specifics of which are regulated in the Federal Building Code (BauGB). According to its section 164b (I): “Under Art. 104a (IV) GG, in accordance with relevant budget law and following a consistent, general and appropriate standard, the Bund may grant financial assistance to the

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<sup>284</sup> Ibid.

<sup>285</sup> BT-Drucks. 17/3049.

<sup>286</sup> Basic Points of the Federal Government on the Energy Turnaround of 6-06-2011; available at: <http://www.bmu.de/service/publikationen/downloads/details/artikel/beschluesse-des-bundeskabinetts-zur-energiewende-vom-6-juni-2011/> (last retrieved: 12-03-2014).

<sup>287</sup> Energieeinsparungsgesetz in its version of 01-09-2005 (BGBl. I 2684) and its amendment of 04-07-2013 (BGBl. I 2197); Energieeinsparungsverordnung of 24-07-2007 (BGBl. I 1519) and its amendment of 18-11-2013 (BGBl. I 3951).

<sup>288</sup> Directive of 25-10-2012 (OJEU L 315/1).

<sup>289</sup> Directive of 19-05-2010 (OJEU L 153/13).

<sup>290</sup> Cf. the aims as provided in s. 2 of the Raumordnungsgesetz of 22-12-2008 (BGBl. I 2986).

*Länder to support major investments by municipalities and associations of municipalities. The criteria and other details governing the utilization of financial assistance shall be settled in an administrative agreement between the Bund and the Länder*". These agreements are concluded once a year. Further on the basis of these agreements, the respective ministries of the respective state governments pass funding guidelines (*Förderrichtlinien*), which further clarify the focus of interests and exact aims. The cities and municipalities are entitled to apply for specific funding. Section 164b (II) BauGB further defines the key functions of such financial assistance:

*"1. to strengthen the urban function of city centres and local sub-centres paying special attention to housing construction and to matters pertaining to the preservation and conservation of buildings of historic interest,*

*2. the reutilization of land, in particular derelict industrial sites, conversion land (disused military sites) and railway land close to city centres, for purposes of housing construction and the construction of commercial premises, public amenities and consequential developments paying due regard to establishing a sensible functional balance (mixed uses) and to the employment of environmentally benign, low-cost construction techniques which make economical use of land.*

*3. urban planning measures to mitigate social deficits*".

Last but not least, the very crucial competence of the Federation lies in the enactment of tenancy and tax law.

## (2) States (*Länder*)

Housing policy at state level is dealt with by different regional ministries: the Ministry of Interior (Bavaria, Saarland, Saxony, Schleswig-Holstein), The Finance Ministry (Baden-Württemberg, Rhineland-Palatinate), The Ministry of Infrastructure and Transport (Brandenburg, Saxony-Anhalt), the Ministry of Social Affairs (Lower Saxony, Thuringia) and mixed types of these ministries (Hesse, Mecklenburg-Western Pomerania, North-Rhine-Westphalia,). Only Bremen, Hamburg and Berlin – the so called city-states – have ministries dedicated specifically to construction, housing and urban development.

The ministers of the 16 *Länder* in charge of urban and construction affairs as well as housing issues form together a working group called the Conference of Ministers of Construction (*Bauministerkonferenz*).<sup>291</sup> Its main task is to deal with issues of housing, urban development, and construction techniques which are of common interest for all the states. It addresses the interests of the states against the federation and presents position papers.

Until 2007, the whole housing sector was subject to the competing legislative competence of the federation and the states. According to the provisions in the German Constitution, with regard to fields being subject to concurrent legislation, the *Länder* have the right to adopt their own legislation provided and in so far as the *Bund* has made no use of its legislative powers in the same field. The frequent case was that once a federal law was enacted, the states were factually banned from passing their own bills. This pattern was applicable as far as the social housing system was concerned. As the *Bund* made use of its legislative powers in this area by passing its Law on State Funding of Housing and Housing Construction (*Wohnraumförderungsgesetz, WoFG*)<sup>292</sup> in 2001, the states

<sup>291</sup> Homepage of the Bauministerkonferenz:

<http://www.bauministerkonferenz.de/verzeichnis.aspx?id=1623&o=1623> (last retrieved: 10-03-2014).

<sup>292</sup> WoFG of 13-09-2001 (BGBl. I 2376); applies only for those *Länder* that have not yet enacted own regulations.



were prevented from enacting their own bills. This act regulated on the one hand the promotion of housing construction and other measures in order to provide affordable residential space, including cooperative housing, and on the other hand the promotion of establishing owner-occupied home ownership (section 1 (I) WoFG). The target group of this law were households who cannot secure adequate accommodation for themselves and need support (section 1(II) WoFG).

In the course of the 2006 constitutional reform of the federal system in Germany (so-called *Föderalismusreform*), the competences in the field of social housing and controlled rent as well as occupation (*Wohnungsbindungsrecht*) were ceded to the federal states as a matter of their exclusive competence. In this respect, the federation bowed mainly out of the social housing policy.<sup>293</sup> The only segments that were still left in the competing legislation sector are the regulation of housing allowance (*Wohngeldrecht*), the regulation of assistance with old debts (*Altschuldenhilferecht*), and the legislation regarding housing construction allowance (*Wohnungsbauprämienrecht*).<sup>294</sup>

Since the *Länder* have also assumed the financing of the social housing system, the federal government supports them in their tasks concerning housing support with the contribution of EUR 518.2 million per annum until 2019.<sup>295</sup> According to *Eichener*, total funding for the social housing sector decreased by 63% due to the reform.<sup>296</sup> For him the 2007 reform marks “the most serious renunciation of the history of success of the national housing politics”.<sup>297</sup>

Since the reform, several states passed their own Housing Promotion Acts.<sup>298</sup> These cover the same fields as the Federal Law on State Funding of Housing and Housing Construction (WoFG) did. Accordingly, there is no longer a single approach towards the social housing policy. Undoubtedly, all of the “new” acts are strongly aligned with the provisions of the “old” federal act, so that the WoFG will be still cited as a source of reference for the purpose of this report. Although not many outstanding differences can be noted, some innovations seem nevertheless revolutionary, especially in the field of social housing. For example the states of Baden Württemberg<sup>299</sup> and Schleswig Holstein<sup>300</sup> gave up one of the most basic characteristics of the social housing system and introduced market rents instead of the so far applicable cost rent (*Kostenmiete*).

Whichever scheme is applicable, the main focus of the policy of the states is provision of sustainable and socially compatible housing. According to section 6 WoFG, this task is to be realized in recognition of:

1. *The situation on the local and regional housing market, differing investment conditions and housing preferences of the people applying for the housing*
2. *The importance of the cooperative housing*

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<sup>293</sup> Cf. A. Holm, *Der Ausstieg des Staates aus der Wohnungspolitik*, available at: [http://www.kopofo-nrw.de/fileadmin/kundendaten/www.kopofo-nrw.de/pdf/Downloads/Tagung\\_Wohnungsbau\\_holm.pdf](http://www.kopofo-nrw.de/fileadmin/kundendaten/www.kopofo-nrw.de/pdf/Downloads/Tagung_Wohnungsbau_holm.pdf) (last retrieved: 10-03-2014).

<sup>294</sup> Cf. Art. 74 (I no. 18) GG.

<sup>295</sup> s. 3 (II) of the Unbundling Law (*Entflechtungsgesetz*) in its version of 15-07-2013 (BGBl. I 2401).

<sup>296</sup> Cf. *Eichener, Wohnungsbau in Deutschland – Zuständigkeiten von Bund, Ländern, Kommunen und Europäischer Union?*, 8.

<sup>297</sup> *Ibid.*, 7.

<sup>298</sup> These are: Baden-Württemberg, Bavaria, Berlin, Bremen, Hamburg, Hesse, Lower Saxony, North-Rhine-Westphalia, Schleswig-Holstein, Thuringia.

<sup>299</sup> LWoFG of 11-12-2007 (GBl. 581).

<sup>300</sup> SHWoFG of 25-04-2009 (GVBl. 194).



3. *The creation and preservation of socially stable resident's structure*
4. *The creation and preservation of balanced settlement structure as well as balanced social and cultural relationship as well as functional coexistence of residential areas and employment venues and infrastructure including good connection to public transport*
5. *The use of the existing housing stock*
6. *The preservation of low-cost residential space in case of modernization measures*
7. *The requirement of cost-saving construction, especially through:*
  - a. *The limitation of funding to a specified amount – (funding fix rates)*
  - b. *The determination of cost ceilings*
  - c. *Funding is awarded within framework of competition proceedings*
8. *Requirements of construction of barrier-free accommodation*
9. *Economical use of soil and respect for environment friendly.*

Apart from that, the *Länder* are also responsible for formulating the technical and structural requirements for buildings and for regulating the procedure to apply for planning permissions laid down in their Building Regulations (*Landesbauordnung*).

### (3) Local authorities

Local authorities play probably the most important and influential role in housing policy. Obviously the scope of action of municipal housing policy is limited by the housing-related laws and policies performed by the *Bund* and the *Länder* as well as the importance of the right to ownership. The municipalities define the housing policy by both managing the existing stocks as well as planning new residential space. For the municipality the most influential, yet the most expensive, instrument is the ownership of the housing stock. However, in the recent years the majority of the municipalities sold out their stocks. In the area of the management of the existing stock, the following instruments are *inter alia* available to the municipalities:

- Acquiring rights to allocate dwellings to tenants in need (*Belegungsrechte*);
- Collection of the countervailing charge for wrong allocation (*Fehlbelegungsabgabe*) that must be paid by tenants of dwellings promoted by public funds if their income increases to the statutory income limits by more than 20%. But it is up to the *Länder* to enact provisions determining the municipalities in which such a charge may be levied. Meanwhile all *Länder*, except for four municipalities in Rhineland-Palatinate, have repealed these provisions;
- Milieu protection statute: important legal instrument aiming at the preservation of physical structures and of the specific urban character of an area (section 172 BauGB);<sup>301</sup>
- Redevelopment measures in urban planning: measures by means of which an area is substantially improved or transformed with the purpose of alleviating urban deficits such as if an area fails to meet the general needs of the people living or working within it in respect of healthy living and working conditions and general safety (section 136 BauGB);

<sup>301</sup> Please refer to 3.4. 'Urban Policies'.

- Modernization and refurbishment measures: in case of deficits, which are deemed to exist where the physical structure no longer meets general requirements concerning healthy living and working conditions, the municipality may order their removal by modernization order (section 177 BauGB).

As far as new constructions are concerned, municipalities can contribute to financing and, in accordance with the Land Utilization Ordinance (*Baunutzungsverordnung*, BauN-VO)<sup>302</sup>, can have an influence on decisions concerning the choice of the plots for the social housing, urban development contracts, and development measures.

Within the municipal administration the housing office (*Wohnungsamt*) is responsible for all the matters related to housing, especially affecting renting but also marginally affecting property ownership. The *Wohnungsamt* is among other things in charge of social housing issues. It accepts applications for public aid regarding social housing construction activities as well as for subsidized, self-owned real estate. The *Wohnungsamt* is also responsible for issuing the public housing certificate (*Wohnberechtigungsschein*), a qualification certifying eligibility to rent subsidized units. In a limited way the *Wohnungsamt* can also assist in searching for an apartment especially in cases of imminent homelessness. All applications for housing allowances are to be filed with this municipal authority as well.

In Germany, municipalities have a legally enforceable obligation under police and regulatory laws of the *Länder* (*Polizei- und Ordnungsrecht*)<sup>303</sup> to provide accommodation to persons who would otherwise be homeless.<sup>304</sup> This accommodation normally takes the form of special public accommodation, (low-standard) bed space in a hostel or shelter for single people, or to a (low-standard) self-contained flat for families.<sup>305</sup> Apart from that, public authorities are also entitled to order that a tenant, who is in risk of becoming homeless, may stay in the dwelling despite a valid termination of the tenancy contract by the landlord. However, the municipality may only decree that the landlord has to tolerate a temporarily cessation of the eviction if there is no available place or if a leaving of the dwelling is not reasonable for the tenant for health reasons.<sup>306</sup>

Given the shortage of social housing, coupled with the decreasing construction activities of the municipalities due to missing means and the increasing rents in particular in the city centers, there is a real risk of socially homogenized districts. In order to counteract this danger, the municipalities seek for solutions, though possibly without engaging their own funds.<sup>307</sup> For this sake the municipalities resort to the instrument of the urban development agreement (*städtebaulicher Vertrag*) stipulated in section 11 BauGB.

Having its origin in Munich and in the meantime adopted as an attractive model in many parts of Germany, the municipalities oblige the investors in case of housing construction projects to devote a prescribed percentage of the project to housing with a public task. This model can take place either by committing the investors to rent out or sale the dwellings to households with low income or by delegating the allocation of these dwellings to the municipalities so as to enable them to offer the dwellings to households in need.

<sup>302</sup> BauNVO in its version of 23-01-1990 (BGBl. I 132).

<sup>303</sup> The enabling provision is principally the general clause (*Generalklausel*) of the police and regulatory laws, since unwanted homelessness constitutes a danger for public safety.

<sup>304</sup> Cf. W. Kronberger, *Problemfeld Wohnen: Unterkunft im Polizei- und Ordnungsrecht*, 2000, available at: <http://www.evangelische-obdachlosenhilfe.de/index.php/recht.html> (last retrieved: 10-03-2014).

<sup>305</sup> According to the definition of homelessness of FEANTSA, these persons would be still regarded as homeless because of the temporary and inadequate accommodation; cf. <http://www.feantsa.org/spip.php?article120&lang=en> (last retrieved: 10-03-2014).

<sup>306</sup> The enabling provision in this case is also the general clause of the police and regulatory laws.

<sup>307</sup> Cf. T. Schröder & C. Kullick, *Gefo(e)rdeter Wohnungsbau?*, NZBau 2011, 151.

In Munich, 30% of the space for new housing construction shall be used in accordance with the principles of the socially responsible use of land (*sozialgerechte Bodennutzung*)<sup>308</sup>.<sup>309</sup> Similar programmes function in Nuremberg, Freiburg and many other cities. A different approach was chosen by the municipality of Heidelberg, which requires that 15 of 100 newly constructed rental dwellings shall become subject to commitments regarding their allocation and the amount of rent, and the same shall apply to 5 of 100 dwellings in respect to ownership.<sup>310</sup>

In order to exemplify the approach, the Housing Development Model of the City of Stuttgart (*Stuttgarter Innenentwicklungsmodell*)<sup>311</sup>, which is however still in the test phase, will be briefly presented. According to this model, 20% of the whole construction project must be devoted to housing building construction. Furthermore, there are three possible ways to manage this 20%:

- (1) This share shall be equally distributed to affordable individually owed condominiums (*bezahlbares Wohneigentum*) –  $\frac{1}{3}$  rental housing for those with middle earnings –  $\frac{1}{3}$ , and social housing –  $\frac{1}{3}$ .
- (2) This share shall be equally distributed to only social housing –  $\frac{1}{2}$  and rental housing for this with middle earnings –  $\frac{1}{2}$ .
- (3) This share shall be equally distributed to only social housing –  $\frac{1}{2}$  and affordable individually owed condominiums –  $\frac{1}{2}$ .

Building construction project	
	20% for housing construction

Option 1:

Social housing ( $\frac{1}{3}$ )	Rental housing for those with middle earnings ( $\frac{1}{3}$ )	Affordable condominium ( $\frac{1}{3}$ )
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Alternatives:

Social housing ( $\frac{1}{2}$ )	Rental housing for those with middle salary ( $\frac{1}{2}$ )
	Affordable condominium ( $\frac{1}{2}$ )

These type of solutions is strongly criticized by the investors, since the imposed obligations imply losses in case of sales and rents incomes, especially if the investors

<sup>308</sup> Term is laid down in s. 1 (V) BauGB.

<sup>309</sup> Cf. Broschüre zur sozialgerechten Bodennutzung, available at: <http://www.muenchen.de/rathaus/Stadtverwaltung/Kommunalreferat/immobilien/sobon.html> and „Wohnen in München V“, available at: <https://www.muenchen.de/rathaus/Stadtverwaltung/Referat-fuer-Stadtplanung-und-Bauordnung/Stadtentwicklung/Grundlagen/Wohnungspolitik.html> (last retrieved: 10-03-2014).

<sup>310</sup> Cf. Wohnungsentwicklungsprogramm: [http://www.heidelberg.de/hd\\_Lde/HD/Leben/Wohnentwicklungsprogramm.html](http://www.heidelberg.de/hd_Lde/HD/Leben/Wohnentwicklungsprogramm.html) (last retrieved: 10-03-2014).

<sup>311</sup> Cf. Stuttgarter Innenentwicklungsmodell of 24-03-2011, available at: <http://www.stuttgart.de/img/mdb/item/428459/64422.pdf>, 13 (last retrieved: 10-03-2014).

wish to invest in office and commercial construction.<sup>312</sup> However, similar models such as the one of the city of Munich ("*Wohnen in München I-V*")<sup>313</sup> which runs since 1990 has proved to be successful in the past.

### 3.3. Housing policies

- What are the main functions and objectives of housing policies pursued at different levels of governance?

This question was already answered above.

- In particular: Does the national policy favour certain types of tenure (e.g. rented housing or home ownership (owner-occupation))?

Since renting is the dominant housing choice in Germany, the political system is highly sensitive to tenants' rights, and perceived threats to the status quo typically receive prominent media attention and political responses. However, the most recent amendment to the German Civil Code on tenancy law<sup>314</sup> also strengthened the right of landlords<sup>315</sup> – *inter alia* by allowing to increase the rent if energy renovation measures are undertaken – and was especially strongly supported by the Association for the Protection of Owners (Haus und Grund).<sup>316</sup>

- Are there measures against vacancies (e.g. fines or forced assignments of vacant houses)?

Only Hamburg and Munich have stipulated provisions aiming against vacancies, dilapidation or misuse of dwellings.<sup>317</sup> If the vacancy lasts longer than three (Munich) or four (Hamburg) months, public authorities may decree that the landlord must rent the dwelling. Infringement is punished as a petty offence with a fine of up to EUR 50,000. Against the trend in all the other federal states where the respective provisions, if they ever existed, were withdrawn, the Parliament of Hamburg recently introduced regulations that go even further including *inter alia*:

- Obligation to intermediary rental during longer periods of vacancy,
  - More human resources for the districts to supervise the law,
  - Obligation to report the vacancies,
  - Interdiction on advertising of illegal summer apartments.
- Are there special housing policies targeted at certain groups of the population (e.g. elderly people, migrants, Sinti and Roma etc)?

There are no important national projects targeted at the housing situation of Sinti and Roma in Germany. There exist, nevertheless, local projects financed within the scope of

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<sup>312</sup> Cf. Schröder & Kullick, *Gefo(e)rdeter Wohnungsbau?*, NZBau 2011, 151.

<sup>313</sup> Cf. "Wohnen in München V" of 01-02-2012, available at:

<http://www.muenchen.de/rathaus/Stadtverwaltung/Referat-fuer-Stadtplanung-und-Bauordnung/Stadtentwicklung/Grundlagen/Wohnungspolitik.html> (last retrieved: 10-03-2014).

<sup>314</sup> Gesetz über die energetische Modernisierung von vermietetem Wohnraum und über die vereinfachte Durchsetzung von Räumungstiteln of 11-03-2013 (BGBl. I 434).

<sup>315</sup> Aim: Effort to maintain the balance between landlords and tenants.

<sup>316</sup> Cf. Haus und Grund, press release of 23-05-2012, *Bundesregierung beschließt Mietrechtsreform*, available at: [http://www.hausundgrund.de/presse\\_928.html](http://www.hausundgrund.de/presse_928.html) (last retrieved: 10-03-2014).

<sup>317</sup> Hamburg - HmbWoSchG of 8-03-1982 (HmbGVBl. 47) and Munich - WohnraumzweckentfremdungsS of 12-12-2013 (MüABl. 550).

the national 'Social City' programme, which aims at improving the housing situation in socially disadvantaged neighbourhoods, where a considerable percentage of the population are often Sinti and Roma in general.<sup>318</sup> The same applies with regard to migrants in general.<sup>319</sup>

The situation is different concerning the housing policy for elderly people. Given the demographic development of the society, the importance of the appropriate housing for elderly people has been recognized on the governmental level.<sup>320</sup> The main outlines of the respective policy are the following:

- Increased supply for age-appropriate housing,
- Overcoming the barriers both at the entrance and inside the dwelling as well as the barriers in the residential environment,
- Optimizing funding instruments in order to enable removal of barriers or construction of fully accessible new housing,
- Strengthening the provision of information and advice concerning special forms of housing as well as possibility of adaptation works.

### 3.4. Urban policies

- Are there any measures/ incentives to prevent ghettoization/segregation, in particular
  - mixed tenure type estates<sup>321</sup>
  - "pepper potting"<sup>322</sup>
  - "tenure blind"<sup>323</sup>
  - public authorities "seizing" apartments to be rented to certain social groups

Other "anti-ghettoization" measures could be: lower taxes, building permit easier to obtain or, in especially attractive localisation - as a condition to obtain building permit, condition of city contribution in technical infrastructure.

Germany does not know typical ghetto-like districts as reported in other countries. However, one can definitely talk about districts where social mix politics clearly did not

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<sup>318</sup> Cf. Peucker, Bochmann & Heidmann, *Housing Conditions of Sinti and Roma – Germany*, 54.

<sup>319</sup> Cf. e.g. the policy of integration of the city of Berlin: Berliner Beiträge zur Integration und Migration, available at: [http://www.berlin.de/imperia/md/content/lb-integration-migration/publikationen/beitraege/integrationsindikatoren\\_bf.pdf?start&ts=1277465163&file=integrationsindikatoren\\_bf.pdf](http://www.berlin.de/imperia/md/content/lb-integration-migration/publikationen/beitraege/integrationsindikatoren_bf.pdf?start&ts=1277465163&file=integrationsindikatoren_bf.pdf), 29 et seq. (last retrieved: 10-03-2014).

<sup>320</sup> Cf. Funding Programme of the Federal Ministry for Families, Elderly, Women and Youths, available at: <http://www.bmfsfj.de/BMFSFJ/Aeltere-Menschen/zuhause-im-alter.html> (last retrieved: 10-03-2014).

<sup>321</sup> Mixed tenure means that flats of different tenure types: rented, owner-occupied, social, etc. are mixed in one estate, it is the simplest way of avoiding homogenized communities, and to strengthen diversification of housing supply.

<sup>322</sup> This mechanism is locating social housing flats among open market ones, so as not to gather lowest income families in one place. The concept is quite controversial, however in English affordable housing system was used for a long time to minimize the modern city ghettos problem.

<sup>323</sup> This is a mechanism for providing social housing in a way that the financial status of the inhabitants is not readily identifiable from outside. It is used to avoid/minimize stigmatization and social exclusion which could be caused by living in a (openly identifiable) social stock.

achieve the intended results. Some examples of this are the pre-fabricated districts of Berlin Marzahn-Hellersdorf.<sup>324</sup>

There are instruments to prevent these processes in construction and planning law as well as at the municipal level and foremost on the housing market.

Concerning the planning law instruments, section 1 (VI no. 2) BauGB provides that the composition of inhabitants in an area should remain on a socially balanced level. The idea of social mix is also reflected in the Housing Promotion Act. According to section 6 WoFG, one of its aims is creating and preserving socially stable residential structures, balanced settlement structures and stable and balanced economic, social and cultural relationships.

In order to fulfill this commitment in practice, for example, the maximal rent permitted to apply for social welfare in Hamburg can be exceeded by 10% if the housing is located in a district with a low number of social welfare beneficiaries.<sup>325</sup>

General urban policies and legislation aim at avoiding the spatial concentration of ethnic groups or ethnic segregation. For example, Article 19 (III) of the General Act of Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*, AGG)<sup>326</sup> allows exceptionally for different treatment in the rental housing sector, in order to create or achieve stable structure of citizens, balanced settlement structures, and balanced economic, social and cultural circumstances. According to the motives of this Act, this provision should contribute to the good functioning of the housing industry and incorporate the well-established principles of social cities and housing policy.<sup>327</sup>

However, in practice, the privatization of municipal housing portfolios and the resulting reduction of social housing deprived the municipalities of important instruments of influence on the social structure of residential areas.

The urban “milieu” protection contained in section 172 BauGB<sup>328</sup> is an instrument of protection against displacement (*Verdrängungsschutz*).<sup>329</sup> However, it is not a tenant protection instrument,<sup>330</sup> even though some tenant protection influences are obvious. Even though the main aim is protection against gentrification, the milieu protection statute can also be applied in order to protect the population of a health resort against conversion of

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<sup>324</sup> Cf. K. Schulze, „Ziehen Sie doch nach Marzahn-Hellersdorf!“, Der Tagesspiegel of 12-07-2011, available at: <http://www.tagesspiegel.de/berlin/debatte-um-mietpreise-ziehen-sie-doch-nach-marzahn-hellersdorf/4386498.html> (last retrieved: 03-03-2014).

<sup>325</sup> Cf. Fachanweisung der Stadt Hamburg, *Höchstwerte für die Kosten der Unterkunft*, 2012, available at: <http://www.hamburg.de/basfi/fa-sgbii-kap03-22/4269084/fa-sgbii-22-kdu.html> (last retrieved: 10-03-2014).

<sup>326</sup> AGG of 14-08-2006 (BGBl. I 1897).

<sup>327</sup> BT-Drucks. 16/1780, 42.

<sup>328</sup> According to s. 172 BauGB:

“Either in a legally binding land-use plan or by some other statute, the municipality may designate areas in which

1. in order to preserve the specific urban character of an area deriving from its urban pattern (para. 3),
  2. in order to maintain the composition of the local residential population (para. 4), or
  3. in the course of reorganization of the structure of urban development (para. 5)
- permission is required for the reduction of development, for alterations and changes in use in respect of physical structures. State governments are empowered to determine by legal ordinance valid for up to five years in respect of plots in areas affected by a statute issued pursuant to sentence 1 no. 2 that the establishment of individual ownership for personal use (condominium and part-ownership pursuant to section 1 of the Law on Apartment Ownership) in respect of buildings which are scheduled either wholly or in part for residential use may only proceed where permission has been obtained.”

<sup>329</sup> BVerfG, NVwZ 1987, 879.

<sup>330</sup> Cf. J. Stock in: *Werner/Zinkhahn* (Munich: C. H. Beck, 2013) s.172 BauGB, rec. 45.



the dwellings into numerous holiday apartments.<sup>331</sup> In the same sense the statute can be applied to preserve an area with small student apartments if the students are dependent on them.<sup>332</sup>

This instrument, as shown for example in the municipality of Frankfurt, can be used also to “protect” the upper middle class (*besser verdienender Mittelstand*).<sup>333</sup> This is legally possible, since the wording of the section 172 to “*maintain the composition of the local residential population*” does not restrict itself only to socially weaker layers of the society but applies to all kinds of population.<sup>334</sup>

One of the main fields of action against the ghettoization processes is the intensification of new constructions in different city districts. The idea is that the increase of the number of dwellings could have a relieving effect on the markets in the areas characterized by bottlenecks.

- Are there policies to counteract gentrification?

The policies to counteract gentrification are an outflow of the general policy aiming at providing balanced housing environment. The balanced social mix sought can be achieved only if the ghettoization and gentrification processes are combated in parallel and equally efficiently. As already explained above,<sup>335</sup> some municipalities oblige the developers to provide a certain percentage of social dwellings, even in so-called “good neighbourhoods” in order to strike an adequate social balance in the society and stop the development of the gated communities.

- Are there any means of control and regulation of the quality of private rented housing or is quality determined only by free market mechanisms? (does a flat have to fulfil any standards so that it may be rented? E.g.: minimum floor area, equipment, access to technical and/or social infrastructure and/or public transport, parameters such as energy efficiency, power/water consumption, access to communal services such as garbage collection. If so: how are these factors verified and controlled?)

The Building Regulations of the *Länder* require that a dwelling fulfils some very basic minimum requirements in order to be called housing. The dwellings must have a lockable door, heating, functioning electricity supply which allows for the use of the regular household appliances. They must be equipped with a room where a kitchen or a kitchenette can be set up, which requires a water connection, and it must be also technically possible to set up a toilet or a bathroom, which however do not necessarily have to be placed within the dwelling itself.<sup>336</sup>

The law does not prescribe further elements of equipment, such as tiles, floor covering or fitted kitchen. Not even a completely furnished bath is required.

As the tenancy law is a field of private law characterized by freedom of contract, even dwellings not fulfilling the minimum standard are considered contract-compliant if these conditions were explicitly agreed on by the tenant.<sup>337</sup> The details are normally ruled in the

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<sup>331</sup> OVG Lüneburg, BauR 1983, 432.

<sup>332</sup> Cf. G. Schmidt-Eichstaedt, *Soziale Sanierungsziele und Mietobergrenzen*, ZfBR 2002, 212 (214).

<sup>333</sup> Cf. T. Schröder & C. Kullick, *Millieuschutz: Auch für Besserverdienende?*, NZBau 2011, 404.

<sup>334</sup> Federal Administrative Court (*Bundesverwaltungsgericht*, BVerwG), NVwZ 1998, 503; cf. J. Stock in: *Werner/Zinkhahn*, s.172 BauGB, rec. 40, 41.

<sup>335</sup> Please refer to 3.2. ‘Local authorities’.

<sup>336</sup> Cf. J. Stock, in: *König/Roeser/Stock* (Munich: C. H. Beck, 2003) s. 3 BauNVO, rec. 18.

<sup>337</sup> *Ibid.*

local laws. For example, an Act in Hesse aims to eliminate housing irregularities.<sup>338</sup> According to this Act, the municipalities are given the legal possibility to oblige the owners to remedy deficiencies and restore the dwelling in order to avoid the danger of dilapidation of rental housing. Should the landlords fail to meet their obligations, the administrative authorities are entitled to carry out respective measures on behalf of the owner. Similar regulations can be found in Berlin<sup>339</sup>.

- Does a regional housing policy exist? (in particular: are there any tools to regulate housing at regional level, e.g.: in order to prevent suburbanization and periurbanization? Is it possible to distribute local taxes so that villages can afford the limitation of housing areas?)

This question was partly answered under the section dealing with housing policy on the municipal level.<sup>340</sup> Important pillars of the municipal administration are the local taxes, which make the autonomous policy-making possible. The municipalities have influence on the amount of this tax and can consequently adopt it in accordance with the level of their needs: a higher tax results in a higher income. However, this bears a risk that the municipality imposing high taxes becomes unattractive both for business and for private persons. As far as the issue of suburbanization and periurbanization is concerned, it is primarily on the regional level that these problems are being solved. Important “soft” instruments in this respect are the dialog of the urban centre and the surrounding communities, the regional developments plans as well as local land use plans.

### 3.5. Energy policies

- To what extent do European, national and or local energy policies affect housing?

Most of the German housing stock dates from the period when energy was relatively cheap. Especially the older stock does not have insulated outer walls, floors and basement ceilings, and is not compatible with the renewable energy technologies.<sup>341</sup> According to calculations, it is possible to reduce 50% of the energy consumption of dwellings on average. Therefore the issues of energy efficiency are a policy of core importance.<sup>342</sup>

The so-called *Energiewende*, initiated by the chancellor *Angela Merkel* after the Fukushima nuclear accident, aims at turning back from nuclear power and moving towards green energy. Landlords may apply for subsidies for energy renovation measures from the Reconstruction Credit Institute (*Kreditanstalt für Wiederaufbau* - KfW)<sup>343</sup>. The costs of these measures are finally to be carried also by the tenants (due to increases in rent pursuant to sections 559 (I), 556 (no. 1) BGB). One of the objectives of this national programme and its corresponding laws<sup>344</sup> consists in creating a climate-neutral building stock until 2050 by promoting energy renovation measures referring to existing buildings as well as by determining energy standards regarding new constructed dwellings. These regulations shall also implement the provisions of the EU-Directive 2012/27/EU<sup>345</sup> on en-

<sup>338</sup> HWoAufG of 4-09-1974 (GVBl. I 395).

<sup>339</sup> WoAufG of 3-04-1990 (GVBl. 1082).

<sup>340</sup> Please refer to 3.2. ‘Local authorities’.

<sup>341</sup> Cf. BMVBS, *Fortführung der Kompensationsmittel für die Wohnraumförderung*, 23.

<sup>342</sup> Ibid.

<sup>343</sup> Homepage of the KfW in English: <https://www.kfw.de/kfw.de-2.html> (last retrieved: 10-03-2014).

<sup>344</sup> Energieeinsparungsgesetz in its version of 01-09-2005 (BGBl. I 2684) and its amendment of 04-07-2013 (BGBl. I 2197); Energieeinsparungsverordnung of 24-07-2007 (BGBl. I 1519) and its amendment of 18-11-2013 (BGBl. I 3951).

<sup>345</sup> Directive of 25-10-2012 (OJEU L 315/1).

ergy efficiency and the EU-Directive 2010/31/EU<sup>346</sup> on the energy performance of buildings. According to the Directives, all new buildings shall be nearly zero-energy buildings (*Niedrigstenergiegebäude*) by the end of 2020. In addition, every owner of new and also of existing residential buildings is required to have an energy performance certificate (*Energieausweis*).<sup>347</sup>

Any modernization of an apartment, including also energy modernization, ultimately leads to increased rents even if these are partially compensated by the reduced costs of heating. The numbers are as follows:<sup>348</sup> whereas the modernization of buildings from the 1960s allows for energy savings of about EUR 0.70 per sqm, at the same time it leads to an increase of the rent of about EUR 2.20 per sqm. Many tenants are unable to sustain such rent increases. In the well situated districts of cities as Munich, Hamburg, Frankfurt a. M. or Berlin, this may lead to social segregation.<sup>349</sup>

According to the recent, controversial amendment of the tenancy law, landlords are entitled to split the costs of dwelling renovations aiming at enhancing the building's energy performance, so that the tenant pays 11% of the whole costs. The apportionment of these costs shall serve as an incentive to invest in renovation works since there is generally no obligation for owners of existing buildings to do so (except for the upgrade of certain boilers and the insulation of so far not insulated ceilings)<sup>350</sup>. Only if they carry out renovation works, these works must comply with the standards laid down in the Regulation on Energy Savings in Buildings (*Energieeinsparverordnung*, EnEV)<sup>351, 352</sup>. According to the calculations of the German Tenants' Association (DMB), the modernization costs of EUR 200 per sqm in case of a 70 sqm dwelling, lead to a monthly rent increase of about EUR 130.<sup>353</sup>

Summary table 3: Laws and Instruments

Laws and Instruments			
Policy aims	National level	2 <sup>nd</sup> level (e.g. federal or provincial)	Lowest level (e.g. municipality)
<ul style="list-style-type: none"> <li>- climate policy</li> <li>- energy policy</li> <li>- regional planning policy</li> <li>- urban and rural development</li> </ul>	<p><b>Laws:</b></p> <ul style="list-style-type: none"> <li>- German Civil Code (BGB)</li> <li>- <i>Raumordnungsgesetz</i></li> <li>- Federal Constitution (GG)</li> <li>- Law on Housing Allowance (WoGG)</li> <li>- Housing Con-</li> </ul>	<p><b>Laws:</b></p> <ul style="list-style-type: none"> <li>- Regional Planning Acts (<i>Landesplanungsgetze</i>)</li> <li>- Building Regulations (<i>Landesbauordnung</i>)</li> <li>- Social housing (WoFG)</li> <li>- Controlled tenan-</li> </ul>	<p><b>Laws:</b></p> <p>The municipalities do not have legislative competences, but implementation of the federal and national policies.</p>

<sup>346</sup> Directive of 19-05-2010 (OJEU L 153/13).

<sup>347</sup> Please refer to 3.2. 'Governmental Actors'.

<sup>348</sup> Cf. S. Wolff, *Energiewende macht Wohnen teuer*, Frankfurter Rundschau of 13-11-2012, available at: <http://www.fr-online.de/energie/wohnen-immobilien-energie-wende-macht-wohnen-teuer,1473634,20860672.html> (last retrieved: 10-03-2014).

<sup>349</sup> Ibid.

<sup>350</sup> Cf. s. 10 EnEV.

<sup>351</sup> EnEV of 24-07-2007 (BGBl. I 1519) and its amendment of 18-11-2013 (BGBl. I 3951).

<sup>352</sup> Cf. s. 9 EnEV.

<sup>353</sup> Cf. DMB, press release of 06-12-2012, *Mieterrechte stärken, nicht abbauen*.

promotion - social policy - family policy	struction Allowance Act, ( <i>Wohnungs- bau- Prämiengesetz</i> ) - Building Code (BauGB)	cies (WoBindG)	
	<b>Instruments:</b> - General directives - Numerous funding programmes in cooperation with the states and the municipalities - legislation - preferential loans.	<b>Instruments:</b> - Funding programmes on the state level - Special loans by the state banks i.e. (climate protection loan program for best-practice measures) - Information campaigns (i.e. energy saving in buildings, energy efficiency in private households) - Programmes in charge of refurbishment of state properties.	<b>Instruments:</b> - Urban land-use planning - Platform for information and advice - Development of local urban development concepts - Funding programmes - Local taxes - Development of Municipal housing concepts

### 3.6. Subsidization

In the German system of subsidization one can distinguish both subject- and object-based funding. As a result of the Constitutional reform of 2006, the competence for housing subsidy legislation in terms of supply side subsidies was fully transferred to the federal states. The social housing policy relies primarily on two main aspects, the cost of housing and the access issue. In Germany, two main instruments are provided to assist to solve these issues. These are on the supply side social housing subsidies (object-based-funding) and on the demand side the direct housing allowance (*Wohngeld*) (subject-based funding).

#### (1) Object-based funding

Every type of landlord is entitled to apply for social housing subsidies according to the Law on State Funding of Housing and Housing Construction. In return for the support, the landlord is committed to observe certain limitations, such as rent ceilings and occupancy control agreements.

An important structural deficiency of this kind of support is the issue of inadequate occupancy (*Fehlbelegung*), which refers to the situation when public or socially subsidized rental dwellings are too big or go beyond the indispensable needs of the tenant in other respects such as his income. The system of inadequate occupancy charges was abolished by nearly all the states (except for four municipalities in Rhineland-Palatinate) of

arguing with the need for socially mixed neighbourhood. These kinds of arguments seem unconvincing considering the dramatic shortage of social housing.

## (2) Subject-based funding

On the demand side, a system of support for low income households also exists, for which it does not matter whether the households applying for the benefit are tenants or owner-occupiers:

- Housing allowance: either rent allowance (*Mietzuschuss*) for tenants or expense benefit (*Lastenzuschuss*) for owner-occupiers
- Accommodation cost subsidy (*Kosten der Unterkunft*) for the recipients of minimum social welfare<sup>354</sup>

There are around 5 million households in Germany who receive either the housing allowance (1 million) or the accommodation cost subsidy (4 million). The amount of funding is about EUR 16.7 billion.<sup>355</sup>

### (a) Housing Allowance

The key instrument to balance the disadvantages to economically weaker tenants is the housing allowance (*Wohngeld*). Ideally this instrument should be completed by the provision of inexpensive living space. However, this approach has become less important, as the state-owned stock was systematically sold-out. According to *Riege*<sup>356</sup>, *Wohngeld* as a steering instrument of housing policy is pointless in the longer term, since it does not contribute to construction of new dwellings, but stabilizes high rents and offers no real counter-value for the general public.

Housing allowance is granted by local authorities if the tenant can afford the rent or the owner no longer the housing costs. The amount of housing allowance depends on the number of household members, the amount of rent/housing costs and the total income of the tenant/owner. To this extent, the tenant or owner has a legal claim to receive housing allowance. As well as in case of social or subsidized housing, German citizens, EU citizens and foreigners with a residence permit are entitled to apply for it. Eight of the sixteen federal states (these are: Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North-Rhine Westphalia, Saarland, Schleswig-Holstein, Thuringia) each have their own calculator which assists tenants to find out whether they would have a claim to housing allowance or not.<sup>357</sup>

### (b) Accommodation cost subsidy

Households in need according to the German Social Code (*Sozialgesetzbuch*) can receive support in the form of direct aid at the basic social security level (*Grundsicherungslevel*).

Indeed, no enforceable claim to living space can be found in the German legal system, although, social security assistance does exist for the following costs<sup>358</sup>:

<sup>354</sup> cf. s. 22 of the German Social Code II (*Sozialgesetzbuch II*) in its version of 13-05-2011 (BGBl. I 850; corr. 2094).

<sup>355</sup> Cf. BMVBS, *Bericht über die Wohnungs-und Immobilienwirtschaft in Deutschland*, 66, 67.

<sup>356</sup> Cited after: F. Jetter, *Wohnungsnot als Schlüsselproblem der Sicherung des sozialen Friedens*.

<sup>357</sup> [http://wohngeldrechner.nrw.de/WgRechner/wogp/cgi/call-TSO.rexx?d2443.WEBP.exec\(wgrbstrt\)](http://wohngeldrechner.nrw.de/WgRechner/wogp/cgi/call-TSO.rexx?d2443.WEBP.exec(wgrbstrt)) (last retrieved: 23-03-2014).

<sup>358</sup> ss. 22, 22a-c Social Code II and 35, 35a, 36 Social Code XII, cited after: H. Gautzsch, *Kosten der Unterkunft gem. SGB II und SGB XII*, NZM 2011, 497.

- The rent in case of rental tenancy,
- Operation costs, advanced payments,
- The costs of regular minor repairs (*Schönheitsreparaturen*),
- The costs of necessary moving,
- The cost for the deposit or the share in a cooperative,
- Heating and water costs.

According to the data of the Federal Employment Agency (*Bundesagentur für Arbeit*), in Germany around 3.6 million of households (around 9% of all households) are eligible for social security assistance.<sup>359</sup>

The aid is in the form of fixed rate service, however, it shall be interpreted in accordance with social principles so that no costs that are inevitable shall remain uncovered, and the tenant shall not feel held to come up for the costs by resorting to their regular social aid. This aid constitutes one of the pillars of the claim for securing the minimum subsistence level.<sup>360</sup> The aid is provided regardless of the quality of a dwelling, and the only factor to be taken into account while distributing the aid is the adequacy (*Angemessenheit*) of the costs.<sup>361</sup> This is a so-called open-textured legal concept (*unbestimmter Rechtsbegriff*), susceptible to judicial review. The amount of the rent is obviously one of the main criteria to assess the adequacy. The rent can, upon request or under certain conditions, be paid directly by the communal authority to the landlord.

### (3) Home owners

#### (a) Subsidies granted by the Reconstruction Credit Institute (KfW)

Diverse subsidies are awarded by the Reconstruction Credit Institute (*Kreditanstalt für Wiederaufbau* - KfW). This financial institution is closely linked with the economic development of the Federal Republic of Germany. Since its beginnings in 1948 and according to its statutory tasks, KfW *has been supporting change and encouraging forward-looking ideas - in Germany, Europe and throughout the world*. The volume of its loans over 60 years is nearly one trillion EUR.<sup>362</sup> The low interest mortgages from the KfW are the most typical form of subsidies. In many cases the subsidized loans from the KfW are combined with interest rate reductions. These subsidies are meant to support special purpose investments, that is, the energy-efficient construction and reconstruction of residential buildings as well as the creation of home-ownership. Additionally, the KfW promotes the construction of housing for low income households and others who have difficulty in finding appropriate living space, such as released prisoners or the homeless.<sup>363</sup> Other subsidies for refurbishment of the existing housing stock for measures concerning energy savings as well as improvements concerning access of disabled people are also available.

<sup>359</sup> Ibid.

<sup>360</sup> Ibid.

<sup>361</sup> s. 22 Social Code II.

<sup>362</sup> Cf. <https://www.kfw.de/KfW-Group/About-KfW/Zahlen-und-Fakten/> (last retrieved: 10-03-2014).

<sup>363</sup> Cf. P. Westerheide, *The Private rented sector in Germany*, in: Towards a sustainable private rented (London: LSE, 2011), available at: [http://www.lse.ac.uk/geographyAndEnvironment/research/london/events/HEIF/HEIF4b\\_10-11%20-newlondonenv/prslaunch/Book.pdf](http://www.lse.ac.uk/geographyAndEnvironment/research/london/events/HEIF/HEIF4b_10-11%20-newlondonenv/prslaunch/Book.pdf), 30 (last retrieved: 10-03-2014).



(b) Payment of premiums under housing saving contracts (*Bausparprämie*)

Payments of premiums under housing saving contracts are subsidies based on the Housing Construction Allowance Act (*Wohnungsbauprämienengesetz*)<sup>364</sup>. This type of funding is awarded for expenses which arise in context of housing construction. Section 2 of this Act covers the following expenses, among others: the contributions to *Bausparkasse* in order to get the credit, expenses borne in connection with the purchase of shares of a cooperative and contributions to saving contracts. The main eligibility criterion is a salary ceiling amounting to EUR 25,000 per year for single households and EUR 51,200 per year for couples. The funding is awarded on a yearly basis and amounts to 8.8% of the expenses (section 4). The maximum of the subsidized expenses is EUR 518 for single households and EUR 1,024 for couples.

(c) Employee saving bonus (*Arbeitnehmersparzulage*).

The employee saving bonus is a state subsidy to promote the capital formation of employees.<sup>365</sup> This bonus is granted on contributions to capital formation, i.e. payments invested by the employer for the benefit of the employee either in form of building society savings (*Bausparen*) or in form capital investment savings (*Beteiligungssparen*). In the latter case, the bonus amounts to at most EUR 80 for single persons and EUR 160 for married couples. Employees are entitled to receive this subsidy if their taxable income does not exceed the amount of EUR 20,000 as far as they are single persons. If they are married the income limit amounts twice as much, thus EUR 40,000. In case of building society savings, the bonus amounts to at most EUR 43 for single persons, while the taxable income may not amount to more than EUR 17,900 and it amounts to EUR 86 for married couples, while the taxable income may not exceed EUR 35,800.

(d) *Riester Pension Programme*

A fairly new means of subsidization is the *Riester Pension Programme*. Within this state-subsidized pension scheme, since 2008 the complete amount of Riester-savings can be used for building loan contracts or for buying real estate (*Wohnriester*). The real estate must be used directly by the Riester saver. The prerequisite are savings of 4% of the yearly income. This amount can be deducted from the income tax. The full subsidy is EUR 154 a year for a single person, EUR 308 for a married couple and EUR 185 or EUR 300 respectively for children born until 2008 and after this date. This means for a married couple with 2 small children a yearly incentive from the state of about EUR 1000.

(e) Regional Programmes

There are also a great number of regional programmes, whose detailed analysis would go beyond the scope of this report. For example, Schleswig Holstein supports small private landlords as well as owners in case of energy saving modernization measures as well as measures aimed at adapting dwellings to the needs of disabled persons. This takes place in forms of direct grants and complements other forms of funding. The city of Frankfurt acquires from owners the right to propose an available dwelling to the prospective tenants. In this framework the dwellings are rented out to less prosperous households and the landlords receive a subsidy from the Agency for Housing (*Amt für Wohnungswesen*). The city of Osnabruck provides direct grants up to EUR 1,000 for new inhabitants in conjunction with the removal and notary costs, as well as supports families with interest rate subsidies up to 6% per annum.

<sup>364</sup> Wohnungsbau-Prämienengesetz in its version of 30-10-1997 (BGBl. I 2678).

<sup>365</sup> Cf. Fünftes Gesetz zur Förderung der Vermögensbildung der Arbeitnehmer in its version of 04-03-1994 (BGBl. I 406).

According to the German Ministry of Finance, “the trends in subsidies for housing reflect two contradictory developments: on the one hand, financial assistance is increasing, mainly due to expanded funding for the CO<sub>2</sub> Building Refurbishment Programme; on the other hand, tax benefits are being reduced”<sup>366</sup>. The ministry attributes the decline in tax benefits to the abolition of the owner-occupied homes premium (*Eigenheimzulage*). According to the ministry’s projections, taken together, subsidies for housing will decline by EUR 600 million over the reporting period to EUR 1.5 billion in 2014.

- Are different types of housing subsidized in general, and if so, to what extent? (give overview)

There is no special scheme of founding for special housing types.

- Explain the different forms of subsidies for tenants, (certain) landlords and, if relevant, housing associations or similar entities acting as intermediaries (e.g. direct, by means of investment loans, tax privileges). Which level of government is competent to assign the subsidies? Is there a subjective right to certain subsidies or does the public administration have discretion in whom to assign the subsidy?

This question has already been answered above under 3.6. ‘Subsidization’.

- Have certain subsidies been challenged on legal grounds (in particular: on the basis of competition law or budget law)?

Unlike in other European countries such as Sweden<sup>367</sup>, housing subsidies have not yet been challenged on grounds of European competition law. With regard to social housing subsidies, the European Commission has determined that this kind of subsidization is not to be qualified as state aid in terms of Article 107 (I) of the Treaty on the Functioning of the European Union (TFEU)<sup>368</sup>, but as a service of general economic interest pursuant to Article 106 (II) TFEU which is not affected by the state aid rules.<sup>369</sup> Subsequent to this decision, the Federal Government was obliged to hand in a report on their national definition of “service of general economic interest”.<sup>370</sup> Accordingly, the national subsidies granted to social housing measures are qualified as such services.<sup>371</sup>

- Summarize these findings in tables as follows:

Summary table 4: Subsidization of the Landlord

Subsidization of the Landlord	Rental	Cooperative
Subsidy before start of contract (e.g. savings)	Diverse KfW credits for construction; low interest loans; diverse regional	Similar approach

<sup>366</sup> Cf. Federal Ministry of Finance, *24th Subsidy Report of the Federal Government – Summary*, 2013, available at: [http://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Service/Publications/Brochures/2013-10-10-24th-subsidy-report-summary-pdf.pdf?\\_\\_blob=publicationFile&v=8](http://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Service/Publications/Brochures/2013-10-10-24th-subsidy-report-summary-pdf.pdf?__blob=publicationFile&v=8), 15 (last retrieved: 10-03-2014).

<sup>367</sup> COM 2007, 652 final (State Aid No. 798/06); COM 2003, 1762 (State Aid No. 40/03).

<sup>368</sup> TFEU of 9-05-2008 (OJEC C 115, 47).

<sup>369</sup> Commission Decision of 28-11-2005 (OJEU L 312/67), rec. 16.

<sup>370</sup> Cf. Bericht der Bundesrepublik Deutschland nach Art. 8 der Entscheidung der Europäischen Kommission zur Freistellung von Diensten von allg. wirtschaftlichem Interesse of 19-12-2008, available at: [http://ec.europa.eu/competition/state\\_aid/public\\_services/2009\\_2011/germany\\_de.pdf](http://ec.europa.eu/competition/state_aid/public_services/2009_2011/germany_de.pdf) (last retrieved: 13-03-2014).

<sup>371</sup> Ibid, 15.

scheme)	programmes offering grants	
Subsidy at start of contract (e.g. grant)	None	None
Subsidy during tenancy (e.g. lower than market interest rate for investment loan, subsidized loan guarantee)	<ul style="list-style-type: none"> <li>- Diverse KfW credits for energy efficient modernization measures; low interest loans; on regional level diverse options possible.</li> <li>- Acquisition of so called occupancy rights</li> </ul>	Similar approach

Summary table 5: Subsidization of the Tenant

<b>Subsidization of the Tenant</b>	Rental	Cooperative
Subsidy before start of contract (e.g. voucher allocated before finding a rental dwelling )	None	None
Subsidy at start of contract (e.g. subsidy to move)	Only persons receiving welfare aid are entitled. As discretionary services, also the deposit, removal costs or the costs of the first equipment ( <i>Erstausstattung</i> ) can be reimbursed.	Similar approach
Subsidy during tenancy (in e.g. housing allowances, rent regulation)	<ul style="list-style-type: none"> <li>- Housing allowance or</li> <li>- Costs of accommodation as part of the welfare aid</li> </ul>	Similar approach

Summary table 6: Subsidization of Owner-Occupier

<b>Subsidization of Owner-Occupier</b>	
Subsidy before purchase of the house (e.g. savings scheme)	i.e. the preferential conditions of the <i>Bausparvertrag</i> ; employee saving bonus, <i>Wohnriester</i> pension plan
Subsidy at start of contract (e.g. grant)	None

Subsidy during tenure (e.g. lower than market interest rate for investment loan, subsidized loan guarantee, housing allowances)	Housing construction allowance, ( <i>Wohnungsbauprämie</i> ); subsidized loans; under certain conditions housing allowance; subsidized loans for energy renovation
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### 3.7. Taxation

- What taxes apply to the various types of tenure (ranging from ownership to rentals)?
  - Tenants: Do tenants also pay taxes on their rental tenancies? If so, which ones?
  - Homeowners:
    - Income tax of homeowners: is the value of occupying a house considered as a taxable income?
    - Is the profit derived from the sale of a residential home taxed?

#### (1) VAT Act

Renting and leasing of entire or partial plots, in accordance with section 4 (no.12a) VAT Act (*Umsatzsteuergesetz*)<sup>372</sup>, is exempted from the value added tax. This exemption provision which relates to rental and lease contracts in terms of section 535 et seq. and 581 BGB, applies also to lifelong right of residence, the permanent right of use (*Dauerwohn- und Dauernutzungsrecht*) in accordance with section 31 WEG, the usufruct in accordance with the section 1030 BGB, the easement in accordance with section 1018 BGB, and the restricted personal easement in accordance with section 1090 BGB.

The tax exemption does not apply if the property is owner-occupied. This type of regulation is meant to contribute to the socio-political task of maintaining rents at a decent level.<sup>373</sup>

Section 4 (no. 12a) VAT Act encompasses not only the rent but also all the auxiliary services which are closely linked to the main tenancy turnover. These are among others: supply of heat and water, provision of washing machines, dryers and elevators, and supply of cleaning and electricity for the corridor. The supply of electricity is excluded, however, and the shares of the rent corresponding with this service are therefore subject to the value added tax.<sup>374</sup>

#### (2) Income Tax Act

The German Income Tax Act (*Einkommenssteuergesetz*)<sup>375</sup> provides that rental revenues are a type of income subject to tax (section 2 (I 1 no. 6)). Whereas the private landlords would normally tax their rental income, the enterprises would normally tax the income of their business. Only cooperatives and REITS can be exempted from this tax.

Accordingly, items such as mortgage interests, depreciation rates and costs of administration or refurbishment of the dwelling can be deducted from income.

<sup>372</sup> Umsatzsteuergesetz in its version of 21-02-2005 (BGBl. I 386).

<sup>373</sup> Cf. A. Fischl in: *Praxis des Wohnungseigentums* (Munich: C. H. Beck, 2010) part E, rec. 365.

<sup>374</sup> Ibid, rec. 369.

<sup>375</sup> Einkommenssteuergesetz in its version 08-10-2009 (BGBl. I 3366; corr. I 3862).

Specifically, the law provides for a possibility to deduct for depreciation of about 2% of the purchase price each year over 50 years. If an owner, in his capacity as a private individual, sells the dwelling after having held it for at least 10 years, no tax on capital gains applies. If the property is sold earlier, the gains are fully taxed.

In line with the Income Tax Act, the costs of modernization and maintenance measures can be under some circumstances deducted from the income tax.

### (3) Inheritance tax law

The tax obligation arises in case of inheritance on account of death or, in case of a *gift inter vivos*, on the day on which the donation was realized (section 9 of the Inheritance and Gift Tax Act (*Erbschaftssteuer- und Schenkungssteuergesetz*)<sup>376</sup>). The amount of the tax depends on the assessment of the value of the property assets. The assessment of the value of real estate is governed by the Valuation Act (*Bewertungsgesetz*)<sup>377</sup>. However, the transaction of (co-) ownership of premises to spouses, civil partner or children is exempted from taxation provided that the premises include residential space that is used by the acquiring person for own residential purposes (section 13 (I no. 4) Inheritance and Gift Tax Act). Apart from that, there are also general franchises (*Steuerfreibeträge*) for family members laid down in section 16 (I no. 4) Inheritance and Gift Tax Act. Accordingly, spouses and civil partners have a tax free amount of EUR 500,000 available, whereas the children have an amount of EUR 400,000 and the grandchildren an amount of EUR 200,000 available.

### (4) Real Property Tax Act

According to Article 106 GG, the municipalities receive the property tax revenues. According to section 2 (no. 2) of the Property Tax Act (*Grundsteuergesetz*)<sup>378</sup> in conjunction with the section 68 (I) of the Valuation Act, these apply also to the condominium properties and fractional property as well as condominium leasehold rights and partially heritable building rights (*Erbbaurecht*). In accordance with the jurisprudence of the BVerfG, the tax on the owner-used condominium complies with the Constitution.<sup>379</sup> The annual property tax is 0.35% of the property value multiplied by a multiplier defined by the municipality according to section 15 Property Tax Act. The reference amount for taxation is, however, not the real market price of the transaction but the so-called standard value (*steuerlicher Einheitswert*). Property acquisition tax ranges from 3.5% to 5% depending on the state.

### (5) Real Property Transfer Tax Act

Real property transfer tax (*Grunderwerbssteuer*)<sup>380</sup> is a transactions tax. It attaches to transactions in respect of real property located in Germany. The rate of tax was previously 3.5%. However, since the Constitutional Reform of 1 September 2006, the *Länder* are in the position to set different rates. Real property transfer tax is collected by the *Länder*, which also receive the revenue. However, they can pass on all or part of the revenue to the municipalities.

### (6) Corporate Tax Act

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<sup>376</sup> Erbschaftssteuer- und Schenkungssteuergesetz of 27-02-1997 (BGBl. I 378).

<sup>377</sup> Bewertungsgesetz in its version of 01-02-1991 (BGBl. I 230).

<sup>378</sup> Grundsteuergesetz of 07-08-1973 (BGBl. I 965).

<sup>379</sup> BVerfG, DWW 2006, 127; ZKF 2006, 213.

<sup>380</sup> Grunderwerbssteuergesetz in its version of 26-02-1997 (BGBl. I 418; corr. 1804).

According to section 5 of the Corporate Tax Act (*Körperschaftsteuergesetz*)<sup>381</sup>, the commercial and industrial cooperatives as well as associations are exempted from the corporate tax if they are in charge of constructing and buying dwellings in order to provide them to their members on the basis of a tenancy contract or contracts concerning cooperative rights of residence.

#### (7) REIT Act

REITS unlike other stock companies are free from corporate tax and trade tax (section 16).

Even though for the tenants, the rule that “no tax is paid on rental tenancy” applies, the property tax charges due by the landlord, can be passed on to the tenants which is usually the case.<sup>382</sup> This is now stipulated in the Regulation on Operating Costs (*Betriebskostenverordnung*, BetrKV)<sup>383</sup>.

- Is there any subsidization via the tax system? If so, how is it organized? (for instance, tenants being able to deduct rent from taxable income; landlords being able to deduct special costs; homeowners being treated favourably via the tax system)

As shown above, the tax saving models are possible within the rental sector. Landlords can deduct from the rental income at least part of the tax payments, so that the tax applies only to what remains after the deduction. From the tax law point of view, these are the landlords – not the owner-occupiers – who benefit from the tax system. All in all, tax benefits for the housing sector now account for less than 2% of total tax benefits.<sup>384</sup>

- In what way do tax subsidies influence the rental markets?

There are no data on the relationship of tax subsidies and performance of rental markets.

- Is tax evasion a problem? If yes, does it affect the rental markets in any way?

Under German law, someone who evade paying taxes commits a criminal offence and is therefore liable to imprisonment not exceeding five years or a fine (section 370 (I) of the General Tax Code (*Abgabenordnung*)<sup>385</sup>). With regard to housing, tax evasion affects rental markets in so far as landlords conceal their income from rent or if home-owners rent out their dwellings pro forma to their life partner.<sup>386</sup>

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<sup>381</sup> *Körperschaftsteuergesetz* in its version of 15-10-2002 (BGBl. I 4144).

<sup>382</sup> Cf. DMB, press release of 21-04-2010, “*Eine reformierte Grundsteuer muss aufkommensneutral, einfach und transparent sein*“, available at: [http://mieterbund.de/index.php?id=325&tx\\_ttnews%5Btt\\_news%5D=214&cHash=211f87cdef7b262bfbdbd09fafafde7a](http://mieterbund.de/index.php?id=325&tx_ttnews%5Btt_news%5D=214&cHash=211f87cdef7b262bfbdbd09fafafde7a) (last retrieved: 06-03-2014).

<sup>383</sup> s. 2 no. 1 of the BetrKV of 25-11-2003 (BGBl. I 2346).

<sup>384</sup> Cf. Federal Ministry of Finance, *24th Subsidy Report of the Federal Government – Summary*, 17.

<sup>385</sup> *Abgabenordnung* in its version of 01-10-2002 (BGBl. I 3866; corr. I 2003, 61).

<sup>386</sup> Cf. Focus Money Online of 21-02-2008, *Steuerhinterziehung – Was Immobilienbesitzer versuchen*, available at: [http://www.focus.de/finanzen/steuern/steuerhinterziehung/am-fiskus-vorbei\\_aid\\_11325.html](http://www.focus.de/finanzen/steuern/steuerhinterziehung/am-fiskus-vorbei_aid_11325.html) (last retrieved: 10-03-2014).



Summary table 7: Taxation with regard to Housing

(+) – tax applicable

(-) – tax not applicable

	<b>Name of taxation</b>	<b>Home-owners (incl. condominium owners)</b>	<b>Landlord of rental tenancies</b>	<b>Tenant of rental tenancies</b>	<b>Institutional or cooperative landlords</b>	<b>Tenant of cooperative</b>
<b>Taxation at point of acquisition</b>	Land Transfer Tax in accordance with Land Transfer Tax Act	+	-	-	+	-
	Inheritance Tax in accordance with the Inheritance Tax Law	+	-	-	+	-
<b>Taxation during tenure</b>	Value added tax, in accordance with the Vat Act	-	Exemption for rentals and lease	Exemption for rentals and lease	-	-
	Tax on capital gains in accordance with the Income Tax Act	-	+	-	+	-
	Property Tax Law in accordance with the Property Tax Act	+	+	However part of these expenses can be allocated to the tenant	+	+
	Cooperative Tax in accordance with the Corporate Tax Act	-	-	-	+, unless exempted as cooperatives dealing with rental	-
<b>Taxation at the end of occupancy</b>	Tax on capital gains in accordance with the Income Tax Act, if the real estate is	+	+	-	-	-

	sold earlier than 10 years after the purchase					
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## 4. Regulatory types of rental and intermediate tenures<sup>387</sup>

### 4.1. Classifications of different types of regulatory tenures

- Which different regulatory types of tenure (different regulation about contracts and tenant security) do you classify within the rental sector? What are their shares in dwelling stock (compare summary table 1)?

In Germany, the notion of “social housing” or “housing with a public task” is used rather seldom and is often understood in the context of the housing policy of the 1960s and 1970s.<sup>388</sup> This term was later replaced by *öffentlich geförderter Wohnungsbau* (publicly subsidized housing construction) and *Wohnraumförderung* (housing promotion – exact translation: promotion of living space).

From the legal point of view, almost the whole housing sector in Germany is market based. Consequently the term “*social housing*” signifies a method of housing financing, covering at the same time a set of regulations and responsibilities with regard to allocation of tenancies and rent levels and does not refer to a physically discernable stock of dwellings.<sup>389</sup> The specificity of the German system is the time-limited character of its housing with a public task. The landlords or investors profiting from public funds are obliged to provide the housing to specified tenants under specified conditions. However, these social obligations run out after some time (often 10 to 15 years), and afterwards the dwellings return to the private market. Actually, this type of dwellings accounts for about 4% of the whole national housing stock.<sup>390</sup>

Nevertheless, the stock of affordable housing is broader than the number of units comprising formally subsidized housing. Also, dwellings managed by cooperatives contribute to the provision of affordable housing, as well as the so-called “quasi-social housing” including especially parts of municipal housing stock that is no longer social housing in a formal sense, due to expiration of the social obligations periods.<sup>391</sup> In the past, the municipal housing companies kept the rents low, even for those dwellings that are no longer covered by the social regulation.<sup>392</sup> This is however only the case if the buildings stay in municipal hands. As soon as the dwellings are sold to private investors, their leading interest is to upgrade the better dwellings and sell at possibly high prices. Only those of poor quality that cannot be sold continue to be rented. Undoubtedly, this distinction among profitable and unprofitable stock brings about intensification of social polarization.<sup>393</sup>

Another option of affordable housing not included in the above mentioned 4% are dwellings provided by cooperatives. Another considerable group of quasi social dwellings are those private rented housing units which were renovated within the framework of special programmes and refigured rent-control for tenants.

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<sup>387</sup> I.e. all types of tenure apart from full and unconditional ownership.

<sup>388</sup> Cf. W. Voss, *Promoting Affordable Housing within Market Economy*, (Rome: 2012), available at: [http://www.fig.net/pub/fig2012/papers/ts03j/TS03J\\_voss\\_6165.pdf](http://www.fig.net/pub/fig2012/papers/ts03j/TS03J_voss_6165.pdf), 4 (last retrieved: 10-03-2014).

<sup>389</sup> Cf. B. Edgar, J. Doherty & H. Meert, *Access to Housing: Homelessness and Vulnerability in Europe* (Bristol: The Policy Press, 2002) 54.

<sup>390</sup> Own calculation based on BMVBS, *Wohnen und Bauen in Zahlen 2012/2013*, 28 and Pestel Institut, *Bedarf an Sozialwohnungen*, 12.

<sup>391</sup> Cf. Ch. Droste & T. Knorr-Siedow, *Social Housing in Germany*, in: *Social Housing in Europe* (London: LSE, 2007), available at: <http://www.lse.ac.uk/geographyAndEnvironment/research/London/pdf/SocialHousingInEurope.pdf>, 97 (last retrieved: 10-03-2014).

<sup>392</sup> Ibid, 101.

<sup>393</sup> Ibid, 102.

The underneath table shows the shrinkage of the social housing sector which is much differentiated among the *Länder*.<sup>394</sup>

<b>Number of social housing dwellings</b>	<b>31.12.2002</b>	<b>31.12.2010</b>
Baden-Württemberg	137,207	65,000
Bavaria	272,630	161,000
Berlin	277,200	213,442
Brandenburg	29,659	39,700
Bremen	24,250	10,196
Hamburg	164,128	108,011
Hesse	157,793	127,910
Mecklenburg-Western Pomerania	9,217	7,296
Lower Saxony	114,957	84,755
North-Rhine-Westphalia	844,258	543,983
Rhineland-Palatinate	62,522	61,732
Saarland	3,850	2,500
Saxony	223,418	83,303
Saxony-Anhalt	75,595	31,298
Schleswig-Holstein	61,060	66,931
Thuringia	12,861	55,090
<b>All Länder</b>	<b>2,470,605</b>	<b>1,662,147</b>

<sup>394</sup> Cf. Antwort von Jan Mücke auf eine Parlamentarische Anfrage der Abgeordneten Caren Lay, 2.

## 4.2. Regulatory types of tenures without a public task

- Please describe the regulatory types in the rental sector in your country that do not have a public task. This category may be called private or market rental housing.<sup>395</sup>
  - Different types of private regulatory rental types and equivalents:
    - Rental contracts

There are several forms of rental tenures in Germany:

- Indefinite rental agreement (*unbefristeter Mietvertrag*) – There is no fixed date on which the contract ends (section 542 (I) BGB). This indefinite rental agreement can be terminated by the tenant with a notice period of three months (section 573c (I) BGB). The termination requires written form, but there is no requirement to submit the grounds of termination. However, if the landlord wants to terminate the tenancy, he must prove a justified interest (section 573 BGB).
- Fixed-term rental agreement (*befristeter Mietvertrag*) – The length of the lease is limited in time (section 575 BGB). However, the landlord has to prove one of three reasons if he wants to limit the duration of the contract, these are (1) personal need, (2) planned extensive renovation or reconstruction works or (3) need for an employee. Furthermore, the possibility to terminate the tenancy ordinarily is excluded.
- Permanent rent (*Dauermietvertrag*) – In this kind of tenancy, the landlords' right to give ordinary notice is excluded. As long as the tenant behaves in accordance with the law, the contract cannot be terminated.
- Sublease agreement (*Untermietvertrag*) – This kind of contract is concluded between the main tenant and the subtenant. The landlord must be informed about the subletting, although the main tenant will in general be entitled to sublet part of the rented dwelling (section 553 BGB).
- Stepped rent (*Staffelmietvertrag*) – Already by the conclusion of the contract the parties agree on the amount of rent increase in the coming years (557a BGB).
- Index linked rent (*Indexmietvertrag*) – The parties agree that the rent will be adjusted to the actual rent index (yearly reported by the Federal Statistical Office)<sup>396</sup> (section 557b BGB).
- Successive tenancy contract (*Kettenmietvertrag*) – When two times in row, the same rental object is rented for a fixed-term. Since the tenancy law reform in 2001, this kind of contract is legally allowed only in exceptional cases.
- Gratuitous loan agreement (*Leihe*) in accordance with section 598 BGB – Regarding premises, such an agreement requires that the lender does not demand any money for the use of the dwelling or house. The typical case is the gratuitous surrender of residential space between family members or for life partners, where it has to be certain that the parties have the intention to create a legally recognized relationship.<sup>397</sup>

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<sup>395</sup> Market rental housing means housing for which the rent price determines the conclusion of contracts and not some social rules of allocation based on need.

<sup>396</sup> Cf. the current Consumer Price Index published in: Federal Statistical Office, *Preise – Verbraucherpreisindizes für Deutschland* (Wiesbaden: November 2013), available at: [https://www.destatis.de/DE/Publikationen/Thematisch/Preise/Verbraucherpreise/VerbraucherpreiseMEPDF/VerbraucherpreiseME2170700132114.pdf?\\_\\_blob=publicationFile](https://www.destatis.de/DE/Publikationen/Thematisch/Preise/Verbraucherpreise/VerbraucherpreiseMEPDF/VerbraucherpreiseME2170700132114.pdf?__blob=publicationFile), 10 (last retrieved: 10-03-2014).

<sup>397</sup> OLG Cologne, NJW-RR 1995, p. 751; NZM 2000, p. 111; BGH NJW 2008, p. 2333.

- Are there different intertemporal tenancy law regimes in general and systems of rent regulation in particular?

In 2001, the German rent law underwent a fundamental reform amending among many aspects: the regulations concerning termination of contracts and period of notice; regulation concerning fixed-term tenancy contracts, utilities, repairs and rent deposit. The reform entered into force as of 1 September 2001.<sup>398</sup>

Yet, according to Article 229 (section 3) of the Introductory Law to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche*, EGBGB),<sup>399</sup> the old version of the rent law is still applicable to all tenancy contracts that were in force as of 1 September 2001. This concerns *inter alia*:

- the termination of the contract which had already been declared before 1 September 2001
  - the demand for an increase in rent which had already been declared before 1 September 2001
  - the amendment of the operation costs which had been declared before 1 September 2001
  - the modernization measures to be pursued which had been notified before 1 September 2001
  - the procedure following the tenant's death if it took place before 1 September 2001.
- Are there regulatory differences between professional/commercial and private landlords?

There are no regulatory differences between landlords being a professional or a private one, except for the application of consumer law. Thus, the distinction which regulations are applicable is based on the kind of housing the landlord provides and not on who he is.

- o Briefly: How is the financing of private and professional/commercial landlords typically arranged (e.g. own equity, mortgage based loan, personal loan, mix, other)

In Germany, real estate is predominantly financed by bank credits. Usually, about 80% to 90% of total financing volume can be provided by a single institute.<sup>400</sup> However, there are some predictions that this could soon change, due to the fact that the professional investors search more and more for alternative solutions.<sup>401</sup> Products such as mezzanine capital, private equity, equity-like forms are already being offered.<sup>402</sup> Some try to finance their projects through issuing of the corporate bonds.<sup>403</sup>

<sup>398</sup> Gesetz zur Neugliederung, Vereinfachung und Reform des Mietrechts of 19-06-2001 (BGBl. I 1149; BT-Drucks. 14/4553).

<sup>399</sup> EGBGB in its version of 21-09-1994 (BGBl. I 2494; corr. 1997, 1061).

<sup>400</sup> Cf. J. Bettink, *Immobilienfinanzierung ändert sich gravierend*, Börsen-Zeitung of 05-10-2013, available at: <https://www.boersen-zeitung.de/index.php?li=1&artid=2013191802> (last retrieved: 10-03-2014).

<sup>401</sup> Ibid.

<sup>402</sup> Ibid.

<sup>403</sup> Ibid.



- Apartments made available by employer at special conditions

In the German legal system, two forms of rental tenures in conjunction with employment contracts can be differentiated.

- (1) These are the so-called *Werkdienstwohnungen* in the sense of section 576b BGB. This type of housing is provided to the tenant within the framework of the given employment contract, in a way that no additional obligation arises on the part of the tenant to pay the rent. This is often the case as far as high state officials are concerned, who either receive or can claim to be granted such housing.
- (2) This type of rental tenure is to be distinguished from the so-called *Werkmietwohnung*<sup>404</sup> (section 576 BGB), in case of which the existence of an employment contract constitutes a contractual basis (*Geschäftsgrundlage*) for the conclusion of the tenancy contract. The most frequent constellation is that the employer rents dwellings to his employees. The character and scope of the employment is legally irrelevant, as these form of tenancy contracts can be concluded also with those in minor employment. This constellation is based on two independent contracts, employment and tenancy which are interdependent, but not fully coupled, so that the termination of one of them does not automatically imply the termination of the other. In general the common tenancy law applies: The specificities apply almost exclusively to termination regulations. These regulations differ according to the type of the *Werkwohnung*:
  - In case of so-called regular *Werkwohnung*, the tenant is not reliant on the dwelling for professional purposes and the period of notice is three months if the tenancy contract is shorter than ten years.
  - In case of so-called function-related *Werkwohnung*, which means the character of the professional activity of the tenant requires that he is provided with the specific living space (this applies to facility managers or concierge dwellings) the period of notice is shorter and amounts to only one month.

If the tenant terminates the employment contract without any incentive thereto provided by the employer, he or she cannot invoke rules concerning protection of tenants (section 576a (II no. 2) BGB).

The municipalities intending to convince enterprises to invest some assets in the *Werkwohnung*, as for example the municipality of Munich sought to do in 2011, regularly encounter negative responses, even in the light of the shortage of professional manpower.<sup>405</sup> German companies such as BMW and Hypovereinsbank, dispose of small stocks of such dwellings especially for new employees.<sup>406</sup> Siemens und MAN have no more such dwellings, due to the sale of their total stock in 2010.<sup>407</sup> The only sector with a more significant stock is the insurance companies. For example, the Munich Re has about 4,000 dwellings in its stock and is considering further investments.<sup>408</sup>

<sup>404</sup> Cf. M. Artz, in: *MüKo-BGB*, Vol. 3 (Munich: C. H. Beck, 201), s. 576, rec. 4.

<sup>405</sup> Cf. S. K. Schmidt & M. Tibudd, *Unternehmen lassen Ude abblitzen*, *Süddeutsche Zeitung* of 05-09-2011, available at: <http://www.sueddeutsche.de/muenchen/werkwohnungen-unternehmen-lassen-ude-abblitzen-1.1138907> (last retrieved: 10-03-2014).

<sup>406</sup> Ibid.

<sup>407</sup> Ibid.

<sup>408</sup> Ibid.

- Mix of private and commercial renting (e.g. the flat above the shop)

A mix of private and commercial renting is possible in Germany. This is the case when within a single tenancy contract, both housing and business premises are rented out. In these cases it appears sometime questionable whether to such a contract the housing tenancy or the business tenancy rules are applicable.<sup>409</sup> In those cases the classification takes place by means of the main focus theory, according to which in order to classify the contract it is essential to clarify which of the aims prevails.<sup>410</sup>

- Cooperatives

Cooperatives were addressed under 1.4. 'Types of Housing Tenure'.

- Company law schemes

Company law schemes do not exist in Germany.

- Real rights of habitation

#### (1) Heritable building right

The heritable building right (*Erbbaurecht*) gives its holder the right to build and own a house on the ground of another person (section 1 (I) of the Law on the Heritable Building Right). Thus, it constitutes an exception to the principle according to which ownership of a plot of land covers also the ownership of buildings built there on (*superficies solo cedit*, section 94 BGB). As consideration the holder of the heritable building right pays a ground rent (*Erbbauzins*) which normally amounts to less than 20% of the achievable rental income.<sup>411</sup> The duration of the heritable building right usually amounts to 99 years.<sup>412</sup>

This form of tenure was introduced in 1919 in order to promote housing construction especially of lower-income households.<sup>413</sup> While in the past mainly churches and municipalities offered the possibility to establish a heritable building right on their land, also private property owners do so nowadays.<sup>414</sup> About 5% of the whole living area in Germany is assigned to heritable building rights.<sup>415</sup>

#### (2) Right of residence and usufruct

Further real rights of habitation are the right of residence (*dingliches Wohnrecht*) according to section 1093 BGB and the usufruct (*Nießbrauch*), which is laid down in sections 1030 et seq., 1048 BGB. Both possible agreements are protected by property law and useful if the possessor of a dwelling is to have a stronger position than he would have as a tenant. The typical case is a life estate: In the context of an anticipated succession, parents often confer premises to their children and agree instead a lifelong right of residence. A person, who has such a right, can use a building or a part of a building as a residence to the exclusion of the owner. The right of residence and the usufruct are both personal easements (*Dienstbarkeiten*), meaning that a specific person has a restricted real right to use the residence. These easements have to be registered in the

<sup>409</sup> Cf. W. Borzutzki-Pasing, *Mischmietvertrag im Gewerberaummietrecht*, juris PR-MietR 7/2010, 5.

<sup>410</sup> BGH, NJW-RR 1986, 877.

<sup>411</sup> Cf. T. Licher, *Das Erbbaurecht – Königsweg für Kommunen*, 2009, available at: [http://www.vhw.de/fileadmin/user\\_upload/Forum\\_Wohneigentum/PDF\\_Dokumente/2009/200901\\_1191.pdf](http://www.vhw.de/fileadmin/user_upload/Forum_Wohneigentum/PDF_Dokumente/2009/200901_1191.pdf), 51 (last retrieved: 10-03-2014).

<sup>412</sup> Ibid.

<sup>413</sup> Cf. H. von Oefele/J. Heinemann, in: *MüKo-BGB*, Vol. 6 (Munich: C. H. Beck, 2013) bef. s. 1 ErbbauRG, rec. 3.

<sup>414</sup> Ibid, rec. 9.

<sup>415</sup> Cf. T. Licher, *Das Erbbaurecht – Königsweg für Kommunen*, 51.

land register (*Grundbuch*), because they are encumbrances of a plot of land (section 873 (I) BGB). Furthermore, both rights are neither transferable (sections 1059, 1092 (I) BGB) nor hereditary (sections 1061, 1092 (II) BGB). In exchange for the strong legal position, the person holding such a right must provide for the maintenance of the residence in its economic condition (sections 1041, 1093 (I) BGB). Therefore, he is obliged to carry out the repairs and renovations to the extent that they are part of the normal maintenance. In accordance with sections 1037 (I), 1093 (I) BGB, the right of use does not however include the entitlement to transform the residence or to substantially change it.

The main difference between these forms of “legal possession” is their scope: The usufruct is more comprehensive in so far as the entitled person is authorized to derive profit or benefit from the premises, especially by letting the residence (section 1059 BGB), whilst the use of the right of residence cannot be ceded without the permission of the owner (section 1092 (I) BGB). It is just allowed to admit family members into the residence or persons required for service befitting and for care, like in a common tenancy. Only in case of an important reason, for example financial distress, the entitled person has a claim against the owner to tolerate the letting to a third party. In case of an adverse effect, the usufructuary is protected like an owner (section 1065 BGB), whilst the right of residence provides protection based only on sections 1004, 1027, 1090 (2) BGB by awarding a claim for removal and injunction. Finally, the usufruct is principally extinguished with the death of the usufructuary (section 1061 BGB). The right of residence can however extinguish, if the use is objectively permanently impossible because of actual or legal reasons, for example in case of destruction of the residence.

### (3) Permanent residential right

A special form of real right of habitation regarding condominiums is provided by the Law on Apartment Ownership with its permanent residential right (*Dauerwohnrecht*) in accordance with sections 31 et seq. WEG. The purpose of this right consists in the protection of financial contributions.<sup>416</sup> If someone makes a contribution to building costs or provides the whole financing for the owner of a plot of land, this person shall have the chance to acquire a right secured by property.<sup>417</sup> As well as the right of residence and the usufruct, it is an easement and has to be registered. But as distinguished from these rights, the permanent residential right is not a personal right and is therefore generally transferable and also hereditary (section 33 (I) WEG).

#### ▪ Any other relevant type of tenure

There are no further important types of tenure except for the time-share agreement under section 481 BGB, which is however more relevant to touristic purposes than to housing. This form of “legal possession” of a dwelling was incorporated into the German Civil Code in the context of the implementation of EU-Directives 2008/122/EC<sup>418</sup> and 1994/47/EC<sup>419</sup> on contracts relating to the purchase of the right to use immovable properties on a timeshare basis.<sup>420</sup> A time-share agreement is a contract by which an entrepreneur (section 14 BGB) procures or promises to procure for a consumer (section 13 BGB) the right, in return for the payment of a total price, to use a building several times for a specified period, for the purpose of overnight stays (section 481 (I) BGB). This right may

<sup>416</sup> Cf. H. Engelhardt, in: *MüKo-BGB*, s. 31 WEG, rec. 1.

<sup>417</sup> *Ibid.*

<sup>418</sup> Directive of 14-01-2009 (OJEC L 33 p. 10).

<sup>419</sup> Directive of 26-10-1994 (OJEC L 280 p. 83).

<sup>420</sup> Gesetz zur Modernisierung der Regelungen über Teilzeit-Wohnrechteverträge, Verträge über langfristige Urlaubsprodukte sowie Vermittlungsverträge und Tauschsystemverträge of 17-01-2011 (BGBl. I 34).

be formed as a real right or another right. In particular, it can be granted through membership in an association or a share in a company or partnership. The right may also consist in opting to use one of a group of residential buildings (section 481 (II) BGB). The contract must have duration of more than one year and has to be concluded in written form. The consumer has a right to revoke within fourteen days after the time of conclusion of the contract or of the preliminary contract, provided the consumer has received the contractual documents (sections 485 (I), 485a, 355 BGB).

#### 4.3. Regulatory types of tenures with a public task

- Please describe the regulatory types of rental and intermediary tenures with public task (typically non-profit or social housing allocated to need) such as:
  - Municipal tenancies

In Germany, generally the same regulatory type of tenancy applies to all above mentioned forms of tenure. Municipal tenancies are those in which the landlord is a municipality or more often a municipal company. For issues like access to such housing (usually a qualification certificate is required) or the amount of rent (usually cost rent), some divergences are possible, but in general the regular civil law rules apply.

- Cooperative tenancies

The regular rental tenure rules apply also to tenancies with cooperatives as far as the respective dwelling is subject to social commitments due to public funding.

- Social tenancies

Social tenancies in Germany are understood as legal relationship between a landlord and a tenant, who fulfils the requirements of the Housing Promotion Act (WoFG). The details of this relationship are also mainly ruled by the regular tenancy law.

- Public renting through agencies

The private real estate agencies (*Maklerbüros*) are also entitled to broker social housing according to the provisions of the WoFG. The only distinction is that they are not entitled to require the agency fee for such services (section 2 (III) WoVermittG). Many municipalities also offer agency services with no fees. Regularly, the main criterion is necessity. As the offer by the municipalities is limited, the applicants for social housing are therefore requested to look for housing on their own.

- Public renting through social rental agencies

Furthermore, it is possible to rent public housing through social rental agencies, which are established in Germany in form of the so-called *Soziale Wohnraumhilfen* or housing assistance agencies.<sup>421</sup> Since there are no legal regulations, neither on the national nor on the regional level, these agencies have remained local initiatives.<sup>422</sup> To date, there are *Soziale Wohnraumhilfen* in the cities Hannover, Pinneberg, Darmstadt, Frankfurt a. M. and Osnabrück (mainly in cooperation with the Protestant Charitable Organizations (*Dia-konische Werke*)). These agencies acquire housing for persons in need of care, including homeless people, mostly by relying on the private rental sector.<sup>423</sup> Furthermore, they car-

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<sup>421</sup> Cf. FEANTSA, *Social Rental Agencies: An Innovative Housing-led Response to Homelessness* (2012), available at: <http://www.feantsa.org/spip.php?article620&lang=en>, 20 (last retrieved: 10-03-2014).

<sup>422</sup> Ibid.

<sup>423</sup> Ibid.

ry out the whole tenancy management which involves guaranteed payments to the landlord, prevention work as well as intervention in order to avoid eviction.<sup>424</sup>

- Privatized or restituted housing with social restrictions

There is no special regulatory tenure for the privatized or restituted housing with social restrictions. This model turned out in many cases questionable. The private investors not always stick to their social commitments; they raise the rents which lead to squeezing out of the poorer population. Social mix does not constitute an essential aim. Often commercial considerations prevail. The negotiated social charters are either time-limited or are being avoided through resorting to intermediary contracts. However, this could be avoided by incorporated statutory restraints on alienation.

- Public entities (e.g. municipalities) taking over private contracts, typically for poor tenants to counteract homelessness

In Germany, the municipalities are obliged under police and regulatory law to counteract homelessness. Accordingly, under provisions of administrative law, there are entitled to assign a homeless to a particular housing. This is an *ultima ratio* solution, and is realized by means of administrative act. Another option is the purchase of the occupancy rights by the municipality. This takes place by the means of contract between the landlord and the municipality. The owners agree to make their housing available to the municipality for a period of 15 years. Normally, the dwellings are used for social tenancies, and only the cost rent is due. As a service in return the owners receive a subsidy. The tenancy itself is regulated under the general tenancy law of the BGB. This model is not very frequently practiced, though.

- Specify for tenures with a public task:
  - selection procedure and criteria of eligibility for tenants

As already mentioned, in Germany the federal states were granted competences in 2006 to deal with the selection procedure and criteria of eligibility for tenants desiring access to social housing. The majority of federal states passed their own respective legislation, which are to varying extents based on the provisions of the Federal Housing Promotion Act of 2001. For the sake of clarity, the above question will be answered only on the basis of this act, which still is a legal basis in some of the states.

The Act regulates the promotion of social housing in terms of promotion of construction of residential buildings as well as support for households in terms of rent housing supply including cooperative housing and support to owner-occupancy (section 1 (I) WoFG).

#### (1) Selection procedure

Dwellings under the funding scheme, in accordance with the WoFG, can be used only by prospective tenants who are in possession of a public housing certificate (section 27 WoFG). The public housing certificate is awarded upon request for a period of twelve months. A tenant is entitled to file in an application if he stays within the territorial scope of application of the Act for longer time and is able to establish there his centre of life. Normally, the public housing certificate is awarded when the yearly income of the prospective tenant does not exceed the binding ceilings (This is for a one-person household – EUR 12,000 and two-person households – EUR 18,000; plus EUR 4,100 Euro for any further person who belongs to the household (section 9 (II) WoFG)). Exceptions are possible, however, in cases where denial would mean a particular hardship to the applicant.

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<sup>424</sup> Ibid.

On the other hand, the public housing certificate can be denied if, regardless of fulfilling the income-requirement, the award of the certificate would appear evidently unjustified. The certificate shall indicate the adequate surface and number of rooms for the applicant and his family. Adjustments are possible taking into account particular personal and professional needs of the household members or in cases in which it is predicable that in the near future the need for leaving space will increase.

## (2) Eligibility of tenants

The target group of the WoFG are households that are incapable of supplying themselves with adequate living space and those who are dependent on the aid of authorities (section 1 (II) WoFG). In terms of rental housing, these are in particular: households with low income, households with children, single-parent households, pregnant women, elderly, handicapped, homeless and others in need (*Hilfsbedürftige*).

As far as the promotion of owner-occupancy is concerned, the target group are in particular households with children and persons with a disability who are not able to support the necessary charges on their own.

## (3) Objects of funding

According to section 2 (I) WoFG, funding shall take place in favour of:

- Construction of residential housing, including the first time acquisition of housing within a maximum of 2 years after the construction was completed,
- Modernization measures,
- Acquiring rights to allocate existing buildings to tenants in need,
- Acquisition of the existing stock.

This can take place by means of special preferential loans from the state (including follow-on subsidies) and direct grants as well as assumption of guarantees of all kinds (*Bürgschaften, Garantien, sonstige Gewährleistungen*) and provision of low-cost land (section 2 (II) WoFG).

- o typical contractual arrangements, and regulatory interventions into, rental contracts

In general, the provisions on tenancy law laid down in the German Civil Code apply both to tenures without and with a public task. The few peculiarities with regard to the latter are listed below:<sup>425</sup>

- Social housing is publicly founded and therefore the rents are predominantly price-bound<sup>426</sup>, so that the rent corresponds with factual expenses to cover capital and operation costs. In the field of social housing, the cost rent (*Kostenmiete*) is deemed to be agreed among the contracting parties. It can change if the capital and operation costs change. In this case, upon approval of the governing authority, the rent increase is effective even if the tenant does not agree. The principle of the cost rent requires that its amount is constantly adjusted to the factual expenses. If the management costs of the house decrease, because for example the building credit interest rate drops, the rent must also decrease.

<sup>425</sup> Cf. <http://www.mieterverein-bochum.de/mietrecht/ratgeber/sozialwohnung> (last retrieved: 10-03-2014).

<sup>426</sup> With exception of few *Länder*, as i.e. Baden Württemberg and Schleswig-Holstein.



- In the social housing sector, gross rents are forbidden. All additional or operation costs must be listed separately.
- From the perspective of tenant security, it should be mentioned that social housing can also be converted to owner-occupied dwellings (*Eigentumswohnungen*). However, the tenants of social housing are, at least in theory, better protected against the termination of the tenancy in case of intended owner-occupation since they have statutory first option rights.
- In certain cases social housing is offered by the real estate agents. In those cases, the agent fees are not to be demanded.
- The tenants of social housing are also entitled to a housing allowance (*Wohngeld*). However, the respective ceilings are even lower as in case of social housing. As far as the tenant receives social welfare, housing allowance is paid together with the social welfare, so that there is no need to apply for it separately.
  - opportunities of subsidization (if clarification is needed based on the text before)
  - from the perspective of prospective tenants: how do I proceed in order to get “housing with a public task”?

The steps that need to be taken in order to apply and get “housing with public task” may differ in detail from municipality to municipality. However, the main steps are the same everywhere in Germany. They can be summarized as follows:

- (1) The prerequisite is the certificate of public housing (*Wohnungsberechtigungsschein*). In order to receive it, one needs to file an application with the local authority (*Wohnungsamts*). If the applicant receives income, they should enclose their tax declaration. Submission of further documents, such as a certificate of severe disability, certificate of nursing care needs, certificate of school attendance or residence permit, can also be required.
  - (2) Applicants for social housing in possession of the certificate of public housing should notify the municipal housing office that they are looking for such accommodation, and they should make a formal application. Alternatively, applicants can directly contact the landlords of a dwelling which is respectively advertised.
- Draw up summary table 8 which should appear as follows:

The rental housing sector in Germany is characterized by a high proportion of private tenancies, whereas social tenancies constitute only a low percentage due to the temporary commitments regarding the rent and the allocation of these dwellings, the low number of new constructions and the focus of the social policy which is more aimed at the promotion of subject-based measures than on the object-based promotion of providing affordable residential space for households in need. Another main feature of the German housing system is the very high proportion of private landlords.

<p>Rental housing <b>without a public task</b> (market rental housing for which the ability to pay determines whether the tenant will get the dwelling); for example different intertemporal schemes of different landlord types with different tenancy rights and duties</p>	<p>Main characteristics</p> <ul style="list-style-type: none"> <li>• Types of landlords</li> <li>• Public task</li> <li>• Estimated size of market share within rental market</li> <li>• Etc.</li> </ul>
<p>1) Private tenancy</p>	<ul style="list-style-type: none"> <li>- Types of landlords: all types of landlords, but private owners are mainly involved in this sector (about 64%)</li> <li>- Size of market share: 92.3% within the rental market</li> <li>- Characteristics: contracts are generally concluded for an indefinite period of time; high protection of tenants, especially regarding security of tenure and increases in rent (termination in order to raise the rent is explicitly excluded); rents are based on the reference rent customary in the locality and are not controlled by public bodies</li> </ul>
<p>Rental housing for which a <b>public task</b> has been defined  (provision of housing that is not determined by the free market, but any form of state intervention)</p>	
<p>2) Social tenancy</p>	<ul style="list-style-type: none"> <li>- Types of landlords: all types of landlords</li> <li>- Size of market share: 7.7% within the rental market</li> <li>- Characteristics: landlords receive public funds and may therefore only demand the cost rent (<i>Kostenmiete</i>); tenants have to be in possession of a public housing certificate (<i>Wohnberechtigungsschein</i>) in order to be entitled to rent such dwellings; commitments are temporary</li> </ul>

- For which of these types will you answer the questions in Part 6; which regulatory types are important in your country?
  - 1) Tenancy type 1 = Private Rental Market (92.3% of the rental housing stock)

The private rental market is mainly exposed to the free market forces. The amount of rent is based on the reference rent customary in the locality. This tenancy type is subject to the general tenancy law laid down in sections 535-580a BGB.

- 2) Tenancy type 2 = Housing with a Public Task (7.7% of the rental housing stock)

Housing with a public task is on the one hand subject to rent control which the owner has to accept in return for subsidization. On the other hand it is subject to access restrictions limiting the number of prospective tenants to those who have a low income which has to be proved by a public housing certificate. Both commitments are only temporary. This tenancy type is subject to the provisions of the WoFG or the respective law of the *Land*, but as far as this law lacks regulations the private tenancy law laid down in the BGB is applicable (*Subsidiaritätsprinzip*).

- 3) Tenancy type 3 = Cooperatives (9.5% of the rental housing stock)

The contractual relationship between the cooperative and the user of its dwellings is subject to the general tenancy law, since there is no special law apart from the respective charter of the cooperative.<sup>427</sup> As far as the cooperative offers housing with a public task, the WoFG or the respective law of the *Land* is applicable. Nevertheless, there are some peculiarities which are explained in Part 6.

## 5. Origins and development of tenancy law

- What was the origin of national tenancy law and where was and is it laid down (civil code, special statute, case law)?

The national tenancy law has its origin in the Roman law, which was valid in Germany in form of the common law (*ius commune*) up to the civil law codifications<sup>428</sup> in the eighteenth and nineteenth centuries. In some parts of Germany, the common law was applicable until the German Civil Code (*Bürgerliches Gesetzbuch*, BGB)<sup>429</sup> went into effect.

The *ius commune* was deeply ingrained with the Roman law. According to both legal concepts, the position of the tenant was considered as a purely personal and obligatory right.<sup>430</sup> Because of this relative character, tenants did not have any claims against third parties,<sup>431</sup> and their position as a possessor was highly disputed as well.<sup>432</sup> In addition, the tenant did not enjoy legal protection in the event that ownership was transferred to a

<sup>427</sup> OLG Karlsruhe, WuM 1985, 77.

<sup>428</sup> Bavaria (Codex Maximillianeus Bavaricus Civilis, 1756), Prussia (Prussian Civil Code, 1794), Saxony (Civil Code for the Kingdom Saxony, 1863).

<sup>429</sup> German Civil Code was promulgated on 18-08-1896 (Imperial Law Gazette (*Reichsgesetzblatt*, RGBL.) 195) and went into effect on 1-01-1900.

<sup>430</sup> Cf. F. Quaiser, *Mietrecht im 19. Jahrhundert* (Frankfurt on Main: Peter Lang, 2005), 74, 78.

<sup>431</sup> Ibid.; cf. also H. Brückner, *Die Miete* (Leipzig: von Veit & Comp., 1902), 4 et seq.

<sup>432</sup> Cf. Quaiser, *Mietrecht*, 74, 78; M. Kaser & R. Knütel, *Römisches Privatrecht* (Munich: C. H. Beck, 2008), s. 42, rec. 13.

third party.<sup>433</sup> Therefore, tenants had a rather weak position. However, the common law deviated from the classical Roman law in some items. Compared to the Roman law, it already knew the termination as an act to end the contract.<sup>434</sup> Furthermore, the *ius commune* distinguished between tenancy (*Miete*) and usufructuary lease (*Pacht*) (i.e. tenancy including the right to extract the fruits), whilst tenancy under the classical Roman law included relationships, which today are divided into tenancy-, usufructuary lease-, service- and work contracts (*locatio conductio*).<sup>435</sup> In summary, it can be stated that these law concepts were focused on the interests of the landlords.<sup>436</sup>

The civil law codifications during the eighteenth and nineteenth centuries replaced the common law in some areas of Germany.<sup>437</sup> Especially the Prussian Civil Code (*Allgemeines Landrecht für die Preußischen Staaten*, ALR)<sup>438</sup> brought considerable changes for tenants. Similar to the common law, the Prussian Civil Code distinguished as well as the common law between tenancy and lease in I 21 section 259 ALR and defined tenancy under I 21 section 258 ALR as the loan in exchange for consideration. But in contrast to the previous law, the Prussian Civil Code was based on socio-political considerations and contained therefore more regulations for the benefit of tenants.<sup>439</sup> According to I 21 section 2, 3 ALR, the position of the tenant was not considered as a personal right anymore, but as a real property right. Consequently, the tenant was indisputably treated as a possessor, which implicated possessory and also tort protection.<sup>440</sup> Furthermore, the principle “purchase is subject to existing tenancies” (*emptio non tollit locatum*) has been introduced (I 21 section 358 ALR).<sup>441</sup> Accordingly, the acquirer of leased residential space had to continue the contract with the tenant.

With the enactment of the German Civil Code in 1900,<sup>442</sup> tenancy law has been uniformly regulated for the whole territory of the German Empire for the first time. The German Civil Code is influenced by the Roman and the common law as well as by the Prussian Civil Code. On the one hand, it adopts the legal concept of the common law that tenancy is a personal, obligatory right.<sup>443</sup> On the other hand, it breaches the principle that rights and duties can arise only where there is privity of contract by introducing the concept *emptio non tollit locatum* from the Prussian Civil Code.<sup>444</sup> Beyond that, the German Civil Code acknowledges the tenant as a possessor with all attached protection rights, too.<sup>445</sup>

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<sup>433</sup> Cf. Quaiser, *Mietrecht*, 111.

<sup>434</sup> Cf. Quaiser, *Mietrecht*, 70.

<sup>435</sup> Cf. Quaiser, 1, 48; Kaser & Knütel, *Römisches Privatrecht*, s. 42, rec. 8.

<sup>436</sup> Cf. Brückner, *Die Miete*, 2.

<sup>437</sup> See fn. 1; the French codification, the Code Civil of 1804, which was valid in the west of the Rhine, will not be explained in more detail, because it stood in the common law tradition of the *locatio conductio*, cf. U. Wolter, *Mietrechtlicher Bestandschutz* (Frankfurt on Main: Fritz Knapp, 1984), 35.

<sup>438</sup> Tenancy law chapter: title 21 of the 1st part of the Prussian Civil Code, 1794.

<sup>439</sup> Cf. Quaiser, *Mietrecht*, 122.

<sup>440</sup> Ibid. 146; cf. Wolter, *Bestandschutz*, 50.

<sup>441</sup> Cf. Quaiser, *Mietrecht*, 151.

<sup>442</sup> An official English translation of the current German Civil Code is available at: [http://www.gesetze-im-internet.de/englisch\\_bgb/](http://www.gesetze-im-internet.de/englisch_bgb/) (last retrieved: 23-03-2014).

<sup>443</sup> Position of the tenancy in the 2nd book of the German Civil Code: “Law of Obligations”.

<sup>444</sup> Cf. Quaiser, *Mietrecht*, 174 et seq.; M. Häublein, in: *MüKo-BGB*, Vol. 3 (Munich: C. H. Beck, 2012) s. 566, rec. 5 et seq.

<sup>445</sup> Cf. Reichsgericht Judgements (*Entscheidungen des Reichsgerichts*, RGZ) 59, 326 (328); 91, 60 (65 et seq.); 105, 213 (218); 170, 1 (6 et seq.); G. Wagner, in: *MüKo-BGB*, Vol. 5 (Munich: C. H. Beck, 2009) s. 823, rec. 157.

The current rules on the general private tenancy law are laid down in the second book of the BGB (Law of Obligations), sections 535-580a BGB.<sup>446</sup> Since the last principal reforms, it is structured as follows: first the general rules applicable to all lease contracts (sections 535-548 BGB); then the provisions on lease of residential space (sections 549-577a BGB); and finally the rules applicable to leases of other things, such as plots of lands (*Grundstücke*) or registered ships (sections 578-580a BGB). According to section 535 BGB, tenancy in the present sense means a contract by which the rightful possessor grants a person the temporary right to occupy and use the property in exchange for rent.<sup>447</sup>

Ancillary laws relating to private tenancy law, e.g. the Regulation on Operating Costs (*Betriebskostenverordnung*, BetrKV)<sup>448</sup>, the Regulation on the Calculation of Heating Costs (*Verordnung über Heizkostenrechnung*, HeizkostenVO)<sup>449</sup>, the Law on Housing Agency (*Wohnungsvermittlungsgesetz*, WoVermittG)<sup>450</sup> and the Law on Apartment Ownership (*Wohnungseigentumsgesetz*, WEG)<sup>451</sup>, are however laid down in special statutes.

Beyond these civil law rules, there are public regulations mainly regarding housing with a public task, e.g. the Law on State Funding of Housing and Housing Construction (*Wohnraumförderungsgesetz*, WoFG)<sup>452</sup>, the Regulation on Habitable Surface (*Wohnflächenverordnung*, WoFIV)<sup>453</sup>, the Law on Commitments regarding Rent Increases and Occupancy (*Wohnungsbindungsgesetz*, WoBindG)<sup>454</sup>, the Regulation on Rent Calculation (*Neubaumietenverordnung*, NMV)<sup>455</sup>, the II. Regulation on Housing Costs (*II. Verordnung über wohnungswirtschaftliche Berechnungen*, II. BV)<sup>456</sup> and the Law on Housing Allowance (*Wohngeldgesetz*, WoGG)<sup>457</sup>.

- Who was the political driving force? Was it based on a particular legal philosophy (e.g. socialism)? Is there a particular philosophy behind the rules (e.g. protection of the tenant's home as in Scandinavia vs. just a place to live as in most other countries)?

Since the foundation of the German Empire in 1871, there were ambitions to regulate the civil law uniformly. In 1873, the imperial constitution was changed to the effect that the legislative competence for the whole civil law was conferred on the *Reichstag*. The legislator of the German Empire endeavoured to create a fair tenancy law for both parties.<sup>458</sup> Whilst the first draft from 1888 acknowledged the legal concept of the Roman law, the second draft of 1890 was more socially orientated because of adverse criticism.<sup>459</sup> In

<sup>446</sup> The amendment of the BGB of 2-01-2002 (Federal Law Gazette (*Bundesgesetzblatt*, BGBl.) I 42, corr. 2909; corr. 2003 738); the German tenancy law was subject to major reforms in 2001 and 2002, whereby the structure and content of the BGB was changed substantially. Hence, the reader should take into account, that many older judgements and acts of legislation are based on sections, which have a different numbering and other wording than nowadays.

<sup>447</sup> Cf. H. Sprau, in: *Palandt* (Munich: C. H. Beck, 2012) s. 535 BGB, rec. 1 et seq.

<sup>448</sup> BetrKV of 25-11-2003 (BGBl. I 2346).

<sup>449</sup> HeizkostenVO of 5-10-2009 (BGBl. I 3250).

<sup>450</sup> WoVermittG of 4-11-1971 (BGBl. I 1747).

<sup>451</sup> WEG of 15-03-1951 (BGBl. I 175, corr. 209).

<sup>452</sup> WoFG of 13-09-2001 (BGBl. I 2376); applies only for those *Länder* that have not yet enacted own regulations.

<sup>453</sup> WoFIV of 25-11-2003 (BGBl. I 2346).

<sup>454</sup> WoBindG in its version of 13-09-2001 (BGBl. I 2404); applies only for those *Länder* that have not yet enacted own regulations.

<sup>455</sup> NMV of 12-10-1970 (BGBl. I 2203).

<sup>456</sup> II. BV of 12-10-1990 (BGBl. I 2178).

<sup>457</sup> WoGG of 24-09-2008 (BGBl. I 1856).

<sup>458</sup> Cf. Brückner, *Die Miete*, 7.

<sup>459</sup> Cf. Brückner, *Die Miete*, 6.

1896, the *Reichstag* received this draft with small alterations and passed it with further small changes as the third draft.

After another four years, the German Civil Code finally went into effect. It was characterized by the liberal legal philosophy at that time, which accented in particular the principle of private autonomy as well as a liberal concept of property.<sup>460</sup> According to this liberal philosophy, the individual was a reasonable and rational person capable to make his own decisions concerning legal transactions.<sup>461</sup> Consequently, many regulations on tenancy law were of dispositive nature, which landlords used as an opportunity to restrict or exclude the rights of tenants to the largest permitted extent in standard contracts.<sup>462</sup> Furthermore, there was no special legislation either to protect tenants' rights or to benefit private and public housing. A turnaround in the legislature occurred after the First World War. The massive housing shortage caused by war destruction and refugees was the reason for the enactment of numerous laws to protect tenants and to control the housing sector. The intention of the legislature was and is still to create a social tenancy law, *inter alia* because of the social obligation of property pursuant to Article 14 (II) GG.<sup>463</sup> Considering this intention, most of the current tenancy law provisions are mandatory, in particular those that restrict the landlord's rights to increase the rent or to terminate the tenancy contract.

In summary, it can be stated that the current tenancy law under the German Civil Code is based extensively on socio-political considerations in favour of the tenants by restricting the freedom of contract, whereas the BGB from 1900 was more landlord-orientated.

- What were the principal reforms and their guiding ideas up to the present date?

Since the German Civil Code entered into force in 1900, the tenancy law has been reformed many times. Below, only the decisive reforms will be illustrated.

The first important step in the development of the national tenancy law took place at the time of the First World War. From 1917 till 1919, four regulations to protect tenants and to manage the housing shortage caused by the war were issued.<sup>464</sup> From then on, the state regulated the housing market, in particular the distribution of available living space (*Wohnraumbewirtschaftung/ Wohnungszwangswirtschaft*) for the almost forty-five years. Local authorities were empowered to register available dwellings, to decide who may use them, to determine if a termination is valid and also to control and prohibit rent increases. Subsequent to this legislation, a large number of regulations with the same purposes, enabling the state to control the housing sector, went into effect over the following decades.<sup>465</sup> All these regulations were conceived as a temporary emergency law (*Notrecht*) indeed.<sup>466</sup>

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<sup>460</sup> Cf. M. Häublein & A. Lehmann-Richter, in: *Soziales Mietrecht in Europa* (Vienna: Springer, 2011) 33.

<sup>461</sup> Cf. W. Wurmnest, *German Report – Research Project: Tenancy Law and Procedure in the EU* (Florence: EUI, 2005) 5.

<sup>462</sup> Cf. Häublein & Lehmann-Richter, in: *Soziales Mietrecht in Europa*, 35 et seq.

<sup>463</sup> BVerfG, NJW 1985, 2633; BVerfG, NJW 1964, 1848.

<sup>464</sup> I. Mieterschutzverordnung of 26-07-1917 (RGBl. I 659); II. Mieterschutzverordnung of 23-09-1918 (RGBl. I 1135); Wohnungsmangelverordnung of 25-09-1918 (RGBl. I 1143); III. Mieterschutzverordnung of 22-06-1919 (RGBl. I 591).

<sup>465</sup> Reichsmietengesetz of 24-03-1922 (RGBl. I 273); Mieterschutzgesetz of 1-06-1923 (RGBl. I 353); Wohnungsmangelgesetz of 26-07-1923 (RGBl. I 754); Preisstoppverordnung of 26-11-1936 (RGBl. I 371); Verordnung zur Wohnraumlenkung of 27-02-1943 (RGBl. I 127); Kontrollratsgesetz no. 18 of 8-03-1946 (KR Abl. 117); Wohnraumbewirtschaftungsgesetz of 31-03-1953 (BGBl. I 97); Bundesmietengesetz of 27-07-1955 (BGBl. I 458).

<sup>466</sup> Cf. Häublein & Lehmann-Richter, in: *Soziales Mietrecht in Europa*, 37 et seq.



But only in the sixties, when the housing market seemed to be recuperated, the legislature enacted a law to start a gradual liberalisation.<sup>467</sup> To convert the housing market into the free market economy to the exclusion that cartels could be formed, it was necessary to create incentives for private investors to invest capital in housing. On the other hand, the state had to ensure sufficient housing provision for its population.<sup>468</sup> Therefore, the regulation provided especially the abolishment of the state-controlled distribution of residential space and rent system. Another guiding idea of this reform was to amplify the protection of tenants as well. In this context, the so-called “social provision” (*Sozialklausel*, today section 574 BGB), that protects tenants in case of termination by granting a right to object, was introduced into the BGB. Additionally, the notice periods were extended. As long ago as 1951, the Law on Apartment Ownership (WEG)<sup>469</sup> was issued in order to reduce the housing shortage and to encourage investments in housing. It enables the establishment of condominiums (*Wohnungseigentum*) and states therewith an exception of the principle, that essential parts of a plot of land cannot be subject of separate rights (sections 93, 94 BGB).

Further incentives were created by the enactment of the First Housing Act (*Wohnungsbaugesetz*, WoBauG) in 1950 as well as by the Second Housing Act in 1956.<sup>470</sup> These regulations fostered private house building with the help of public funds. Dwellings constructed by such subsidies are subject to a system of rent and allocation control laid down in the Law on Protection of the function of housing with a public task (WoBindG)<sup>471</sup>. But this applies only for a certain period of time. After that period, the dwellings pass into the free private rental market.

In 1963 and 1964, a series of regulations was adopted, from which may not be deviated to the disadvantage of the tenant.<sup>472</sup> These regulations concerned in particular security of tenure as well as the right of the spouse or family members to succeed to the tenancy upon death of the tenant.

The purpose of the next reform, which took place in 1967,<sup>473</sup> was especially to establish the exclusive jurisdiction of the local court (*Amtsgericht*, AG) that lies within the circuit where the immovable property is situated. Prior to the reform of the Code of Civil Procedure (*Zivilprozessordnung*, ZPO)<sup>474</sup> in 2002,<sup>475</sup> the stages of appeal in case of tenancy litigation would already have been exhausted with the first appeal to the regional court (*Landgericht*, LG). This caused an “own Land Law” where regional courts were concerned with a large number of tenancy law cases.<sup>476</sup>

In 1970, the Law on Housing Allowance (WoGG)<sup>477</sup> was enacted. Until today, it empowers local authorities to concede a housing benefit to economically disadvantaged per-

<sup>467</sup> Gesetz über den Abbau der Wohnungszwangswirtschaft of 23-06-1960 (BGBl. I 389); cf. also Wurmnest, *German Report*, 5.

<sup>468</sup> Ibid.

<sup>469</sup> WoGG of 15-03-1951 (BGBl. I 175, 209).

<sup>470</sup> I. WoBauG of 24-04-1950 (BGBl. I 83); II. WoBauG of 27-06-1956 (BGBl. I 523).

<sup>471</sup> Gesetz zur Sicherung der Zweckbestimmung von Sozialwohnungen of 24-08-1965 (BGBl. I 954).

<sup>472</sup> I. Gesetz zur Änderung mietrechtlicher Vorschriften of 29-07-1963 (BGBl. I 505); II. Gesetz zur Änderung mietrechtlicher Vorschriften of 14-07-1964 (BGBl. I 457).

<sup>473</sup> III. Gesetz zur Änderung mietrechtlicher Vorschriften of 21-12-1967 (BGBl. I 1248).

<sup>474</sup> ZPO in its version of 05-12-2005 (BGBl. I 3202; corr. 2006, 431; 2007, 1781); an official English translation of the current Code of Civil Procedure is available at: [http://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html](http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html) (last retrieved: 23-03-2014).

<sup>475</sup> Gesetz zur Reform des Zivilprozesses of 27-07-2001 (BGBl. I 1887).

<sup>476</sup> Cf. Häublein & Lehmann-Richter, in: *Soziales Mietrecht in Europa*, 41.

<sup>477</sup> Wohngeldgesetz of 14-12-1970 (BGBl. I 1637).

sons. Housing benefit can be either granted to tenants in form of a rent allowance (*Mietzuschuss*) or to owners of dwellings that are inhabited by themselves in form of a charge subsidy (*Lastenzuschuss*). It enables tenants to gain access to residential space on the private rental market with average costs and owners to stay in their dwellings if their income is too low to bear the full rent or costs on their own.

The housing situation should be further improved through the next reform in 1971.<sup>478</sup> For example, the prohibition to divert residential space from its intended use (*Verbot der Zweckentfremdung von Wohnraum*) served as one instrument. It empowers the German federal states (*Länder*) to enact statutory instruments that fine owners for any misappropriation of housing premises.

Parallel to this, the social elements of tenancy law, i.e. the protection of tenants, were intensified by enacting the Laws on Security of Tenure<sup>479</sup> as well as the Law on Rent Control<sup>480</sup>. Since then, landlords may only terminate the tenancy if they can prove a justified interest, and terminations for the purpose to increase the rent are explicitly prohibited.

In this context, the Economic Offences Act (*Wirtschaftsstrafgesetz*, WiStG)<sup>481</sup> was reformed in so far as a regulation about the prohibition of excessive claim for rent was entered in (section 5 WiStG). Additionally, the punishment of exorbitant rents (*Mietwucher*) was also inserted into the German Criminal Code (*Strafgesetzbuch*, StGB)<sup>482</sup>, which applies if the landlord acts deliberately (section 291 (I no. 1) StGB). Both penal provisions are still valid up to the present date.

In the eighties, the Law to Increase the Supply of Rented Dwellings went into effect.<sup>483</sup> It provided regulations on the right of the landlord to limit the duration of the contract without any justification as well as on the deposit which tenants usually have to pay. Within the same decade, the Law on Non-Profit Housing (*Wohnungsgemeinnützigkeitgesetz*) was repealed.<sup>484</sup> This concerned primarily cooperatives and municipal housing associations, which enjoyed tax advantages because of this regulation

After the German reunification, the legislature enacted a Law to exonerate the Eastern German landlords from past debts (*Altschuldenhilfe*), which arose from the period of the German Democratic Republic (DDR).<sup>485</sup> Accordingly, municipal housing associations, cooperatives and private landlords are entitled to apply for these funds. It is up to the eastern *Länder* to issue provisions determining that the promoted dwelling shall be subject to a commitment related to the allocation (section 12 (II) *Altschuldenhilfe-Gesetz*). Public funds according to these regulations can be requested until the end of 2013.

The purpose of the next reform, which took place in 1993<sup>486</sup>, was essentially to limit the enormous rent increases and also to encourage investments in housing by improving the

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<sup>478</sup> MRVG of 4-11-1971 (BGBl. I 1745).

<sup>479</sup> I. Wohnraumkündigungsschutzgesetz of 25-11-1971 (BGBl. I 1839); II. Wohnraumkündigungsschutzgesetz of 18-12-1974 (BGBl. I 3603).

<sup>480</sup> Miethöhegesetz of 18-12-1974 (BGBl. I 3604), incorporated into the BGB in 2001.

<sup>481</sup> WiStG in its version of 03-06-1975 (BGBl. I 1313).

<sup>482</sup> StGB in its version of 13-11-1998 (BGBl. I 3322); an official English translation of the current German Criminal Code is available at: [http://www.gesetze-im-internet.de/englisch\\_stgb/](http://www.gesetze-im-internet.de/englisch_stgb/) (last retrieved: 23-03-2014).

<sup>483</sup> Gesetz zur Erhöhung des Angebots an Mietwohnungen of 20-12-1982 (BGBl. I 1912).

<sup>484</sup> Gesetz zur Überführung der Wohnungsgemeinnützigkeit in den allgemeinen Wohnungsmarkt of 25-07-1988 (BGBl. I 1093).

<sup>485</sup> Gesetz über Altschuldenhilfen of 23-06-1993 (BGBl. I 944) + Verordnung zum Altschuldenhilfe-Gesetz of 15-12-2000 (BGBl. I 1734).

<sup>486</sup> Viertes Mietrechtsänderungsgesetz of 21-07-1993 (BGBl. I 1257); Printed Matter of the Federal Parliament (*Bundestagsdrucksache*, BT-Drucks.) 12/3254.

tenancy law. In this context, the limit to increase the rent within a certain period (*Kapungsgrenze*) was reduced from 30% within three years to 20% within the same period. In addition, the creation of housing space in ancillary rooms of existing buildings or on open space was facilitated. Since this reform of tenancy law, tenants have furthermore a right of pre-emption in case of selling the residential premises to a third party (section 577 BGB). But this is only applicable to the extent that apartment ownership has been established or is to be established after the tenant has been permitted to use the residential space. This regulation shall protect tenants if rented residential premises are converted into apartment ownerships, with the consequence that the landlord is able to terminate the tenancy.

The last principal reform of tenancy law was in 2001.<sup>487</sup> For decades, the legislation regarding tenancy law took place outside of the BGB. By the enactment of this Tenancy Law Reform Act, most of the rules were incorporated and codified in the BGB.<sup>488</sup> Apart from consolidating the general private tenancy law, it was necessary to simplify and to adapt these provisions to changes in society, like the increasing mobility of tenants and new forms of cohabitation<sup>489</sup>, as well as to codify the case law.<sup>490</sup> The new tenancy law was again amended by the Act to Modernize the Law of Obligations (*Schuldrechtsmodernisierungsgesetz*)<sup>491</sup> in 2002. It implemented EU-Directive 1999/44/EC<sup>492</sup> on sale of consumer goods and adapted the Law of Obligations to the rules of the United Nations Convention on Contracts for the International Sale of Goods (CISG)<sup>493</sup>.

Parallel to this, the promotion of housing with a public task was reformed by shifting the focus from a general subsidy approach to a system that considers solely households in need, like single parents, the elderly or handicapped persons.<sup>494</sup> In this context, also a redraft of the law on reduction of wrong promotion in housing was enacted.<sup>495</sup> It especially contains provisions on a countervailing charge for wrong allocation (*Fehlbelegungsabgabe*) that must be paid by tenants of dwellings promoted by public funds if their income increases to the statutory income limits by more than 20%. But it is up to the *Länder* to enact provisions determining the municipalities in which such a charge may be levied. Meanwhile all *Länder*, except for four municipalities in Rhineland-Palatinate, have repealed these provisions, so that tenants can stay in the promoted dwelling for the whole tenancy period even though they are no longer entitled to live in it because of financial circumstances.

The latest draft to change the current tenancy law was published in August 2012<sup>496</sup> and came into effect in May 2013.<sup>497</sup> The purpose of this draft is essentially the energy modernization of rented residential property. The intention to change the energy rules, i.e.

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<sup>487</sup> Gesetz zur Neugliederung, Vereinfachung und Reform des Mietrechts of 19-06-2001 (BGBl. I 1149; BT-Drucks. 14/4553).

<sup>488</sup> Cf. Häublein & Lehmann-Richter, in: *Soziales Mietrecht in Europa*, 36.

<sup>489</sup> In particular the registered partnership that constitutes a new family law institute. Same-sex couples are able to sign a public register and enjoy therefore partly the same rights as married couples; Civil Partnership Act (*Lebenspartnerschaftsgesetz*) of 16-02-2001 (BGBl. I 266).

<sup>490</sup> Cf. Wurmnest, *German Report*, 6.

<sup>491</sup> Gesetz zur Modernisierung des Schuldrechts of 26-11-2001 (BGBl. I 3138).

<sup>492</sup> Directive of 25-05-1999 (OJEC L 171, 12).

<sup>493</sup> CISG of 11-04-1980 (BGBl. 1989 II 586; corr. 1990, 1699).

<sup>494</sup> WoFG of 13-09-2001 (BGBl. I 2376; BT-Drucks. 14/5538).

<sup>495</sup> Gesetz über den Abbau der Fehlsubventionierung im Wohnungswesen of 13-09-2001 (BGBl. I 2414).

<sup>496</sup> BT-Drucks. 17/10485.

<sup>497</sup> Gesetz über die energetische Modernisierung von vermietetem Wohnraum und über die vereinfachte Durchsetzung von Räumungstiteln of 11-03-2013 (BGBl. I 434).

sections 555a-555f, 559-559b BGB, is based on the energy concept of the year 2010<sup>498</sup> and was advanced in the context of the turnaround in energy policy in 2011<sup>499</sup>. From now on, tenants will have to tolerate energy efficient modernization measures without having a right to reduce the rent for three months, and landlords are able to increase the rent annually to the amount of 11% of the costs for modernization. Additionally, the capping limit of legal rent increases shall be reduced from maximum 20% within three years, as laid down in section 558 (III) BGB, to maximum 15% within the same period. However, this limit will only be valid for already existing tenancies and it is up to the *Länder*, whether they choose to implement it.<sup>500</sup> Beyond that, the draft shall also facilitate the enforcement of evictions. Landlords, particularly private landlords, shall be protected from tenants who methodical shirk their duty to pay (*Mietnomaden*).

After the elections for the German Federal Parliament, the *Bundestag*, in autumn 2013, the new governing parties, the Christian Democratic Union (CDU) and the Social Democratic Party of Germany (SPD), agreed during the coalition negotiations on a “Package for affordable Building and Housing”.<sup>501</sup> The proposed measures of this package especially concern the introduction of new rent limits. In March 2014, the Federal Minister of Justice submitted the draft law which shall enter into force in 2015.<sup>502</sup> Regarding existing tenancies, the *Land* governments shall be legitimized to determine regions with a tight rental market in which the rent may not be raised by more than 15% within four years instead of three. Furthermore, the apportionment to the tenant of costs for energy efficient modernization measures shall be reduced from 11% to 10%. On the other hand, the amount of rent in case of new tenancy contracts may not exceed 10% of the reference rent customary in the locality. Apart from that, the package provides that the brokerage fee shall in the future be borne by the landlord if he has commissioned the estate agent. Currently, landlords in populous cities often pass this fee onto the tenant for lack of a contrary regulation. Moreover, recipients of the housing allowance shall again receive a grant for heating costs, which had just been abolished in 2009. The proposed reintroduction of the reducing balance depreciation (*degressive Abschreibung*) in order to promote the construction of rental housing was however deleted from the coalition agreement.<sup>503</sup>

To conclude, it can be stated, that the protection of tenants takes at all times an important role in the national law system.<sup>504</sup>

- Human rights:
  - To what extent and in which fields was tenancy law since its origins influenced by fundamental rights enshrined in

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<sup>498</sup> BT-Drucks. 17/3049.

<sup>499</sup> Basic Points of the Federal Government on the Energy Turnaround of 6-06-2011; available at: <http://www.bmu.de/service/publikationen/downloads/details/artikel/beschluesse-des-bundeskabinetts-zur-energiewende-vom-6-juni-2011/> (last retrieved: 23-03-2014).

<sup>500</sup> To date only in: Berlin; Hamburg and several cities in Bavaria.

<sup>501</sup> Cf. Frankfurter Allgemeine Zeitung of 05-11-2013, *Vermieter sollen Makler zahlen*, available at: <http://www.faz.net/aktuell/wirtschaft/immobilien/koalitionsverhandlungen-vermieter-sollen-makler-bezahlen-12648807.html> (last retrieved: 23-03-2014).

<sup>502</sup> Cf. R. Roßmann, *Die Mietpreisbremse kommt*, in: Süddeutsche Zeitung of 20-03-2014, available at: <http://www.sueddeutsche.de/wirtschaft/gesetzentwurf-ist-fertig-die-mietpreisbremse-kommt-1.1917435> (last retrieved: 21-03-2014).

<sup>503</sup> Cf. R. Bünger, *“Das Ende des Mieterlandes Deutschland“*, Der Tagesspiegel of 29-11-2013, available at: <http://www.tagesspiegel.de/wirtschaft/immobilien/koalitionsvertrag-das-ende-des-mieterlandes-deutschland/9145096.html> (last retrieved: 10-03-2014).

<sup>504</sup> The development of the protection of tenants is elaborated in: Wolter, *Bestandschutz*, 73-219.

- the national constitution<sup>505</sup>

The fundamental rights are enshrined in the German Basic Law (*Grundgesetz*, GG)<sup>506</sup>, which constitutes the basic order of the Federal Republic of Germany.

Originally the fundamental rights were constructed as rights to be protected from and to defend oneself against the state. However it is beyond dispute that the jurisprudence has adjudicated a “third party effect” between private actors (*Drittwirkung*).<sup>507</sup> Although the fundamental rights do not bind private actors directly, they have an indirect effect by entering into the private law through general clauses.<sup>508</sup> As early as 1958, a ruling of the Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) stated that fundamental rights are “objective principles” forming a value system (*objektive Werteordnung*) that must be given effect in all areas of the legal system.<sup>509</sup> Therefore, the civil courts are also subject to the legally binding force of the fundamental rights (Art. 1 (III) GG), that is they have to observe the fundamental rights when applying tenancy law. That is why the interpretation of tenancy law is influenced by the fundamental rights.

Below, only the most important judgements and fundamental rights with regard to tenancy law will be named:

#### (1) Guarantee of private property

Especially, the guarantee of private property pursuant to Article 14 (I 1) GG has a strong influence on tenancy law and the relationship between tenant and landlord. Primarily, the landlord as the owner of the dwelling is protected by this fundamental right. But in accordance with a ruling of the BVerfG from 1993, the tenant’s right of occupancy relating to the dwelling leased by him is also considered as property within the meaning of Article 14 (I 1) GG.<sup>510</sup> The protection of tenants does not result from the social responsibility of property as laid down in Article 14 (II) GG.<sup>511</sup> Accordingly, property shall also serve the public good. This provision obliges only the German legislature to consider the interests of tenants properly in case of new regulation the tenancy law.<sup>512</sup> Since tenants enjoy protection under the constitution, they can rely on Article 14 (I) GG for approval of structural changes or other installations in order to make the use of the leased object fit for handicapped people.<sup>513</sup> Because of this jurisdiction the right to an accessible dwelling was incorporated into the BGB within the framework of the tenancy law reform in 2001 and is now laid down in section 554a BGB.<sup>514</sup> On the part of the landlord, the guarantee of property is particularly relevant in case of termination for personal use. In this context, the BVerfG ruled that the tenant’s way of life may not take precedence over the way of life of the landlord.<sup>515</sup> In addition, the landlord himself is entitled to decide how much residential space he and his relatives need.<sup>516</sup>

<sup>505</sup> Cf. to the third-party effect of fundamental rights in tenancy law: J. Reismann, *Die Drittwirkung der Grundrechte im Wohnraummietrecht*, WuM 1997, 361 et seq.

<sup>506</sup> GG of 23-05-1949 (BGBl. I 1); an official English translation of the current German Basic Law is available at: [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html) (last retrieved: 23-03-2014).

<sup>507</sup> Cf. especially for tenancy law: BVerfG, NJW 1993, 2035.

<sup>508</sup> Cf. Wurmnest, *German Report*, 8.

<sup>509</sup> *Lüth*-judgement: BVerfG, NJW 1958, 257.

<sup>510</sup> BVerfG, NJW 1993, 2035; cf. D. Joost, in: *MüKo-BGB*, Vol. 6 (Munich: C. H. Beck, 2013) s. 854, rec. 14.

<sup>511</sup> *Ibid.*

<sup>512</sup> BVerfG, NJW 1974, 1499.

<sup>513</sup> BVerfG, NJW 2000, 2658.

<sup>514</sup> BT-Drucks. 14/5663, 78.

<sup>515</sup> BVerfG, NJW-RR 1993, 1358.

<sup>516</sup> BVerfG, NZM 1999, 659.



## (2) Right to free development

Furthermore, the right to free development pursuant to Article 2 (I) GG has an impact on tenancy law. For example making music belongs to a free personality development.<sup>517</sup> Loud celebrations however are not covered by Article 2 (I) GG.<sup>518</sup> Further, keeping animals inside the dwelling is protected by this fundamental right.<sup>519</sup> Therefore, a general prohibition to keep animals of any kind is ineffective.<sup>520</sup> In general, only non-disturbing animals are allowed inside the dwelling without the permission of the landlord.<sup>521</sup> Non-disturbing animals in this sense are for example aquarium fishes as well as animals that are usually kept in a cage, like birds, dwarf rabbits, guinea pigs or hamster.<sup>522</sup> Keeping these animals thus belongs to the conventional use of the leased dwelling.<sup>523</sup> The prohibition of keeping dogs and cats in the dwelling does not however infringe Article 2 (I) GG.<sup>524</sup>

## (3) General right of personality (*Allgemeines Persönlichkeitsrecht*)

Beyond that, the general right of personality, which is not explicitly regulated but is deduced from human dignity (Article 1 (I) GG) and the right to free development (Article 2 (I) GG)<sup>525</sup>, influences tenancy law. Regarding this right, the landlord is not principally permitted to take pictures of the residential property without the consent of the tenant.<sup>526</sup> The tenant's fundamental right of personality is also infringed, when the landlord installs a video camera for surveillance of the entrance area or the lift, even if it is only a dummy.<sup>527</sup>

## (4) Right to life and physical integrity

And also the right to life and physical integrity as laid down in Article 2 (II 1) GG plays a role in tenancy law in case of the accommodation of homeless<sup>528</sup> or suicidal<sup>529</sup> persons. In accordance with the Police and Regulatory Laws of the *Länder*, public authorities are entitled to order that a tenant, who is in risk of becoming homeless, may stay in the dwelling despite a valid termination of the tenancy contract by the landlord (*Obdachloseinweisung*). Since there exists public accommodation for homeless persons, public authorities can only decree that the landlord has to tolerate a temporarily cessation of the eviction if there is no available place or if a leaving of the dwelling is not reasonable for the tenant for health reasons. If the tenant is however in risk of committing suicide, the execution of eviction can also be ceased for an indefinite period of time by accommodating him in his "previous" dwelling.

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<sup>517</sup> Cf. Reismann, WuM 2007, 361 (362).

<sup>518</sup> OLG Düsseldorf, NJW 1990, 1676.

<sup>519</sup> OLG Saarbrücken, NZM 2007, 168.

<sup>520</sup> BGH, NJW 1993, 1061 (1062).

<sup>521</sup> BGH, NJW 2008, 218 (220).

<sup>522</sup> Cf. Blank, in: *Blank/Börstinghaus* (Munich: C. H. Beck, 2008), s. 535 BGB, rec .459.

<sup>523</sup> Ibid.

<sup>524</sup> BVerfG, WuM 1981, 77.

<sup>525</sup> This fundamental right was developed by the BVerfG in 1954: BVerfG, NJW 1954, 1401.

<sup>526</sup> OLG Düsseldorf, NJW 1994, 1971.

<sup>527</sup> KG Berlin, NZM 2009, 736; AG Berlin-Lichtenberg, NZM 2008, 802.

<sup>528</sup> Cf. OVG Lüneburg, NJW 2010, 1094 (1095); W. Ewer & K. von Detten, *Ausgewählte Rechtsfragen bei der Beschlagnahme von Wohnraum zur Obdachloseinweisung*, NJW 1995, 353.

<sup>529</sup> Cf. BGH, NJW 2006, 505; BGH, NJW 2005, 508; BVerfG, NZM 2005, 657; BVerfG, NJW 1998, 295; Reismann, WuM 2007, 361 (363).



## (5) Freedom of information

Further, the freedom of information protected by Article 5 (I 1) GG has an influence on tenancy law. Regarding this fundamental right, a landlord has to tolerate the installation of a parabolic antenna by his foreign tenant even if the tenant would be able to get the same information via newspaper or internet.<sup>530</sup> But if it is possible for the tenant to gain access to television channels in his native language by using cable television, the landlord's property right (Article 14 (I) GG) outweighs the right of the tenant to inform himself without hindrance from generally accessible sources.<sup>531</sup> In that case, it is reasonable for the tenant to bear the costs for a decoder or an additional subscription.<sup>532</sup>

## (6) Protection of marriage and family

Moreover, the protection of marriage and family enshrined as a fundamental right in Article 6 (I) GG plays a role in tenancy law. Section 569a (I) BGB (old version) stated that upon the death of the tenant the spouse who maintained a joint household with him enters into the tenancy by rights. According to a judgement of the BVerfG, there are no constitutional concerns against the analogous application of section 569a (I) BGB to co-habitees.<sup>533</sup> The BGH, which is responsible for the interpretation of private law, confirmed the conception of the BVerfG by stating that this form of partnership is close to marriage.<sup>534</sup> This jurisprudence was codified within the context of the major tenancy law reform in 2001.<sup>535</sup>

## (7) Inviolability of home

Finally, the inviolability of the home as laid down in Article 13 GG is relevant to tenancy law as far as it concerns the duty of the tenant to grant the landlord access to his dwelling.<sup>536</sup> For example the tenant has to tolerate the entry of a court-appointed expert<sup>537</sup> and the landlord is allowed to gain access to the dwelling if he worries about the tenant for comprehensible reasons<sup>538</sup>.

- international instruments, in particular the ECHR<sup>539</sup>

There are only three decisions of the European Court of Human Rights (ECtHR) against Germany concerning tenancy law.<sup>540</sup> All of them are related to the right to a fair trial pursuant to Article 6 (I) of the European Convention on Human Rights (*Europäische Menschenrechtskonvention*, ECHR)<sup>541</sup>. Accordingly, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The applicants in the case *Havermann v. Germany* were two tenants who were in default of paying the rent as well as of vacating the dwelling. Their application was based on a violation of the right to a fair trial because of their doubts to find a coun-

<sup>530</sup> BVerfG, NJW 1994, 1147; BGH, NJW 2010, 436.

<sup>531</sup> BVerfG, NZM 2005, 252; BGH, NZM 2005, 335; LG Krefeld, NZM 2007, 246; LG Konstanz, NZM 2002, 341.

<sup>532</sup> Cf. also BVerfG, NZM 2013, 376; LG Cologne, WuM 2001, 235.

<sup>533</sup> BVerfG, NJW 1990, 1593.

<sup>534</sup> BGH, NJW 1993, 999.

<sup>535</sup> today section 563 (II 4) BGB.

<sup>536</sup> Cf. Reismann, WuM 2007, 361 (364).

<sup>537</sup> BVerfG, WuM 2001, 111.

<sup>538</sup> VerfGH Thuringia, NZM 2004, 416.

<sup>539</sup> Cf. C. U. Schmid & J. R. Dinse, *Towards a Common Core of Residential Tenancy Law in Europe?*, ZERP-Working Paper, 1/2013.

<sup>540</sup> Application no. 51314/10, *Havermann v. Germany* of 22-01-2013; Application no. 17019/08, *von Koester v. Germany* of 22-09-2011; Application no. 5398/03, *Rippe v. Germany* of 02-02-2006.

<sup>541</sup> ECHR of 4-11-1950 as amended by the provisions of Protocol No. 14 (CETS no. 194) as from its entry into force on 1-06-2010; German source (EMRK): announcement of 22-10-2010 (BGBl. II 1198).

sel who would represent them. Therefore, they felt prevented from making use of a new kind of remedy introduced by the Law about Legal Protection in Overlong Legal Proceedings and Criminal Investigation Proceedings<sup>542</sup>. Since, however, the general provisions for legal aid are applicable, the ECtHR rejected the application as inadmissible under Article 35 (I, IV) ECHR.

The other two decisions against Germany are only related to commercial tenancy law. In the case *von Koester v. Germany*, the applicant, a landlord who claimed payment of outstanding rent from the former tenant of his business premises, complained about the length of the proceedings. Considering the duration of proceedings of almost 18 years, the ECtHR observed that there has been a breach of Article 6 (I) ECHR.

Cause of the third application, *Rippe v. Germany*, was the rejection of an appeal without hearing (section 522 (I) ZPO). The ECtHR found that there were special features to justify the decision not to hold a public hearing. Therefore, the Court rejected the applicant's complaint as manifestly ill-founded in accordance with Article 35 (III a, IV) ECHR.

Since there are only these three decisions of the ECtHR concerning Article 6 (I) ECHR, further relevant Articles of the ECHR with regard to residential tenancy law shall be specified below:

#### (1) Protection of property

First of all, the protection of property as laid down in Article 1 of Protocol 1 ECHR has to be mentioned. Accordingly, every person is entitled to the peaceful enjoyment of his possessions and no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

#### (2) Right to respect for private and family life

Furthermore, the right to respect for private and family life as enshrined in Article 8 (I) ECHR has an impact on tenancy law in so far as it includes the protection of everyone's home.

#### (3) Right to receive information

Also, deduced from the right to receive information regardless of frontiers pursuant to Article 10 (I) ECHR, the ECtHR has recognized the right of a foreign tenant to install a parabolic antenna to gain access to television and radio channels from his home country, as well as the BVerfG under Article 5 (I) GG.<sup>543</sup> Nevertheless, the BGH has held that the freedom of information does not take precedence over the landlord's property right in general even considering Article 10 (I) ECHR and Article 56 (I) of the Treaty on the Functioning of the European Union (TFEU)<sup>544 545</sup>.

#### (4) Non-discrimination right

Finally, the non-discrimination rights of tenants as part of the general prohibition of discrimination laid down in Article 14 ECHR take on an important role under the Convention,

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<sup>542</sup> Gesetz über den Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren of 24-11-2011 (BGBl. I 2302).

<sup>543</sup> Cf. C. U. Schmid & J. R. Dinse, 11.

<sup>544</sup> TFEU of 9-05-2008 (OJEC C 115, 47).

<sup>545</sup> BGH, NZM 2006, 98; cf. also: D. Dörr, *Das Recht auf eine Satellitenempfangsanlage unter Berücksichtigung der EU-Mitteilung zum freien Dienstleistungs- und Warenverkehr*, WuM 2002, 347-351; Communication of the Commission (COM 2001, 351 final).

especially in conjunction with the right to respect for private and family life (Article 8 (I) ECHR) regarding discrimination based on sexual orientation.<sup>546</sup>

Apart from the ECHR, the revision of the European Social Charter from 1996 has to be mentioned as an international instrument, since it includes in its Article 31 a right to housing. Although Germany has signed and ratified the European Social Charter of 1961<sup>547</sup>, the ratification of the revised Charter is still expected.

- Is there a constitutional (or similar) right to housing (*droit au logement*)?<sup>548</sup>

Article 155 of the Weimar Constitution from 1919 stated a right of housing for every German citizen. Especially soldiers, war veterans and families with many children were taken into account. Apart from that, a constitutional or basic right of housing does not exist anymore. In 1994, a draft law of the political parties Party of Democratic Socialism (PDS) and Linke Liste,<sup>549</sup> which provided the introduction of a constitutional right of housing, failed.<sup>550</sup> Indeed, nine federal state (*Land*) constitutions contain a right to housing space or a duty of the *Land* to create enough. But this right is not valid because of the principle that state law pre-empts federal state law according to Article 31 GG. However, Article 142 GG states an exception in so far as the provisions remain in force if they guarantee fundamental rights in conformity with the GG. This exception only applies for the *Land* constitutions which provide a real right to housing space<sup>551</sup> and not for those which formulate this right as an objective of the Land (*Staatsziel*) and not as a subjective right, i. e. that a person can claim.<sup>552</sup> Three Land constitutions, namely Bavaria, Berlin and Bremen, guarantee such a subjective right in contrast to the Basic Law.<sup>553</sup> However, only in Bavaria and Berlin it is possible to lodge a constitutional complaint to the *Land* Constitutional Court (*Landesverfassungsgericht*, LVerfG) in case of infringement of a fundamental right.<sup>554</sup> Despite the wording of these provisions and their systematic position among other fundamental rights, the Constitutional Courts of Bavaria and Berlin have held that the provisions do not entitle to a claim to appropriate housing space, but rather oblige the *Land* to invest in housing construction.<sup>555</sup> Therefore, these rights cannot be considered as real fundamental (subjective) rights.

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<sup>546</sup> Ibid, 11 et seq..

<sup>547</sup> BGBl. II 1964, 1262.

<sup>548</sup> Cf. P. Derleder, *Die Notwendigkeit eines Grundrechts auf Wohnen*, WuM 2009, 615-623.

<sup>549</sup> BT-Drucks. 12/6570.

<sup>550</sup> BT-Drucks. 12/8165.

<sup>551</sup> Right to residential space: Bavaria (Art. 106 (I) BayVerf.), Berlin (Art. 28 (I) BlnVerf.), Bremen (Art. 14 (I) BremVerf.).

<sup>552</sup> Objective of the federal state: Brandenburg (Art. 47 (I) BranVerf.), Lower Saxony (Art. 6a NdsVerf.), Rhineland-Palatinate (Art. 63 RhpVVerf.), Saxony (Art. 7 (I) SaVerf.), Saxony-Anhalt (Art. 40 LSA Verf.), Thuringia (Art. 15, 16 ThürVerf.).

<sup>553</sup> As already outlined above in 3.1. 'Constitutional framework of housing'.

<sup>554</sup> Bavaria (Art. 66, 120 BayVerf.); Berlin (Art. 84 (II) no. 5 BlnVerf.).

<sup>555</sup> BayVerfGH 15, 49 (56); 42, 28 (32); 58, 94 (104); BerlVerfGH, NVwZ-RR 1997, 202; cf. Derleder, WuM 2009, 615 (616).

## 6. Tenancy regulation and its context

### 6.1. General introduction

- As an introduction to your system, give a short overview over core principles and rules governing the field (basic requirements for conclusion, conditions for termination of contracts by the landlord, for rent increase etc.; social orientation of tenancy law in force; habitability (i.e. the dwellings legally capable of being leased))

#### (1) Requirements for conclusion

In order to form a tenancy contract, two reciprocal, corresponding declarations of intent (*Willenserklärungen*) are required (offer and acceptance) in accordance with the provisions of the General Part of the BGB. The presence of the landlord and the prospective tenant at the same time is not necessary. It is also possible to conclude the contract through an agent, by letter or even by email, but in the two latter cases the declaration of acceptance has to be received by the offeror within a few days and without any important expansions, restrictions or other alternations (section 150 BGB). Furthermore, the tenancy agreement does not have to be in writing to be valid. However, if the tenancy shall be temporary for a period longer than one year, the contract has to be laid down in written form in order to not apply for an indefinite period of time (section 550 BGB).

Beyond that, a tenancy demands the capacity to contract of both parties, since a declaration of intent of a person incapable of contracting is void (section 105 (I) BGB). Under German law, a person is capable of contracting if he has reached the age of eighteen and is not in a state of pathological mental disturbance (sections 2, 104, 106 BGB). A minor, who has reached the age of seven, has limited capacity to contract indeed (section 106 BGB). Since the conclusion of a tenancy contract does not cause only a legal benefit (*nicht lediglich rechtlich vorteilhaft*) regarding its associated obligations, the minor needs the consent of his legal representative for his declaration of intent (section 107 BGB). If the minor enters into the tenancy without the consent, the effectiveness of the contract is subject to the ratification of his legal representative (section 108 (I) BGB). Persons under custodianship (*Betreuung*) are in general capable of entering into contracts,<sup>556</sup> but the custodianship court can order that the person under custodianship requires the consent of the custodian for a declaration of intent, if it necessary to prevent a substantial danger for this person or his property (section 1903 (I) BGB).

A tenancy contract must include and describe the parties, the rental object, the contract duration, the amount of rent and the purpose, which is especially necessary in case of a mixed-use tenancy. Regarding the amount of rent, the contract must distinguish between the net rent (*Netto-/Kaltmiete*) as consideration for the use of the dwelling, the utilities (*Nebenkosten*) which are included in the gross rent (*Brutto-/Warmmiete*) and those for which the tenant himself has to conclude a contract of supply. Further, the tenancy agreement may not derogate from mandatory tenancy law regulations, e.g. section 543 BGB.

Additionally, the tenancy must not violate provisions which entail voidness such as violation of statutory prohibitions according to section 134 BGB and legal transactions contrary to public policy as set out in section 138 BGB. Primarily, rents that do not conform to legal price regulations come within these provisions. In particular, the criminal offence of exorbitant rents as set out in section 291 (I no. 1) StGB as well as the regulatory violation

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<sup>556</sup> Cf. U. Diederichsen, in: *Palandt*, s. 1903 BGB, rec. 19.

pursuant to section 5 WiStG have to be borne in mind. The violation of building regulations does not however affect the effectiveness of the tenancy.

In case of housing with a public task, i.e. that the construction of the dwelling was at least partly financed through public funds, the tenant has to be in possession of a qualification certificate for living in such a dwelling (*Wohnberechtigungsschein*) as laid down in sections 27 (I 1) WoFG and 4 (II 1) WoBindG. This certificate is issued by local authorities to tenants who belong to a benefited group of people because of their low income or other financial circumstances (sections 27 (III 1), 9 (II) WoFG).

Furthermore, it is generally prohibited to divert residential space from its intended use. This prohibition is laid down in section 27 (VII) WoFG in case of housing with a public task and for private residential space it is regulated in Article 6 section 1 (I 1) of the Law on the Improvement of Tenancy Law (*Mietrechtsverbesserungsgesetz*, MRVG)<sup>557</sup> in conjunction with the statutory instruments of the *Länder*.<sup>558</sup>

(2) Conditions for termination of contracts by the landlord, sections 542, 543, 569, 573, 575a BGB

The German system of termination distinguishes between the ordinary notice of termination (573 BGB), the termination for cause without notice (sections 543, 569 BGB) and the special rights of termination (*Sonderkündigungsrechte*) as laid down for example in sections 544 (1), 563 (IV), 563a (II), 564 BGB or section 57a of the Act on Compulsory Auction of Immoveable Property (*Zwangsversteigerungsgesetz*, ZVG)<sup>559</sup>. The provisions on the termination of tenancies are mandatory for the landlord. As distinguished from the tenant, the landlord must always prove a reason for the termination. Otherwise the termination would be unlawful.

However, certain tenancy contracts are exempted from this security of tenure. According to section 549 (II, III) BGB, the provisions on notice protection do not apply to dwellings that are rented only for temporary use (No. 1) or that are part of the landlord's own home and have been largely equipped with furniture by the landlord himself, except in case that it has been let for the permanent use of his family (No. 2) or that legal persons under public law or recognised private welfare work organisations have rented to permit persons who are in urgent need of accommodation, use of the residential space (No. 3). Beyond that, the notice protection rules are not applicable to residential space in a student hostel or in a hostel for young people.

The ordinary notice of termination is only applicable in cases where the tenancy was entered into for an indefinite period of time (section 542 (I) BGB). It requires that the landlord has a justified interest in the termination of the tenancy agreement. The notice of termination for the purpose of increasing the rent is explicitly excluded (section 573 (I 2) BGB). A legitimate interest on the part of the landlord is expendable if the rented dwelling is part of a building which has less than two dwellings and is inhabited by the landlord himself (section 573a BGB) or if the termination concerns only side rooms that are not intended as residential (section 573b BGB). The landlord is also not required to prove a justified interest in case of tenancies that are exempted from the notice protection rules

<sup>557</sup> MRVG of 4-11-1971 (BGBl. I 1745).

<sup>558</sup> Valid regulations exist in Hamburg - HmbWoSchG of 8-03-1982 (HmbGVBl. 47) and Munich - WohnraumzweckentfremdungS of 12-12-2013 (MüABl. 550); Berlin has enacted a similar regulation in November 2013 which is however not published yet; cf. M. Vetter, *Zweckentfremdungsgesetz ist durch*, Immobilienzeitung of 28-11-2013, available at: <http://www.immobiliien-zeitung.de/124391/zweckentfremdungsgesetz-ist-durch> (last retrieved: 07-03-2014).

<sup>559</sup> ZVG in its version of 20-05-1898 (RGBl. 713).

(section 549 (II, III) BGB). The ordinary notice of termination is subject to a period of notice of three months. It must be given at the latest on the third working day of a calendar month to the end of the second month thereafter (section 573c (I) BGB). The notice period is only extended for the landlord, by three months in each case, five and eight years after the tenant is permitted to use the residential space.<sup>560</sup> For tenancies on dwellings where the landlord lives in the same building it can be extended up to twelve months (section 573a (I 2) BGB).

If the landlord wants however to terminate the tenancy for cause without notice, he needs a compelling reason, which is normally a fundamental breach of contract by the tenant. Then, the notice of termination is only permitted after an unheeded warning notice (*Abmahnung*), unless it does not show an obvious chance of succeeding (section 543 (III) BGB). This kind of termination is applicable to unlimited tenancies as well as to temporary tenancies, which usually end per lapse of time unless they are extended (section 542 (II) BGB). The landlord may give notice only within a reasonable period after obtaining knowledge of the reason for termination (section 314 (III) BGB). It cannot be based on an event that is dated back to more than a half year.<sup>561</sup> The extraordinary termination is not subject to a period of notice. Therefore, the tenancy ends with immediate effect, but the tenant has a time period of one<sup>562</sup> to up to two weeks<sup>563</sup> to vacate the dwelling.

Beyond that, there are also special rights of termination, which are only given in certain cases prescribed by law, e.g. in case of an intended energy-saving measure (section 555e (I) BGB), if the landlord increases the rent according to sections 558, 559 BGB, if the tenancy is continued with the heir of the tenant (section 564 BGB), with the special heirs at law (*Sonderrechtsnachfolger*) (section 563 (IV) BGB) or with joint tenants (section 563a (II) BGB), at the end of the usufruct (section 1056 (II 1) BGB), if the tenancy agreement is signed for a period of more than thirty years and thirty years have already passed (section 544 (1) BGB), or if the housing premises was sold in a compulsory auction (*Zwangsversteigerung*) (section 57a ZVG). This kind of termination is subject to the statutory notice period of three months (sections 573d (II), 575a (III) BGB).

The notice of termination must always be made in written form and should contain the reason for giving notice (section 569 (IV) BGB) as well as a reference to the possibility of an objection according to section 574 to 574b BGB (section 568 BGB). Beyond the possibility to terminate the tenancy, it is also admissible for the landlord to conclude a termination agreement with the tenant.

### (3) Conditions for rent increase, sections 557 et seq. BGB

There are two main forms of rent increases: the negotiated rent increase (sections 557-557b BGB) and the increase by law (sections 558-560 BGB). A negotiated increase in rent may be agreed by the parties at any time during the tenancy period (section 557 (I) BGB). However, if there already is a clause in the tenancy contract providing for future changes in the amount of rent, such a rent increase may be only agreed as stepped rent under section 557a BGB (*Staffelmiete*) or as indexed rent under section 557b BGB (*Indexmiete*) (section 557 (II) BGB). A stepped rent is an agreement by which the rent is fixed in varying amounts for specific periods of time. An indexed rent is however an agreement by which the rent is determined by means of the price index for the cost of liv-

<sup>560</sup> Until 1-09-2001, the notice period was also extended for a termination on part of the tenant (s. 565 (II) BGB o.v.).

<sup>561</sup> OLG Munich, NJW-RR 2002, 631.

<sup>562</sup> LG Munich II, WM 1989, 181.

<sup>563</sup> LG Hannover, NJW-RR 1992, 659.



ing of all private households in Germany. In both cases, the new amount of rent must remain unchanged for at least one year and the landlord has to inform the tenant about the increase in text form pursuant to section 126b BGB. Therefore, the landlord can either submit his demand in writing, including his signature, by post or fax or via email without any specific electronic signature.<sup>564</sup>

Apart from this forms of consensual rent increases, unilateral increases are only permitted under the provisions of sections 558 to 560 BGB, provided that an increase is not excluded by agreement or the exclusion emerges from the circumstances (section 557 (III) BGB). The rules on unilateral rent increases serve the landlord as a compensation for the prohibition to terminate the tenancy for the purpose of increasing the rent (section 573 (I 2) BGB).<sup>565</sup> First, the landlord can require the tenant to accept an increase in rent up to the reference rent customary in the locality (*ortsübliche Vergleichsmiete*) if, at the time when the increase is to occur, the rent has remained unchanged for fifteen months (section 558 (I) BGB). In that case, the rent may not be raised within three years by more than 20% or even 15% in specific regions determined by the *Land* government (section 558 (III) BGB). The landlord has to declare and to justify his demand of rent increase to the tenant in text form (section 558a (I) BGB). Provided the tenant approves within two months, he then owes the increased rent from the beginning of the third calendar month after receipt of the demand for an increase (section 558b BGB). Otherwise, the landlord may sue for grant of approval within three additional months.

Second, the landlord may increase the annual rent by 11% of the modernization costs he invested to construction measures that improve the general living conditions (section 559 BGB). The demand is effective only if it is declared to the tenant in text form and provides the calculation of the increase based on the incurred costs (section 559b (I) BGB). Then, the tenant owes the increased rent from the beginning of the third month after receipt of declaration (section 559b (II) BGB). The period is extended by six months if the landlord has failed to notify the tenant of the expected increase in rent or if the *de facto* rent increase is more than 10% greater than the increase notified.

If the landlord asserts a right to a rent increase under sections 558, 559 BGB, the tenant has a special right of termination (section 561(I) BGB). After receipt of the declaration of the landlord, the tenant has a period of two months to give notice. Then, the tenancy will be terminated to the end of the second month thereafter.

Third, the landlord is entitled to apportion increases in operating costs (*Betriebskosten*) proportionately to the tenant, provided that the parties agreed on a lump sum charge for operating costs and that an apportionment is required by the tenancy contract (section 560 BGB). Such an increase in rent is effective only if it is declared to the tenant in text form and referred to the reason for the apportionment. Then, the tenant has to pay the costs apportioned to him from the beginning of the third month after the declaration is made. To the extent that operating costs have risen retroactively, the rent increase has also a retroactive effect from the date when the costs rose.

In general, the landlord must ensure, that the new amount of rent due to any kind of a rent increase does not exceed the limits of the provisions on the prohibition of excessive rents laid down in sections 5 WiStG, 291 (I no. 1) StGB.

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<sup>564</sup> Cf. H. Heinrichs, in: *Palandt*, s. 126b BGB, rec. 3 et seq..

<sup>565</sup> Cf. U. Börstinghaus, in: *Schmidt-Futterer* (Munich: C. H. Beck, 2011) bef. ss. 557-557b BGB, rec. 13.

#### (4) Social orientation of tenancy law in force

Most of the tenancy rules protecting tenants are mandatory for the landlord since the last principal reform in 2001, which means that a deviating agreement to the disadvantage of the tenant is ineffective.<sup>566</sup> In particular, the landlord has only limited rights to terminate the tenancy and to increase the rent. Beyond that, there exists a special security of tenure in form of the right to object to the notice of termination (*Sozialklausel*, section 574 BGB). If termination of the tenancy would place in an unjustifiable hardship on the tenant, his family or another member of his household, he may demand continuation of the tenancy as long as it is appropriate if all circumstances are taken into consideration (section 574a BGB). The social orientation of tenancy law is also evidenced by some special rules in case of a compulsory enforcement. Pursuant to sections 721, 794a ZPO, the court may determine a period of time up to one year in which the tenant has to vacate the dwelling and section 765a ZPO provides furthermore that the court may also reserve, prohibit or temporarily stay the measure of compulsory enforcement if it would entail an immoral hardship for the tenant.

#### (5) Habitability

Under German law a dwelling is usually defined as the entirety of single or connected rooms in residential or other buildings, which are externally closed, intended for residential purposes and enabling the running of an own household.<sup>567</sup> General provisions on the habitability of a dwelling are laid down in the Building Regulations of the respective *Land* (*Landesbauordnung*). Accordingly, a dwelling must have at least one habitable room, one toilet, one bathtub or shower and a kitchen or a kitchenette to be habitable.

Apart from that, there exist specific regulations in two *Länder*, Berlin and Hesse, defining the habitability of dwellings in more detail (*Wohnungsaufsichtsgesetze*).<sup>568</sup> The government of North-Rhine Westphalia has recently submitted such a draft law which is still in the legislative procedure.<sup>569</sup> These regulations specify defects which affect habitation so much that public authorities may declare the dwelling to be uninhabitable, provided the defects cannot be remedied. Uninhabitable dwellings may no longer be surrendered for residential purposes. Examples for such defects are the absence of appliances for cooking, heating and water supply, inadequate supply of daylight and air as well as permanent moisture and mildew infestation regarding walls, ceilings and floors. Furthermore these regulations require that a dwelling must have a living area of at least nine square metres for every person and six square metres for every child less than six years of age in order to be inhabitable regarding its occupation.

- To what extent is current tenancy law state law or infra-national law (if legislative jurisdiction is divided: what is the allocation of competencies and for which subject matters)?

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<sup>566</sup> E.g. ss. 536 IV, 536 d, 547 II, 551 IV, 552 II, 553 III, 554a III, 555, 555a IV, 555c III, 555d VII, 555e III, 556 IV, 556a III, 556b II 2, 557 IV, 557a IV, 557b IV, 558 VI, 558a V, 558b IV, 559 III, 559 a V, 559b III, 560 VI, 561 II, 563 V, 563a III, 565 III, 566c 3, 569 V, 571 III, 572, 573 IV, 573a IV, 573b V, 573c IV, 573d III, 574 IV, 574a III, 574b III, 574c III, 575 IV, 575a IV, 576 II, 576a III, 576b II, 577a III BGB.

<sup>567</sup> Federal Finance Court (*Bundesfinanzhof*, BFH), NJW 1985, 1184; cf. also K. Dol & M. Haffner, *Housing Statistics in the European Union* (Delft: 2010), available at: [http://www.bmwfw.gv.at/Wirtschaftspolitik/Wohnungspolitik/Documents/housing\\_statistics\\_in\\_the\\_european\\_union\\_2010.pdf](http://www.bmwfw.gv.at/Wirtschaftspolitik/Wohnungspolitik/Documents/housing_statistics_in_the_european_union_2010.pdf), 122 (last retrieved: 10-03-2014).

<sup>568</sup> Valid regulations exist only in Berlin - WoAufG of 3-04-1990 (GVBl. 1082); Hesse - HWoAufG of 4-09-1974 (GVBl. I 395).

<sup>569</sup> North-Rhine Westphalia - Draft Law of 15-11-2013 (Drucks. 16/4379).

As laid down in Article 30, 70 (I) GG, the *Länder* are generally responsible for the legislation in Germany. The legislative competence for tenancy law as a part of the civil law lies however with the Federal Government (*Bundesregierung*) pursuant to Article 72 (I), 74 (I no. 1) GG. The German federal parliament has made use of its competence in the form of title 5, division 8 of the second book “Law of Obligation” of the German Civil Code.

In contrast, the *Länder* are responsible for housing law, including housing with a public task. This competence was conferred to the *Länder* in the context of the reform of federalism in 2006.<sup>570</sup> As long as they do not make use of it<sup>571</sup> the federal law still takes effect (Article 125a (I) GG). However, the competence for the law on rent subsidies still remains with the federation (*Bund*) (Article 74 (I no. 18) GG). Furthermore, the *Länder* are legitimated to regulate by statutory instrument that residential space can be let for purposes other than housing only by way of an exception (Article 6 section 1 (I 1) MRVG).<sup>572</sup> The prohibition to divert residential space from its intended use in case of housing with a public task is however regulated uniformly in section 27 (VII) WoFG. Beyond that, the eastern *Länder* are entitled to regulate by law that landlords, who were exonerated from past debts by the help of public funds, are bound regarding the allocation of their dwellings (section 12 (II) Altschuldenhilfe-Gesetz).<sup>573</sup>

In summary, it can be said that the allocation of the competencies is generally strict. Whilst the general tenancy law is state law, the housing law and most of the special statutes are infra-national law, especially since the reform of federalism.

- Is the position of the tenant also considered as a real property right (and therefore also governed by property law) or (only) as a personal (obligatory) right?

Whilst a person entitled to a right of residence or usufruct enjoys protection under property law,<sup>574</sup> the position of the “normal” tenant is principally considered as a personal, obligatory right. Since the German Civil Code acknowledges tenants as possessors, their position is protected by two important regulations. First, section 858 BGB protects tenants in case of unlawful interference with possession (*verbotene Eigenmacht*). Second, section 823 (I) BGB provides that the tenant recovers compensation for damages if his position – which is regarded as another right in this sense<sup>575</sup> – becomes unlawfully injured. Although these protection rights do not change the obligatory right into a real property right, the position of a tenant is very close to it.<sup>576</sup>

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<sup>570</sup> Gesetz zur Änderung des Grundgesetzes of 28-08-2006 (BGBl. I 2034); Art. 6-9 of the Föderalismusreform-begleitgesetz of 5-09-2006 (BGBl. I 2098, 2100 et seq.).

<sup>571</sup> Only the following federal states have made use of their new competence up to the present date: Baden-Württemberg - LWoFG of 11-12-2007 (GBl. 581); Bavaria - BayWoFG of 10-04-2007 (BayGVBl. 260) + DVWoR of 8-05-2007 (BayGVBl. 326) + BayWoBindG of 23-07-2007 (GVBl. 562); Berlin - WoG Bln of 1-07-2011 (GVBl. 319); Bremen - BremWoBindG of 18-11-2008 (BremGBl. 392); Hamburg - HmbWoFG of 19-02-2008 (HmbGVBl. 74) + HmbWoBindG of 19-02-2008 (HmbGVBl. 74); Hesse - HwoBindG of 13-12-2012 (GVBl. 608); Lower Saxony - NWoFG of 29-10-2009 (GVBl. 403); North-Rhine Westphalia - WFNG NRW of 8-12-2009 (GV. NRW. 772); Schleswig-Holstein - SHWoFG of 25-04-2009 (GVBl. 194); Thuringia - ThürWoFG of 31-01-2013 (GVBl. 1).

<sup>572</sup> Valid regulations exist in Hamburg - HmbWoSchG of 8-03-1982 (HmbGVBl. 47) and Munich - WohnraumzweckentfremdungsS of 12-12-2013 (MüABl. 550).

<sup>573</sup> Brandenburg - BelBindG of 26-10-1995 (GVBl. I 256); Berlin - BelBindG of 10-10-1995 (GVBl. 638); Mecklenburg-Western Pomerania - BelBindG MV of 18-12-1995 (GVBl. 661); Saxony - SächsBelG of 14-12-1995 (GVBl. 396); Saxony-Anhalt - BelBindG repealed by law of 16-07-2003 (GVBl. 158); Thuringia - BelBindG invalid since 31-12-2003. All the other regulations apply until the 31-12-2013, since the regulation on *Altschuldenhilfe* expires then.

<sup>574</sup> As outlined above in 4.2. ‘Regulatory types of tenures without a public task’.

<sup>575</sup> RGZ 59, 326 (328).

<sup>576</sup> Cf. Wurmnest, *German Report*, 11.

As already mentioned above, the tenants right to possess the object leased by him is protected by the property guarantee of Article 14 (I) GG. Beyond that, there is one provision which suggests that the position of tenants could also be considered as a kind of a real property right. This “exception” of the obligatory structuring contained in section 566 BGB orders that the acquirer of leased residential space takes the place of the landlord in the rights and duties arising from the tenancy agreement and enters into it with the previous tenant.

All the previous explanations require that the tenant is already in possession of the leased object. As long as the tenancy object is not handed over, the tenant has only an obligatory right to claim possession according to section 535 (I) BGB.

- To what extent is the legislation divided up into general private law and special statutes? To what extent are these rules mandatory and dispositive? Does the relationship between general and special rules work properly so as to create legal certainty?

The legislation concerning private housing is almost exclusively specified in the general private law, namely the BGB. Only ancillary laws, mainly relating to the calculation of costs for utilities, like the Operating Costs Order (BetrKV) and the Regulation on the Calculation of Heating Costs (HeizkostenVO), as well as the Regulation on Housing Agency (WoVermittG) and the Law on Apartment Ownership (WEG) are set out in special statutes.

The legislation regarding housing with a public task is however solely specified in special statutes, in particular public regulations, like the Law on State Funding of Housing and Housing Construction (WoFG) and the corresponding laws of the *Länder* as well as the Regulation on Habitable Surface (WoFIV), which are applicable to housing promotion measures approved after 31 December 2001 (section 46 (I) WoFG). Former promotion measures are however still subject to the Second Housing Act (II. WoBauG), the Law on Commitments regarding Rent Increases and Occupancy (WoBindG), the Law on Rent Calculation (NMV) and the II. Regulation on Housing Costs (II. BV) (sections 48, 50 WoFG).

Finally, the Law on Housing Allowance (WoGG), which is equally applicable to private housing and housing with a public task, is laid down in a special statute.

As already mentioned above, the protection of tenants takes on an important role in the national civil law. Based on this great importance, the tenancy rules of the general private law are predominantly mandatory since the last principal reform in 2001, i.e. a deviating agreement to the disadvantage of the tenant is ineffective.<sup>577</sup> Mandatory provisions are especially the rule on rent reduction for material and legal defects (section 536 BGB), the rules on rent increases (sections 558 et seq. BGB) as well as the termination rules (sections 573 et seq. BGB). To this extent the principle of freedom of contract is restricted.<sup>578</sup> But there are special kinds of tenancy contracts which are exempted at least from the mandatory rules on rent increases, security of tenure and limitation of contract duration: tenancies only for temporary use; tenancies on furnished residential space; tenancies with a legal person under public law or a recognized private welfare work organisation; tenancies on residential space in a student hostel or in a hostel for young people (section 549 (II, III) BGB). In all the mentioned cases, the landlord is therefore entitled to deviate from the statutory provisions. With regard to housing with a public task, sections 4 (II)

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<sup>577</sup> As already outlined above in 6.1. ‘Social orientation of tenancy law in force’.

<sup>578</sup> Cf. H.-R. Horst, *Praxis des Mietrechts* (Munich: C. H. Beck, 2009), rec. 18.

WoBindG and 27 (I) WoFG, that regulate the permission to use promoted residential space, are for instance mandatory.

The interaction of general private law and special statutes concerning the private rental market as well as housing with a public task works well. For instance, courts and literature even use the II. BV, which is actually only applicable to housing with a public task, in order to define the terms “minor maintenance works” (*kleine Instandhaltungsarbeiten*) and “cosmetic repairs” (*Schönheitsreparaturen*), also with regard to tenancies on the private rental market (section 28 (III 2, IV 3) II. BV).<sup>579</sup>

- What is the court structure in tenancy law? Is there a special jurisdiction or is the ordinary one competent? What are the possibilities of appeal?

#### (1) Jurisdiction

The competency for litigation regarding private tenancy law lies with the ordinary jurisdiction, i.e. it is enforced in civil courts. But for the competency within the civil jurisdiction, it is necessary to distinguish residential from commercial tenancies. For conflicts arising out of residential tenancies the local court is competent, independent of the amount in dispute (section 1 ZPO and section 23 (no 2a) of the Courts Constitution Act (*Gerichtsverfassungsgesetz*, GVG)<sup>580</sup>). A residential tenancy exists if the rooms are leased for habitation, which means that only the agreement is essential in determining whether or not the tenancy is residential.<sup>581</sup> In contrast, the competency for commercial tenancies depends on the amount in dispute. If it is less than EUR 5,000, the local court is competent, if it is higher, the regional court is responsible for the case (sections 1 ZPO, 23 Nr. 1, 71 GVG). The place of jurisdiction for tenancy conflicts is where the immovable property is situated (exclusive jurisdiction, section 29a (I) ZPO). This does not apply to residential space of the type provided for by section 549 (II no. 1-3) BGB). In that case, the landlord is allowed to select among the general venue of the place of residence (section 13 ZPO) and the special venue of the place of performance (section 29 (I) ZPO) (section 35 ZPO).

On the other hand, parties to litigation concerning public tenancy law, e.g. housing allowance and subsidies, may have recourse to the administrative courts (Art. 19 IV GG, section 40 I of the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*, VwGO)<sup>582</sup>.

#### (2) Court structure

In some *Länder*<sup>583</sup> it is compulsory to undertake a pre-trial conciliation in case of pecuniary disputes with an amount in dispute of less than EUR 750, which applies often to tenancy law related conflicts. After the implementation of this conciliation procedure, provided it is necessary, the case can be submitted to the ordinary court. The court of first instance, in case of residential tenancies, is always the local court (section 23 (no. 2a) GVG). Legal representation is not compulsory for hearings before this court. An appeal against the judgement of the first instance is admissible if the value of the matter ex-

<sup>579</sup> BGH, NJW 1989, 2247; NJW 2009, 1408.

<sup>580</sup> GVG in its version of 09-05-1975 (BGBl. I 1077); an official English translation of the current Courts Constitution Act is available at: [http://www.gesetze-im-internet.de/englisch\\_gvg/](http://www.gesetze-im-internet.de/englisch_gvg/) (last retrieved: 23-03-2014).

<sup>581</sup> Cf. Blank, in: *Blank/Börstinghaus*, s. 535 BGB, rec. 13 et seq.

<sup>582</sup> VwGO in its version of 19-03-1991 (BGBl. I 686).

<sup>583</sup> To the present date, the opening clause has only been used in the following federal states: Baden-Württemberg (GVBl. 2000, 470); Bavaria (GVBl. 2000, 268); Brandenburg (GVBl. 2000, 134, 182, 158); Hesse (GVBl. I 2001, 98); North Rhine-Westphalia (GVBl. 2000, 476); Saarland (Abl. 2001, 532); Saxony-Anhalt (GVBl. 2001, 214); Schleswig-Holstein (GVBl. 2001, 361).

ceeds EUR 600 or if the local court permits an appeal because of the fundamental importance of the matter in developing the law or securing uniform jurisprudence (section 511 ZPO).

The regional court is the court of second instance (section 72 (I 1) GVG). It checks the judgement of the local court for infringements as well as for the accuracy and completeness of its findings (sections 513 (I), 529 (I) ZPO). An appeal against the second judgement is further possible if the regional court admits or the Federal Court of Justice (*Bundesgerichtshof*, BGH) grants such an appeal (section 543 ZPO). Both courts have to give permission for the same reasons that apply for an appeal against the first judgement. The competency for this appeal lies with the BGH (section 133 GVG). The BGH reviews the judgement solely for infringements or questions of law based on the conception that this appeal shall be an instrument to develop the law and to protect legal uniformity (section 545 (I) ZPO).<sup>584</sup> Finally, the case can also be brought from the court of first instance directly to the BGH in form of a leap-frog appeal (section 566 ZPO) (*Sprungrevision*). Once again, this requires that the case is either of fundamental meaning or contributes to the development of the law or to the protection of a uniform jurisprudence.

### (3) Possibilities of appeal

As already mentioned, the possibilities to appeal are:

- appeal against the judgements of the first instance to the regional court, sections 511 et seq. ZPO, 72 (I 1) GVG
- appeal against the judgements of the second instance to the BGH, sections 542 et seq. ZPO, 133 GVG
- leap-frog appeal against the judgements of the first instance to the BGH, sections 566 ZPO, 133 GVG
- Are there regulatory law requirements influencing tenancy contracts?
  - E.g. a duty to register contracts; personal registration of tenants in Eastern European states (left over of soviet system)

The German law does not require that tenancy contracts have to be registered in the land register. But tenants are obligated to inform the local residents' registration office (*Einwohnermeldeamt*) about their new residence (section 11 (I) of the Registration Framework Law (*Melderechtsrahmengesetz*))<sup>585</sup>. Otherwise, they have to pay a fine. The period in which the registration must be done depends on the Registration Law (*Meldengesetz*) of the respective *Land*. It ranges from promptly or within one week to a maximum of within two weeks after the date of moving in.<sup>586</sup> Since the reform of federalism in 2006, the *Bund* is responsible for the registration (Article 73 (I no. 3) GG). If the current draft of a national registration law comes into effect, the period will be uniformly fixed at two weeks.<sup>587</sup> Furthermore, the tenant has to define one address as his primary residence in case of more possible residences, e.g. a student, who moves from his parental home to the place of his studies. According to section 12 (II) of the registration framework law, the primary residence is the one mainly used by the inhabitant. The definition is crucial for

<sup>584</sup> Cf. Horst, *Praxis des Mietrechts*, rec. 2306.

<sup>585</sup> *Melderechtsrahmengesetz* of 19-04-2002 (BGBl. I 1342).

<sup>586</sup> The periods: *promptly* = Rhineland-Palatinate; *one week* = Baden-Württemberg, Bavaria, Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North-Rhine-Westphalia, Saarland, Saxony Anhalt, Thuringia; *two weeks* = Berlin, Brandenburg, Bremen, Saxony, Schleswig-Holstein.

<sup>587</sup> Cf. s. 17 (1) *MeldFortGE*, BT-Drucks. 17/7746.



determining the place where the inhabitant can exercise his right to vote, in particular regarding *Länder* and local elections. Additionally, inhabitants are obligated to file their tax return at the tax office where their primary residence is situated.

An obligation to register is not justified if the inhabitant is registered for a dwelling and his stay in one another will be no longer than six months (section 15 of the Registration Framework Law). The other exception is that the stay of an inhabitant who is registered abroad will be no longer than two months.

- Regulatory law requirements on - new and/or old - habitable dwellings capable of being rented - e.g. on minimum size, number of bathrooms, other mandatory fittings etc.

The planning and zoning law requirements on (new) habitable dwellings depend on the Building Regulations of the respective *Land* (*Landesbauordnung*). These regulations are based on the Model Building Regulation<sup>588</sup>, which is published by the conference of the minister and senators for housing and urban development (ARGEBAU).

### (1) Rooms

First, all building regulations require that the dwelling must have at least one habitable room, one toilet, one bathtub or shower and a kitchen or a kitchenette, i.e. the technical requirements for the installation of a kitchen suffice (room with cooking facilities).<sup>589</sup> Provisions about the minimum size of kitchens and bathrooms do not exist. A benchmark of eight square metres applies only in Bavaria.<sup>590</sup> In addition, these rooms have to be capable of being aerated. This is also valid for habitable rooms like living rooms or bedrooms, which, moreover, must be adequately illuminated by natural light penetrating from the exterior of the building. Furthermore, these rooms should have a sufficient size<sup>591</sup> and have ceilings higher than 2.40 metres<sup>592</sup>. If the whole building is greater than a specific size<sup>593</sup>, every dwelling must be equipped with a storage room.

### (2) Size

In case of housing with a public task, the size of the dwelling has to be adequate corresponding to its purpose (section 10 WoFG), but neither the WoFG nor the provisions of the *Länder* referring to this contain a size specification. Solely the Bavarian administrative regulations, which were enacted in regard to the Bavarian WoFG, determine the maximum adequate size of a dwelling.<sup>594</sup> Accordingly, a single-person household should not have more than fifty square metres available. For each additional member of the household, the maximum sufficient size increases by fifteen square metres.

Furthermore, regulations providing the minimum size of a dwelling belonging to the private housing sector do not exist either. There is only case law which defines benchmarks, such as a judgement of the LVerfG of Bavaria<sup>595</sup>. It states on the one hand, that the size has to be determined for every concrete dwelling and on the other hand that a one room flat should be at least sixteen square metres in size. Under the law of taxation,

<sup>588</sup> The Model Building Regulation is not a law, but serves as an orientation for the legislation of the federal states.

<sup>589</sup> Cf. only Art. 41 IV Building Regulation of Brandenburg.

<sup>590</sup> Cf. J. Nolte, in: *Simon/Busse*, BayBO (Munich: C. H. Beck, 2008) Art. 45, rec. 35; Art. 46, rec. 87.

<sup>591</sup> A definition exists only in the regulation of Lower Saxony: min. 6 m<sup>2</sup> and as a benchmark in Bavaria: min. 8 m<sup>2</sup> (Nolte, in: *Simon/Busse*, BayBO, Art. 45, rec. 33-35).

<sup>592</sup> Exceptions: Berlin: 2,50m; Baden-Württemberg: 2,30m.

<sup>593</sup> This requirement depends on the respective building regulation: from 2 or 3 dwellings to a size over 7 metres.

<sup>594</sup> Wohnraumförderungsbestimmungen 2012 of 11-09-2012 (AllMBI. 592).

<sup>595</sup> Higher Administrative Court (*Oberverwaltungsgericht*, OVG/VGH) Munich, NVwZ-RR 2000, 660.

in particular the tax purpose of developed plots which are used for housing, a dwelling must be at least twenty-three square metres in size to be a dwelling in this sense.<sup>596</sup> In student halls or nursing homes a size of twenty square metres is sufficient.<sup>597</sup> Finally, there are provisions in two *Länder*, Berlin and Hesse, which determine the habitability and occupancy of dwellings (*Wohnungsaufsichtsgesetz*).<sup>598</sup> Accordingly, a dwelling must have a living area of at least nine square metres for every person and six square metres for every child less than six years of age.

However, all of these provisions and cases are based on social and habitability aspects rather than on building law requirements.

### (3) Other mandatory fittings

Regarding other mandatory fittings, four of the sixteen building regulations require for instance that every dwelling has to be structural separated from other dwellings or rooms.<sup>599</sup> It has to be equipped with an own lockable entrance directly from the outside, the stairwell or from the hall. This means that it should be possible for the occupant to enter and to leave his dwelling without traversing a room of another household. This requirement applies only to buildings containing two or more dwellings. If the building is not used only for residential purposes, the dwelling must have an own entrance.<sup>600</sup> For reasons of structural fire protection, there has to be also an emergency exit from each dwelling to get outside. In this context, nine building regulations state that new dwellings have to be equipped with smoke detectors in every bedroom as well as in every child's room. The owner or tenant of an already existing dwelling has to equip the mentioned rooms with smoke detectors until a legally fixed date.<sup>601</sup>

There are three more characteristics of particular building regulations worth mentioning. Only the building regulation of Hamburg states explicitly that a dwelling is not allowed in the cellar. In Baden-Württemberg and in Hamburg every dwelling must have a separate water meter. Finally, the building regulations in Brandenburg, North-Rhine Westphalia and Rhineland-Palatinate require that the toilet must be installed inside the dwelling and also must be operated by flushing water.

If any of these mandatory fittings is missing, there are only consequences under public law (especially under the existing *Wohnungsaufsichtsgesetze*). The tenancy contract is however valid,<sup>602</sup> but the tenant is entitled to rent reduction as well as to claim for damages and he may even terminate the tenancy with immediate effect.

#### ○ Regulation on energy saving

A Law on Energy Saving in Buildings (*Energieeinsparungsgesetz*, EnEG)<sup>603</sup> has existed in Germany since the seventies, but it determines only the regulatory framework. The statutory instrument (*Energieeinsparverordnung*, EnEV)<sup>604</sup> that has been enacted on this

<sup>596</sup> s. 181 IX 4 BewG; cf. BFH, judgement of 20-06-1985, Az. III R 71/83 (BStBl. II 582).

<sup>597</sup> Cf. BFH, judgement of 30-04-1982, Az. III R 33/80 (BStBl. II 671).

<sup>598</sup> WoAufG Berlin of 3-04-1990 (GVBl. 1082); HWoAufG of 4-09-1974 (GVBl. I 395).

<sup>599</sup> Brandenburg, Lower Saxony, North-Rhine Westphalia, Rhineland-Palatinate.

<sup>600</sup> The building regulation of Hesse requires this, too.

<sup>601</sup> Bremen: duty of the owner until 31-12-2015; Hamburg: until 31-12-2010; Lower Saxony: duty of the owner until 31-12-2015; Mecklenburg-Western Pomerania: duty of the tenant until 31-12-2009; Rhineland-Palatinate: until 23-03-2016; Saarland: without a date; Saxony-Anhalt: until 31-12-2015; Schleswig-Holstein: until 31-12-2010; Thuringia: without a date.

<sup>602</sup> AG Hamburg, NZM 1999, 1056 with further references.

<sup>603</sup> EnEG in its version of 01-09-2005 (BGBl. I 2684) and its amendment of 04-07-2013 (BGBl. I 2197).

<sup>604</sup> EnEV of 24-07-2007 (BGBl. I 1519) and its amendment of 18-11-2013 (BGBl. I 3951).

basis takes on the important role instead. It superseded the hitherto applicable Ordinances on Thermal Insulation (*Wärmeschutzverordnung*) and Heating Systems (*Heizungsanlagenverordnung*).

These regulations were redrafted to implement the EU-Directives 2002/91/EC<sup>605</sup> and 2010/31/EU<sup>606</sup> about the energy performance of buildings as well as the EU-Directives 2012/27/EU<sup>607</sup> and 2006/32/EC<sup>608</sup> on energy efficiency. Now, the EnEV contains in particular provisions about the issue and use of energy performance certificates (*Energieausweis*) for new and also existing residential buildings. Only small buildings are exempted from this obligation, i.e. buildings with a useable area of less than 50 square metres (section 2 (no. 3) EnEV) and listed buildings (section 16 (IV) EnEV). The energy performance certificate assesses a building according to energy criteria either on the basis of its energy required (new buildings or building repairs) or on its energy consumption (existing buildings). Landlords are obligated to submit this document to prospective tenants or purchasers unrequested (section 16 II EnEV). Refusal results in a fine (sections 27 (II) EnEV, 27 8 (II) EnEG). Under civil law, there are no consequences if the landlord does not provide the energy certificate; in particular the tenancy contract is not void. The certificate is valid for a maximum of ten years (section 17 (VI) EnEV). In addition, if the building is offered for sale or rent, the energy performance rating (*Energiekennzahl*) indicated on the energy performance certificate for the building must be stated in the advertisements in commercial media. Beyond that, landlords are required to retrofit the heating system as well as to maintain the energetic quality of the building (sections 10, 11 EnEV). Furthermore, all new buildings shall be nearly zero-energy buildings (*Niedrigstenergiegebäude*) by the end of 2020. This means that these buildings will have a very high energy performance and nearly zero or very low amount of energy requirements, which should be covered to a significant extent by energy from renewable sources. An additional aim of the national energy concept of 2010<sup>609</sup> and the turnaround in energy policy in 2011<sup>610</sup> consists in creating a climate-neutral building stock until 2050 by promoting energy renovation measures referring to existing buildings as well as by determining energy standards regarding new constructed dwellings.

Beyond that, the EU-Directives on energy efficiency also have an impact on the national tenancy law. Pursuant to sections 555d (I), 555b no. 1 BGB, tenants have to tolerate measures taken to save energy sustainably (energy-saving measures). But this obligation to tolerate applies only insofar as the measure would not be a hardship that is not justifiable even considering the justified interests of the landlord as well as interests in energy saving and climate protection (section 555d (II) BGB). If the landlord has carried out such construction measures that lead to energy savings with lasting effect, he may increase the annual rent by 11% of the costs spent on the dwelling (section 559 (I) BGB). In both cases, i.e. the notice of an intended energy-saving measure as well as a possible following rent increase, the tenant is entitled to terminate the tenancy by special notice (sections 555e (I), 561 (I) BGB).

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<sup>605</sup> Directive of 16-12-2002 (OJEC L 1, 65) repealed with effect from 1-02-2012.

<sup>606</sup> Directive of 19-05-2010 (OJEU L 153, 13).

<sup>607</sup> Directive of 25-10-2012 (OJEU L 315, 1).

<sup>608</sup> Directive of 5-04-2006 (OJEC L 114, 64) repealed with effect from 05-06-2014.

<sup>609</sup> BT-Drucks. 17/3049.

<sup>610</sup> Basic Points of the Federal Government on the Energy Turnaround of 6-06-2011.

## 6.2. Preparation and negotiation of tenancy contracts<sup>611</sup>

	<b>Tenancy type 1 = private rental market</b>	<b>Tenancy type 2 = housing with a public task</b>	<b>Tenancy type 3 = cooperatives</b>	<b>Ranking from strongest to weakest regulation</b>
<b>Choice of tenant</b>	<ul style="list-style-type: none"> <li>- basically freedom of contract, but restrictions with regard to agreements on a preliminary contract or a pre-rent right</li> <li>- finding a tenant either by hiring estate agents, who shall propose potential tenants, or on their own by placing advertisements in newspapers or in the internet</li> <li>- common checks on the financial status of the tenant</li> </ul>	<ul style="list-style-type: none"> <li>- freedom of contract is restricted, since tenants must be in possession of a qualification certificate for housing with a public task</li> <li>- finding a tenant on their own either by placing advertisements in the common internet portals or on their own website</li> <li>- no estate agents, since agreements on a brokerage fee are prohibited</li> <li>- usually no checks on the financial status of the tenant because of the qualification certificate</li> </ul>	<ul style="list-style-type: none"> <li>- basically freedom of contract, but restrictions with regard to agreements on a preliminary contract or a pre-rent right</li> <li>- finding a tenant on their own either by placing advertisements in the common internet portals or on their own website</li> <li>- common checks on the financial status of the tenant</li> </ul>	
<b>Ancillary duties</b>	<ul style="list-style-type: none"> <li>- pre-contractual duties of care and duties to inform</li> <li>- liability in case of breakdown in negotiations without a good reason and in case of providing wrong relevant information</li> </ul>			

- Freedom of contract

- Are there cases in which there is an obligation for a landlord to enter in a rental contract?

The principle of freedom of contract, which follows from Article 2 (I) GG and section 311 (I) BGB, provides the freedom to enter into a contract (*Abschlussfreiheit*) and the freedom to determine its conditions (*Gestaltungsfreiheit*). It applies to tenancies only since the abolition of rent control in 1964.<sup>612</sup> Nowadays, landlords are therefore generally free in the tenant selection process.

However, there are exceptional situations in which all types of landlords are committed to enter in a rental contract:

<sup>611</sup> Cf. for the initiation of tenancy contracts: P. Derleder & M. Pellegrino, *Die Anbahnung des Mietverhältnisses*, NZM 1998, 550-557.

<sup>612</sup> As outlined above in 5. 'Principal reforms of tenancy law'.

First of all it is possible to conclude a preliminary contract (*Vorvertrag*), which is already legally binding and obliges the parties to conclude the main tenancy contract.<sup>613</sup> Such a preliminary contract requires a special intent to be legally bound prior to the actual contract.<sup>614</sup> It is often arranged if the rental object is not completely finished.<sup>615</sup> A valid preliminary contract requires that the parties agree on the handover of the rental object and that the essential conditions of the tenancy, i.e. the rental object, the period and the amount of rent, are at least determinable.<sup>616</sup>

The landlord and the tenant can also agree a pre-rent right (*Vormiete*), i.e. that the prospective tenant is entitled to enter the tenancy contract concluded by the landlord with a third party.<sup>617</sup> The provisions about the pre-emption right (section 463 et seq. BGB) are applicable by analogy.<sup>618</sup> Therefore, the landlord must inform the tenant entitled to a pre-rent right about the contents of the tenancy entered into with the third party (section 469 BGB analogue). Provided the tenant wants to, he enters into the tenancy in preference to the third party. The purpose of this agreement is on the one hand the guarantee for the tenant concerning the leasing of a particular dwelling. On the other hand, the landlord can continue the search for other prospective tenants with whom he can negotiate more favourable conditions from his point of view, e.g. a higher rent. This is permissible, because the agreement of a pre-rent right creates only a duty of the landlord, while the entitled tenant is still free in his decision to enter the contract.

In addition, there are three situations, in which the landlord can be required to enter into a tenancy:

If the tenant dies, the tenancy is continued with the other tenants as far as the contract has been entered into with more than one tenant (section 563a (I) BGB). Nevertheless, the surviving tenant is entitled to terminate the tenancy extraordinarily with the statutory notice period within one month after obtaining knowledge of the death of the tenant (section 563a (II) BGB). Provided there is no other tenant, specific persons have a right of succession according to section 563 BGB. First of all, the spouse or the civil partner, who maintains a joint household with the tenant at the time of demise, enters into the tenancy contract *ipso iure* (section 563 (I) BGB).<sup>619</sup> This person has however a month-long right to object (section 563 (III) BGB). In case of objection or if the tenant was not married, the children of the tenant succeed to the tenancy (section 563 (II) BGB). The succession of the civil partner is however not affected by the succession of the children, which means that they may enter into the tenancy together. If there are also no children, other family members or persons, who lived a long time with the deceased tenant in one household such as the life partner, become eventually party to the tenancy contract. In case no objection is raised, the landlord is principally committed to continue the contract with this person. Only in case of an important reason, which concerns the person of the new tenant, like insolvency or personal animosity,<sup>620</sup> he has an extraordinary right to terminate the tenancy within one month. If, on the death of the tenant, no persons within the meaning of section 563 BGB succeed to the tenancy, then it is continued with the heir accord-

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<sup>613</sup> Cf. H. Blank, in: *Schmidt-Futterer*, before s. 535 BGB, rec. 117.

<sup>614</sup> *Ibid*, rec. 116.

<sup>615</sup> *Ibid*, rec. 115.

<sup>616</sup> Cf. Derleder & Pellegrino, NZM 1998, 550 (552).

<sup>617</sup> *Ibid*.

<sup>618</sup> cf. Derleder & Pellegrino, NZM 1998, 550 (554).

<sup>619</sup> BGH NZM 2002, 910 (913).

<sup>620</sup> Cf. E. Streyll, in: *Schmidt-Futterer*, s. 563 BGB, rec. 6.

<sup>620</sup> Cf. Blank, in: *Blank/Börstinghaus*, s. 563 BGB, rec. 64.

ing to section 564 BGB. But in this case, both the heir and the landlord are however entitled to terminate the contract.

Furthermore, purchase is subject to existing tenancies according to section 566 BGB, i.e. if the rented residential space is disposed of by the landlord to a third party, then the acquirer, in place of the landlord, takes over the rights and duties that arise under the tenancy agreement during the period of his ownership. This obligation of the acquirer to enter into a tenancy shall protect tenants in case of purchase and restricts the new landlord in his tenant selection process. However, if the acquirer obtains the premises through a compulsory auction, he has a special right of termination pursuant to section 57a ZVG.

The freedom of contract can also be restricted pursuant to section 1568a (III) BGB. Accordingly, a former spouse who is granted the use of the matrimonial home (*Ehewohnung*) as a consequence of divorce enters into the tenancy, which was entered into by the other spouse or both. Yet, the landlord has an extraordinary right to terminate the contract provided that there is a compelling reason in the person of the entering spouse (sections 1568a (III 2), 563 (IV) BGB).

An obligation to contract can further be a consequence of section 826 BGB if the refusal to conclude the tenancy contract is contrary to public policy.<sup>621</sup> This requires on the one hand that the landlord possesses a quasi monopoly position and on the other that the prospective tenant is reliant on that dwelling.<sup>622</sup>

In the end, there is one situation in case of housing with a public task, i.e. that the landlord is granted housing subsidies according to the WoFG, in which case he is bound as to the choice of tenants.<sup>623</sup> The same applies for landlords in the new eastern *Länder* who receive public funds in particular for the purpose of improving their credit standing and ability to invest. Those landlords can conclude a lawful tenancy contract only with persons who are in possession of a qualification certificate for housing with a public task according to section 27 (I 1) WoFG, 4 (II 1), 5 WoBindG. Furthermore, these dwellings may not be vacant for longer than three months, may not be used by the landlord himself and not for purposes other than housing, unless the landlord has obtained permission by the municipality (section 27 (VII) WoFG).

Beyond that, there are several situations in which the tenant is entitled to permit other persons to use the rented property. In all the following cases, the landlord does not enter into a rental contract with the third party, but he has to tolerate the entry:

- Family members – The spouse, the civil partner<sup>624</sup> and the children of the tenant are allowed to move in a dwelling together with the tenant. A permission of the landlord within the meaning of section 540 (I) BGB is not necessary, because the entry of family members belongs to the contractual use.<sup>625</sup> This is also valid for domestic servants and nursing staff.<sup>626</sup>
- Justified subletting – Section 540 (I) BGB states that the tenant is not principally entitled to transfer the use of the rented property to a third party without the permission of the landlord, in particular not to sublet it. According to section 553 (I)

<sup>621</sup> Cf. Häublein, in: *MüKo-BGB*, Vol. 3, s. 535, rec. 6.

<sup>622</sup> Ibid.

<sup>623</sup> Cf. explanations under no. 2: 'Requirements for conclusion'.

<sup>624</sup> I.e. a civil partnership partner pursuant to section 1 (I) of the Civil Partnership Act (*Lebenspartnerschaftsgesetz*).

<sup>625</sup> OLG Hamm, WuM 1997, 364; BayObLG GE 1997, 1463; see also Blank, in: *Schmidt-Futterer*, s. 540 BGB, rec. 24 with further proofs.

<sup>626</sup> BayObLG GE 1997, 1463 (1464).



BGB, which is *lex specialis* for residential tenancies, the tenant may however demand permission from the landlord, provided that he has a justified interest in permitting a third party to use part of the residential space, e.g. a room. In that case, the landlord has to accept the subletting. If the dwelling is rented by a group of tenants, e.g. students, the BVerfG infers from such a tenancy that the landlord has to tolerate the change of several members.<sup>627</sup>

- Accommodation for homeless persons – Confiscation of residential space to accommodate a person who will otherwise become homeless does not result in a compulsory tenancy contract between this accommodated person and the landlord. Rather, it effects a relationship under public law,<sup>628</sup> but the landlord is unable to lease the dwelling for this period.<sup>629</sup>
- Matching the parties
  - How does the landlord normally proceed to find a tenant?

The way landlords normally proceed to find a tenant depends on their type: Private landlords often engage estate agents, who shall propose potential tenants to them, or they place advertisements in newspapers or in the internet on their own. In case the old tenant wants to move out prior to the expiry of the notice period, private landlords usually agree with it under condition that the old tenant can present a suitable and solvent new tenant. Commercial landlords, especially housing associations and cooperatives, however advertise their dwellings always on their own either in the common, reliable internet portals like “immobilienscout24”, “immowelt” and “immonet” or on their own website, as well. These advertisements are not regarded as legally binding offers but only as invitations on the part of the landlord to submit an offer (*invitatio ad offerendum*). Following the publication of the rental offer, landlords or estate agents usually arrange appointments with potential tenants in order to show them the offered dwelling and to get to know them better. These viewings provide the basis for the landlord’s decision of with whom to conclude a new tenancy contract.

- What checks on the personal and financial status are usual? In particular: May the landlord ask for a salary statement? May he resort to a credit info agency and is doing so usual?

The following checks on the personal and financial status of the potential tenant are usual:

- interviews either with the potential tenant (especially about his solvency), his last landlord or his employer; the last landlord is not obligated to issue his previous tenant a certificate that there are no rent arrears (*Mietschuldenfreiheitsbescheinigung*), but the tenant may demand receipts for received rent payments<sup>630</sup>; in the metropolises such as Hamburg or Frankfurt a. M. where estate agents are often involved in the tenant selection process, it is common that they ask such a certificate from former landlords of the tenant
- demanding submission of a salary statement (*Gehaltsnachweis*) from the prospective tenant

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<sup>627</sup> BVerfG, WuM 1993, 104.

<sup>628</sup> BGH, NJW 1996, 315; cf. Häublein, in: *MüKo-BGB*, Vol. 3, s. 535, rec. 7.

<sup>629</sup> As outlined above in 5. ‘Human Rights’.

<sup>630</sup> BGH, NZM 2009, 853.

- common solvency check of the General Credit Protection Agency (*Schutzgemeinschaft für allgemeine Kreditsicherung*, SCHUFA) with the tenant's consent or a self-disclosure of the tenant
- inspection of lists of debtors (*Schuldnerverzeichnis*) maintained by the local courts or other credit agencies
- requiring a bank reference is permissible only in the case of commercial tenants
  - How can information on the potential tenant be gathered lawfully? In particular: Are there blacklists of "bad tenants"? If yes, by whom are they compiled? Are they subject to legal limitations e.g. on data protections grounds?

Information concerning the personal status or the solvency of the potential tenant can be gathered lawfully from the tenant or a third party if it is essential for the tenancy, meaning that the landlord must prove a legitimate interest. Legitimate questions are for example the identity of the potential tenant, his civil status and the number of children.<sup>631</sup> Questions about the solvency are justified as well, if they concern the profession and income of the potential tenant.<sup>632</sup>

In that case, the tenant is obligated to provide information truthfully. Otherwise the landlord has a right to dispute the contract or to avoid his declaration of will. If the landlord was deceived by the tenant, he may rescind his declaration based on the tenant's wilful deceit (section 123 (I) BGB). If the landlord is however in error as to the essential characteristics of the tenant conditioned by behaviour of the latter that does not constitute deceit, the landlord can avoid his declaration pursuant to section 119 (II) BGB. Then, the tenancy is to be regarded as having been void from the outset (*ex tunc*) pursuant to section 142 (I) BGB. Provided the landlord notices the deceit or his error after the handover of the dwelling, he can terminate the tenancy immediately without notice (*ex nunc*) according to section 543 (I) BGB.<sup>633</sup>

If the question is however illegitimate, especially because of infringing personal rights,<sup>634</sup> the tenant has a "right to lie". In that case, the landlord cannot rescind the contract. This applies to detailed questions about civil status, sexual orientation, the intention to have children or the state of the potential tenant's health.<sup>635</sup>

Data checks on the prospective tenant, particularly those concerning the financial status can in any case be gathered lawfully with the consent of the tenant. The consent is necessary because of the fundamental right to informational self-determination and the right to data protection, which follow from Article 2 (I) i.c.w. 1 (I) GG as well as from Article 8 of the EU Charter of Fundamental Rights (*Europäische Grundrechtecharta*, CFR)<sup>636</sup>. Independent of the type of landlord, the SCHUFA has to obtain the consent of the prospective tenant, because this company is subject to restrictions based on data protection rights.

Also, there are blacklists of "bad tenants" in Germany. These lists or databases are compiled by different companies<sup>637</sup> which are subject to restrictions based on data protection

<sup>631</sup> LG Landau, ZMR 1985, 127.

<sup>632</sup> LG Munich I, NZM 2009, 782; Derleder & Pellegrino, NZM 1998, 550 (551).

<sup>633</sup> LG Wuppertal, WM 1999, 39.

<sup>634</sup> BGH, NJW 1991, 2411.

<sup>635</sup> Cf. Blank, in: *Schmidt-Futterer*, s. 543 BGB, rec. 204.

<sup>636</sup> CFR of 18-12-2000 (OJEC C 364, 1) as amended on 12-12-2007 (OJEC C 303, 1) became effective on 1-12-2009 together with the Lisbon treaty; cf. Art. 6 (1) TFEU.

<sup>637</sup> E.g. Deutsche Mieter Datenbank KG (DEMDA) [www.demda.de](http://www.demda.de); SAF Forderungsmanagement GmbH <http://www.immobilienscout24.de/de/anbieten/serviceleistungen/bonitaetspruefung.jsp>; Supercheck GmbH

rights as well (sections 28a, 29 (I) of the Data Protection Act (*Bundesdatenschutzgesetz*, BDSG)<sup>638</sup>). These companies obtain data from the local courts and their lists of debtors in terms of section 915 ZPO as well as from credit institutions, energy utilities, debt collection agencies and landlords. Landlords who want to request information about a tenant must register and pay a fixed rate for each disclosure. Even tenants themselves have the possibility to get a self-disclosure from these companies or the SCHUFA (section 34 BDSG). Tenants are neither obligated to give their consent to a solvency check nor to request a self-disclosure, but it is often demanded and therefore “helpful” for the landlord in the tenant selection process. Beyond that, there is no public register of “bad tenants”.

- What checks may and does the tenant carry out on the landlord (e.g. to avoid being trapped by a swindler landlord)?

In order to avoid being trapped by a swindler landlord, the tenant can obtain information about the landlord from the local tenant association. Apart from that, a website exists on which tenants can rate landlords as well as neighbourhoods.<sup>639</sup> The landlord is not in fact named on the website, but the exact address of the dwelling is indicated.

In general, tenants should be careful about rental offers, which seem very cheap considering the location of the dwelling and its furniture, as swindler landlords are often behind these advertisements. They pretend to live abroad and to be therefore prevented from appearing in person for viewing the dwelling. In exchange for the keys, they demand first from the prospective tenant to transfer a deposit. If the tenant does so, he will never hear again from the landlord, not to mention to get the keys. Provided the landlord is represented by an estate agent, tenants should further find out whether or not the estate agent is a member of the German Real Estate Association (*Immobilienverband Deutschland*, IVD), since a membership of the IVD confirms the agent as a professional and qualified service provider.

- Services of estate agents
  - What services are usually provided by estate agents?

The usual services provided by estate agents include especially the following: placing advertisements into the common internet portals like “immobilienscout24”, “immowelt” and “immonet”, answering requests of interested tenants, checking the solvency of prospective tenants, organizing and executing the viewing of dwellings and finally preparing tenancy contracts. If the estate agent has been hired by the tenant he assists the latter in the search, in particular by proposing and executing viewings of dwellings corresponding to the tenants’ needs.

Besides housing agency, estate agents typically offer landlords comprehensive support, in particular with regard to existing tenancies and the management of the building.

- To what extent are estate agents regulated? In particular: Are there rules on how an agent should present a house, i.e. on the kind of information which needs to be given?

Estate agents take on an important role within the private rental market especially in the German metropolises. In the last decades, the first major estate agencies that are oper-

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[www.privatevermieter.de](http://www.privatevermieter.de); Vermieterschutzkartei Deutschland-GmbH & Co. KG (VSK)  
<http://www.vermieterschutzkartei.de/>; Zentralverband der Deutschen Haus-, Wohnungs- und Grundeigentümer e.V.  
- Haus & Grund Deutschland <http://www.hausundgrund.de/mietersolvenzcheck.html> (last retrieved: 23-03-2014).

<sup>638</sup> BDSG in its version of 14-01-2003 (BGBl. I 66).

<sup>639</sup> <http://www.wowirwohnen.de/leitbild/> (last retrieved: 23-03-2014).

ating supra-regional, such as *Engel&Völkers*, have emerged. In addition, many credit institutions, in particular people's and savings banks (*Volks- und Sparkassen*), are providing the typical services of an estate agent. Over six thousand estate agencies are members of the German Real Estate Association (IVD), which is the biggest association the area of housing in Germany.<sup>640</sup> Every IVD member gets a certificate of membership confirming them as a professional and qualified service provider.

The function and activities of estate agents are laid down in sections 652-655 BGB as well as in the law on Regulation on Housing Agency (WoVermittG). According to the latter regulation, an estate agent is someone who negotiates a tenancy contract or who can prove an opportunity to enter into such a contract. The job description "estate agent" is neither protected by law nor prescribes a professional education. But the practicing brokerage requires a general business registration (section 14 of the German Industrial Code (*Gewerbeordnung*, GewO)<sup>641</sup>) and also a special permission for brokerage (section 34c (I 1 no. 1) GewO). The responsible authority is for both cases determined by federal state law. Accordingly, responsibility rests either with the municipality or with the Chamber of Industry and Commerce (*Industrie- und Handelskammer*). Although there is no professional education required, it is possible to do an education as management assistant in real estate (*Immobilienkaufmann*) which covers the essential contents of the profession of real estate agents.<sup>642</sup> Apart from that, institutions such as distance universities offer courses in order to get the title "Certified Real Estate Agent". Additionally, section 6 WoVermittG prescribes that an estate agent may only offer residential space if he is entitled to do so because of an order by the landlord. Apart from that, sections 652-655 BGB and the WoVermittG provide only regulations on certain parts of the contractual relationship between an estate agent and a prospective tenant, especially regarding the amount of the brokerage fee, which is part of the next question.

Any advertisement placed by an estate agent must indicate its commercial character, since the concealment of commercial advertisements as private offers is regarded as a misleading commercial practice and is prohibited by section 5 of the Law against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*, UWG)<sup>643</sup> as well as by section 6 WoVermittG.<sup>644</sup> The latter provision requires the estate agent also to state his name, the amount of rent as well as whether additional costs, like utilities, have to be borne by the tenant or not. This applies however only to the extent that the estate agent is acting on a commercial basis (section 7 WoVermittG).

- What is the usual commission they charge to the landlord and tenant? Are there legal limitations on the commission?

The Regulation on Housing Agency (WoVermittG) contains provisions in particular about the legitimacy and amount of brokerage fees. Accordingly, the brokerage fee must not exceed the amount of two monthly net rents excluding utilities plus value added tax (*Mehrwertsteuer*, VAT)<sup>645</sup> (section 3 (II 1, 3) WoVermittG). This ceiling applies only to the extent that the estate agent is acting on a commercial basis (section 7 WoVermittG). The fee is only incurred if the tenancy contract is really concluded (sections 2 (I) WoVermittG; 652 (I) BGB). Advance payments are therefore prohibited (section 2 (IV) WoVermittG). If

<sup>640</sup> Homepage of the IVD in English: <http://ivd.net/der-bundesverband/english> (last retrieved: 23-03-2014).

<sup>641</sup> GewO of 21-06-1869 (BGBl. 245) in the version of its promulgation on 22-02-1999 (BGBl. I 202).

<sup>642</sup> <http://www.ivd.net/der-bundesverband/nachrichtendetail/article/ivd-fordert-sach-und-fachkundenachweis-fuer-makler-und-verwalter-1.html> (last retrieved: 10-03-2014).

<sup>643</sup> UWG of 27-05-1896 (RGBl. 145) in the version of its promulgation on 3-03-2010 (BGBl. I 254).

<sup>644</sup> BGH, GRUR 1987, 748.

<sup>645</sup> The current VAT amounts to 19%.

a disproportionately high brokerage fee has been agreed, it may, on the application of the party owing it, be reduced to the appropriate amount by court decision (section 655 BGB). Furthermore, the estate agent commits a regulatory violation by demanding an excessive brokerage fee, which is finable up to EUR 25,000 (section 8 WoVermittG).

The claim to a brokerage fee is furthermore excluded if the tenancy is only continued, prolonged or renewed by the new contract or if the estate agent himself is the owner or landlord of the offered dwelling or a party of the management company of the dwelling (section 2 (II) WoVermittG).<sup>646</sup>

Provisions about who has to pay the brokerage fee do not exist currently. While landlords in less populous regions often pay the commission on their own, landlords in populous cities, like Hamburg and Berlin, mostly pass this fee along to the tenant. The city state of Hamburg introduced a bill in the Federal Council (*Bundesrat*) in March 2013, whereby the WoVermittG shall prospectively provide the so-called “hirer principle” (*Bestellerprinzip*).<sup>647</sup> This principle means that the tenant has to pay for negotiating a tenancy contract only if he himself has hired the estate agent. Otherwise, the landlord will be responsible for paying the brokerage fee in future. The *Länder* Baden-Württemberg, Bremen and North-Rhine Westphalia have followed suit<sup>648</sup> with the result that the *Bundesrat* passed a bill in July 2013.<sup>649</sup> In November 2013, the governing parties entered the introduction of the “hirer principle” into their coalition agreements and the Federal Minister of Justice has incorporated it in the draft law that was submitted in March 2014.

In the case of housing with a public task, section 9 (I) WoBindG states a prohibition on agreements which commit the prospective tenant to delivering performance in exchange for letting the dwelling. Therefore, any kind of brokerage fee is forbidden in this sector (section 2 (III) WoVermittG), but this applies only to dwellings which are promoted by federal funds according to the II. WoBauG or WoFG. Consequently, estate agents can claim a brokerage fee for negotiating a tenancy contract on a dwelling promoted by funds of the *Länder*. But the current draft law of the federal government<sup>650</sup> to transpose the EU directive 2011/83/EU on consumer rights<sup>651</sup> shall shut this legal loophole in so far as it provides an annex to section 2 (III) WoVermittG which includes also the promotion according to *Land* law.

- Ancillary duties of both parties in the phase of contract preparation and negotiation (“culpa in contrahendo” kind of situations)
  - (1) “Culpa in contrahendo” kind of situations

In the phase of contract preparation and negotiation, a quasi-contractual relationship of trust between the landlord and the future tenant already exists. This relationship implicates pre-contractual duties of care and duties to inform. In case of infringement, there

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<sup>646</sup> Cf. BGH, NZM 2003, 984.

<sup>647</sup> Cf. Frankfurter Allgemeine Zeitung of 24-10-2012, *Vermieter sollen künftig Maklerprovisionen zahlen*, available at: <http://www.faz.net/aktuell/wirtschaft/reformplaene-im-bundesrat-vermieter-sollen-kuenftig-maklerprovisionen-zahlen-11936646.html> (last retrieved: 23-03-2014).

<sup>648</sup> Cf. IVD, *IVD steht Bestellerprinzip offen gegenüber*, available at: <http://www.ivd.net/der-bundesverband/nachrichtendetail/archive/2012/october/article/ivd-steht-bestellerprinzip-offen-gegenueber-1.html> (last retrieved: 23-03-2014).

<sup>649</sup> Printed Matter of the Federal Council (*Bundesratsdrucksache*, BR-Drucks.) 17/14361.

<sup>650</sup> Draft Law of the Federal Government of 06-03-2013 (BT-Drucks. 17/12637) will enter into force on 13-06-2014 (Article 14).

<sup>651</sup> Directive of 25-10-2011 (OJEU L 304, 64).

can be claims for damages out of a “*culpa in contrahendo*” (*cic*) (sections 280 (I), 311 (II), 241 (II) BGB).

The following situations concern the ancillary duties within the quasi-contractual relationship:

Until the conclusion of the tenancy contract the parties are principally free in their leeway in decision-making (Article 2 (I) GG and section 311 (I) BGB). Nevertheless, liability for damages arises if one of the parties breaks down the negotiations without any good reason, although the other party has already reasonably relied on the realization of the contract.<sup>652</sup> The amount of compensation is limited to the damage, which has arisen from the disappointed reliance, e.g. costs for travelling, moving and estate agents.

Beyond that, inaccurate information can cause a liability from *cic*.<sup>653</sup> A general pre-contractual duty to inform does not exist. The parties are only obligated to inform each other if the facts are important for their decision whether they want to conclude the tenancy contract or not.<sup>654</sup> This applies for example to information regarding the income level of the potential tenant.<sup>655</sup> Such a duty to inform requires that the relevance of these facts is obvious for the other party, e.g. because of pointed questions. Within the limits of legitimacy, especially with regard to personal rights, both parties have to answer truthfully.

Finally, the landlord has the duty to maintain safety in his sphere of influence, which means that he has to preserve the potential tenant from harm.

## (2) Duty of the landlord to inform and instruct the tenant on his right of revocation

Beyond these ancillary duties whose infringement can cause a liability from *cic*, there are further ancillary duties possible depending on the form of concluding the tenancy contract and provided that the landlord is an entrepreneur:

- Distance contract (*Fernabsatzvertrag*) – If the landlord for example solely uses means of distance communications in order to conclude the tenancy contract, he is obliged to provide special information to the prospective tenant, in particular about the existence of the right to revoke the contract. Otherwise, the revocation period does not commence. Means of distance communications are for example letters, telephone calls, faxes, emails (section 312b (II) BGB). This duty to inform follows from sections 312c-312f BGB as well as Article 246 sections 1, 2 of the Introductory Act to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche*, EGBGB)<sup>656</sup>, which were incorporated into the BGB and the EGBGB due to the EU-Directive 97/7/EC<sup>657</sup>.<sup>658</sup> They affect national tenancy law especially with regard to short stays like internships or semesters abroad.<sup>659</sup> In addition, the landlord has to instruct the tenant on his right of revocation in accordance with the requirements of the section 360 BGB.

<sup>652</sup> Cf. Horst, *Praxis des Mietrechts*, rec. 88.

<sup>653</sup> Cf. Horst, *Praxis des Mietrechts*, rec. 523.

<sup>654</sup> Cf. Derleder & Pellegrino, NZM 1998, 550 (552).

<sup>655</sup> Cf. Horst, *Praxis des Mietrechts*, rec. 91; P. Derleder & Pellegrino, NZM 1998, 550 (551).

<sup>656</sup> EGBGB in its version of 21-09-1994 (BGBl. I 2494; corr. 1997, 1061).

<sup>657</sup> Directive of 20-05-1997 (OJEC L 144/19).

<sup>658</sup> The new EU-Directive 2011/83/EU on consumer rights, which repeals the Directives 85/577/EEC and 97/7/EC, has been transposed into German law in 2013 by a law that will enter into force on 13 June 2014 (BGBl. I 3642; BT-Drucks. 17/12673).

<sup>659</sup> Cf. W. Hau, *Harmonisierung des Immobiliarmietrechts in Europa – Bestandsaufnahme und Perspektiven*, JZ 2010, 553 (555).



- Doorstep transaction (*Haustürgeschäft*) – The same applies if the parties agree a tenancy by a doorstep transaction pursuant to section 312 BGB, which transposes the EU-Directive 85/577/EEC<sup>660</sup>. Accordingly, a doorstep transaction requires a contract between an entrepreneur and a consumer concerning performance for remuneration which the consumer has been induced to enter into (i) by oral negotiations at his place of work or in the area of a private home, (ii) on the occasion of a leisure event carried out by the entrepreneur or by a third party which at least was also in the interest of the entrepreneur, or (iii) following a surprise approach in a means of transport or in an open public area. Since the subject matter of a tenancy is performance for remuneration, it is possible that a tenancy contract could be concluded in such a doorstep situation, e.g. if the conclusion occurs at the tenant's home or place of work. Then, the landlord is also obliged to instruct the tenant on his right to revoke.
- E-commerce contract – If the landlord however uses a teleservice or media service in order to enter into the tenancy contract, he has in addition to his obligations because of a distance contract to provide further information to the tenant pursuant to section 312g BGB and Article 246 section 3 EGBGB. The revocation period does not begin until this duty has been performed by the landlord (section 312g (III) BGB). These provisions serve as transposition of the Directive 2000/31/EC<sup>661</sup> on electronic commerce.
- Time-share agreement or contract relating to long-term holiday products<sup>662</sup> – Their regulation was incorporated into the BGB in order to transpose the Directive 2008/122/EC. In these cases, the entrepreneur must provide to the consumer, in good time prior to the submission of his contract declaration, preliminary contract information under Article 242 section 1 EGBGB, which must be clear and comprehensible (section 482 (I) BGB). Otherwise, the revocation period does not commence (485a (II) BGB). Furthermore, the landlord must instruct the tenant prior to conclusion of the contract on his right of revocation (section 482a BGB).

Thus, in all the cases described above, the tenant has a right of revocation pursuant to section 355 BGB (sections 312 (I), 312d (I), 485 (I) BGB). The revocation period is usually fourteen days, provided that the tenant has been instructed by the landlord on his right at the latest on conclusion of the contract (section 355 (II) BGB).<sup>663</sup> Otherwise, the right to revoke does not expire, even after the general deadline of six months (section 355 (IV 3) BGB).

### 6.3. Conclusion of tenancy contracts

	<b>Tenancy type 1 = private rental market</b>	<b>Tenancy type 2 = housing with a public task</b>	<b>Tenancy type 3 = cooperatives</b>	<b>Ranking from strongest to weakest regulation</b>
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<sup>660</sup> Directive of 20-12-1985 (OJEEC L 371/31).

<sup>661</sup> Directive of 08-06-2000 (OJEU L 178/1).

<sup>662</sup> As outlined above in 4.2. 'Regulatory types of tenures without a public task'.

<sup>663</sup> If the landlord instructs the tenant after that time, the revocation period is one month.

				<b>tion</b>
<b>Requirements for a valid conclusion</b>	- tenancy agreement must at least include and describe the parties, the rental object, the contract duration and as the case may be a reason for the limitation on duration, the amount of rent and the residential purpose - written form is required if tenancy shall be temporary for a period longer than one year			
<b>Regulations limiting freedom of contract</b>	- landlord must consider a broad non-discrimination rule that prohibits discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation - control of contractual terms; ineffective contractual terms are replaced by the statutory provisions - tenant has a right of pre-emption in case of selling the residential premises to a third party connected with the establishment of apartment ownership	- the same regulations as in case of tenancies with private landlords - tenant must be in possession of a qualification certificate for housing with a public task	- the same regulations as in case of tenancies with private landlords - special unwritten principle of equal treatment, which obliges the cooperative to treat all their members equally in every respect	

- Tenancy contracts

- distinguished from functionally similar arrangements (e.g. licence; real right of habitation; *Leihe*; *commodato*)

(1) Gratuitous loan (*Leihe*), sections 598 et seq. BGB

First of all, the gratuitous loan can be named as a functionally similar arrangement. Tenancy contracts differ from the gratuitous loan in the consideration. While the tenant owes a rent in return for granting the right to use and to occupy the dwelling, the borrower is permitted to use the item at no charge.

(2) Usufructuary lease, sections 581 et seq. BGB

Further, tenancy contracts have to be distinguished from the usufructuary lease. This arrangement includes, besides the permission to use the leased object, the right to extract and enjoy the fruits of the object.<sup>664</sup> A tenancy however permits only to use and occupy the dwelling as a possessor. The same applies to a sublease agreement, since the rent, the subtenant pays, serves as consideration for using the dwelling and is not converted into a fruit due to the fact that the main tenant receives it instead of the landlord.<sup>665</sup>

<sup>664</sup> Cf. Blank, in: *Schmidt-Futterer*, bef. ss. 535 BGB, rec. 170.

<sup>665</sup> Cf. J. D. Harke, in: *MüKo-BGB*, s. 581, rec. 11.

### (3) Right of residence, section 1093 BGB

The right of residence differs from a tenancy contract in its legal arrangement. While the tenant's right to possess the dwelling is considered as a personal, obligatory right, the right of residence is a personal easement that has to be entered into the land register and is governed by property law.

### (4) Usufruct, sections 1030 et seq., 1048 BGB

The same applies for the usufruct, which is additionally more comprehensive than the right of residence because of its right to derive profit or benefit from the premises.

### (5) Familiar arrangements

Finally, tenancy contracts can be distinguished from familiar arrangements, i.e. permitting family members to use residential space at no charge or a reduced rent. As against tenancy contracts, such familiar arrangements are often not legally binding.

- specific tenancy contracts, e.g. contracts on furnished apartments; student apartments; contracts over room(s) only (e.g. student rooms); contracts over rooms or apartments located in the house in which the landlord lives himself as well. Please describe the legal specificities in these cases.

Pursuant to section 549 (I) BGB, tenancies on residential space are subject to special provisions on the protection of tenants. But certain tenancy contracts are exempted from this general rule in so far as the special provisions on increases in rent, security of tenure and limitation of contract duration do not apply. This exemption concerns tenancy contracts on residential space only for temporary use, tenancies on furnished dwellings, tenancies with a legal person under public law or a recognized welfare work organisation and tenancies on residential space in a student hostel or a hostel for young people (section 549 (II, III) BGB). Consequently, the landlord is entitled to deviate from the mentioned provisions on the tenant's protection by agreement, even to the disadvantage of the tenant.

Except for these specific contracts, there are also other tenancies which are generally subject to the rules on tenant protection but are nevertheless exempted from single provisions. If the rented dwelling is for example part of a building having no more than two dwellings of which one is inhabited by the landlord himself, the latter has a simplified right to give ordinary notice. Pursuant to section 573a (I) BGB, the landlord may terminate the tenancy with an extended period of three months but without the need for a justified interest. The same applies in case of tenancies for unfurnished rooms located in a dwelling in which the landlord lives as well (section 573a (II) BGB). Finally, there are special provisions for dwellings rented to persons who are obliged to perform services (*Werkwohnung*), such as employees of the landlord (section 576-576b BGB). If for instance the employment has been terminated, the landlord may terminate the tenancy with a period of just one month, provided the service relationship requires residential space for another employee that is located in immediate relation to the place of work (section 576 (I no. 2) BGB). In this case, the tenant has no right to object to notice of termination (section 576a (II no. 1) BGB). This applies also if the employee has terminated the service relationship without any legally justified reason to do so or if the relationship has been terminated on justified grounds by the employer (section 576a (II no.2) BGB).

- Requirements for a valid conclusion of the contract
  - formal requirements

Generally, legal transactions are not subject to formal requirements. But if the tenancy shall be temporary for a longer period than one year, the contract has to be laid down in written form. The same applies in case of a tenancy unlimited in time, but under exclusion of the right to terminate the tenancy ordinarily for a period of more than one year.<sup>666</sup> Otherwise, the tenancy is deemed to be concluded for an indefinite period of time (section 550 (1) BGB). Apart from that, the contract is still effective, but it is advisable to always conclude a tenancy in writing to avoid problems of proof.<sup>667</sup> Furthermore, the landlord would be prevented from assigning duties to the tenant, such as the obligation to pay for utilities and to carry out cosmetic repairs, if he concludes the tenancy only verbally, since a verbal contract entails the application of the legal regulations on tenancy law (section 535 (I) BGB). However, the writing requirement shall primarily enable a potential buyer to be informed about tenants on the property he intends to acquire, since tenancy contracts are not registered in the land register.<sup>668</sup> With regard to the principle “purchase is subject to existing tenancies” (section 566 BGB), it is important for the potential acquirer to know about the tenancy contracts he would be entering into.

In order to satisfy the requirement of written form, the essential conditions of the contract must follow from the tenancy agreement, in particular the rent amount, the parties, the period and the rental property.

Instead of writing, the tenancy agreement can also be concluded in electronic form by using an electronic signature (section 126 (III), 126a BGB). A notarial recording of the contract is only required if the tenancy contains a right of pre-emption for the benefit of the tenant, since then the contract also concerns the future acquisition of the dwelling which must be recorded by a notary (section 311b (I) BGB).

- Is there a fee for the conclusion and how does it have to be paid? (e.g. “fee stamp” on the contract etc.)

There is no fee in terms of a public charge for the conclusion of a tenancy contract in Germany, but the landlord is not prohibited from agreeing to charge the tenant a fee for the conclusion of the tenancy contract (*Vertragsausfertigungsgebühr*).<sup>669</sup> The limit of this contract fee constitutes the coverage of costs (*Kostendeckung*), since the landlord may not demand commission for his own dwelling (section 2 (II no. 2) WoVermittG).<sup>670</sup> Unreasonable, excessive fees illegally violate principles of good morals (*contra bonos mores*) and can therefore be reclaimed from the landlord (section 138 (II) BGB).<sup>671</sup> Courts have held that a fee of about EUR 50 is cost-covering and therefore reasonable.<sup>672</sup> An agreement on a fee for the conclusion of the contract within the frame of standard business terms is however always ineffective.<sup>673</sup> This also applies in the case of housing with a public task. According to section 9 (I) WoBindG, an agreement on the performance of services in exchange for letting the dwelling is void.

<sup>666</sup> BGH, NZM 2008, 687.

<sup>667</sup> Cf. Derleder & Pellegrino, NZM 1998, 550 (553).

<sup>668</sup> Cf. W. Weidenkaff, in: *Palandt*, s. 550 BGB, rec. 1.

<sup>669</sup> Cf. N. Eisenschmid, in: *Schmidt-Futterer*, s. 535 BGB, rec. 643.

<sup>670</sup> AG Witzhausen, WuM 1997, 333.

<sup>671</sup> AG Hamburg, NZM 1999, 460.

<sup>672</sup> LG Hamburg, WuM 1990, 62.

<sup>673</sup> LG Hamburg, WuM 2009, 452.

- registration requirements, legal consequences in the absence of registration (distinguish existing registers: e.g. land register, tax register, register of domicile)

### (1) Land register

Ordinary tenancy contracts do not have to and cannot be registered at the land register. Only several other forms of “lawful possession” of a premise, namely the right of residence, the usufruct and the permanent residential right, are subject to a register duty because of their legal arrangement. These rights are easements of enjoyment (*dingliches Nutzungsrecht*), that is encumbrances on ownership or on a plot of land, and therefore require registration in the land register (section 873 (I) BGB). If the right has been entered into the land register for a person, it is presumed that the person is entitled to this right, because of the presumption of accuracy of the contents of the land register (sections 891 (I), 892 (I) BGB). The land registry under section 873 (I) BGB is constitutive and not of declaratory character.<sup>674</sup> In the absence of registration, the alteration of a right in a plot of land is therefore ineffective.

### (2) Tax register

Income from rent of residential space is income from property, which is subject to taxation according to sections 2 (I no. 6), 21 of the Law on Income Tax (*Einkommenssteuergesetz*, EStG)<sup>675</sup>. Therefore, a landlord has to state such income in his annual tax declaration. The reduced leasing of residential space especially for family members is taxable as well (section 21 (II) EStG). If the rent amounts to 65% of the reference rent customary in the locality, the reduced leasing is considered completely non-gratuitous. This entails on the one hand that income-related expenses (*Werbungskosten*) can be deducted to 100%. To this extent, the reduced leasing enjoys tax privileges. On the other hand, the intent to realize a profit (*Einkunftserzielungsabsicht*) is presumed by law.

### (3) Register of domicile

The Registration Framework Law provides in section 11 (I) a duty of the tenant to inform the local residents' registration office, which collects the register of domicile, about moving and changing the residence. If the tenant fails to do this within the period determined by the registration law of the respective *Land*, he has to pay a fine.

- Restrictions on choice of tenant - antidiscrimination issues
  - EU-Directives (see enclosed list) and national law on antidiscrimination

Directives	Related Subject	Transposition Germany
Council Directive 2000/43/EC of 29 June 2000 on the principle of equal treatment between persons irrelevant of racial or ethnic	<ul style="list-style-type: none"> <li>- Discrimination on grounds of racial or ethnic origin.</li> <li>- Framework for combating</li> </ul>	<ul style="list-style-type: none"> <li>- Both directives on anti-discrimination were transposed into the national law by the enactment of the General Act of Equal Treatment (<i>Allgemeines Gleichbehandlungsgesetz</i>, AGG)<sup>677</sup>.</li> <li>- It includes with section 1 AGG a broad non-discrimination rule that prohibits discrimination on the grounds of race or ethnic origin, gender, reli-</li> </ul>

<sup>674</sup> Cf. J. Kohler, in: *MüKo-BGB*, Vol. 6, s. 873, rec. 87.

<sup>675</sup> EStG in its version of 08-10-2009 (BGBl. I 3366; corr. 3862).

<sup>677</sup> AGG of 14-08-2006 (BGBl. I 1897) + (BT-Drucks. 16/1780).

origin (OJEC L 180/22).	<p>direct and indirect discrimination <i>inter alia</i> in relation to access to and supply of goods and services which are available to the public, including housing (Article 3 (1 h)).</p> <p>- Directive constitutes a concretization of the non-discrimination rule in Article 21 CFR.<sup>676</sup></p>	<p>gion or belief, disability, age or sexual orientation. This rule must be considered by landlords in every phase of the tenancy pursuant to section 2 (I no. 8) AGG. However, Article 19 (III) AGG allows exceptionally for different treatment in the rental housing sector in order to create or achieve stable structure of citizens, balanced settlement structure, and balanced economic, social and cultural circumstances.</p> <p>- With regard to the requirement that the residential space has to be available to the public, it suffices if the offer of the landlord leaves somehow his sphere of privacy, e.g. by placing an advertisement in the internet or in newspapers.<sup>678</sup></p> <p>- To prove that there has been discrimination on one of the grounds referred to section 1, it suffices that the tenant is able to establish that it may be presumed. Then it shall be for the landlord to prove that there has been no breach of the provisions prohibiting discrimination (section 22 AGG). If the landlord is not able to produce proof of the contrary, the disadvantaged person may claim for removal, injunction and also for damages from the landlord (section 21 AGG).</p> <p>- Such an infringement of the non-discrimination rule does not cause a duty for the landlord to contract, but these provisions reduce the freedom of contract.<sup>679</sup> However, if the discrimination consists in the refusal to conclude the tenancy, a claim for removal consists in a claim to conclude the contract (<i>actus contrarius</i>).<sup>680</sup></p> <p>- In 2010, a court adjudged a tenant compensation for immaterial damage in the amount of EUR 2,500 because of the comment that the dwelling will not be rented out to "nigger" (section 21 (II) AGG).<sup>681</sup></p>
Council Directive 2004/113/EC of 13 December 2004 on the principle of equal treatment between men and women in the access to and supply of goods and services (OJEC L 373/37).	<p>- Discrimination on grounds of sex.</p>	<p>- In 2010, a court adjudged a tenant compensation for immaterial damage in the amount of EUR 2,500 because of the comment that the dwelling will not be rented out to "nigger" (section 21 (II) AGG).<sup>681</sup></p>

Apart from the AGG, there exists a special unwritten principle of equal treatment with regard to tenancies with cooperatives, which obliges the cooperative to treat all their members equally in every respect.<sup>682</sup>

<sup>676</sup> Cf. Hau, JZ 2010, 553 (556).

<sup>678</sup> BT-Drucks. 16/1780 p. 32.

<sup>679</sup> Cf. Horst, *Praxis des Mietrechts* rec. 27.

<sup>680</sup> Cf. G. Thüsing, in: *MüKo-BGB*, Vol. 1 (Munich: C. H. Beck, 2012) s. 21 AGG, rec. 18.

<sup>681</sup> OLG Cologne, NJW 2010, 1676.

<sup>682</sup> BGH, NZM 2010, 121; NJW 1960, 2142.



- Limitations on freedom of contract through regulation
  - mandatory provisions in rental contracts, in particular: mandatory minimum requirements of what needs to be stated in a tenancy contract

A tenancy contract must at least include and describe the parties, the rental object, the contract duration (and as the case may be a reason for the limitation on duration), the amount of rent and finally the residential purpose, which is especially necessary in case of a mixed-use-tenancy.<sup>683</sup> However, only the parties, the rental object and the amount of rent are the *essentialia negotii*.<sup>684</sup> If the parties have not agreed on these requirements there is no tenancy contract. Apart from these minimum requirements, the contract should (according to the pre-formulated forms of tenants and landlords associations) also provide information on the beginning of the tenancy, the size of the dwelling, the scope of use, provisions on keeping of animals, contracts of supply, the allocation of costs for utilities and the duty to carry out cosmetic repairs as well as to bear the costs for minor damages. If any of these information is missing the content of the contract is determined by the statutory provision, that is e.g. the landlord must bear the operating costs (section 556 (I 1) BGB).

- control of contractual terms (EU directive and national law); consequences of invalidity of contractual terms

The framework for the control of contractual terms constitutes the EU-Directive 93/13/EEC<sup>685</sup> on unfair terms in consumer contracts, which was transposed into German law by sections 305 et seq. BGB.<sup>686</sup> These provisions on control of standard business terms (*Allgemeine Geschäftsbedingungen*, AGB) apply even if they are circumvented by other constructions (section 306a BGB). Standard business terms are contract terms pre-formulated for more than two contracts which one party to the contract (*Verwender*) presents to the other party upon the entering into of the contract (section 305 (I 1) BGB). Pre-formulated contract terms in this sense are existent even if they are intended for non-recurring use (section 310 (III no. 2) BGB). Contract terms that have been negotiated in detail between the parties are not deemed standard business terms. In order for standard business terms to become a part of the contract, (i) the party proposing the terms must refer the other party to them, (ii) the proposing party must give the other party the opportunity to take notice of their contents and (iii) the other party must agree to their application (section 305 (II) BGB).

The steps of the control of reasonable contents are as follows: First, section 309 BGB contains a list of prohibited clauses that are ineffective *ipso iure*; secondly, there are clauses, provided in section 308 BGB, which are generally ineffective, but for whose evaluation the court has some discretion; and finally section 307 BGB contains a general clause. Pursuant to section 307 (I) BGB, provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they disadvantage the other party unreasonably. Such an unreasonable disadvantage may also arise from the provision not being clear and comprehensible. Apart from that, an unreasonable disadvantage is, in case of doubt, assumed if a provision (i) is not compatible with essential principles of the statutory provision from which it deviates, or (ii) limits essential rights or duties inherent in

<sup>683</sup> As outlined above in 6.1. 'Basic requirements for conclusion'.

<sup>684</sup> If the duration of the contract is not specified the tenancy is concluded for an indefinite period of time (cf. s. 542 (I) BGB).

<sup>685</sup> Directive of 5-04-1993 (OJEEC L 95, 29).

<sup>686</sup> Lists of void clauses in tenancy contracts can be found in: W. Wurmnest, in: *MüKo-BGB*, Vol. 2 (Munich: C. H. Beck, 2012) s. 307, rec. 110-120; Heinrichs, in: *Palandt*, s. 307 BGB, rec. 128, 129.

the nature of the contract to such a extent that attainment of the purpose of the contract is jeopardized.

Below, a few examples for unfair standard business terms shall be mentioned:

An unfair and therefore ineffective clause constitutes for example the obligation of the tenant to execute cosmetic repairs (*Schönheitsreparaturen*) by craftsmen.<sup>687</sup> If the landlord does not confer this duty on the tenant, he would only owe an execution of average kind and quality under sections 536, 243 BGB.<sup>688</sup> A craftsmen clause places therefore an unreasonable disadvantage on the tenant, which is contrary to the principle of good faith. The same applies to a clause after which the tenant is obliged to remove all wallpapers<sup>689</sup> or to renew the carpets<sup>690</sup> at the end of the tenancy. Apart from the mentioned unfair terms, over three quarter of all terms concerning cosmetic repairs are void.<sup>691</sup>

If the landlord wants however to assign the responsibility to pay the costs for minor maintenance works such a clause would require a certain ceiling for every single repair as well as for all minor repairs within a year.<sup>692</sup> The costs that shall be borne by the tenant for a single repair may not exceed an amount of EUR 75<sup>693</sup> up to EUR 100<sup>694</sup>, while the costs for a whole year may not amount to more than 8%<sup>695</sup> to 10%<sup>696</sup> of the annual rent. Furthermore, the tenant may not be obligated to do the maintenance works on his own.<sup>697</sup>

The legal consequence of an ineffective contractual term is that the respective contents of the contract are determined by the statutory provisions (section 306 (II) BGB). Apart from that, the contract remains in effect (section 306 (I) BGB). Only if its maintenance would be an unreasonable hardship for one party would the whole contract be ineffective (section 306 (III) BGB).

- statutory pre-emption rights of the tenant

Apart from the possibility to agree a pre-emption right to the benefit of the tenant (sections 463 et seq. BGB analogue), statutory right also exists which is laid down as a mandatory provision in section 577 (I) BGB. In case of selling the residential premises to a third party for the first time<sup>698</sup> connected with the establishment of apartment ownership after the tenant has been permitted to use it, the tenant has a right of pre-emption. This does not apply if the landlord sells the residential premises to a member of his family or a member of his household. The seller or the third party must inform the tenant immediately about the contents of the purchase agreement and his right of pre-emption (sections 577 (II) (I 3), 469 (I) BGB). The tenant has a period of two months after receiving the notice to make use of his pre-emption right (sections 577 (I 3), 469 (II) BGB). The period of time does not begin until the tenant is informed about the actual and entire content of the

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<sup>687</sup> BGH, NZM 2010, 615; OLG Stuttgart, NJW-RR 1993, 1422.

<sup>688</sup> Ibid, 1423.

<sup>689</sup> BGH, NJW 2006, 2116.

<sup>690</sup> OLG Hamm, NJW-RR 1991, 844.

<sup>691</sup> Cf. SPIEGEL of 21-07-2013, *Schönheitsreparaturen: Fast alle Klauseln in Mietverträgen sind ungültig*, available at: <http://www.spiegel.de/wirtschaft/service/schoenheitsreparaturen-miet-klauseln-meistens-ungueltig-a-912280.html> (last retrieved: 23-03-2014).

<sup>692</sup> Cf. for legitimacy of the clauses on minor maintenance works: BGH, NJW 1991, 1750 (1752).

<sup>693</sup> OLG Hamburg, NJW-RR 1991, 1167.

<sup>694</sup> AG Braunschweig, ZMR 2005, 717.

<sup>695</sup> Ibid.

<sup>696</sup> OLG Hamburg, NJW-RR 1991, 1167.

<sup>697</sup> BGH, NJW 1992, 1759.

<sup>698</sup> BGH, NZM 2006, 505.

certain purchase agreement.<sup>699</sup> The pre-emption right has to be exercised by a written declaration of the tenant to the seller (section 577 (III) BGB). Then the purchase takes effect between the tenant and the seller subject to the terms that the seller agreed with the third party (section 577 (I 3), 464 (II) BGB).

- Are there provisions to the effect that a mortgagor is not allowed to lease the dwelling (charged by the mortgage) or similar restrictions?

There are no restrictions regarding the lease of a dwelling encumbered with a mortgage.<sup>700</sup> Pursuant to section 1123 (I) BGB,<sup>701</sup> the mortgage extends to the claim for rent, if the plot of land is already let on lease. The same applies even to claims for rent, which are founded on new tenancy contracts entered into after the creation of the mortgage.<sup>702</sup> This implies that the landlord is able to continue existing tenancy contracts as well as to conclude new ones. The extension of the mortgage to the claims of rent serves the mortgagee only as compensation, since the rights of the tenant remain unaffected by the creation of a mortgage.<sup>703</sup>

The mortgagor shall however still be free to use and to administer as well as to profit from the plot of land up to the date of compulsory enforcement.<sup>704</sup> Therefore, section 1123 (II) BGB provides that the claim for rent is released from liability upon the expiry of one year from the due date, unless it is attached in favour of the mortgagee prior to this date. With regard to advance dispositions of the rent, section 1124 (I) BGB provides furthermore that these dispositions are effective in relation to the mortgagee, if the rent is collected or disposed of in another way prior to the attachment.

Finally, one has to consider that the realization of liability under section 1123 (I) BGB can only be pursued by an attachment within a receivership (*Zwangsverwaltung*) according to section 148 ZVG, since an attachment within a compulsory auction does not include claims for rent (section 21 (II) ZVG). In the latter case, the right to use and to administer the plot of land within the limits of a proper management remains therefore with the mortgagor (section 24 ZVG). In the context of a receivership, these rights are however revoked (section 148 (II) ZVG).

#### 6.4. Contents of tenancy contracts

	<b>Tenancy type 1 = private rental market</b>	<b>Tenancy type 2 = housing with a public task</b>	<b>Tenancy type 3 = cooperatives</b>	<b>Ranking from strongest to weakest regulation</b>
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<sup>699</sup> BGH, NZM 2006, 796 (797); BGH, NJW 1994, 315 (316).

<sup>700</sup> Cf. Blank, in: *Blank/Börstinghaus*, s. 567, rec. 3.

<sup>701</sup> Cf. also the Law on the Attachment of Claims for Rent or Lease due to Claims arising from Public Encumbrances (MietPfändG) of 09-03-1934 (RGBl. I 181).

<sup>702</sup> RGZ 81, 146 (150).

<sup>703</sup> Only if the mortgage is defaulted and the property is sold in a compulsory auction the tenant's position may be affected in so far as the acquirer has a special right of termination pursuant to section 57a ZVG.

<sup>704</sup> Cf. D. Eickmann, in: *MüKo-BGB*, Vol. 6, s. 1123, rec. 2.

<b>Description of dwelling</b>	<ul style="list-style-type: none"> <li>- as detailed as possible in order to avoid remedies and problems regarding the scope of the right of use</li> <li>- indication of habitable surface is important because of its impact on the amount of rent, warranty rights and the apportionment of costs for utilities</li> </ul>			
<b>Parties to the tenancy contract</b>	<ul style="list-style-type: none"> <li>- Landlord: all persons who are capable of contracting</li> <li>- Change of the landlord: position of the tenant is neither affected through inheritance nor through sale; only in case of public auction the acquirer has a termination right</li> <li>- Tenant: natural persons who are capable of contracting as well as plurality of persons; spouses, civil partners, parents and children of the tenant are allowed to move into a dwelling with the tenant</li> <li>- Subletting: the landlord has to approve the subletting, provided that the tenant acquires, after entering into the tenancy, a justified interest in permitting a third party to use part of the dwelling</li> </ul>	<ul style="list-style-type: none"> <li>- Landlord: all persons who are capable of contracting and have received public funds</li> <li>- Tenant: persons who are in possession of a qualification certificate for housing with a public task</li> </ul>	<ul style="list-style-type: none"> <li>- Landlord: co-operatives</li> <li>- Tenant: (prospective) members of the co-operative</li> </ul>	
<b>Duration</b>	<ul style="list-style-type: none"> <li>- tenancy contracts are mainly concluded for an indefinite period of time, since the landlord has to prove one of the three reasons for the fixed-term tenancy (needing the dwelling for himself, his family, household members or persons who are obliged to perform services; intention to change or repair the dwelling substantially)</li> <li>- due to the requirement to prove a specified reason for the limited duration, periodic tenancies, prolongation options and contracts concluded for life are of little importance</li> </ul>			
<b>Rent</b>	<ul style="list-style-type: none"> <li>- there is no system of rent control yet, except for criminal provisions and consequences under civil law if the parties have agreed on an excessive high rent</li> <li>- the tenancy contract may include clauses on rent increase concerning future changes in the amount of rent (stepped rent and indexed rent)</li> </ul>	<ul style="list-style-type: none"> <li>- the landlord may only demand a rent that is required to cover the current expenditures or a rent with a maximum permitted amount determined by the promise to grant public funds</li> </ul>	<ul style="list-style-type: none"> <li>- the same regulations and restrictions as in case of tenancies with private landlords</li> </ul>	
<b>Deposit</b>	<ul style="list-style-type: none"> <li>- serves as a guarantee for all claims of the landlord arising from the tenancy</li> </ul>	<ul style="list-style-type: none"> <li>- an agreement on a security deposit is only valid if it is intended for ensuring</li> </ul>	<ul style="list-style-type: none"> <li>- the tenant usually has to acquire shares in a business</li> </ul>	

	- may amount at most to three months' rent excluding operating costs	claims for damages regarding the dwelling or forborne cosmetic repairs	instead of providing a deposit; these shares may also amount at most to three months' rent excluding operating costs	
<b>Utilities, repairs, etc.</b>	<ul style="list-style-type: none"> <li>- Statutory rule: the landlord has to bear the costs for utilities and is responsible for all kinds of maintenance works and repairs</li> <li>- In practice: the tenant has to bear the allocatable operating costs and is obligated to bear a portion of costs for minor maintenance works as well as to carry out cosmetic repairs</li> </ul>			

- Description of dwelling; indication of habitable surface (and consequences in case of the provision of wrong data)

The dwelling should be described as detailed as possible in order to avoid remedies, like rent reduction and claims for damages, and problems regarding the scope of the right of use. In this context, the indication of habitable surface in the tenancy agreement is often the subject of disputes, because of its impact on the amount of rent (sections 558 (II) BGB, 8a WoBindG), warranty rights (sections 536, 536a BGB) and the apportionment of costs for utilities (section 556a (I) BGB).<sup>705</sup> The habitable surface is determined either on the basis of sections 42 II. BV for tenancies on housing with a public task concluded prior to 2004 or according to the Law on Habitable Surface (WoFIV) for newer tenancies. These provisions are also applicable with regard to tenancies on the private rental market.<sup>706</sup> The BGH has held that suitability of the dwelling is considerably reduced if the habitable surface negatively deviates from the agreed surface by more than 10%.<sup>707</sup> Thus, the tenant is entitled to rent reduction pursuant to section 536 (I, II) BGB. If, to the contrary, the actual habitable surface exceeds the surface indicated in the contract to not more than 10%, the latter still provides the basis for increases in rent etc.<sup>708</sup>

In case of provision of wrong data in general, the period prior to the handover of the dwelling and the period afterwards have to be distinguished regarding legal consequences. Prior to the handover of the dwelling, the tenant may avoid his declaration of intent because of a mistake about a characteristic of the dwelling (section 119 (II) BGB). This requires that the characteristic of the dwelling is customarily regarded as essential and that the mistake was causal for declaration of the tenant. Avoidance must be effected without undue delay (section 121 (I) BGB). Then, his declaration related to the conclusion of a tenancy contract is regarded as having been void from the beginning (section 142 (I) BGB).

After the handover of the dwelling, the warranty provisions of tenancy law are *lex specialis* (sections 536, 536a BGB). Provided a warranted characteristic is lacking, for example

<sup>705</sup> Cf. H.-J. Kraemer, *Mietraumfläche - Auswirkungen auf Mietpreis, Gewährleistung und Betriebskosten*, NZM 1999, 156-162.

<sup>706</sup> BGH, NZM 2004, 454.

<sup>707</sup> BGH, NZM 2005, 500; NJW 2004, 3115; NJW 2004, 1947.

<sup>708</sup> BGH, NZM 2007, 594.

the existence of a fitted kitchen,<sup>709</sup> the tenant is entitled to a rent reduction because of a material defect (section 536 (I, II) BGB). Additionally, the tenant may demand damages regardless of whether the landlord is responsible or not, since the defect existed already when the tenancy agreement had been entered into (section 536a (I var. 1) BGB).

- Allowed uses of the rented dwelling and their limits
  - In particular: To what extent are mixed (residence/commercial) contracts lawful and usual (e.g. having a shop, a legal office or a doctor's studio in the dwelling)?

Mixed tenancy contracts, according to which the tenant shall be allowed to use the dwelling also for commercial purposes, are lawful as far as the following requirements are met:

- The commercial use of the dwelling may not be the prevailing or even the only purpose of the contract. Pursuant to Article 6 section 1 (I 1) MRVG, the *Länder* are legitimated to regulate by statutory instrument that residential space can be let for purposes other than housing only by way of an official permission. Such regulations were issued for example in Hamburg<sup>710</sup> and Munich<sup>711</sup> for the private rental market. In case of housing with a public task, landlords are even obliged to always apply for permission from the municipality in order to be allowed to let the dwelling for other purposes or to alter its construction for this purpose (section 27 (VII 1 no. 3) WoFG). According to these provisions, residential space is diverted from its intended use if it is used solely or mainly for commercial purposes. A partly commercial use is however allowed.
- Other tenants as well as the rental object may not be impaired by the exercise of commercial activities, like for instance in case of home offices.<sup>712</sup> Thus, offices or shops with active customer traffic are not permitted in a dwelling.<sup>713</sup>

If the commercial use of the dwelling is the prevailing purpose of the contract, the contractual relationship is subject to the rules on commercial leases with the result that the tenant does not enjoy the protection tenants of residential space do.<sup>714</sup> Provided the tenant uses the dwelling mainly for commercial purposes although he has agreed otherwise with the landlord, he uses the dwelling in breach of contract.<sup>715</sup> The landlord may therefore seek a prohibitory injunction (section 541 BGB) or even terminate the tenancy (section 573 (II no. 1) BGB).

- Parties to a tenancy contract
  - Landlord:
    - Who can lawfully be a landlord?

First of all, only persons who are capable of contracting can be a landlord, that is must have reached the age of eighteen and must not be in a state of pathological mental disturbance (sections 104, 105 BGB).<sup>716</sup> Minors, who for example have inherited a dwelling, need the consent or the ratification of their legal representative, since the conclusion of a

<sup>709</sup> LG Dresden, WuM 2001, 336.

<sup>710</sup> HmbWoSchG of 8-03-1982 (HmbGVBl. 47).

<sup>711</sup> WohnraumzweckentfremdungsS of 02-01-2009 (MüABl. 4).

<sup>712</sup> LG Frankfurt a.M., WuM 1996, 532.

<sup>713</sup> LG Munich, ZMR 2007, 278.

<sup>714</sup> Cf. Blank, in: *Blank/Börstinghaus*, s. 535 BGB, rec. 25, 26.

<sup>715</sup> Cf. Blank, in: *Blank/Börstinghaus*, s. 535 BGB, rec.17.

<sup>716</sup> As outlined above in 6.1. 'Basic requirements for conclusion'.

tenancy contract does not cause only a legal benefit regarding its associated obligations (sections 107, 108 (I) BGB). The same applies for persons under custodianship, who are mentally ill and require therefore the consent of the custodian for a declaration of intent (section 1903 (I) BGB).

In general, the owner of the plot of land can be a landlord. However, the eligibility to lease is irrespective of the assignment *in rem* to the rental object. Therefore, also entitled persons of a heritable building right (*Erbauberechtigter*), of a usufruct or of a right of residence (provided that the letting is permitted) are entitled to lease. Beyond that, the acquirer of rented residential space enters into existing tenancies and become (section 566 (I) BGB).

- Does a change of the landlord through inheritance, sale or public auction affect the position of the tenant?

If the landlord dies, the general principle of universal succession is applicable as distinguished from the case of death of the tenant. This principle provides that upon the death of a person, that person's property passes as a whole to one or more than one other persons (heirs) (section 1922 (I) BGB). Thus, the heirs become party to the tenancy contract *ipso iure* after the landlord's demise. They can only terminate the contract in accordance with the general rules (e.g. personal need or fundamental breach of contract by the tenant), since there are no special termination rights for the heirs of the landlord.<sup>717</sup> Consequently, the tenant's position remains unaffected by a change of the landlord through inheritance.

The same applies if the dwelling is disposed of by the landlord. According to the rule "*emptio non tollit locatum*" as laid down in section 566 BGB, the acquirer of the residential space enters into existing tenancies and takes over all the rights and duties of a landlord that the seller used to have. Since there exists no register for tenancy contracts in Germany, the acquirer must rely on the content of the purchase agreement and may claim for damages if the residential space is rented out contrary to the agreement. Provided the acquirer does not perform his duties resulting from existing tenancy contracts, the landlord is liable for damages in the same way as a surety (section 566 (II) BGB). The landlord is however released from liability in case the tenant does not terminate the tenancy to the earliest date at which termination is allowed, although he obtained knowledge by the passing of ownership by notification from the landlord. Furthermore, section 566a BGB provides that the acquirer takes over also the rights and duties created by a rent security deposit. In case the acquirer is not able to return the deposit after termination of the tenancy, then the landlord continues to be obliged to do it. Finally, despite the disposal, legal transactions entered into between the tenant and the landlord on the rent claim are effective in relation to the acquirer to the extent that they do not relate to rent for a period of time subsequent to the month in which the tenant obtains knowledge of the passing of ownership (section 566c BGB). Considering these provisions, the sale of the dwelling does not change the position of the tenant. If the dwelling is however disposed of after the conclusion of the contract but prior to the handover to the tenant, the acquirer is only bound to the tenancy to the extent that he has agreed so with the landlord pursuant to section 567a BGB. Otherwise, the effectiveness of the landlord change depends on the approval by the tenant pursuant to section 415 BGB.<sup>718</sup> Provided the tenant does not approve it, the landlord is liable for damages due to non-

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<sup>717</sup> Different: the heirs of the tenant, s. 564 BGB.

<sup>718</sup> Cf. Blank, in: *Blank/Börstinghaus*, s. 567a, rec. 1.



performance. Consequently, it is solely up to the tenant whether his situation will be affected by this case or not.

If the dwelling is however sold through a compulsory auction, the new owner has a special right to terminate existing tenancy contracts within the statutory notice period (section 57a ZVG). Apart from that, the same provisions as in the case of general sale, that is, sections 566 et seq. BGB, are applicable pursuant to section 57 ZVG.

- Tenant:
  - Who can lawfully be a tenant?

First of all, natural persons who are capable of contracting can lawfully be a tenant. But also plurality of persons, for example spouses, people sharing a flat and joint ownerships (*Gesamthandsgemeinschaft*) are able to rent a dwelling. Joint ownerships are in particular a community of heirs, partnerships and associations (especially in case of mixture tenancies).

- Which persons are allowed to move in an apartment with the tenant (spouse, children etc.)

Spouses, civil partners, parents and children of the tenant are allowed to move into a dwelling with the tenant, as well as domestic servants and nursing staff, without the permission of the landlord, since taking close family members into the dwelling falls within the scope of appropriate use.<sup>719</sup> Nevertheless, the tenant has to inform the landlord that he intends to take family members into the dwelling. Cohabitees<sup>720</sup> and other family members like brothers and sisters of the tenant<sup>721</sup> are however subject to approval.

- Changes of parties: in case of divorce (and equivalents such as separation of non-married and same sex couples); apartments shared among students (in particular: may a student moving out be replaced by motion of the other students); death of tenant

In case of divorce, a former spouse who is granted the use of the matrimonial home (*Ehewohnung*) as a consequence of divorce becomes party to the tenancy which was entered into by the other spouse or both (section 1568a (III) BGB). The same applies with regard to civil partners.<sup>722</sup> Pursuant to section 1568a (I) BGB, the spouse shall get it that is more dependent on using the matrimonial home than the other spouse, especially taking into account the best interests of the children living in the household and of the circumstances of the spouses. The entry of the spouse is not subject to approval by the landlord. However, he has an extraordinary right to terminate the contract provided that there is a compelling reason in the person of the entering spouse (sections 1568a (III 2), 563 (IV) BGB). Such a compelling reason is assumed if the entering spouse is bankrupt.<sup>723</sup>

If the dwelling is rented as a flat-share (*Wohngemeinschaft*), the BVerfG infers from such a tenancy that the landlord has to accept the change of several members.<sup>724</sup>

In case of death of the tenant, the tenancy is continued with the surviving tenants provided that the contract has been entered into with more than one tenant (section 563a (I)

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<sup>719</sup> As outlined above in 6.2. 'Freedom of contract'.

<sup>720</sup> BGH, NJW 2004, 56.

<sup>721</sup> BayObLG WuM 1984, 13.

<sup>722</sup> Cf. s. 17 of the Civil Partnership Act.

<sup>723</sup> OLG Cologne, ZMR 2007, 617.

<sup>724</sup> BVerfG, WuM 1993, 104.

BGB). Then, the surviving tenant may terminate the tenancy with the statutory notice period within one month after obtaining knowledge of the death of the tenant (section 563a (II) BGB). As far as there is no other tenant, specific persons who maintained a joint household together with him at the time of demise, like spouse, civil partner, children or life partner (in this order), have a right of succession (section 563 BGB).<sup>725</sup> If any of these persons do not object, the landlord is committed to continue the tenancy with this person, provided he is not entitled to an extraordinary right of termination due to a compelling reason in the person of the successor. Such a compelling reason is assumed if the landlord cannot be reasonably expected to continue the tenancy with the successor because of personal animosity, insolvency or a feared disturbance of the domestic peace.<sup>726</sup> In case the tenancy is not continued with a person within the meaning of section 563 BGB or with a joint tenant under section 563a BGB, it has to be continued with the heir (section 564 BGB), who is as well as the landlord entitled to terminate the lease extraordinarily within one month. The persons with whom the tenancy is continued are liable together with the heir as joint and several debtors for obligations incurred up to the death of the tenant (section 563b (I) BGB). Thus, sections 563-564 BGB constitute a deviation from the principle of universal succession laid down in section 1922 (I) BGB. Accordingly, only the heirs of the tenant would automatically enter into the tenancy contract.

In all these cases described, the new tenant enters into the tenancy contract under the same conditions as the former tenant.

- Subletting: Under what conditions is subletting allowed? Is subletting being abused e.g. with the aim of circumventing the legal protection of tenants (when the tenant is offered not an ordinary lease contract but a sublease contract only)?

As laid down in section 540 (I) BGB, the tenant is not principally entitled to permit a third party use of the rented property without the consent of the landlord, particularly not to sublet it. This applies in any case to the subletting of the whole dwelling. If the tenant wants however to sublet just a part of the residential space, for example one room, he may demand permission from the landlord under the conditions of section 553 (I 1) BGB, which is *lex specialis* for residential tenancies. Accordingly, the landlord has to approve the subletting, provided that the tenant acquires, after entering into the tenancy, a justified interest in permitting a third party to use part of the dwelling. Personal or economic interests of the tenant can cause such a justified interest,<sup>727</sup> as for instance the need of a financial adjustment due to income reduction or unemployment.<sup>728</sup> The mere wish to admit someone else is however not sufficient.<sup>729</sup>

In case of a legitimate interest, the landlord may refuse approval only if (i) there is a compelling reason in the person of the third party, (ii) the residential space would be overcrowded or (iii) the landlord cannot for other reasons reasonably be expected to permit third-party use (section 553 (I 2) BGB). Similar to the termination right in case of a succession pursuant to section 563 BGB, a compelling reason is assumed if the landlord fears serious disturbance of the domestic peace based on concrete indications or if he has a personal animosity with the subtenant.<sup>730</sup> But the decision whether or not to permit

<sup>725</sup> As outlined above in 6.2. 'Freedom of contract'.

<sup>726</sup> Cf. Streyll, in: *Schmidt-Futterer*, s. 563 BGB, rec. 69.

<sup>727</sup> LG Frankfurt, WuM 1981, 39 (40); OLG Hamm, NJW 1982, 318.

<sup>728</sup> LG Hamburg, WM 1983, 261; AG Charlottenburg, MM 1986, no. 7-8, 41; cf. Blank, in: *Schmidt-Futterer*, s. 553 BGB, rec. 4 et seq. with further examples.

<sup>729</sup> BGH, NJW 1985, 130 (131).

<sup>730</sup> Cf. Häublein, in: *MüKo-BGB*, Vol. 3, s. 563, rec. 26.

the sublet may especially not be based on the solvency of the subtenant, since it causes a tenancy just between the subtenant and the main tenant and not with the landlord.<sup>731</sup> Further, the determination of when a dwelling is regarded as overcrowded depends on the circumstances of the individual case.<sup>732</sup> According to the *Wohnungsaufsichtsgesetze*, each person needs at least nine square metres and children less than six years of age should have at least six square metres.<sup>733</sup>

If there is no reason to refuse within the meaning of section 553 (I 2) BGB, the tenant may demand permission of the subletting from the landlord. Because subletting causes a contractual relationship just between the subtenant and the main tenant, the main tenant is responsible for the culpability in the use of the property attributable to the subtenant (section 540 (II) BGB). Provided the landlord can only be expected to permit third-party use with a reasonable increase in rent, he may then make permission dependent on the tenant agreeing to such a rent increase (section 553 (II) BGB).

If the third party moves in without the permission of the landlord, the sublease contract is nevertheless effective<sup>734</sup> and the landlord has no claim to the rent which the main tenant charged the subtenant, because the subletting does not affect the landlord's legal position.<sup>735</sup> However, he is entitled to terminate the main tenancy without notice after an unheeded warning notice (section 543 (II no. 2, III) BGB), but giving notice is unjustified when the landlord has to accept the subtenant on grounds of section 553 (I) BGB (*dolo agit, qui petit, quod statim redditurus est*).<sup>736</sup> After termination of the main tenancy, the landlord may demand return of the dwelling pursuant to section 985 from the subtenant (section 546 (II) BGB).

Since a sublease contract does not cause a contractual relationship between the landlord and the subtenant and is in its existence dependent on the main tenancy, the subtenant does not enjoy legal protection in relation to the landlord. But the latter has to observe the provisions on the protection of tenants nevertheless in relation to the main tenant. Therefore, landlords usually do not offer a sublease contract instead of an ordinary one.

This is not only a consequence of the protection of the main tenant, but also of the protection of the subtenant in case of a commercial subletting. In this connection, the landlord concludes the main tenancy contract with a commercial intermediate landlord (*gewerblicher Zwischenvermieter*), who shall sublet the residential space to a third party for residential purposes. Since the main contract is assigned to the law on commercial leases, which is not subject to the rules on tenants' protection, the BVerfG has considered such kind of subletting as an abuse of rights.<sup>737</sup> Due to this case law, the legislature introduced section 565 BGB, according to which the landlord takes over the rights and duties under the sublease agreement between the commercial intermediate landlord and the subtenant upon termination of the main contract. As a result, the subtenant enjoys the same security of tenure as a tenant who rents directly from the owner.

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<sup>731</sup> LG Berlin, WuM 1993, 344.

<sup>732</sup> Cf. e.g. OLG Hamm, NJW 1983, 48; OLG Karlsruhe, NJW 1987, 1952; BGH, NJW 1993, 2528.

<sup>733</sup> As outlined above in 6.1. 'Regulatory law requirements'.

<sup>734</sup> BGH, NZM 2008, 167, cf. Blank, in: *Schmidt-Futterer*, s. 540 BGB, rec. 3.

<sup>735</sup> LG Berlin, GE 2004, 1028; BGH, NJW 1996, 838; BGH, NJW 1964, 1853.

<sup>736</sup> BGH, NJW 2011, 1065; LG Hamburg, ZMR 2001, 973.

<sup>737</sup> BVerfG, NJW 1991, 2272.

- Is it possible and if yes under what conditions, to conclude a contract with a municipality of tenants (e.g. group of students)?

There are two different possibilities to conclude a contract with a municipality of tenants: Either all members of the group sharing a flat are party to the tenancy contract and organized as a BGB company<sup>738</sup> in their internal relationship or only one of them concludes the contract with the landlord and the others are subtenants. In either case, the landlord accepts the change of several members at least impliedly by concluding a tenancy contract with a municipality of tenants, for example with students.<sup>739</sup> Consequently, he has to exclude the right to change the members or to include a clause on their succession in the tenancy agreement, in order to avoid possible unfavourable legal consequences regarding the constant exit and entry of tenants.<sup>740</sup> A clause on the succession of tenants should provide (i) the conditions under which a member of the group sharing a flat can be released from the contract early, (ii) the obligation to inform the landlord about a coming change and finally (iii) the right of the landlord to check the new tenant on his reasonableness.<sup>741</sup>

- Duration of contract
  - Open-ended vs. limited in time contracts
    - for limited in time contracts: Is there a mandatory minimum or maximum duration?

Tenancy contracts can be concluded either for a definite or an indefinite period of time (section 542 BGB). A tenancy limited in time expires at the end of that period, unless it has been terminated for extraordinary reasons or is extended. Open-ended tenancies may be however terminated ordinarily or extraordinarily.

In Germany, tenancy contracts are mainly concluded for an indefinite period of time, since, to the protection of tenants, the landlord must prove one of the three reasons for the fixed-term tenancy named in section 575 (I) BGB. Accordingly, a fixed-term tenancy is permitted only if the landlord upon termination of the tenancy period (No. 1) wishes to use the premises as a dwelling for himself, members of his family or his household, (No. 2) wishes to eliminate the premises or change or repair them so substantially that the measures would be significantly more difficult as a result of a continuation of the lease, or (No. 3) wishes to rent the premises to a person obliged to perform services, for example an employee of the landlord (*Werkwohnung*). The landlord must notify the tenant in writing of the reason for the fixed-term when the agreement is entered into. Otherwise, the tenancy is deemed to be concluded for an indefinite period of time (section 575 (I 2) BGB). The same applies if a reason under section 575 (I 1) BGB is not met. The tenant may also demand an unlimited extension of the tenancy if the reason ceases during the period of the fixed-term tenancy (section 575 (III 2) BGB). But if the reason for the fixed-term is met and does not cease to apply, the tenant has no claim to contract extension. A continuation pursuant to section 574 BGB is excluded as well as a grant of a period of time before the tenant has to give up possession according to sections 721, 794a ZPO.

<sup>738</sup> Partnership organized under the German Civil Code, ss. 705 et seq..

<sup>739</sup> BVerfG, WuM 1993, 104.

<sup>740</sup> Cf. Blank, in: *Schmidt-Futterer*, s. 540 BGB, rec. 19; Horst, *Praxis des Mietrechts*, rec. 57.

<sup>741</sup> Cf. Horst, *Praxis des Mietrechts*, rec. 57.

The law no longer prescribes a minimum or maximum duration of the fixed-term tenancy.<sup>742</sup> The limitation to a maximum duration of five years was abolished in the course of tenancy law reform in 2001 (section 564 (II) BGB (o.v.)).

Tenancies on holiday homes, dwellings inhabited by the landlord himself or public houses are exempted from this restriction as well as residential space in student or other hostels for young people (section 549 (II, III) BGB).

- Other agreements and legal regulations on duration and their validity: periodic tenancies (“chain contracts”, i.e. several contracts limited in time among the same parties concluded one after the other); prolongation option; contracts for life etc.

#### (1) Periodic tenancies

As already mentioned above, the landlord has to prove actual need in the sense of one of the three reasons stated by section 575 (I) BGB if he wants to limit the duration of the tenancy contract. This requirement secures that periodic tenancies, which are tenancies concluded by the landlord subsequently as fixed-term contracts with usually short duration to circumvent tenant protection rules (*Kettenmietverträge*), are not possible. But this regulation, that only qualified fixed-term tenancies (*qualifizierte Zeitmietverträge*) are legally allowed, exists only since the last principal reform on tenancy law in 2001.

Previously, it was permitted to conclude simple tenancies limited in time. Fixed-term tenancies concluded before the 1 September 2001 can be therefore periodically extended without proving any reason for the limited duration on the part of the landlord. According to Article 229 (section 3 (III)) EGBGB such tenancies are processed pursuant to sections 564b, 564c BGB (o.v.).

Under the new law, it is possible to agree only a second fixed-term tenancy after the termination of the first tenancy contract, provided the landlord can prove another reason listed in section 575 (I) BGB.<sup>743</sup>

#### (2) Prolongation option

With regard to the prolongation of tenancies limited in time, there are two possibilities imaginable: a prolongation option which entitles the tenant to prolong the duration of the tenancy by a unilateral declaration or a prolongation clause according to which the contract duration is extended if the tenancy has not been terminated beforehand. Both kinds of prolongation are since 2001 no longer possible in case of tenancies over residential space, because the landlord must always prove a reason for the fixed-term pursuant to section 575 (I) BGB. However, the protective purpose of section 575 (I) BGB is not considered to apply in the case that the tenancy shall be automatically prolonged for an indefinite period of time as far as the tenant does not object, since then the tenancy does not end automatically upon expiry of the limitation.<sup>744</sup>

A prolongation option or clause may be therefore included in the tenancy agreement, provided the tenancy is prolonged for an indefinite period of time after the agreed end of contract duration.

#### (3) Contracts for life

In case of tenancies “for life” one has to distinguish between contracts which are really concluded for life and those which provide a very long, but a certain period of tenancy. If

<sup>742</sup> Cf. B. Gramlich, *Kommentar zum Mietrecht* (Munich: C. H. Beck, 2013), s. 575 BGB, no. 2.

<sup>743</sup> Cf. Weidenkaff, in: *Palandt*, s. 575 BGB, rec. 21.

<sup>744</sup> LG Halle, ZMR 2006, 534.

the tenancy is entered into for a period of more than thirty years, each of the parties, after such period has passed, may terminate the lease within the statutory notice period (section 544 (1) BGB). But the scope of application of this provision is severely restricted because of the requirement to prove a reason for a fixed-term tenancy for more than thirty years pursuant to section 575 (I) BGB. If the agreement is however signed for the duration of the life of the landlord or the tenant, the termination on ordinary grounds is not permissible (section 544 (2) BGB). Nevertheless, both parties retain their right to terminate the tenancy for extraordinary reasons laid down in sections 543, 569 BGB.

Different from the tenancy “for life”, a right of residence according to section 1093 BGB that has been agreed as a life estate cannot be terminated by the landlord in any way. Since the right of residence is a personal easement and therefore a property right that has to be registered in the land register, it is independent from the underlying obligatory agreement that grants the entitled person a right of residence for his lifetime.<sup>745</sup> Accordingly, the right of residence remains unaffected by the termination of the underlying obligatory contract.

- Rent payment<sup>746</sup>

- In general: freedom of contract vs. rent control

In contrast to existing tenancies, which are subject to certain rent limits in case of an increase in rent, there have so far been no restrictions regarding the negotiation of the amount of rent for a new tenancy except for the criminal provisions on excessive rents (sections 291(I no. 1) StGB, 5 WiStG) and the general provision on usury laid down in section 138 (II) BGB. But the coalition agreement of the new Federal Government as well as the recently submitted draft law of the Federal Minister of Justice provide for the introduction of a ceiling for the amount of rent in new tenancy contracts on the private rental market. Accordingly, the rent may not exceed 10% of the reference rent customary in the locality. The lists of representative rents (*Mietspiegel*) shall serve as benchmark in so far. The first renting of new constructed dwellings shall however be exempted from this regulation. Furthermore, the rent control shall only apply to tight housing markets which have to be determined by the *Länder*. About 4 million rental dwellings are located in such areas in Germany.<sup>747</sup> The draft law shall enter into force in 2015.

Down to the present day, a real rent control is therefore only applicable in the case of housing with a public task.

- Rent control: How is it legally framed; When does it apply; Who carries it out; What are the consequences when the parties agree on an excessive rent?

Hitherto, a system of rent control has applied only to tenancies concerning housing with a public task. Provided the dwelling was promoted by public funds before the 31 December 2001, the landlord may only demand a rent that is required to cover the current expenditures (*Kostenmiete*) (section 8 WoBindG). The amount of this rent is calculated on the basis of a calculation of profitability (*Wirtschaftlichkeitsberechnung*) and therefore usually well below the market level (sections 8a, 8b WoBindG). For dwellings that were promoted after this date, the WoFG is however applicable (section 46 (I) WoFG). Accordingly, the landlord is entitled to demand a rent with a maximum permitted amount determined

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<sup>745</sup> BGH, NZM 1999, 138.

<sup>746</sup> Cf. U. P. Börstinghaus, *Miethöhe-Handbuch* (Munich: C.H. Beck, 2009).

<sup>747</sup> Cf. R. Roßmann, *Die Mietpreisbremse kommt*, in: Süddeutsche Zeitung of 20-03-2014, available at: <http://www.sueddeutsche.de/wirtschaft/gesetzentwurf-ist-fertig-die-mietpreisbremse-kommt-1.1917435> (last retrieved: 21-03-2014).

by the promise to grant public funds (*Förderzusage*) (section 28 (I) WoFG). In either case, the landlord is prohibited from surrendering the dwelling for a higher rent (sections 8 (I) WoBindG, 28 (II) WoFG). The control of whether landlords observe these rent limits or not is carried out principally by local authorities (sections 3 WoBindG; 3 WoFG). After an average period of about fifteen years, the dwellings pass however into the free market, and landlords are then permitted to increase the rent up to the market level.

With regard to the private rental market, the introduction of a rent control system is laid down in a draft law that has been recently submitted by the Federal Minister of Justice and shall enter into force in 2015.

If the parties have agreed on an excessive rent, there are criminal sanctions as well as consequences under civil law, which are applicable to tenancies on the private rental market as well as in case of housing with a public task:

#### (1) Criminal sanctions

First, the landlord commits an administrative offence, pursuant to section 5 WiStG and can be fined up to EUR 50,000, if he demands intentionally or with gross negligence an excessively high consideration for the rent of living space. Accordingly, an excessively high rent is to be assumed if the amount exceeds the customary rent for comparable dwellings by more than 20% in times of a limited supply of housing accommodation. It is sufficient, when the housing shortage existed at the time of concluding the tenancy contract.<sup>748</sup> Furthermore, the housing shortage has to be the cause of the agreement on the excessively high rent.<sup>749</sup> Finally, section 5 WiStG does not apply for a rent that is required for the defrayal of the landlord's current expenditures.

The landlord commits however a criminal offence, according to section 291 (I no. 1) StGB, when he exploits the predicament or lack of experience of the tenant by allowing material benefits to be promised or granted to himself or a third person for the rent of living space, which are in striking disproportion to the value of the service or its procurement. Then the landlord is liable to imprisonment not exceeding three years or a fine. A striking disproportion between performance and consideration is to be assumed if the landlord demands a rent in excess of 50% of the rent charged for comparable dwellings.<sup>750</sup>

These offences differ in their protective purpose: While section 291 (I no.1) StGB is directed against the exploitation of the predicament of a single tenant (*Individualwucher*), section 5 WiStG punishes the exploitation of a limited supply of housing accommodation to the disadvantage of the populace (*Sozialwucher*).<sup>751</sup> Moreover, the legal prerequisites of the criminal offence are narrower than in case of section 5 WiStG, since it requires a disproportion of more than 50%. Nevertheless, if both offences are committed, just the criminal one is applicable (section 21 (I 1) of the Administrative Offences Act (*Ordnungswidrigkeitengesetz*)).

#### (2) Consequences under civil law

The consequences of such excessive rent agreements under civil law are laid down in sections 134 and 138 BGB. First, both criminal sanctions are prohibitive laws, the violation of which entails voiding of the legal transaction (section 134 BGB). Secondly, the

<sup>748</sup> OLG Hamburg, NZM 1999, 363; KG Berlin, NZM 2001, 283.

<sup>749</sup> BGH, NZM 2004, 381.

<sup>750</sup> BGH, NJW 1982, 896.

<sup>751</sup> Cf. Börstinghaus, *Miethöhe-Handbuch*, part 2, chapter 4, rec. 12, 29.



agreement on an excessively high rent can also be void because of *contra bonos mores* (section 138 (I) BGB) or usury (section 138 (II) BGB). The latter is very similar to section 291 (I no. 1) StGB by requiring also a clear disproportion between performance and consideration, which has to be in excess of 50% to the customary rent for comparable dwellings.

Void legal transactions are processed pursuant to the provision on unjust enrichment (sections 812 et seq. BGB). Pursuant to section 812 (I 1 alt. 1) BGB, a person who obtains something as a result of the performance of another person without legal grounds for doing so is under duty to make restitution to him. Therefore, the tenant may claim restitution regarding paid excessively high rents. Regarding the amount of restitution, the BVerfG confirmed the opinion of the BGH that the rent agreement is only partially invalid to the extent that only the excessive amount can be claimed back.<sup>752</sup> Prospectively, the tenant will have to pay a permissible rent instead of the excessive rent, which anyhow still exceeds the level of the customary rent.

Apart from the partially void rent agreement, the rest of the tenancy contract remains effective, since it is principally to be assumed that it would have been undertaken even without the void part (section 139 BGB).

In case of housing with a public task, where the rent control is applicable, section 8 (II) WoBindG provides that a rent agreement as far as it exceeds the rent to cover the current expenditures is void. Then, the landlord has to refund the excessive amount of already received payments.

Beyond that, the landlord who demands a higher rent than is required to cover the current expenditures acts improperly pursuant to section 26 (I no. 4) WoBindG. This administrative offence is punished by a fine up to EUR 15,000 and if the landlord acts with intent or gross negligence and demands a significant higher consideration, he can be fined up to EUR 50,000 (section 26 (II, III) WoBindG). Furthermore, it is *lex specialis* to the general administrative offence laid down in section 5 WiStG.

- Maturity (fixed payment date); consequences in case of delayed payment

The rent is to be paid at the beginning – but at the latest on the third working day – of each payment period the parties had agreed in the contract (section 556b (I) BGB). Usually, the parties agree that the tenant has to pay the rent monthly via bank transfer, often in form of a standing order. Since Saturday is not a bank business day, this day is not considered as a working day in the context of calculating the payment deadline.<sup>753</sup>

In case of delayed payment, the tenant is automatically in default (section 286 (I) BGB). There is no need for a warning notice by the landlord, since the period of time for paying the rent has been specified according to the calendar (section 286 (II no. 1) BGB). During the time of default, the tenant has to pay interest on the rent (section 288 (I) BGB). The default rate of interest per year is five percentage points above the basic rate of interest. Currently, the basic rate of interest is -0.38% (section 247 (I) BGB), so that the default rate of interest amounts to 4.62%.

If the tenant (i) is in default, on two successive dates, of paying the rent or a portion of it that is not insignificant or (ii) in a period of time spanning more than two months is in de-

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<sup>752</sup> BGH, NJW 1984, 722; BVerfG, NJW 1994, 993.

<sup>753</sup> BGH, NZM 2010, 661; BGH, NZM 2010, 664; If the third day falls however on a Saturday, s. 193 BGB already applies, by which the payment deadline is extended to the following Monday, cf. H. Langenberg, in: *Schmidt-Futterer*, s. 556b BGB, rec. 5 with further references.

fault of paying the rent in an amount that is as much as the rent amount for two months, then the landlord is after an unheeded warning notice entitled to terminate the tenancy without notice period (section 543 (II no. 3) BGB).

- May the tenant exercise set off and retention rights over the rent payment (i.e. the tenant withholding the rent or parts of it as the landlord does not respect his contractual duties, e.g. does not repair a defect)?

Against a claim for rent, the tenant may set off a claim based on damages or reimbursement of expenses or a claim for unjust enrichment for excess payment of rent (section 556b (II) BGB). He may also exercise a right of retention in relation to such a claim. These set-off and retention rights apply notwithstanding a contrary provision in the tenancy agreement. The exercise of these rights require that the tenant has notified the landlord in text form of his intention to do so at least one month prior to the due date of the rent.

Apart from that, the tenant is, according to the general provisions, entitled to set off any claim that is due against the rent claim of the landlord (section 387 BGB) as well as to exercise a retention right (sections 273, 320 BGB). However, these general set-off and retention rights are often excluded or limited in tenancy contracts.<sup>754</sup>

In case the dwelling has been disposed of and the tenant pays the rent to the former landlord, unaware that ownership has already changed, the tenant can set off against the claim for rent of the acquirer a claim to which he is entitled against the landlord (section 566d BGB). Set-off is however excluded if the tenant acquires the counterclaim after he obtained knowledge of the passing of ownership or if the counterclaim becomes due only after obtaining knowledge and after the rent becomes due.

- May claims from rental agreements be assigned to third parties (i.e. may the landlord assign his rent claim to a bank)?

In general, any claims may be transferred by the obligee to another person by contract (section 398 (1) BGB). An assignment is however excluded if the performance cannot be made to a person other than the original obligee without a change of its contents (section 399 BGB). In this respect, the BGH has held that the close connection of rights and duties in a tenancy cannot justify such an exclusion of assignment.<sup>755</sup> Consequently, rent claims as rights arising from a tenancy may be assigned without transferring also the duties at the same time. The landlord is therefore entitled to assign his rent claim to a bank. This conclusion does not put the tenant at a disadvantage, since he may raise against the new obligee the objections he was entitled to against the previous obligee at the time of assignment (section 404 BGB).

- May a rent payment be replaced by a performance in kind (e.g. reparation, renovation)? Does the tenant have a statutory right to this effect? Could a lien of the “tenant-undertaker” create problems in this case? (A lien is a statutory right of an undertaker to ensure his being paid for his performances, e.g. improvements to the house, e.g. section 648 BGB)

Whether or not the tenant may replace the rent payment by a performance in kind depends primarily on the provisions in the tenancy agreement. Provided that the parties have agreed on a performance in kind the tenancy is nevertheless treated as a regular one. Apart from that, the tenant has a statutory right to this effect in so far as he is enti-

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<sup>754</sup> Cf. Blank, in: *Blank/Börstinghaus*, s. 556b, rec. 9.

<sup>755</sup> BGH, NZM 2003, 716.

tled to a set-off right against the claim for rent pursuant to section 556b (II) BGB. Accordingly, the tenant may, notwithstanding a contract provision to the contrary, set off a claim for reimbursement of expenses against the landlord's claim for rent, provided he has notified the landlord of his intention to do so one month prior to the due date of the rent. A claim for reimbursement requires that the tenant had remedied a defect either because the landlord was in default in remedying the defect or because an immediate remedy was necessary to preserve or restore the state of the rented property (section 536 (II) BGB). Furthermore, the tenant may also have a claim for reimbursement if he has carried out for instance necessary renovation works or repairs which correspond to the landlord's interests and will, but to which he has not been instructed by the landlord (sections 539, 677, 683 (1), 670 BGB). This does not apply to cosmetic repairs and minor maintenance works as far as the landlord has conferred their execution on the tenant by a valid contractual clause.<sup>756</sup> But even if the corresponding clause is void and the tenant does nevertheless execute these works, he may only assert a claim on account of unjust enrichment under sections 812 (I), 818 BGB.<sup>757</sup>

Provided the tenant has been instructed by the landlord to carry out repairs or other works, he may principally not demand, for satisfaction of his claims under the contract, that a mortgage over the plot of land is granted. To this extent, section 648 (I 1) BGB requires works which are essential for the renewal or the preservation of the building.<sup>758</sup> This is usually not the case with regard to repairs carried out in rented dwellings. A security right over the movable things that the tenant has produced or repaired (section 647 BGB) is also excluded, since building repairs almost always concern parts of the dwelling which are inseparably attached to it and therefore not movable (section 94 (II) BGB).

- Does the landlord have a lien on the tenant's (movable) property in the house (Vermieterpfandrecht as in section 562 BGB, which functions as a guarantee for the payment of the rent by the tenant)? If yes, what is the scope of this right? How is it enforced?

The landlord has, for his claims arising from the tenancy, a statutory right of lien (*Vermieterpfandrecht*) over the things brought upon the dwelling by the tenant (section 562 (I) BGB). This right may not be asserted for future compensation claims and for rent for periods subsequent to the following years of the tenancy. Furthermore, it does not extend to the things that are not subject to attachment (*Pfändung*). Pursuant to section 811 (I) ZPO, objects exempted from attachment are especially things serving the tenant's personal use or his household as well as food, fuel for heating and cooking, and means of lighting required for four weeks by the tenant and his household members.

The right of lien is extinguished upon the removal of the things, provided that the landlord knows about the removal or has not objected to it (section 562a BGB). The tenant may also release his things from the right of lien by provision of security (*Sicherheitsleistung*) (section 562c BGB). If the landlord wants to enforce his claim to grant possession of the tenant's things, he must go to court or he can make use of his limited right of self-help pursuant to section 562b (I) BGB. Accordingly, the landlord is on the one hand entitled to prevent the removal of the things that are subject to his right of lien. On the other hand he may take possession of these things if the tenant moves out. Since most of the tenant's things are exempted from attachment and the realization of pledges is relatively

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<sup>756</sup> Please refer to 6.3. 'Limitations on freedom of contract through regulation'.

<sup>757</sup> Cf. Langenberg, in: *Schmidt-Futterer*, s. 538 BGB, rec. 205, 206.

<sup>758</sup> BGH, NJW 1993, 3195.

complicated and often not productive, the landlord's right of lien is of little importance for practice.<sup>759</sup>

- Clauses on rent increase
  - Open-ended vs. limited in time contracts

Clauses on rent increase concern future changes in the amount of rent and may be therefore agreed only as a stepped rent under section 557a BGB or as indexed rent under section 557b BGB (section 557 (II) BGB). Either of these clauses can be agreed within an open-end tenancy contract as well as within a fixed-term one (*argumentatum e contrario* section 549 (II) BGB).

- Automatic increase clauses (e.g. 3% per year)

A stepped rent is an automatic increase clause by which the rent is fixed in varying amounts for specific periods of time. Each amount of rent or increase must be indicated as a monetary amount in the written contract (section 557a (I) BGB). If the clause only indicates the increase per square metre<sup>760</sup> or as a percentage<sup>761</sup>, the agreement on the stepped-rent is void, since the amount of increase is not transparent enough for the tenant.<sup>762</sup> The rent must remain unchanged on each occasion for at least one year and further unilateral increases under sections 558-559b BGB are excluded during the period of stepped rent (section 557a (II) BGB). Moreover, the right of the tenant to terminate the tenancy may be excluded for a maximum of four years (section 557a (III) BGB).

- Index oriented increase clauses

The possibility to exclude the tenant's right to terminate the tenancy does not apply for the alternative agreement: the indexed rent. An index oriented increase clause is a written agreement by which the rent is determined by means of the price index for the cost of living of all private households in Germany. The price index is computed by the Federal Statistical Office (*Statistisches Bundesamt*) (section 557b (I) BGB). As well as in the case of a stepped rent, the rent must remain unchanged for at least one year while an indexed rent is applicable, except for increases because of modernization (section 559 BGB) or changes in operating costs (section 560 BGB). An increase in rent up to reference rent customary in the locality (section 558 BGB) is however completely excluded (section 557b (II) BGB). If the indexed rent changes, the landlord must indicate the change in the price index as well as the rent (or the increase in rent) in the individual case as a monetary amount in a declaration that has to be in text form. The revised rent must be paid at the commencement of the second month beginning after receipt of the declaration (section 557b (III) BGB).

- Utilities<sup>763</sup>
  - Describe the usual kinds of utilities (e.g. basic utilities like the supply of water, gas and electricity vs. additional utilities, i.e. services such as waste collection) and their legal regulation

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<sup>759</sup> Cf. Blank, in: *Blank/Börstinghaus*, s. 562 BGB, rec. 3; nevertheless, the landlord's pledge with regard to residential space has been subject of some cases: cf. only OLG Rostock, DWW 2013, 237 (scope of the landlord's pledge); LG Berlin, GE 2011, 1310 (things that are exempted from attachment); BGH, NZM 2009, 660 (landlord's pledge in the compulsory enforcement); OLG Koblenz, NZM 2004, 39 (self-help).

<sup>760</sup> AG Hamburg-St. Georg, WuM 2010, 37.

<sup>761</sup> BGH, NZM 2012, 416.

<sup>762</sup> Cf. Börstinghaus, in: *Schmidt-Futterer*, s. 557a BGB, rec. 35 et seq. with further references.

<sup>763</sup> Cf. for details: M. J. Schmid, *Handbuch der Mietnebenkosten* (Munich: Luchterhand, 2013).

Under German law, utilities mean primarily operating costs (*Betriebskosten*). Their specification is laid down in the Operating Costs Order (BetrKV). Accordingly, operating costs are defined as the costs that are incurred from day to day by the owner as a result of the ownership or of the intended use of the building, the outbuildings, facilities, installations and the land (sections 556 (I 2) BGB, 27 (I) II. BV, 1 (I 1) BetrKV). These running costs include on the one hand basic utilities like the costs for the supply and the consumption of water and heating and on the other hand additional utilities like the real estate tax, the charge for sewage water as well as the costs for the maintenance of the heating system, for street cleaning, waste disposal, house cleaning, disinfestations, garden maintenance, lighting for shared parts of the building, chimney cleaning, lifts, caretaker and insurances (section 2 BetrKV). In addition, benefits in kind and performances rendered by the owner are regarded as operating costs to the extent that they are fixed with an amount, which could be also charged for an equivalent performance of a third party, in particular an entrepreneur (section 1 (I 2) BetrKV). The costs of administration, maintenance and restoration are not however part of operating costs (section 1 (II) BetrKV), and also the costs for the supply and consumption of electricity as another basic utility besides water and heating are not specified by the BetrKV.

Apart from the BetrKV, there are also rules on the calculation and distribution of operating costs laid down in the general tenancy law, namely sections 556, 556a BGB. Accordingly, the costs for utilities may be distributed according to the consumption, the size of the dwelling, per capita or per housing unit. If the parties have not agreed on a certain method and subject to other provisions, operating costs are to be apportioned in proportion to the floor space (section 556a (I) BGB). Regarding contrary provisions, the HeizkostenVO has to be mentioned. It is applicable for residential buildings with a central heating and water supply system (section 1 (I) HeizkostenVO). In that case, the provisions of the HeizkostenVO take precedence over contractual agreements on the apportionment and distribution of costs for heating and warm water, unless the building comprises just two dwellings and one of them is inhabited by the landlord (section 2 HeizkostenVO). According to its section 6 (I), the costs for heating and warm water must always be distributed according to the consumption of the tenant. Other operating costs depending on the reported consumption or causation by the tenant shall be also distributed according to consumption, as far as such technical requirements are available, for example regarding waste disposal. Moreover, the landlord may always choose this kind of distribution pursuant to section 556a (II 1) BGB to encourage the tenant to economize on resources.<sup>764</sup>

- Responsibility of and distribution among the parties:
  - Does the landlord or the tenant have to conclude the contracts of supply?

Whether the landlord or the tenant must conclude the contracts of supply depends on the contractual agreement as well as on the respective supply system, since there exists no legal regulation. As a general rule, it is always the landlord who concludes the contract if the costs for the supply and consumption cannot be distributed according to the consumption of the tenant.

Regarding the supply of hot water and heating, it is therefore up to the landlord to enter into the contract with the utility company as far as the dwelling is supplied by a central heating system, since all dwellings of the building are connected to it. Nevertheless, the landlord is obliged to distribute the costs according to the consumption of the tenant (sec-

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<sup>764</sup> Cf. Langenberg, in: *Schmidt-Futterer*, s. 556a BGB, rec. 131.

tion 6 (I) HeizkostenVO). But if the supply is effected by means of a self-contained heating system (*Etagenheizung*) or is obtained from district heating (*Fernwärme*)<sup>765</sup>, the tenant is most likely the contractual partner of the utility company, since the accruing costs can be calculated according to his consumption without any further installations as in the case of a central heating system.

The same applies to the supply of cold water. While the tenant typically enters into the contract of supply if each dwelling in the building has its own water meter, it is up to the landlord to conclude this contract if all dwellings in the building are connected to the just one water meter.

With regard to the supply of electricity, it is almost always the tenant who concludes the contract with the power company (except for cases in which the owner supplies the dwelling by means of renewable energies like solar power), since most of the dwellings have their own electric meter. This is the case also because the supply and consumption of electrical power are not included among the utilities attributable to the landlord unless apportioned to the tenant, since they are not specified by the BetrKV.

- Which utilities may be charged from the tenant?<sup>766</sup>

Pursuant to section 535 (I 3) BGB, the landlord must bear all costs to which the rented object is subject. However, the parties may agree that the tenant is to bear the operating costs (section 556 (I 1) BGB). As already mentioned above, operating costs include the real estate tax, the charge for sewage water, the costs for the supply and the consumption of water and heating as well as the costs for the maintenance of the heating system, for street cleaning, waste disposal, house cleaning, disinfestations, garden maintenance, lighting for shared parts of the building, chimney cleaning, lifts, caretaker, insurances and benefits in kind and performances rendered by the owner (sections 1, 2 BetrKV). The costs of administration, maintenance and restoration however are not apportionable (section 1 (II) BetrKV).

The apportionment of utilities requires in general a specific and explicit agreement, although a reference to section 556 (I) BGB or section 2 BetrKV shall be sufficient.<sup>767</sup> In contrast, with regard to the costs for the supply and consumption of electricity, it is the other way around. Since these costs are not regarded as operating costs which the landlord usually must bear according to the BetrKV, the tenant has to pay them even if a corresponding agreement is missing.<sup>768</sup>

Pursuant to section 556 (II) BGB, the parties may agree that the tenant has to pay either a lump sum (*Betriebskostenpauschale*) or an advance payment in a reasonable amount. In the latter case, the landlord is obliged to invoice the advance payments for operating costs once a year, observing the principle of economic efficiency (section 556 (III) BGB). The tenant is to be notified about the accounting at the latest by the end of the twelfth month subsequent to the accounting period. Otherwise, the landlord loses his right to assert an additional demand. After receipt of the invoice, the tenant may object to it within a period of twelve months. If this period expires, objections may no longer be asserted.

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<sup>765</sup> Cf. also the recently introduced s. 556c BGB.

<sup>766</sup> Cf. A. Strangl, *Umlagefähigkeit einzelner Betriebskostenpositionen bei Wohnraum*, ZMR 2006, 95 et seq..

<sup>767</sup> BGH, NZM 2007, 769; BGH, NZM 2004, 417 (418); cf. Langenberg, in: *Schmidt-Futterer*, s. 556 BGB, rec. 35, 43.

<sup>768</sup> Cf. Eisenschmid, in: *Schmidt-Futterer*, s. 535 BGB, rec. 541.

- What is the standing practice?

Usually, the parties agree that the tenant has to bear the allocatable operating costs specified in section 2 BetrKV.

- How may the increase in prices for utilities be carried out lawfully?<sup>769</sup>

How the landlord may apportion increases in prices for utilities to the tenant depends on the respective agreement on operating costs. Pursuant to section 556 (II) BGB, the parties may agree that the tenant has to pay either a lump sum or an advance payment in a reasonable amount. In the latter case, each of the parties may, according to a statement of operating costs, undertake an adjustment to a reasonable amount by a declaration in text form. The statement of operating costs, which must precede the adjustment, has to be correct in form and content.<sup>770</sup> Otherwise, the adjustment of advance payments for operating costs is ineffective.

If the parties have agreed on a lump sum charge for operating costs, increases in prices for utilities can be apportioned to the tenant proportionately pursuant to section 560 BGB, to the extent that this has been agreed in the tenancy contract (section 560 (I) BGB). The landlord has to declare and explain the reason for the apportionment to the tenant at least in text form. Then, the tenant owes the part of the increased costs apportioned to him from the beginning of the second month following the month in which the declaration is made (section 560 (II) BGB). In case operating costs have risen retroactively, the declaration has also retroactive effect from the date when operating costs rose, but at the earliest from the beginning of the year preceding the year of declaration. Such a retroactive apportionment requires however that the landlord makes the declaration within three months after he first has knowledge of the increase. Provided operating costs are reduced, the landlord has to reduce the lump sum for operating costs accordingly from the date of such reduction and must inform the tenant about it without undue delay (section 560 (III) BGB).

Regardless of whether the parties have agreed on advance payments or on a lump sum, the principle of economic efficiency must be observed in case of changes in operating costs (section 560 (V) BGB).

- Is a disruption of supply by the external provider or the landlord possible, in particular if the tenant does not pay the rent?<sup>771</sup>

Provided the landlord is obligated, according to the tenancy agreement, to care for the provision of basic supplies, he must ensure that the rented dwelling is supplied with water, heating and electricity during the tenancy period. Therefore, the landlord is principally not entitled to disrupt supply if the tenant is in arrears with rent payments. Since the landlord may only react on default in payment by way of termination, section 320 BGB is considered to grant him a retention right concerning the supply, in case he would be also entitled to terminate the tenancy, generally after two months (section 543 (II no. 3) BGB).<sup>772</sup> Apart from that, the BGH has held that disruption of supply is no longer regarded as inter-

<sup>769</sup> Cf. Operating Costs Index for Germany of the DMB, available at: [http://mieterbund.de/fileadmin/user\\_upload/BKS\\_BRD\\_AJ2011\\_Betriebskostenspiegel\\_Deutschland.jpg](http://mieterbund.de/fileadmin/user_upload/BKS_BRD_AJ2011_Betriebskostenspiegel_Deutschland.jpg) (last retrieved: 23-03-2014).

<sup>770</sup> BGH, NZM 2012, 455.

<sup>771</sup> Cf. E. Streyl, *Versorgungssperre im Mietrecht*, DWW 2009, 82-90.

<sup>772</sup> Cf. Streyl, DWW 2009, 82 (85).



ference with possession, with the result that the tenant may not demand removal of disturbance under section 862 BGB.<sup>773</sup>

After termination of the tenancy due to arrears with rent payments, the landlord is principally no longer obligated to supply the dwelling with water, heating or electricity.<sup>774</sup> Only by way of exception, especially with regard to the principle of good faith and trust (*Treu und Glauben*), he must still provide basic supplies,<sup>775</sup> for instance if the tenant is granted a period to vacate the dwelling pursuant to sections 721, 794a, 765a ZPO.<sup>776</sup>

If, however the external provider disrupts the supply, the legal consequences depend on whether the landlord or the tenant has concluded the contract of supply.<sup>777</sup> In the latter case, a disruption because of default in payment on the part of the tenant does not affect the tenancy. Thus, the tenant has no claims against the landlord. The requirements for disruption of supply are determined by the general conditions of contract (*Allgemeine Vertragsbedingungen*) of the utility companies.<sup>778</sup> In case contracts of supply are entered into with the landlord who is in default of payment, a disruption on the part of the external provider does however affect the tenancy. Therefore, the tenant may enforce contractual claims against the landlord. In relation to the utility company, the tenant has no claims, since the contract of supply entered into with the landlord is neither regarded as a contract for the benefit of third parties (section 328 BGB) nor as a contract with protective effect for the benefit of third parties.<sup>779</sup> Due to the principle of proportionality (*Verhältnismäßigkeitsgrundsatz*) a disruption to the disadvantage of the tenant is however only possible, if the landlord is in considerable arrears with payment and the tenant has been informed on the intended disruption.<sup>780</sup>

- Deposit

- What is the legal concept (e.g. Is the deposit an advance rent payment or a guarantee deposit to cover future claims of the landlord)?<sup>781</sup>

Apart from the landlord's right of lien, which is nevertheless of very little importance,<sup>782</sup> there is no further security prescribed by the law. However, it is common practice that the parties agree on a security deposit for the performance of the tenant's duties. The restrictions on the agreement and the investment of such a security deposit are laid down in section 551 BGB. Accordingly, the security deposit serves as a guarantee for all claims of the landlord arising from the tenancy.<sup>783</sup> It is precisely not supposed to be an advance rent payment, so that the tenant is not entitled to stop paying the rent before the tenancy ends.<sup>784</sup> In case of housing with a public task, an agreement on a security deposit is only valid if it is intended for ensuring claims for damages regarding the dwelling or forborne cosmetic repairs (section 9 (V) WoBindG).

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<sup>773</sup> BGH, NZM 2009, 482.

<sup>774</sup> BGH, NZM 2009, 482 regarding commercial leases.

<sup>775</sup> BGH, NZM 2009, 482 et seq. regarding tenancies on residential space.

<sup>776</sup> LG Koblenz, WuM 2012, 140; AG Berlin-Schöneberg, NZM 2011, 72.

<sup>777</sup> Cf. Streyll, DWW 2009, 82 (88 et seq.).

<sup>778</sup> AVBWasserV of 20-06-1980 (BGBl. I 750, 1067); AVBFernwärmeV of 20-06-1980 (BGBl. I 742); GasGVV of 26-10-2006 (BGBl. I 2391, 2396); StromGVV of 26-10-2006 (BGBl. I 2391).

<sup>779</sup> LG Frankfurt Oder, NJW-RR 2002, 803.

<sup>780</sup> Ibid.

<sup>781</sup> Cf. P. Derleder, *Im Überblick: Die Sicherung des Vermieters durch Barkaution, Bürgschaft, Verpfändung, Sicherungsabtretung und Schuldübernahme*, NZM 2006, 601 et seq..

<sup>782</sup> As already mentioned above in 6.4. 'Rent payment'.

<sup>783</sup> Cf. Horst, *Praxis des Mietrechts*, rec. 440.

<sup>784</sup> Cf. Gramlich, *Mietrecht*, s. 551 BGB, no. 5.

Usually, the parties agree that the tenant must provide the security deposit in the form of a sum of money. Additionally or as an alternative, the parties can agree on a pledge of claims or movable things as well as on the provision of a reasonable surety (*Bürge*) as other forms of provision of security (section 232 BGB).

- What is the usual and lawful amount of a deposit?

The security deposit may amount at most to three months' rent excluding operating costs (section 551 (I) BGB). This ceiling is also applicable to tenancies with cooperatives, where the tenant usually has to acquire shares in a business instead of providing a deposit.<sup>785</sup> If the parties agree on several security deposits, their total amount also may not exceed this limit of three months' rent.<sup>786</sup> If, however, the tenant or a third party grants the landlord a deposit to avoid an impending termination on grounds of default in payment, section 551 (I) BGB does not apply.<sup>787</sup>

If the deposit is to be provided in the form of a sum of money, the tenant is entitled to pay in three equal monthly instalments. The first instalment is due upon commencement of the tenancy, while the other instalments become due together with the subsequent rent payments (section 551 (II) BGB). A deviating agreement to the disadvantage of the tenant is ineffective. If the tenant is in default to pay the security deposit in the amount of two monthly rents, the landlord may terminate the tenancy with immediate effect pursuant to section 569 (IIa 1) BGB, which has been recently introduced within the scope of the last tenancy law reform.<sup>788</sup>

- How does the landlord have to manage the deposit (e.g. special account; interests owed to the tenant)?

According to section 551 (III) BGB, the landlord must invest a security deposit provided in form of a sum of money with a banking institution at the usual rate of interest for savings deposit and with a notice period of three months. Because of this duty to invest the deposit, the landlord often requires the tenant to open a savings account on his own and to put in pledge for the landlord's benefit. Alternatively, the parties may also agree on another form of investment. In either case, the investment must be made separately from the assets of the landlord, usually in the form of a trust account (*Treuhandkonto*),<sup>789</sup> and the tenant is entitled to the income. The duty of the landlord to pay interest on the deposit does not however apply to residential space in a student hostel or a hostel for young people.

After termination of the tenancy, the landlord has to return the deposit including interest, provided he has no claims against the tenant. To find out whether claims may arise which can be set off against the tenant's claim for reimbursement of the deposit courts grant the landlord an appropriate period depending on the circumstances of each individual case.<sup>790</sup> Usually, this period should not amount to more than six months.<sup>791</sup>

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<sup>785</sup> AG Saarbrücken, WuM 2007, 506, also Horst, *Praxis des Mietrechts*, rec. 2508; different: LG Regensburg, NZM 2010, 360.

<sup>786</sup> BGH, NZM 2004, 613; BGH, NJW 1989, 1853.

<sup>787</sup> BGH, NJW 2013, 1876; LG Kiel, NJW-RR 1991, 1291.

<sup>788</sup> BT-Drucks. 17/10485, 16.

<sup>789</sup> Cf. Derleder, NZM 2006, 601 (606).

<sup>790</sup> BGH, NJW 2006, 1422 (1423); BGH, NJW 1987, 2372; OLG Düsseldorf, WuM 2003, 621.

<sup>791</sup> Ibid.

- What are the allowed uses of the deposit by the landlord?

In general, the landlord is prohibited from making use of the security deposit during the tenancy. Only if he has an undisputed, legally recognized or obviously justified claim arising from the tenancy, is he entitled to use the deposit.<sup>792</sup> In that case, the landlord may demand the tenant to replenish the deposit pursuant to section 240 BGB.<sup>793</sup>

- Repairs

- Who is responsible for what kinds of maintenance works and repairs? What kind of repairs or works may lawfully be assigned to the other party (especially the tenant)?

(1) Responsibility

Pursuant to section 535 (I 2) BGB, one of the primary duties of the landlord is to maintain the rented property in a suitable condition for the tenancy period. Therefore, the landlord is principally responsible for all kinds of maintenance works and repairs. Additionally, section 538 BGB provides that the tenant is not responsible for modifications to or deterioration of the dwelling brought about by use in conformity with the contract. Nevertheless, it is lawful and usual to include clauses in the tenancy contract, according to which the tenant is obligated to bear a portion of costs for minor maintenance works (*kleine Instandhaltungsarbeiten*) as well as to carry out cosmetic repairs (*Schönheitsreparaturen*) ((section 28 (III 1, IV 1) of the II. Regulation on Housing Costs Calculation (II. BV)).

(2) Repairs assigned to the tenant

The typical kind of repairs which are assigned to the tenant by an agreement is the execution of cosmetic repairs. According to section 28 (IV 2) II. BV, cosmetic repairs include only paperhanging, painting or whitewashing the walls and ceilings, painting the floors, radiators including tubes, inner doors as well as the windows and insides of exterior doors. In 1976 the Federal Ministry of Justice published a model tenancy contract, which includes in its section 7 a general schedule for the cosmetic repairs of the rented rooms. This schedule constitutes only a guideline, when rented rooms usually have to be renovated. Usually, kitchens and bath rooms with showers have to be renovated every three years; toilets, corridors, halls, living and sleeping rooms every five years; and ancillary rooms e.g. storage rooms every seven years. Nevertheless, the scope of the duty to renovate depends primarily on the degree of the real wear and tear (*Abnutzung*). Therefore, a fixed schedule in a tenancy agreement is ineffective.<sup>794</sup> But if the tenancy contract provides a flexible schedule using the words “regularly”, “usually” or “in general”, the assignment of cosmetic repairs is effective.<sup>795</sup> The same applies to clauses according to which the tenant is obliged to pay the costs for cosmetic repairs proportionately in case of commenced but not expired renovation periods (*Quotenklausel*). If the tenant must however pay these costs on the basis of inflexible periods, such a clause would be void.<sup>796</sup> In this context, the BGH has recently held that clauses committing the tenant to pay the costs for cosmetic repairs according to an estimate of a professional company

<sup>792</sup> LG Mannheim, WuM 1996, 269.

<sup>793</sup> BGH, NJW 1972, 625; cf. Derleder, NZM 2006, 601 (607).

<sup>794</sup> BGH, NJW 2004, 2586.

<sup>795</sup> BGH, NZM 2012, 527; BGH, NZM 2008, 926.

<sup>796</sup> BGH, NZM 2007, 355; NJW 2006, 3778.

are ineffective as well.<sup>797</sup> Furthermore, clauses according to which the tenant is obliged to carry out cosmetic repairs at his own expense by craftsmen are void.<sup>798</sup>

Apart from cosmetic repairs, landlords often assign the responsibility to bear the costs for repairing minor damage (*Bagatellschäden*) to the tenant. These minor maintenance works include only those parts of the dwelling which the tenant uses directly and often, for example repairing small damage to the installed hardware for electricity, water and gas, to the equipment for cooking and baking as well as to the locks of doors and windows (section 28 (III 2) II. BV). However, an assignment to the tenant is only effective, if the clause determines a ceiling for every single repair and also for all minor repairs within a year.<sup>799</sup> The costs the tenant shall bear for a single repair may not exceed an amount of EUR 75<sup>800</sup> up to EUR 100<sup>801</sup>, while the costs for the whole year may not amount to more than 8%<sup>802</sup> to 10%<sup>803</sup> of the annual rent. Furthermore, the tenant may not be obliged to carry out the maintenance works on his own.<sup>804</sup>

Provided a clause on the assignment of cosmetic repairs or minor maintenance works is ineffective, the contents of the tenancy contract are determined by the statutory provisions with the result that the landlord remains responsible pursuant to section 535 (I 2) BGB (section 306 (II) BGB).

- Connections of the contract to third parties
  - Rights of tenants in relation to a mortgagee (before and after foreclosure)

Prior to the compulsory enforcement, the mortgage extends to the claim for rent pursuant to section 1123 (I) BGB. However, upon the expiry of one year from the due date, the claim for rent is released from this liability, unless it is attached in favour of the mortgagee prior to this date (section 1123 (II) BGB). In this respect, realization of the liability under section 1123 (I) BGB may only be pursued by way of an attachment within a receivership (*Zwangsverwaltung*) according to section 148 ZVG. An attachment within a compulsory auction does not however include claims for rent (section 21 (II) ZVG). Consequently, the mortgagor is in the latter case still entitled to use and to administer the plot of land (section 24 ZVG), while these rights are revoked within a receivership in favour of the official receiver (section 148 (II), 152 (I) ZVG). Nevertheless, tenancies which have been already entered into at the time of attachment remain effective in relation to the receiver (section 152 (II) ZVG).

Furthermore, section 1124 (I) BGB provides that advance dispositions on the rent prior to the attachment are effective in relation to the mortgagee. After attachment, collection of the rent is however ineffective (section 1124 (II) BGB), and in addition, the tenant is not entitled to set off against the mortgagee a claim he has against the landlord (section 1125 BGB). The right to set-off is further restricted by section 392 BGB. Accordingly, a set-off against an attached claim is excluded, if the tenant acquired his claim only after attachment, or if his claim only became due after the attachment and later then the attached claim.

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<sup>797</sup> BGH, NJW 2013, 2505.

<sup>798</sup> BGH, NZM 2010, 615; OLG Stuttgart, NJW-RR 1993, 1422.

<sup>799</sup> Requirements for a valid assignment of minor maintenance works to the tenant: AG Brandenburg, NJOZ 2008, 2135; BGH, NJW 1989, 2247 and as already outlined above in 6.3. 'Control of contractual terms'

<sup>800</sup> OLG Hamburg, NJW-RR 1991, 1167.

<sup>801</sup> AG Braunschweig, ZMR 2005, 717.

<sup>802</sup> Ibid.

<sup>803</sup> OLG Hamburg, NJW-RR 1991, 1167.

<sup>804</sup> BGH, NJW 1992, 1759.

With regard to the time after the compulsory enforcement, section 57 ZVG provides that the rights of the tenant are almost the same as in the case that the dwelling has been disposed of (sections 566-566c BGB analogue). Thus, the new owner of the plot of land, who has nevertheless a special right of termination pursuant to section 57a ZVG, must in general continue existing tenancies (section 566 BGB analogue). Furthermore, a legal transaction entered into between the landlord and the tenant on the claim for rent is ineffective in relation to the new owner to the extent that it is related to rent for a period of time after the tenant has obtained knowledge of attachment (sections 57b ZVG, 566c BGB analogue). Set-off against the claim for rent is also excluded in this case (sections 57b ZVG, 566d (2) BGB analogue).

## 6.5. Implementation of tenancy contracts

	<b>Tenancy type 1 = private rental market</b>	<b>Tenancy type 2 = housing with a public task</b>	<b>Tenancy type 3 = co-operatives</b>	<b>Ranking from strongest to weakest regulation</b>
<b>Breaches prior to handover</b>	<ul style="list-style-type: none"> <li>- Sphere of the landlord: landlord refuses the handover due to a "double lease" or previous tenant is entitled to refuse clearing and handover of the dwelling – tenant must not pay the rent, may demand damages due to the legal defect of the dwelling and may terminate the tenancy with immediate effect</li> <li>- Sphere of the tenant: if the tenant is in default of acceptance, he is not released from his obligation to pay the rent</li> </ul>			
<b>Breaches after handover</b>	<ul style="list-style-type: none"> <li>- Defects of the dwelling: the tenant is usually entitled to a rent reduction, claims for damages as well as to claims to reimbursement provided he has remedied the defect on his own; in case of considerable defects, the tenant may also terminate the tenancy</li> <li>- Entering the dwelling: in general, the landlord is only allowed to enter the dwelling if he has a concrete and legitimate reason, announced his intention beforehand and obtained the tenant's consent</li> </ul>			
<b>Rent increases</b>	<ul style="list-style-type: none"> <li>- Forms: increase in rent up to the reference rent customary in the locality (max. 20% within three years); increase in rent after renovation measures (max. 11% of the costs spent on the modernization)</li> <li>- tenant has a special right of termination</li> </ul>	<ul style="list-style-type: none"> <li>- increases in rent due to increases in the current expenditures or due to structural alterations may be based on a new calculation of profitability</li> <li>- other increases in rent are only allowed if the current amount of rent is below the rent level covering the current expenditures</li> </ul>	<ul style="list-style-type: none"> <li>- the same regulations and restrictions as in case of tenancies with private landlords</li> </ul>	
<b>Changes</b>	<ul style="list-style-type: none"> <li>- without the landlord's permission, the tenant is principally not allowed to carry out</li> </ul>			

<b>of the dwelling</b>	physical alterations affecting the structure of the residential building - the tenant must principally tolerate maintenance as well as modernization measures; however, he has a special right of termination
<b>Use of the dwelling</b>	- Keeping animals: general prohibition to keep pets of any kind is ineffective - Producing smells: especially smoking, not in an excessive way, belongs to the contractual use of residential space - Receiving guests: basically, as often and as much as the tenant wants to - Prostitution: not allowed - Commercial uses: allowed as long as the professional activities are exercised in a way that they do not emerge to the outside - Removing an internal wall: without the landlord's permission not allowed - Fixing pamphlets: depends on its content and presentation

- **Disruptions of performance (in particular “breach of contract”) prior to the handover of the dwelling**

- In the sphere of the landlord.<sup>805</sup>

In order to fulfil his obligation to grant the tenant use of the dwelling (section 535 (I 1) BGB), the landlord has to transfer the actual possession to the tenant at the agreed time, which is usually carried out by the handover of the keys.<sup>806</sup>

- Delayed completion of the dwelling

If the landlord is not able to surrender the dwelling because it is not completed at the time when the tenancy should be commenced, he cannot require the tenant to pay the rent, since he cannot perform on his part (section 326 (I) BGB). Moreover, the landlord is liable for damages for delay of performance as far as the delay can be imputed to him (sections 280 (I, II), 286 BGB). This especially concerns additional expenses for renting another dwelling. Plus, the tenant can still demand the handover of the dwelling, since the claim for performance remains unaffected by this claim for damages in addition to performance (*Schadenersatz neben der Leistung*). Alternatively, the tenant may withdraw the contract if he has specified, without result, an additional period for performance (section 323 (I) BGB) and may also demand damages in lieu of performance (*Schadenersatz statt der Leistung*) pursuant to section 280 (I, III), 281 BGB, provided the landlord is responsible for the delay. The right to damages is not excluded by withdrawal (section 325 BGB).

Although the BGH has rejected a liability under a guarantee for the readiness of occupancy without a corresponding agreement,<sup>807</sup> it is nevertheless advisable for landlords to agree only an approximate period for the handover.<sup>808</sup> Since the handover of the rental

<sup>805</sup> Cf. H.-J. Kraemer, *Die verspätete Vermieterleistung*, in: NZM 2004, 721-728.

<sup>806</sup> Cf. Blank, in: *Blank/Börstinghaus*, s. 535, rec. 264.

<sup>807</sup> BGH, NJW 1992, 3226 (3228); BGH, WuM 1970, 791 (792).

<sup>808</sup> Cf. Kraemer, NZM 2004, 721 (724).

object belongs to the cardinal duties of the landlord, an exclusion of liability would fail due to the test of reasonableness pursuant to section 307 (I) BGB.<sup>809</sup>

- Refusal of handover of the dwelling by landlord (in particular: case of “double lease” in which the landlord has concluded two valid contracts with different tenants over the same house)

The same principles are applicable if the landlord refuses the surrender of the dwelling to the tenant. Then, the latter may sue for performance provided that a handover is possible.<sup>810</sup> Also, the tenant can demand damages for delay in performance of the landlord (sections 280 (I, II), 286 BGB).

However, in case the landlord refuses the handover due to a “double lease”, the consequences for the landlord as well as for the tenants require a more detailed explanation:

Since contractual relationships under the law of obligations take effect only *inter partes*, the landlord is able to conclude more than one valid contract with different tenants over the same dwelling.<sup>811</sup> This is also a consequence of section 311a BGB according to which a contract is effective even if the obligor does not need to perform and the obstacle to performance already exists when the contract is entered into. Each of these tenants, independent of the chronology,<sup>812</sup> may therefore demand the handover of the dwelling.<sup>813</sup> On the other hand, the landlord can choose to whom he wants to surrender the dwelling.<sup>814</sup> Nevertheless, if one of the tenants moves into the dwelling, he is entitled to possession and the landlord loses his right of choice.<sup>815</sup> The rights of the tenant who goes away empty-handed comply with sections 536 et seq. BGB and will be explained in the following. Although these provisions apply in general only after the handover the dwelling, they are nevertheless applicable, since the “double lease” is qualified as an initial legal defect (*Rechtsmangel*) within the meaning of section 536 (III) BGB.<sup>816</sup>

First, the tenant who does not get the dwelling is not obliged to pay the rent, since the landlord does not grant him use of the dwelling (section 537 (II) BGB). Furthermore, he is entitled to terminate the contract for extraordinary reasons pursuant to section 543 (II no. 1) BGB. Accordingly, the refusal of handover by the landlord on time constitutes a compelling reason for the tenant to give immediate notice. Apart from that, the tenant may demand damages in lieu of performance because of the initial legal defect, whether the landlord is responsible or not (section 536a (I) in conjunction with 536 (III, I) BGB). However, if the tenant knows about the “double lease” when entering into the tenancy contract he is not entitled to claim for damages (section 536b BGB). The amount of compensation includes only actual damages such as expenses for moving, an estate agent as well as a higher rent to be paid for a comparable dwelling.<sup>817</sup> Considering these costs, the “double lease” in order to find another tenant who is willing to pay a higher rent is not advisable for landlords.<sup>818</sup>

<sup>809</sup> OLG Düsseldorf, DWW 1993, 197.

<sup>810</sup> Cf. Blank, in: *Blank/Börstinghaus*, s. 535, rec. 266.

<sup>811</sup> Cf. Derleder & Pellegrino, NZM 1998, 550 (556).

<sup>812</sup> BGH, MDR 1962, 398.

<sup>813</sup> Cf. Derleder & Pellegrino, NZM 1998, 550 (556).

<sup>814</sup> KG Berlin, NZM 2008, 889; OLG Schleswig, MDR 2000, 1428; OLG Cologne, ZMR 1998, 696; OLG Frankfurt, ZMR 1997, 22.

<sup>815</sup> Cf. Derleder & Pellegrino, NZM 1998, 550 (556).

<sup>816</sup> Prevailing view: cf. only Eisenschmid, in: *Schmidt-Futterer*, s. 536 BGB, rec. 286; Blank: in *Blank/Börstinghaus*, s. 536, rec. 22.

<sup>817</sup> Cf. Derleder & Pellegrino, NZM 1998, 550 (556).

<sup>818</sup> *Ibid.*



- Refusal of clearing and handover by previous tenant

In case the previous tenant refuses to vacate and surrender the dwelling, one has to distinguish between a justified and an unjustified refusal. Provided that the previous tenant is still entitled to use the dwelling, the new tenant has the same claims against the landlord as in case of a “double lease”, since the dwelling has a legal defect.<sup>819</sup> If the previous tenant is however no longer entitled to be in possession of the dwelling, the rights of the new tenant comply with the general rules, and thus he can either demand the handover and damages for delay of performance or withdraw from the tenancy contract and claim damages in lieu of performance.<sup>820</sup>

Regarding the renting of a dwelling where an estate agent is involved, section 4a (I 1) WoVermittG provides that an agreement which obliges the new tenant to pay for the removal of the current tenant is void.

- Public law impediments to handover to the tenant

Apart from that, the landlord may also be unable to grant possession to the tenant due to public law impediments. According to the *Wohnungsaufsichtsgesetze* of the *Länder* Berlin and Hesse for example, public authorities may declare a dwelling to be uninhabitable, provided it has defects which considerably affect habitation and cannot be remedied. Such defects are especially assumed if appliances for cooking, heating and water supply are absent, daylight and air supply are inadequate, or if walls, ceilings and floors are permanently moist or infested by mildew. Uninhabitable dwellings may no longer be surrendered for residential purposes.

In addition, the landlord can be prevented from surrendering or from even completing the dwelling due to a neighbour’s appeal. Although an appeal of a third party against a building permit has no suspensive effect (section 212a of the Federal Building Code (*Baugesetzbuch*, BauGB)<sup>821</sup>), the neighbour may however achieve that the administrative court suspends its implementation by submitting a corresponding request pursuant to sections 80 (V), 80a (I no. 2) VwGO).

With regard to provisions under building law, the landlord can be furthermore unable to surrender the dwelling to the tenant if the residential building has been built in an undesignated outlying area (*Außenbereich*) without the required exceptional permission pursuant to section 35 (II) BauGB. Accordingly, building projects within such an area may be only permitted as exceptional cases provided that their execution and use do not conflict with any public interests and public infrastructure provision can be guaranteed. In case permission is missing, the building authority may order the demolition of the residential building.<sup>822</sup> The same applies if building projects within built-up areas (*Innenbereich*) do not blend with the characteristic features of its immediate environment (section 34 (I) BauGB). The permissibility of such developments complies especially with the Land Utilization Ordinance (*Baunutzungsverordnung*, BauNVO)<sup>823</sup> (section 34 (II) BauGB). Pursuant to its section 15 (I), developments, which are contrary to the character of the specific land-use area, are inadmissible. For example dwellings are not permissible in commercial and industrial areas unless they serve as accommodation for employees or managers (sections 8, 9 BauNVO).

<sup>819</sup> BGH, NJW 1961, 917.

<sup>820</sup> OLG Düsseldorf, NZM 1999, 24; MDR 1990, 725; cf. also Kraemer, NZM 2004, 721 (724).

<sup>821</sup> BauGB in its version of 23-09-2004 (BGBl. I 2414); an official English translation of the current Building Code is available at: <http://www.iuscomp.org/gla/statutes/BauGB.htm> (last retrieved: 23-03-2014).

<sup>822</sup> Cf. e.g. OVG Bremen, NordOR 1998, 121.

<sup>823</sup> BauNVO in its version of 23-01-1990 (BGBl. I 132).

Beyond that, it is prohibited to rent a dwelling to a tenant for commercial uses, although the landlord has not have an exceptional permission to dos so pursuant to Article 6 section 1 (I 1) MRVG.

In case of housing with a public task, the landlord may finally not surrender the dwelling to a tenant who is not in possession of the necessary qualification certificate (section 27 (I 1) WoFG).

- In the sphere of the tenant
  - Refusal of the tenant to take possession of the house

Since the landlord owes only the surrender of the dwelling pursuant to section 535 (I) BGB, all reasons of the tenant's risk area which prevent him from making use of the residential space are to be borne by him.<sup>824</sup> Therefore, if the tenant does not take possession of the dwelling due to circumstances he is responsible for or even due to any reason relating to his person, he is in default of acceptance (*Annahmeverzug*) pursuant to section 293 BGB. In this case, sections 537 (I) BGB and 326 (II) BGB states that the tenant is not released from his obligation to pay the rent for the period he is unable to exercise his right of use. If the surrender to the tenant fails however for reasons the landlord is responsible for, then the tenant is not in default (section 297 BGB) and not obliged to pay the rent (section 537 (II) BGB). This applies also if the tenant refuses to take possession of the dwelling because of defects, since the landlord does not offer the dwelling as it is to be rendered (section 294 BGB).

- **Disruptions of performance (in particular “breach of contract”) after the handover of the dwelling**

To understand when one of the parties breaches the contract, one must first know, which obligations the landlord and the tenant have to meet. There are primary as well as secondary obligations. The primary obligations of a landlord are (i) to grant the tenant use of the dwelling, (ii) to surrender and maintain it in a condition suitable for use in conformity with the contract and (iii) in general to bear all costs to which the dwelling is subject (section 535 (I) BGB). The primary obligations of the tenant are (i) to pay the rent (section 535 (II) BGB) and (ii) to return it after termination of the tenancy contract (section 546 (I) BGB). The secondary obligations of the tenant include the use of the dwelling in conformity with the contract, the notice of defect as well as the obligation to tolerate measures required for maintenance of the dwelling. The landlord has especially to meet the duty to maintain safety as a secondary obligation.

- **Defects of the dwelling**
  - Notion of defects: Is there a general definition?

According to the prevailing subjective notion of defects, a defect is every adverse deviation of the actual condition from the contractually agreed condition, which impairs or negates the suitability of the rented dwelling.<sup>825</sup> Such an impairment can be based either on a material (section 536 (I) BGB) or on a legal defect (section 536 (III) BGB). The latter exists if the tenant is fully or partially deprived by a third-party right of use of the rented dwelling. A defect is also assumed if a warranted characteristic is lacking or ceases later (section 536 (II) BGB).

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<sup>824</sup> OLG Düsseldorf, ZMR 1992, 536; BGH, NJW 1963, 341 (342).

<sup>825</sup> BGH, NJW 2010, 1133 (1134).

- Examples: Is the exposure of the house to noise from a building site in front of the house or are noisy neighbours a defect? What about damages caused by a party or third persons? Is the occupation of the house by third parties such as squatters considered as a defect in the legal terms?<sup>826</sup>

As a general rule, noise from a building site and noisy neighbours are considered as material defects of the dwelling within the meaning of section 536 (I) BGB only if the noise exceeds the limits of reasonableness. Thus, a defect is especially assumed in case of noise due to extensive construction works at the neighbouring plot<sup>827</sup> as well as in case of noisy disputes during the night time in the dwelling next door<sup>828</sup>, but not in the event of general noise caused by children<sup>829</sup>.

Damage caused by the tenant is not regarded as a defect, with the result that the tenant is not entitled to rent reduction. The landlord retains therefore his claim for rent to the full extent pursuant to section 326 (II) BGB. Whether damage caused by third persons may be considered as a defect depends however on the relationship between the tenant and the third party.<sup>830</sup> If the third person comes into contact to the rented property at the instance of the tenant, the latter is responsible to the same extent as for fault on his own part (section 278 (1) BGB). This applies especially to family members and guests. Consequently, the tenant's right to reduce the rent because of a defect is excluded in this case. Provided the tenant is not responsible for fault on the part of the third party, for example with regard to a thief or neighbour, damage caused by this person is a defect, even though the landlord is not responsible.<sup>831</sup> The same applies of course to damages caused by the landlord himself.

Finally, the occupation of the dwelling by third parties is regarded as a legal defect, since the tenant is pursuant to section 536c (I 1) BGB obliged to inform the landlord about defects, which includes the situation that a third party arrogates to himself a right to the dwelling (section 536c (I 2) BGB).

- Discuss the possible legal consequences: rent reduction; damages; "right to cure" (to repair the defect by the landlord); reparation of damages by tenant; possessory actions (in case of occupation by third parties); what are the relationships between different remedies; what are the prescription periods for these remedies

Principally, all claims and rights of the tenant against the landlord due to defects of the dwelling require that the tenant did not know of the defect when entering into the tenancy contract or at the time of acceptance (section 536b BGB). In case the tenant accepts a defective dwelling although he is aware of it, then he may only assert the rights under sections 536, 536a BGB if he reserved them. Provided he remains unaware of the defect due to gross negligence, he has these rights only if the landlord fraudulently concealed the defect. Furthermore, the tenant is obligated to notify the landlord immediately if a defect comes to light during the tenancy period, if action to protect the rented dwelling from an unforeseen hazard becomes necessary, or if a third party arrogates to himself a right to the dwelling (section 536c (I) BGB). Immediately means, that notice of defect must be effected without undue delay (section 121 (I) BGB). Otherwise, he is entitled neither to

<sup>826</sup> Cf. also the list of defects in: Eisenschmid, in: *Schmidt-Futterer*, s. 536 BGB, rec. 78-301; 331-336.

<sup>827</sup> LG Berlin, GE 2013, 552; LG Frankfurt a.M., WuM 2007, 316.

<sup>828</sup> AG Bergisch-Gladbach, WuM 2003, 29.

<sup>829</sup> LG Munich I, NZM 2005, 339.

<sup>830</sup> Cf. Horst, *Praxis des Mietrechts*, rec. 1292 et seq..

<sup>831</sup> Then, the landlord has a claim to recourse against the third party.

reduce the rent nor to demand damages (section 536c (II) BGB). Rather, the tenant is liable to the landlord for damages incurred by the failure or delay to report. Finally, the landlord is not subject to any claims due to a defect which is imputed solely to the sphere of the tenant.<sup>832</sup>

Provided these requirements are met, the tenant is entitled to a rent reduction pursuant to section 536 (I) BGB. For the period when suitability of the dwelling is negated, the tenant is exempted from paying the rent, while he has to pay a reasonable part of the rent as far as suitability is merely reduced. Concerning this, only a defect which substantially reduces suitability can cause the legal consequence of rent reduction (section 536 (I 3) BGB). A defect is regarded as trivial if it is easy to recognize and to remedy and its removal entails only low costs.<sup>833</sup> In addition, an impairment of suitability due to energy-saving measures is not taken into account for a period of three months (section 536 (Ia) BGB). The amount of rent reduction is calculated on the basis of the gross rent and usually expressed as a percentage.<sup>834</sup> Since the rent is reduced automatically provided all requirements are fulfilled, the right to rent reduction is not subject to limitation (section 194 (1) BGB).

Apart from rent reduction, the tenant may also demand damages under section 536a (I) BGB if (i) a defect exists when the tenancy contract is entered into, regardless of any fault by the landlord, (ii) a defect arises later due to a circumstance that the landlord is responsible for or (iii) the landlord is in default in remedying a defect. The claim to damages is subject to the standard prescription period of three years, which commences at the end of the year in which the claim arose (sections 195, 199 (I) BGB). In the latter case as well as if an immediate removal of the defect is necessary to maintain or restore the state of the dwelling, the tenant may remedy the defect himself and demand reimbursement of the necessary expenses (section 536a (II) BGB). In order to place the landlord in default, the tenant has to give a warning notice in addition to the notice of defect. Claims to reimbursement of expenses prescribe within a period of six months after termination of the tenancy (section 548 (II) BGB). If the tenant remedies the defect on his own although the requirements of section 536a (II) BGB are not met, he is not entitled to any compensation except for a claim on account of unjust enrichment.<sup>835</sup> Pursuant to section 536a (I) BGB, the tenant may demand damages notwithstanding the right to rent reduction. Instead of demanding damages and reimbursement of expenses, the tenant may set off these claims or a claim for unjust enrichment for excess payment of rent against the landlord's claim for rent (section 556b (II) BGB). Alternatively, he may also exercise a right of retention in relation to such a claim. In both cases, the tenant has to notify the landlord in text form of his intention at least one month prior to the due date of the rent.

Finally, the tenant can only assert his claims and rights against the landlord due to defects of the dwelling provided they are not contractually excluded. Regarding the right to reduce the rent, section 536 (IV) BGB provides that any deviating agreement to the disadvantage of the tenant is ineffective. An exclusion of the right to rent reduction is therefore out of the question. Even though a corresponding provision does not exist for claims for damages, the landlord cannot nevertheless exclude by standard business terms his liability for defects of the dwelling caused by (slight) negligence.<sup>836</sup> An exclusion of liability for defects caused by intention or gross negligence fails already because of the prohi-

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<sup>832</sup> BGH, NZM 2011, 198.

<sup>833</sup> BGH, NZM 2004, 776.

<sup>834</sup> BGH, NZM 2005, 699; NZM 2005, 455; KG Berlin, NZM 2004, 70.

<sup>835</sup> BGH, NZM 2008, 279.

<sup>836</sup> BGH, NZM 2002, 116.

bition laid down in sections 309 (no. 7b), 276 (III) BGB. Solely the strict liability for initial defects may be legally excluded.<sup>837</sup>

Apart from that, the landlord may not invoke an agreement by which the rights of the tenant with regard to defects are excluded or restricted if he fraudulently concealed the defect (section 536d BGB). This provision is only applicable to individual agreements on the exclusion of claims for damages as well as to terms which bear up against a control of standard business terms (sections 305 et seq. BGB).<sup>838</sup>

With regard to possessory actions, the tenant is, so long as he is in actual possession of the dwelling, entitled to the protection rights laid down in sections 859 et seq. BGB.<sup>839</sup> Accordingly, the tenant may either claim for repossession in case he is deprived of possession or for removal of interference in case he is disturbed in his possession (sections 861 (I), 862 (I) BGB). Both claims require that possession has been deprived or disturbed by unlawful interference (*verbotene Eigenmacht*), which is defined as against the will of the possessor (section 858 (I) BGB). Thus, the tenant may for instance demand a third party, who lives in the dwelling without paying rent, to vacate the dwelling.<sup>840</sup> These claims to possession expire at the end of one year after the act of unlawful interference, unless the claim is asserted in a legal action before this date (section 864 BGB). Apart from that, the tenant may also claim damages due to interference with possession under the terms of section 823 BGB. This claim is subject to the standard prescription period of three years (sections 195, 199 (I) BGB). Furthermore, the tenant may even assert claims against the landlord, who is, because of his contractual duties laid down section 535 (I) BGB, also obliged to prevent disturbances to the tenant caused by other tenants, neighbours or third parties.<sup>841</sup> On the other hand, the tenant must inform the landlord without undue delay if a third party arrogates to himself a right to the dwelling, in order to keep his rights under sections 536, 536a BGB (section 536c (I 2) BGB).

- **Entering the premises and related issues**

- Under what conditions may the landlord enter the premises?<sup>842</sup>

Considering the protection of the tenant's right of occupancy as enshrined in Article 14 (I) GG as well as the inviolability of home pursuant to Article 13 (I) GG, tenants have the right to be left alone in their rented dwelling.<sup>843</sup> Therefore, the landlord is only allowed to enter the dwelling if he has (i) a concrete and legitimate reason, (ii) announced his intention beforehand and (iii) obtained the tenant's consent. Otherwise, he commits the criminal offence of trespass (*Hausfriedensbruch*) pursuant to section 123 (I) StGB.

Reasons which entitle the landlord to enter the dwelling are for example the implementation of maintenance or modernization measures, the reasonable suspicion of a breach of contract by the tenant, the intention to sell the dwelling and to show it to prospective buyers or tenants as well as the inspection in order to avert imminent dangers.<sup>844</sup> The tenant has to be informed at least twenty-four hours in advance<sup>845</sup> and the inspection should

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<sup>837</sup> BGH, ZMR 2002, 899; ZMR 1992, 241.

<sup>838</sup> Cf. Häublein, in: *MüKo-BGB*, Vol. 3, s. 536d, rec. 2.

<sup>839</sup> Cf. T. Hannemann, in: *Münchener Anwaltshandbuch Mietrecht*, (Munich: C. H. Beck, 2010), s. 52, rec. 11.

<sup>840</sup> AG Friedberg, WuM 1991, 276.

<sup>841</sup> LG Essen, WuM 1998, 278; BGH, NJW 1987, 831 (833); WuM 1966, 763.

<sup>842</sup> Cf. K. Lützenkirchen, *Besichtigungsrechte des Vermieters von Wohn- oder Gewerberaum*, in: NJW 2007, 2152-2156.

<sup>843</sup> BVerfG, NZM 2004, 186.

<sup>844</sup> Cf. Lützenkirchen, NJW 2007, 2152.

<sup>845</sup> AG Cologne, WuM 1986, 86.

take place at an acceptable time (from 10:00 a.m. to 1:00 p.m. and 3:00 p.m. at the latest to 8:00 p.m.).<sup>846</sup>

Whether the landlord above is entitled to inspect the dwelling periodically without any reason is controversial. While some courts concede landlords the right to inspect the dwelling in intervals of one to two years,<sup>847</sup> other courts deny such a general right<sup>848</sup> on the grounds that periodic inspections are not necessary, since the tenant is obliged anyhow to inform the landlord about defects or dangers pursuant to section 536c (I) BGB.

- Is the landlord allowed to keep a set of keys to the rented apartment?

The landlord is obliged to hand all keys over to the tenant in order to enable him to use the rented dwelling without any disturbance.<sup>849</sup> Especially, he may not withhold a key for no apparent reason.<sup>850</sup> Moreover, if the landlord enters the dwelling by means of an own key, the tenant can terminate the tenancy without notice pursuant to section 543 (I) BGB, since he cannot be reasonably expected to continue the contract under these circumstances.<sup>851</sup>

- Can the landlord legally lock a tenant out of the rented premises, e.g. for not paying the rent?

The landlord is not entitled to lock the tenant out of the rented dwelling, even if he could terminate the tenancy due to arrears of rent.<sup>852</sup> In case the landlord nevertheless replaces the lock, the tenant is not obliged to pay the rent for as long as he is not able to use the dwelling (section 537 (II) BGB).<sup>853</sup> Beyond that, the tenant may require possession to be restored pursuant to section 861 (I) BGB, since the landlord commits unlawful interference by locking the tenant out (section 858 (I) BGB).<sup>854</sup>

- **Rent regulation (in particular implementation of rent increases by the landlord)**

- Ordinary rent increases to compensate inflation/ increase gains

The ordinary form of rent increase to compensate inflation or to increase gains is set out in section 558 (I) BGB. Accordingly, the landlord may demand approval of an increase in rent up to the reference rent customary in the locality (*ortsübliche Vergleichsmiete*) if, at the time when the increase is to occur, the rent has remained unchanged for fifteen months. It can be made at the earliest one year after the most recent rent increase. Then the rent may not be raised within three years by more than 20% or even 15% in regions which can be determined by the *Land* governments (section 558 (III) BGB). To date, the capping limit of 15% is applicable in Berlin<sup>855</sup>, Hamburg<sup>856</sup> and many cities in Bavaria<sup>857</sup>. According to the adopted coalition agreement of CDU and SPD, the *Land* governments shall be legitimated to reduce the capping limit for regions with a tight rental market to

<sup>846</sup> Cf. K. Lützenkirchen, NJW 2007, 2152 (2153).

<sup>847</sup> AG Berlin-Schöneberg, GE 2007, 453; AG Saarbrücken, ZMR 2005, 372; AG Münster, NZM 2001, 1030; LG Stuttgart, ZMR 1985, 273; also Lützenkirchen, NJW 2007, 2152 (2153)

<sup>848</sup> LG Munich II, NZM 2009, 277; AG Bonn, NZM 2006, 698; also Eisenschmid, in: *Schmidt-Futterer*, s. 535 BGB, rec. 206, 224.

<sup>849</sup> Cf. Eisenschmid, in: *Schmidt-Futterer*, s. 535 BGB, rec. 523.

<sup>850</sup> Ibid.

<sup>851</sup> LG Berlin, NZM 2000, 543.

<sup>852</sup> OLG Düsseldorf, DWW 1998, 342.

<sup>853</sup> Cf. Blank, in: *Blank/Börstinghaus*, s. 537, rec. 19.

<sup>854</sup> KG Berlin, NJW 1967, 1915 for commercial leases.

<sup>855</sup> Kappungsgrenzen-Verordnung of 07-05-2013 (GVBl. 128).

<sup>856</sup> Kappungsgrenzenverordnung of 30-07-2013 (GVBl. 350).

<sup>857</sup> Kappungsgrenzenesenkungsverordnung of 03-05-2013 (GVBl. 266).

15% within four years instead of three. However, rent increases due to renovation measures or changes in operating costs are not taken into account with regard to the period of fifteen months as well as to the capping limit. In case the capping limit is not observed, the demand to increase the rent is not entirely void but is capped to the admissible extent.<sup>858</sup>

The reference rent customary in the locality is formed from the usual payments that have been agreed or that have been changed in the last four years in the municipality or in a comparable municipality for residential space that is comparable in type, size, furnishings, quality, location and energy quality and furnishing (section 558 (II) BGB). The landlord must declare and justify the demand for a rent increase in text form under section 126b BGB (section 558a (I) BGB). As references for the justification of a rent increase may be used a (expert) list of representative rents (sections 558c, 558d BGB), information from a rent database (section 558e BGB), an opinion, provided with supporting grounds, by an officially appointed and sworn expert, or finally examples of equivalent payment for individual comparable dwellings (section 558a (II) BGB).

Many municipalities and especially the twenty-five metropolises in Germany (except Bremen)<sup>859</sup> have lists of representative rents (*einfacher Mietspiegel*).<sup>860</sup> These tables, showing the reference rent customary in the locality, have to be jointly produced or recognized by municipalities or by landlord and tenant associations (section 558c (II) BGB). They may be produced for the area of one or several municipalities or for only parts thereof, and they should be adjusted for market trends at intervals of two years (section 558c (III) BGB). Alternatively, a rent increase may be justified with reference to an expert list of representative rents (*qualifizierter Mietspiegel*). This list differs from the simple list of representative rents only to the effect that it is produced according to recognized scientific principles and has to be renewed every four years (section 558d (I, II 3) BGB). If these requirements are fulfilled, it is assumed that the payment cited in the expert list reflects the rent customary in the locality (section 558d (III) BGB). If there is neither a list of representative rents nor an expert list since the municipalities are not obliged to produce them, the landlord can use a rent database as a reference. Such a database is a collection of rents, maintained or recognized by the municipality or representatives of landlords or tenants, that makes it possible to come to a conclusion as to the reference rent customary in the locality with regard to individual dwellings (section 558e BGB). The advantage compared to the lists of representative rents is that a rent database has to be redrafted on an ongoing basis. Up to the present date, there exists only one rent database in Germany.<sup>861</sup> In municipalities where neither a list of representative rents nor a rent database is maintained, the landlord can lastly refer to an expert opinion or also to information on the rent for three comparable dwellings.

With regard to operating costs, the landlord may undertake an adjustment to a reasonable amount in case advance payments have been agreed. If the parties have agreed on a lump sum charge for operating costs, the landlord is entitled to apportion increases in operating costs proportionately to the tenant, provided that an apportionment is required

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<sup>858</sup> Cf. Börstinghaus, in: *Schmidt-Futterer*, s. 558 BGB, rec. 198.

<sup>859</sup> Cf. Die Tageszeitung of 26-01-2013, *Widerstreitende Ziele*, available at: <http://www.taz.de/1/archiv/digitaz/artikel/?ressort=ra&dig=2013%2F01%2F26%2Fa0101&cHash=49b5c35ccad38742114be475ac379e97> (last retrieved: 23-03-2014).

<sup>860</sup> The current lists of representative rents are available at: <http://www.mietspiegelportal.de/> (last retrieved: 23-03-2014).

<sup>861</sup> Rent database for the regions Hannover, Langenhagen and Laatzen, available at: <http://www.vergleichsmieten-mea.de/mea.htm> (last retrieved: 23-03-2014).



by the contract (section 560 BGB). Still, the landlord has to observe the principle of economic efficiency in case of measures and decisions affecting the amount of operating costs borne by the tenant (section 560 (V) BGB).<sup>862</sup> If the operating costs are however reduced, the lump sum must be accordingly reduced from then on and the tenant has to be informed about the reduction immediately (section 560 (III) BGB).

- Is a rent increase after renovation measures, e.g. upgrading the energy performance of the house, or similar lawful and dealt with in a special procedure?

The landlord may also increase the rent if he has carried out modernization measures that lead to savings of energy or water, improve the general living conditions including also the utility value of the dwelling, or those were made due to circumstances for which the landlord is not responsible (section 559 (I), 555b BGB). On the other hand, the right of the tenant to reduce the rent because of impairments as a result of energy-saving measures is excluded for a period of three months (section 536 (Ia) BGB). The increase of the annual rent may not amount to more than 11% of the costs spent on the modernization. If these measures were carried out for several dwellings, the costs are to be reasonably apportioned on the individual dwellings (section 559 (III) BGB). Costs that were required for maintenance measures, were assumed by the tenant or a third party or were covered by subsidies from public authorities do not form part of these costs invested in modernizing the dwelling (sections 559 (II), 559a (I) BGB). An increase in rent because of renovation is excluded, however, if this would cause a hardship for the tenant that is not justifiable, even considering the prospective operating costs as well as the justified interests of the landlord (section 559 (IV) BGB). Such a weighting of interests is not conducted if (i) the dwelling was just set in a condition that is common practice, (ii) the modernization measure was carried out due to circumstances the landlord is not responsible for or (iii) the tenant failed to inform the landlord in due time about the circumstances constituting the hardship (section 559 (IV, V) BGB).

Compared to the other forms of increases in rent, the rent increase because of renovation measures does not deal with a special procedure, meaning that the landlord must declare the rent increase and its calculation in text form as well (section 559b (I) BGB).

- Rent increases in “housing with a public task”

With regard to rent increases in the case of housing with a public task, one must again distinguish between dwellings that were promoted by public funds before and after the 31 December 2001. For dwellings promoted after this date, the general provisions of the BGB on rent increases are applicable.

Regarding the dwellings promoted earlier, there are different possibilities and restrictions for the landlord to increase the rent. For example, if the total amount of current expenditures increases, the landlord can compile a new calculation of profitability (*Wirtschaftlichkeitsberechnung*), which provides the basis for the rent to cover the current expenditures (section 4 (I) NfV).

The same applies if the landlord wants to increase the rent due to structural alterations (section 6 (I, II) NfV). Then, he can either compile a new calculation of profitability or demand an extra charge beside the rent if not every dwelling of a building has been altered. As far as structural measures lead to a modernization in terms of section 11 (VI) II. NfV, their costs may only be apportioned among the tenants, if the responsible authority has approved the measures (section 11 (VII) II. NfV). Similar to section 555b BGB, mod-

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<sup>862</sup> BGH, NZM 2008, 78.

ernization measures in this sense are those which improve the general living conditions, raise the utility value of the residential space with lasting effect, or effect savings of energy and water.

Beyond that, the rent can only be increased by the landlord provided that the current amount of rent is below the rent level covering the current expenditures (section 10 (I) WoBindG). A rent increase up to the level of expenditures is effective only if the landlord declares the increase and its calculation to the tenant in writing. The landlord must further attach a calculation of profitability. Then, the tenant owes the increased rent from the beginning of the month after following receipt of the declaration (section 10 (II) WoBindG). It is also possible to apportion increases in operating costs retroactively among the tenant by means of section 10 WoBindG (section 10 (II 3) WoBindG). The landlord is not however entitled to this unilateral increase in rent, when it is excluded because of a clear agreement with the tenant or a third party or due to the circumstances (section 10 (IV) WoBindG).

- Procedure to be followed for rent increases

The landlord has to declare and to justify all types of unilateral rent increases to the tenant in text form under section 126b BGB. With regard to an increase in rent up to the customary level in the locality, the declaration must state one of the possible references for the justification of the increase (section 558a (I) BGB). In case an expert list of representative rents containing information for the respective dwelling exists, the landlord must however communicate such information even if he wishes to support his rent increase by another means of justification (section 558a (III) BGB). If the landlord wants to increase the rent because of modernization measures, the declaration must provide the calculation of the increase based on the incurred costs (section 559b (I 2) BGB). Further, an increase in rent because of changes in operating costs requires, that the basis of the apportionment is referred to and explained in the declaration (section 560 (I 2) BGB).

- Is there some orientation at the market rent; if yes, how is the market rent measured/calculated (e.g. statistical devices such as a *Mietspiegel* (= rent statistics for a certain area))?

As already mentioned above, the landlord has to justify an increase in rent to compensate inflation or to increase gains by referring to the reference rent customary in the locality. It is formed from the usual payments that have been agreed or that have been changed in the last four years in the municipality or in a comparable municipality for residential space that is comparable in type, size, furnishings, quality, location, and energy quality and furnishing (section 558 (II) BGB). Their listing can be found in a list of representative rents, in an expert list of representative rents which is produced according to recognized scientific principles, or in a rent database which is a collection of rents maintained on an ongoing basis. All these listings have in common that they are jointly produced or recognized by the municipality or by representatives of landlords and tenants.

- Possible objections of the tenant against rent increase

In general, the tenant owes the unilaterally increased rent from the beginning of the third month after receipt of the demand (sections 558b (I), 559b (II), 560 (II) BGB). In contrast, if the landlord wants to increase the rent up to the customary level in the locality, the tenant has to approve the increase (section 558b (I) BGB). Nevertheless, if the tenant does not grant his approval by the end of the second month after receiving the declaration although all requirements like the period of fifteen months or the capping limit are met, the landlord may sue for it within three additional months (section 558b (II) BGB). If, howev-

er, the tenant does not approve the rent increase explicitly, but pays the increased rent without any reservation, he grants his approval at least impliedly.<sup>863</sup> It is controversial how many payments are required to assume such an approval. The number of unre-served payments that is demanded by the courts ranges between one<sup>864</sup> or two<sup>865</sup> and five<sup>866</sup> to six<sup>867</sup> times.

Apart from that, the tenant has a special right to terminate the tenancy contract within two months after receipt of the declaration of the increase if the landlord asserts a right to a rent increase under sections 558, 559 BGB (section 561 (I) BGB). Then, the tenancy ends after three months, and the rent increase does not take effect. If the landlord in-creases the rent in housing with a public task, the tenant is also entitled to terminate the contract (section 11 WoBindG). In that case, the tenancy ends already after two months.

- **Alterations and improvements by the tenant**

- Is the tenant allowed to make (objective) improvements on the dwelling (e.g. putting in new tiles)?

Without the landlord's permission, the tenant is principally not allowed to carry out physi-cal alterations affecting the structure of the residential building, even if these measures lead to an improvement on the condition of the dwelling.<sup>868</sup> This includes the refurbish-ment of bathrooms, the installation of new heating systems as well as the renewal of floors. Only in the case of minimal structural alterations or if refusal of approval on part of the landlord would be due to other reasons contrary to the principle of good faith and trust (section 242 BGB), would the tenant have a claim to permission.<sup>869</sup>

- Must, and if yes under what conditions, improvements of the dwelling by the tenant be compensated by the landlord?

If the tenancy agreement does not provide regulations on the compensation of improve-ment measures carried out by the tenant, the latter often has no claim in this respect. In-stead, the landlord may even demand the tenant remove all installations at the end of the tenancy in order to restore the original condition of the dwelling.<sup>870</sup> However, it is also im-aginable that the tenant wants to remove his installations, especially regarding a fitted kitchen.<sup>871</sup> Pursuant to section 539 (II) BGB, the tenant is entitled to remove the installa-tions that he has provided in the dwelling. The landlord may however ward off exercise of the right of removal by payment of appropriate compensation, unless the tenant has a justified interest in removal (section 552 (I) BGB). Furthermore, it is possible to exclude the tenant's right of removal by agreement, but only to the extent that reasonable com-pensation is provided for (section 552 (II) BGB). Provided the landlord has agreed to the improvement measures and wants to keep the installations made for this purpose, the tenant may assert claim reimbursement of expenses under section 539 (I) BGB. Apart from that, the tenant has only a claim for unjust enrichment (sections 812, 818 (II) BGB).

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<sup>863</sup> Cf. Horst, *Praxis des Mietrechts*, rec. 619.

<sup>864</sup> LG Berlin, GE 2009, 1625.

<sup>865</sup> AG Leipzig, NZM 2002, 20.

<sup>866</sup> AG Bad Hersfeld, WuM 1996, 708.

<sup>867</sup> AG Berlin-Hohenschönhausen, GE 2004, 301.

<sup>868</sup> Cf. Horst, *Praxis des Mietrechts*, rec. 949.

<sup>869</sup> BGH, NZM 2012, 154.

<sup>870</sup> Cf. Horst, *Praxis des Mietrechts*, rec. 2011.

<sup>871</sup> Ibid, rec. 2000 et seq..

- Is the tenant allowed to make other changes to the dwelling?
  - in particular changes needed to accommodate a handicap (e.g. building an elevator; ensuring access for wheelchairs etc.)?

With regard to changes necessary in order to accommodate a handicapped person, section 554a BGB<sup>872</sup> provides that the tenant may demand the approval of the landlord for structural changes or other installations required to make the use of the dwelling or access to it fit for the needs of the disabled. The landlord may only refuse approval if his interest in maintaining the rented dwelling or building unchanged outweighs the tenant's interests (section 554a (I 2) BGB). Furthermore, the landlord may make his approval dependent upon payment of a reasonable additional security deposit for restoration of the original condition (section 554a (II) BGB). Consequently, the tenant must bear not only the costs of the structural alterations, but also the costs of the restoration works.

- fixing antennas, including parabolic antennas<sup>873</sup>

In general, tenants are not entitled to fix a parabolic antenna without the permission of the landlord. However, if a foreign tenant cannot gain access to TV channels in his native language or of his home country even by using cable television, he is, pursuant to his right to inform himself without hindrance from generally accessible sources, allowed to install such an antenna without permission.<sup>874</sup> To this extent, the freedom of information as protected by Article 5 (I 1) GG outweighs the landlord's property right (Article 14 (I 1) GG).<sup>875</sup> The interest of a foreign tenant to be informed about the events in his home country is not lessened if he lives in Germany for many years or even if he has German citizenship.<sup>876</sup> Furthermore, the tenant may not be referred to newspapers or the internet in order to inform himself.<sup>877</sup> However, some courts, including the BGH, have recently held that the possibility to receive TV channels via internet should be considered within the weighting, since it is nowadays comparable to TV.<sup>878</sup> Therefore, it remains to be seen if foreign tenants will be permitted in the future to install a parabolic antenna as often as in recent years.

The possibility for a German tenant to claim permission for the installation of such an antenna is however *a priori* more limited:<sup>879</sup> He has to prove a higher need for information, for example due to his profession, which cannot be satisfied through other media sources, like the internet, cable or terrestrial television.<sup>880</sup> This case law leads especially to discrimination of German tenants compared to those German tenants who are allowed to install a parabolic antenna because of their foreign background.<sup>881</sup>

Provided the landlord has to tolerate the installation of a parabolic antenna, he has nevertheless still the right (i) to determine the place where the antenna shall be fixed, (ii) to be indemnified from all costs and (iii) to demand a deposit for the costs of a removal.<sup>882</sup> If

<sup>872</sup> Introduced in 2001 due to a judgement of the BVerfG: NJW 2000, 2658.

<sup>873</sup> As outlined above in 5. 'Human Rights'.

<sup>874</sup> BVerfG, NJW 1994, 2143; cf. also regarding the criteria: B. C. Koch, in: *Münchener Anwaltshandbuch Mietrecht*, s. 16, rec. 225-233.

<sup>875</sup> Regarding the relationship between fundamental rights and tenancy law and related cases please refer to 5. 'Human Rights'.

<sup>876</sup> KG Berlin, NZM 2008, 39; BerlVerfGH, GE 2007, 1178; opposite view: AG Frankfurt a.M., ZMR 2006, 449.

<sup>877</sup> BVerfG, NJW 1994, 1147; BGH, NJW 2010, 436.

<sup>878</sup> BGH, NZM 2013, 647; LG Hallo, ZMR 2013, 536; LG Berlin, GE 2012, 1169; LG Wuppertal, NZM 2012, 725.

<sup>879</sup> Cf. Koch, in: *Münchener Anwaltshandbuch Mietrecht*, s. 16, rec. 201-224.

<sup>880</sup> VerfGH Berlin, NZM 2002, 560.

<sup>881</sup> AG Frankfurt a.M., ZMR 2005, 458.

<sup>882</sup> OLG Karlsruhe, NJW 1993, 2815.

the tenant is not however entitled to install such an antenna, the tenant uses the dwelling in breach of contract and the landlord may after an unheeded warning seek a prohibitory injunction pursuant to section 541 BGB.

- **Maintenance measures and improvements, in particular upgrading the energy performance of the house by the landlord**

- What kinds of maintenance measures and improvements does the tenant have to tolerate?

Pursuant to sections 555a (I), 555d (I) BGB, the tenant must principally tolerate maintenance as well as modernization measures. The duty to tolerate the former is justified due to the fact that the landlord is obliged to maintain the dwelling in a suitable condition for the tenancy period (section 535 (I 2) BGB).

Maintenance measures are only those measures which are necessary to maintain, repair or to restore the dwelling without improving its practical value, just as the repair or replacement of a defective heating system. In contrast, modernization measures are however defined as structural alterations which lead to energy savings, climate protection, reduction of water consumption, increase of the practical value of the leased property, improvement of the general housing conditions or creation of new residential space (section 555b BGB). Additionally, the term modernization measure includes also alterations that are executed due to circumstances the landlord is not responsible for and which do not serve as maintenance measures.

- What conditions and procedures does a landlord who wants to make renovations need to respect (e.g. giving adequate (i.e. sufficiently long) notice; offer an alternative dwelling; offer a rent reduction to compensate for disturbances)?

The conditions and procedures the landlord needs to respect are different in case of maintenance and modernization measures.

If the landlord intends to carry out maintenance measures, he must notify the tenant in due time, unless these measures have only insignificant effects on the rented property or their immediate execution is absolutely necessary (section 555a (II) BGB). Outlays which the tenant had to make as a result of such measures must be reimbursed to a reasonable extent by the landlord (section 555a (III) BGB). Upon demand, the landlord must make an advance payment.

The execution of modernization measures is however subject to more detailed regulations and requirements. First, the landlord must inform the tenant about an intended modernization measures in text form at the latest three months prior to the commencement of the measure (section 555c (I) BGB). The notification must include information on the nature of the modernization measure, its estimated scope, commencement and duration, as well as on the amount of an increase in rent to be expected and the future utility costs. However, the landlord does not have to notify the tenant of an intended modernization measure if it has only insignificant effects on the rented property and entails only an insignificant increase in rent (section 555c (IV) BGB).

Provided these requirements are met, the tenant usually has to tolerate the modernization measure. This does not apply if the measure would be for the tenant, his family or another member of his household a hardship that is not justifiable even considering the interests of the landlord as well as the importance of energy savings and climate protection (section 555d (II 1) BGB). In this context, an expected increase in rent and the future utility costs are not to be taken into account (section 555d (II 2) BGB). The tenant must

notify the landlord in text form of the circumstances constituting the hardship until the end of the month following the month when notification of the modernization measure is received. The period commences only in case the tenant has been informed by the landlord on his right to make use of the hardship regulation (section 555c (III), 555d (III) BGB).

To the extent the tenant is obligated to tolerate the modernization measure, his right to rent reduction due to an impairment of suitability is excluded for a period of three months (section 536 (Ia) BGB). However, he has a special right of termination pursuant to section 555e (I) BGB. Accordingly, the tenant may terminate the tenancy to the end of the second month after termination has been declared. Notice has to be given by the end of the month subsequent to the month when notification of the modernization measure is received.

Apart from this procedure, the parties may reach on occasion of modernization as well as maintenance measures an agreement especially on the temporal and technical implementation of measures, warranty rights of the tenant and the future amount of rent (section 555f BGB).

- **Uses of the dwelling**

- Keeping animals; producing smells; receiving guests; prostitution and commercial uses (e.g. converting one room in a medical clinic); removing an internal wall; fixing pamphlets outside

With regard to allowed and forbidden uses of the dwelling, section 538 BGB states that the tenant is not responsible for modifications to or deterioration of the dwelling brought about by use in conformity with the contract. If the tenant however uses the dwelling in breach of contract and persists with it despite a warning by the landlord, then the latter may seek a prohibitory injunction (section 541 BGB).

- (1) Keeping animals<sup>883</sup>

In the course of the tenancy law reform in 2001, the legislature defeated the proposal to regulate the tenant's right to keep animals by law.<sup>884</sup> Nevertheless, it is generally accepted that keeping animals inside the dwelling belongs to the contractual use of the rented dwelling and is also protected by the fundamental right to free development in so far as it concerns non-disturbing pets, which are usually kept in a cage or an aquarium.<sup>885</sup> Therefore, a general prohibition to keep pets of any kind is ineffective.<sup>886</sup> The decision whether to permit the keeping of animals or not must be made instead on a case-by-case basis.<sup>887</sup> It depends especially on the species and number of animals, the size of the dwelling, special needs of the tenant as well as on the conduct of the landlord in comparable cases.<sup>888</sup> In 1980, the BVerfG ruled that keeping of dogs and cats can be prohibited in the tenancy agreement.<sup>889</sup> According to a recently delivered judgement of the BGH, a general prohibition of keeping disturbing animals like dogs and cats inside the dwelling is

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<sup>883</sup> Cf. H. Blank, *Tierhaltung in Eigentums- und Mietwohnungen*, in: NJW 2007, 729-733.

<sup>884</sup> BT-Drucks. 14/5670, 3.

<sup>885</sup> As outlined above in 5. 'Human Rights'.

<sup>886</sup> BGH, NJW 1993, 1061 (1062).

<sup>887</sup> LG Hamburg, WuM 2002, 666; LG Freiburg, WuM 1997, 175.

<sup>888</sup> Cf. Blank, NJW 2007, 729 (731).

<sup>889</sup> BVerfG, WuM 1981, 77.

however ineffective.<sup>890</sup> Such a clause in standard business terms disadvantages the tenant unreasonably (section 307 (I) BGB).

## (2) Producing smells

With regard to smells, especially smoking has been subject of many court decisions.<sup>891</sup> Smoking, not in an excessive way,<sup>892</sup> belongs to the contractual use of residential space.<sup>893</sup> Therefore, it is principally not possible for the landlord to terminate the tenancy due to the fact that the tenant smokes inside the dwelling. Recently, however, a local court has upheld such a termination, since the smoke led to an unreasonable odour nuisance that posed a risk to health of the other tenants of a multiple dwelling.<sup>894</sup> In general, the landlord is not also entitled to claim for compensation because of discolorations or other damage due to nicotine.<sup>895</sup> In contrast, if smoking causes a deterioration of the dwelling, which cannot be removed by aesthetic repairs within the meaning of section 28 (IV 3, II) of the II. BV, the tenant is liable for damages.<sup>896</sup>

Other smells which cause an unreasonable stench and originate from dirt and uncleanness' in the dwelling entitle other tenants of the residential building to a rent reduction<sup>897</sup> as well as the landlord to terminate the tenancy<sup>898</sup>.

## (3) Receiving guests<sup>899</sup>

As a general rule, tenants may receive guests as often and as much as they want to, also over-night. Only in exceptional cases may the landlord ban a guest of the tenant from the dwelling, for example if this person has disturbed the domestic peace several times.<sup>900</sup> The tenant is even entitled to receive guests for a period of several weeks not needing the permission of the landlord. But in the case that the visit lasts over a period of three months, it is assumed that the accommodation of the guest is permanent.<sup>901</sup> Then, the tenant may demand permission for the subletting from the landlord (section 553 (I) BGB). This does not apply to spouses or children of the tenant.<sup>902</sup>

## (4) Prostitution

The tenant is not allowed to engage in prostitution in the rented dwelling,<sup>903</sup> and this is not changed by the Law to regulate the Legal Relationships of Prostitutes<sup>904</sup>.<sup>905</sup> Otherwise, the landlord may seek a prohibitory injunction (section 541 BGB) or terminate the tenancy without notice period (section 543 (I) BGB). Other tenants of the residential

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<sup>890</sup> BGH, NZM 2013, 378.

<sup>891</sup> Cf. Eisenschmid, in: *Schmidt-Futterer*, s. 535 BGB, rec. 513-517.

<sup>892</sup> LG Paderborn, NZM 2000, 710.

<sup>893</sup> LG Cologne, NZM 1999, 456.

<sup>894</sup> AG Düsseldorf, Az. 24 C 1355/13.

<sup>895</sup> BGH, NZM 2006, 691.

<sup>896</sup> BGH, NZM 2008, 318.

<sup>897</sup> LG Berlin, WuM 2011, 157;

<sup>898</sup> AG Münster, WuM 2012, 372.

<sup>899</sup> Cf. Blank, in: *Blank/Börstinghaus*, s. 540, rec. 29-35.

<sup>900</sup> AG Cologne, WuM 2004, 673.

<sup>901</sup> AG Frankfurt a.M., WuM 1995, 396.

<sup>902</sup> As outlined above in 6.4. 'Persons allowed to move in an apartment together with the tenant'.

<sup>903</sup> OLG Frankfurt a.M., NZM 2004, 950; LG Lübeck, NJW-RR 1993, 325; different if the dwelling is also rented for commercial purposes: AG Aachen, ZMR 2007, 41.

<sup>904</sup> Prostitutionsgesetz of 20-12-2001 (BGBl. I 3983).

<sup>905</sup> OLG Frankfurt a.M., NZM 2004, 950; different: AG Aachen, ZMR 2007, 41.



building (the neighbours) are even entitled to rent reduction up to 20%<sup>906</sup> as well as to termination without notice period<sup>907</sup>.

Apart from that, the prohibition of engaging in prostitution inside the dwelling is also subject to public law, provided the dwelling is located within an area that has been declared as prohibited area (*Sperrbezirk*) under the terms of section 297 (I) of the Introductory Act to the German Criminal Code (*Einführungsgesetz zum Strafgesetzbuch*)<sup>908 909</sup>.

#### (5) Commercial uses

The BGH has recently held that a commercial use of a dwelling rented solely for residential purposes still falls under the term “habitation” as long as the professional activities are exercised in a way that they do not emerge to the outside.<sup>910</sup> Otherwise, the commercial use is contrary to the contract and does not have to be tolerated by the landlord without any prior agreement. However, if the effects on the rental object and on other tenants are not beyond the scope of usual residential use, the landlord is obligated to permit the commercial activity.<sup>911</sup>

#### (6) Removing an internal wall

Without the landlord’s permission, the tenant is not entitled to carry out physical alterations affecting the structure of the residential building, except for alterations that are reversible with little trouble or that can be restored easily, like repainted walls, dowels<sup>912</sup> or nails. Since the removal of an internal wall cannot be restored easily, the tenant needs the permission of the landlord. Otherwise, he takes the risk of a termination by the landlord on grounds of section 573 (I no. 1) BGB.<sup>913</sup>

#### (7) Fixing pamphlets outside

Whether or not the tenant is entitled to fix a pamphlet in the window or at the house front depends essentially on its content and presentation.<sup>914</sup> Furthermore, the tenant’s freedom of expression (Article 5 (I 1) GG) has to be weighed against the landlord’s property right (Article 14 (I) GG) as well as against the rights of the other tenants. Considering this, courts have held that the tenant should be in principle allowed to fix posters outside, even if its content is political.<sup>915</sup> But as far as such a poster causes a disturbance of the domestic peace, it has to be removed.<sup>916</sup>

- Is there an obligation of the tenant to live in the dwelling? Are there specificities for holiday homes?

Based on the tenancy contract, the tenant is entitled, but not obligated, to live in the dwelling.<sup>917</sup> The disuse has at least no impact on the tenant’s duty to pay the rent (section 537 (I 1) BGB). The tenant can even use the dwelling just as a storage place for his

<sup>906</sup> AG Wiesbaden, WuM 1998, 315.

<sup>907</sup> AG Cologne, WuM 2003, 145.

<sup>908</sup> EGStGB of 2-03-1974 (BGBl. I 469, corr. 1975, 1916 and 1976, 507).

<sup>909</sup> BVerfG, NVwZ 2009, 905.

<sup>910</sup> BGH, NZM 2013, 456.

<sup>911</sup> BGH, NZM 2009, 658.

<sup>912</sup> Cf. T. Hannemann, in: *Münchener Anwaltshandbuch Mietrecht*, s. 48, rec. 161.

<sup>913</sup> LG Kassel, DWW 2011, 336.

<sup>914</sup> BayObLG, NJW 1984, 496; BayObLG, ZMR 1983, 352.

<sup>915</sup> AG Freiburg, WuM 1987, 144; LG Hamburg, NJW 1986, 320.

<sup>916</sup> LG Tübingen, NJW 1986, 321; BVerfG, NJW 1958, 259.

<sup>917</sup> BGH, NJW 1979, 2351; LG Arnsberg ZMR 1980, 182 for commercial leases.

furniture.<sup>918</sup> As long as he still takes care of the dwelling, the landlord has therefore no legitimate reason to terminate the tenancy contract based on the tenant's failure to occupy the dwelling.<sup>919</sup>

An obligation to use the residential space results neither from the prohibition on leaving the dwelling vacant for longer than three months, which is set out in section 27 (VII 1 no. 2) WoFG for housing with a public task, nor from the same regulations which were issued for the private rental market based on Article 6 section 1 (I 1) MRVG.<sup>920</sup> Solely in case of cooperative dwellings, the tenant could be required to use the dwelling at least temporarily because of his obligations as a member of the cooperative.<sup>921</sup>

There are specificities for holiday homes only in so far as these homes or dwellings usually may not be inhabited year-round by the same tenant due to building regulations. Holiday homes or apartments are often located in areas which are designated as special areas under section 10 (I) BauNVO. In these areas, it is not possible to have one's primary residence, with the result that it is not allowed to live there permanently.<sup>922</sup>

- **Video surveillance of the building:**<sup>923</sup>

- Is the surveillance of certain parts (e.g. corridors) of the building lawful and usual?

Over the last years, the installation of video cameras in order to protect the landlord's property and to encourage the tenant's sense of security has become more and more important and usual.<sup>924</sup> With regard to the general right of personality (Article 2 (I), 1 (I) GG), it is however controversial to what extent a surveillance of a residential building by a closed circuit television (CCTV) can be lawful. Apart from constitutional law, the tenant's general right of personality is protected by civil law (sections 823 (I), 1004 analogue BGB; 823 (II) in conjunction with 6b BDSG) as well as by criminal law (section 201a (I) StGB).<sup>925</sup> According to the criminal provision, someone who unlawfully creates or transmits pictures of another person located in a dwelling or a room especially protected from view shall be liable to imprisonment not exceeding one year or a fine.

Considering this comprehensive protection, courts have held that the installation of a CCTV by the landlord for surveillance of the entrance area or the lift infringes the tenant's right of personality and is therefore principally prohibited.<sup>926</sup> The same applies to the installation of dummy cameras, since the mere impression of being monitored is sufficient.<sup>927</sup>

Nevertheless, video surveillance can be lawful as far as the landlord complies with the following requirements:

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<sup>918</sup> BGH, NZM 2011, 151.

<sup>919</sup> AG Hamburg, NZM 1998, 477.

<sup>920</sup> Cf. Langenberg, in: *Schmidt-Futterer*, s. 537 BGB, rec. 9.

<sup>921</sup> Cf. OLG Stuttgart, NJW-RR 1991, 1226; different: LG Cologne, WuM 1991, 589.

<sup>922</sup> OLG Düsseldorf, NJOZ 2005, 1657.

<sup>923</sup> Cf. S. Senkel & A. Niggeweg, *Videoüberwachung im Miet-, Nachbarschafts- und WEG-Recht*, in: WuM 2010, 72-76; P. Hitpaß, *Videoüberwachung und Streitpunkt im Mietverhältnis*, in: WuM 2007, 355-360.

<sup>924</sup> Cf. Hitpaß, WuM 2007, 355.

<sup>925</sup> Cf. Senkel & Niggeweg, WuM 2010, 72 et seq..

<sup>926</sup> KG Berlin, NZM 2009, 736; AG Berlin-Lichtenberg, NZM 2008, 802.

<sup>927</sup> AG Berlin-Schöneberg, judgement of 08-06-2012, Az. 19 C 166/12; AG Tempelhof-Kreuzberg, GE 2010, 416; AG Berlin-Lichtenberg, NZM 2008, 802; AG Aachen, NZM 2004, 339.

- The tenants have to be informed about the installation of a CCTV and agree to it.<sup>928</sup> A clandestine video surveillance is therefore never permissible.<sup>929</sup>
- Furthermore, the landlord has to prove a concrete imminent danger to his property.<sup>930</sup> Otherwise, it would be reasonable for the landlord to protect his property by another way, like more frequent controls by the caretaker or the installation a locking system.<sup>931</sup>
- Finally, the requirements of section 6b BDSG have to be met, since house entrances, staircases and lifts are qualified as publicly accessible rooms in this sense.<sup>932</sup> Accordingly, video surveillance is lawful as far as necessary to exercise the right to determine who shall be allowed or denied access (*Hausrecht*) and there are no indications of overriding legitimate interests of the tenant. In particular, the landlord must therefore make it clear that the area is being monitored, to what purpose the monitoring takes place and by whom. Data collected by this means may be processed or used if necessary to achieve the intended purpose and the data shall be erased as soon as it is no longer needed to achieve the purpose. A video surveillance of the entrance, staircase or lift within these limits does not infringe the right of the tenants to informational self-determination and data protection.

With regard to a CCTV at a collective doorbell, the BGH has recently ruled that such an installation is permissible if the camera is only activated by ringing the bell, the image transmission does not take longer than one minute and only take place in the dwelling, the ringing was intended for, and finally a permanent video recording is not possible.<sup>933</sup>

## 6.6. Termination of tenancy contracts

	Tenancy type 1 = private rental market	Tenancy type 2 = housing with a public task	Tenancy type 3 = cooperatives	Ranking from strongest to weakest regulation
<b>Mutual termination</b>	- may be concluded at any time - tenant may demand to be released from the tenancy early, provided he has a justified interest in it and can present a suitable new tenant to the landlord			
<b>Notice by tenant</b>	- Ordinary notice: tenant does not need a justification for giving notice; notice period amounts always to three months; right of termination may be excluded up to a period of four years - Extraordinary notice: tenant must prove a compelling reason; no notice period; right of termination may not be excluded			
<b>Notice</b>	- Ordinary notice: landlord must prove a justified interest; notice period depends on			

<sup>928</sup> Cf. Senkel & Niggeweg, WuM 2010, 72 (74).

<sup>929</sup> OLG Cologne, NJW 2005, 2997.

<sup>930</sup> LG Berlin, WuM 2005, 663.

<sup>931</sup> LG Berlin, NZM 2001, 207.

<sup>932</sup> Cf. Senkel & Niggeweg, WuM 2010, 72 (73); Hitpaß, WuM 2007, 355 (359).

<sup>933</sup> BGH, NZM 2011, 512.

<b>by land-lord</b>	the duration of the tenancy; tenant has a right to object against notice of termination which can result in a continuation of the tenancy  - Extraordinary notice: landlord must prove a compelling reason; no notice period but landlord must grant the tenant a time limit of one up to two weeks for to vacate the dwelling; basically a prior warning notice is necessary  - Restriction in case residential space has been converted into apartment ownership  - tenant has a prolongation option			
<b>Other reasons for termination</b>	- the plot of land has been disposed of by compulsory enforcement  - the municipality has a right to terminate a tenancy when the aims and purposes of urban redevelopment measures require termination	- tenant is not in possession of a qualification certificate for housing with a public task	- tenant has terminated membership and the cooperative needs the dwelling for another member	

### • Mutual termination agreements

Different from the unilateral termination, which is subject to the provisions on security of tenure, a mutual termination agreement can be concluded at any time. Need for such an agreement exists for example if the tenant wants to move out prior to the expiry of the notice period, if a fixed-term tenancy shall end prior to the agreed date of termination, or if one of several tenants wants to be released from the tenancy which shall be then continued with another tenant.<sup>934</sup> With respect to the first reason, the tenant has principally no claim to be released from the tenancy contract prematurely. But as an exception, the landlord is obligated to conclude a termination agreement based on the principle of good faith and trust laid down in section 242 BGB (*Treu und Glauben*). According to a judgement of the BGH, the tenant may demand to be released from the tenancy early, provided he has a justified interest in it and can present a suitable new tenant to the landlord.<sup>935</sup>

Regarding the content of a mutual termination agreement, there are no specific restrictions, unless the tenant's protection rights shall be circumvented in this way. This is assumed for example if the tenant is obliged to make his declaration of intent already at the beginning of the tenancy, which the landlord may accept *ad libitum*.<sup>936</sup>

Apart from that, the landlord is prohibited from making use of an agreement by which he is entitled to revoke the tenancy after he has permitted the tenant to use the residential space (section 572 (I) BGB). The same applies to a contractual agreement by which the tenancy is subject to condition subsequent to the disadvantage of the tenant, i.e. the contract ends when condition is satisfied (section 572 (II), 158 (II) BGB).

### • Notice by the tenant

- Periods and deadlines to be respected

<sup>934</sup> Cf. Blank, in: *Schmidt-Futterer*, annex to s. 542 BGB, rec. 1.

<sup>935</sup> BGH, NZM 2003, 277.

<sup>936</sup> Cf. Blank, in: *Schmidt-Futterer*, annex to s. 542 BGB, rec. 1.

If the tenancy is entered into for an indefinite period of time, the tenant can give ordinary notice (section 573 BGB). The notice period amounts to three months and is allowed at the latest on the third working day of a calendar month to the end of the second month thereafter (section 573c (I 1) BGB). Agreements on deviating deadlines and notice periods are excluded (section 573c (IV) BGB), but the parties are free to agree on a shorter notice period for a termination on part of the tenant.<sup>937</sup> As against the termination by the landlord, the tenant does not need a justification for giving notice and the notice period remains constant regardless of the duration of the tenancy<sup>938</sup>. The aim of this regulation is to ensure the mobility of tenants.<sup>939</sup> Nevertheless, it is possible to exclude the tenant's right to give ordinary notice up to four years by a corresponding agreement, provided that the landlord's right to termination is excluded for the same period.<sup>940</sup> In case of a tenancy contract limited in time, termination may never be based on ordinary reasons.<sup>941</sup> Provided an intended fixed-term tenancy applies for an indefinite period of time, since it has not been concluded in writing, termination is however only allowed at the earliest at the end of one year (section 550 (2) BGB).

If the tenant wants to make use of his right to terminate the tenancy for extraordinary reasons, which may not be excluded and is subject to both unlimited and limited in time tenancy contracts, there is no notice period to be regarded.

- May the tenant terminate the agreement before the agreed date of termination (in case of contracts limited in time); if yes: Does the landlord then have a right to compensation (or be allowed to impose sanctions such as penalty payments)?

In case of a tenancy limited in time, the tenant is able to terminate the contract before the agreed date if he can prove a compelling reason. Then, the tenancy ends with immediate effect. In general, a compelling reason is deemed to obtain if the party giving notice cannot be reasonably expected to continue the lease until the end of the notice period or until the lease ends in another way, principally because of a fundamental breach of contractual obligations (section 543 (I 2) BGB). Certain examples for compelling reasons that justify a termination without notice are enumerated in sections 543 (II), 569 BGB. Accordingly, the tenant can give immediate notice if he is not permitted the use of the rented property in conformity with the contract, in whole or in part, in good time, or is deprived of this use (section 543 (II no. 1) BGB). A compelling reason also exists if (i.) the dwelling is in such a condition that its use entails a significant endangerment of health or if (ii.) the landlord permanently disturbs the domestic peace (*Störung des Hausfriedens*) (section 569 (I, II) BGB). Examples of a significant endangerment of the tenant's health are mildew infestation in the dwelling to a substantial extent.<sup>942</sup> However, in the case that the compelling reason consists in the violation of an obligation under the tenancy, the notice of termination is permitted only after an unheeded warning notice, unless such a warning notice obviously shows no chance of succeeding (section 543 (III) BGB).

Provided the tenancy has been terminated prior to the agreed date, the landlord has no right to any compensation. He is especially not allowed to impose sanctions, since an

<sup>937</sup> Cf. Blank, in: *Schmidt-Futterer*, s. 573c BGB, rec. 22.

<sup>938</sup> Until 1-09-2001, the notice period was also extended for a termination on part of the tenant (s. 565 (II) BGB o.v.).

<sup>939</sup> BT-Drucks. 14/4553, 67.

<sup>940</sup> BGH, NZM 2005, 419; previously 5 years were assumed: BGH, NZM 2004, 216.

<sup>941</sup> BGH, NJW 2007, 2177.

<sup>942</sup> LG Bremen, WuM 2006, 621; LG Duisburg, NZM 2002, 214.

agreement by which the landlord binds the tenant to promise a contractual penalty is ineffective pursuant to section 555 BGB.

- Are there preconditions such as proposing another tenant to the landlord?

Just in case the tenant wants to move out prior to the expiry of the statutory notice period, for example due to a new job in another city, landlords often agree with it on condition that the tenant can propose a suitable and solvent prospective tenant, who is willing to move in soon.

- **Notice by the landlord**

- Ordinary vs. extraordinary notice in open-ended or time-limited contracts; if such a distinction exists: definition of ordinary vs. extraordinary (= normally related to fundamental breaches of the contract, e.g. in cases of massive rent arrears or strong antisocial behaviour)

Whilst the tenant needs only an important reason if he wants to terminate the tenancy extraordinarily, the right of the landlord to give notice is restricted in both cases. An extraordinary notice by the landlord is only allowed for compelling reasons, and an ordinary notice requires that the landlord can prove a justified interest (except for tenancies named in sections 549 (II, III) BGB, which are excluded from the security of tenure).

The main differences between both kinds of termination are their application concerning the duration of the contract and the notice period. In contrast to the termination for extraordinary reasons, the termination on ordinary grounds is just applicable to tenancies entered into for an indefinite period of time, and it is subject to a statutory notice period.

- (1) Extraordinary notice - compelling reasons

The landlord can give a compelling reason if (i.) he cannot be reasonably expected to continue the tenancy until the end of the notice period or until the tenancy ends in another way, (ii.) the tenant violates the rights of the landlords to a substantial degree by substantially endangering the rented property by neglecting to exercise the care incumbent upon him or by allowing a third party to use it without permission, (iii.) the tenant is in default, on two successive dates, of payment of the rent or of a portion of the rent that is not insignificant, or (iv.) in a period of time spanning more than two dates is in default of payment of the rent in an amount that is as much as the amount of rent for two months (section 543 (I, II no. 2,3 BGB). In the latter case, termination is excluded if the landlord has by then obtained satisfaction. Furthermore, section 569 (III) BGB restricts the application of section 543 BGB for delayed payments of rent by ordering the ineffectiveness of the termination, if at the latest by the end of two months after the eviction claim is pending, the landlord is satisfied or a public authority agrees to satisfy him. However, this will not apply again if a previous termination had already been rendered ineffective under this provision within the last two years.

Further compelling reasons for the landlord are named in section 569 (II, IIa) BGB. Accordingly, the landlord is entitled to terminate the tenancy without notice if (i.) the tenant disturbs the domestic peace or if (ii.) the tenant is in default of the payment of security deposit in the amount of two months' rent.

The so far unspecified reason for termination of unreasonable continuation of lease, set out in section 543 (I 2) BGB, serves as a catch-all clause (*Auffangtatbestand*) for those cases that are very similar to the special codified ones in sections 543 (II), 569 (II, IIa)

BGB.<sup>943</sup> Such similar reasons on the part of the landlord are for example severe insults against him<sup>944</sup> or his employees<sup>945</sup> as well as criminal acts<sup>946</sup>, threats<sup>947</sup> or false offences willfully reported<sup>948</sup> against him.

In addition, special rights of termination exist, meaning that the landlord is entitled to terminate the tenancy for extraordinary reasons prescribed by the law<sup>949</sup>, but not with immediate effect, since this kind of termination is subject to the statutory notice period and requires additionally an ordinary reason under section 573 BGB (section 573d (I) BGB). An additional reason is only expendable in case of notice of termination to the heirs of the tenants under section 564 BGB. The special rights of termination are applicable to open-ended tenancy contracts (section 573d (I) BGB) as well as to fixed-term tenancies (section 575a (I) BGB).

## (2) Ordinary notice - justified interests

As laid down in section 573 (II) BGB, a justified interest exists in particular if (i.) the tenant has culpably and non-trivially violated his contractual duties, (ii.) the landlord needs the premises for himself, members of his family or of his household (*Eigenbedarf*) or (iii.) the tenancy contract prevents the landlord from making appropriate commercial use of the premises (*angemessene wirtschaftliche Verwertung*). Notice of termination for the purpose of increasing the rent is however explicitly excluded by section 573 (I 2) BGB.

A justified interest on the part of the landlord is expendable only if the rented dwelling is part of a building, which has less than two dwellings and is inhabited by the landlord himself (section 573a BGB) or if the termination concerns only side rooms that are not intended as residential (section 573b BGB).

Violations of contractual duties by the tenant are for example use in breach of contract, default in payment in general, payments not on time, unapproved subletting, as well as noise disturbance and defamation of the landlord or other tenants.<sup>950</sup> In any case, the tenant has to violate his duties culpably and non-trivially, which with regard to default in paying the rent would require that the tenant is in arrears with an amount of at least one monthly rent.<sup>951</sup> A prior warning notice by the landlord is not necessary.<sup>952</sup>

Termination due to personal needs requires that the landlord can prove actual need for him or one of his family or household members. Meanwhile, the BGH interprets the term "personal need" very broadly and landlord-friendly: For instance, family members in this sense include *inter alia* parents,<sup>953</sup> children,<sup>954</sup> brothers and sisters,<sup>955</sup> grandchildren<sup>956</sup>, parents-in-law<sup>957</sup> as well as sons- or daughters-in-law<sup>958</sup> and even nieces and neph-

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<sup>943</sup> Cf. Blank, in: *Schmidt-Futterer*, s. 543 BGB, rec. 187.

<sup>944</sup> LG Berlin, GE 2009, 326.

<sup>945</sup> AG Berlin-Tempelhof-Kreuzberg, GE 2010, 697.

<sup>946</sup> LG Munich I, WuM 2006, 524; LG Cologne, NJW-RR 1994, 909.

<sup>947</sup> AG Warendorf, WM 1996, 412.

<sup>948</sup> BVerfG, NZM 2002, 61.

<sup>949</sup> As outlined above in 6.1. 'Conditions for termination of contracts by the landlord'.

<sup>950</sup> Cf. Blank, in: *Schmidt-Futterer*, s. 573 BGB, rec. 21-40a.

<sup>951</sup> BGH, NJW 2013, 20.

<sup>952</sup> BGH, NJW 2008, 508.

<sup>953</sup> LG Berlin, MDR 1989, 1104.

<sup>954</sup> OLG Karlsruhe, NJW 1982, 889.

<sup>955</sup> BGH, NJW 2003, 2604.

<sup>956</sup> AG Cologne, WuM 1989, 250.

<sup>957</sup> LG Cologne, WuM 1994, 541.

<sup>958</sup> LG Hamburg, WuM 1993, 50.



ews<sup>959</sup>. It is not necessary that the family member lives in the same household as the landlord,<sup>960</sup> but if the landlord wants to terminate the tenancy in order to allow a person other than a family member to move into the dwelling, this person must necessarily be a member of his household.<sup>961</sup> An effective notice of termination requires further that it is based on a reliable plan for the future of the person who wants to move in.<sup>962</sup> Regarding the minimum duration this person must stay in the dwelling, courts have held that the intention to use the dwelling only for a few months is insufficient.<sup>963</sup> Apart from that, personal need does not only mean that the landlord needs a place to live, but also needs a place to work.<sup>964</sup> Provided the landlord has another suitable dwelling in the same house or housing complex, which is available for rent, he is furthermore obligated to offer the tenant this dwelling as replacement accommodation.<sup>965</sup> Termination for personal needs is finally regarded as an abuse of rights if the landlord could have foreseen his needs at the time of concluding the tenancy contract.<sup>966</sup> However, this applies only in so far as notice is given within the first three years of the tenancy.<sup>967</sup> Instead of giving notice, it is therefore more advisable to agree on a qualified fixed-term tenancy in this case (section 575 (I no. 1) BGB).

With regard to housing with a public task, the landlord may however live in his own dwelling only with the consent of the municipality (section 27 (VII 1 no. 1) WoFG). Provided the landlord and his household members fulfil the requirements to live in a public dwelling, meaning if they obtain a qualification certificate, the municipality has to grant permission (section 27 (VII 2) WoFG).

Ordinary notice of termination is furthermore allowed if the tenancy contract prevents the landlord from making appropriate commercial use of the premises. The landlord must have the intention to use the premises differently, for example by selling the house or the dwelling,<sup>968</sup> by demolishing the residential building in order to use the plot of land in another way,<sup>969</sup> by dividing a large dwelling into small ones<sup>970</sup> or by executing fundamental refurbishment measures.<sup>971</sup> The possibility to attain a higher amount of rent by renting the residential space to others may not be taken into account in this context. In any case, the intention to use the premises in another way has to be based on comprehensible and reasonable considerations.<sup>972</sup> Additionally, it is required that the landlord would suffer substantial disadvantages by continuing the tenancy contract.

In the case of housing with a public task, the landlord has also a justified interest in terminating the tenancy if the tenant is not in possession of a qualification certificate which entitles him to rent such a dwelling (sections 27 (VI 1) WoFG, 4 (VIII 1) WoBindG). And

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<sup>959</sup> BGH, NJW 2010, 1290.

<sup>960</sup> Cf. Horst, *Praxis des Mietrechts*, rec.1466.

<sup>961</sup> Ibid, rec. 1463.

<sup>962</sup> LG Hamburg, NZM 2011, 33.

<sup>963</sup> Cf. BayObLG, NJW-RR 1993, 979 (980): AG Cologne, WuM 1992, 250 (2 years not enough); LG Landau, NJW-RR 1993, 81 (1 year enough).

<sup>964</sup> BGH, NZM 2005, 943; BGH, NZM 2013, 22.

<sup>965</sup> BGH, NJW 2010, 3775; NJW 2003, 2604.

<sup>966</sup> BVerfG, NJW 1989, 970 (972).

<sup>967</sup> BGH, NZM 2013, 419; to date 5 years were assumed: BGH, NJW 2009, 1139 (1140) with further references.

<sup>968</sup> BVerfG, NJW 1989, 972.

<sup>969</sup> BGH, NZM 2009, 234.

<sup>970</sup> LG Hamburg, WuM 1989, 393.

<sup>971</sup> AG Neustadt a.d. Aisch, ZMR 2008, 215.

<sup>972</sup> BGH, NZM 2009, 234.

cooperatives are finally entitled to give ordinary notice if the membership of the tenant is terminated.<sup>973</sup>

- Statutory restrictions on notice:
  - for specific types of dwelling, e.g. public dwellings; dwellings recently converted into condominiums (if there exists a special form of protection in this case as in German law) etc.

Tenants of public dwellings enjoy a special security of tenure regarding the termination of the landlord because of personal needs. If the residential space has been converted into apartment ownership after the tenant was permitted to use it, the landlord is prohibited from terminating due to personal needs as long as he is bound regarding the choice of the tenant and the amount of rent he may demand (section 32 (III 2) WoFG). This period averages fifteen years before the dwelling may pass into the free market. According to section 2 WoBindG, section 32 (III 2) WoFG is equally applicable to housing with a public task promoted before and after 2001. Tenancies for residential space that has been rented from a legal person under public law or a recognized private welfare work organisation because of urgent need of accommodation are however exempted from this security of tenure (section 549 (II no. 3) BGB).

A similar protection against termination exists also with respect to tenants on the private rental market in case residential space has been recently converted into condominiums. If apartment ownership has been established after the tenant was permitted to use it and the dwelling is sold to a third party, then the acquirer may invoke a legitimate interest (personal needs or prevention of making appropriate commercial use) only after the end of three years after the disposal (section 577a (I) BGB). The period is up to ten years if adequate supply of rental dwellings to the population on reasonable conditions is particularly jeopardized in a municipality or in a part of it, provided that the particular area is specified by the *Land* government.<sup>974</sup> This security of tenure is only applicable to the disposal of apartment ownership that has been established after the handover of the dwelling. Therefore, tenants who have already rented a condominium (*Eigentumswohnung*) instead of a rental apartment do not enjoy this special protection.

Since the last tenancy law reform, the restriction on notice of termination applies also if rented residential space is sold to a partnership or to several acquirers (section 577a (Ia) BGB). Previously, it had been possible to circumvent section 577a (I) by the so-called *Münchener-Modell*.<sup>975</sup> Accordingly, partnerships or joint ownerships (*Miteigentümergemeinschaften*) established apartment ownership of every single dwelling, but only after they acquired the apartment building and terminated existing tenancy contracts due to personal needs of the partners.

- in favour of certain tenants (old, ill, in risk of homelessness)

Since tenants in general already enjoy comprehensive legal protection, especially with regard to the provision on security of tenure (sections 569, 573 BGB) as well as on the prevention from eviction (sections 574-574c BGB; 721, 794a, 765a ZPO), there are no further restrictions on the right to terminate contracts with tenants who are old, ill or in risk of homelessness. Nevertheless, termination will be often meaningless with respect to these tenants, because they can usually prove that termination or vacating would be an

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<sup>973</sup> BGH, NZM 2004, 25.

<sup>974</sup> E.g. in some districts of Berlin, a period of seven years applies and in Munich a period of ten years.

<sup>975</sup> BT-Drucks. 17/10485, 16; cf. also BGH, NZM 2009, 613.

unjustifiable hardship in terms of the mentioned substantive and procedural provisions on protection from eviction.

- for certain periods

As already mentioned above, the right to give ordinary notice is excluded for a minimum period of three years if residential space has been converted into condominiums (sections 577a (I) BGB). In case of housing with a public task, termination is prohibited for a period of about fifteen years (2 WoBindG; 32 (III 2) WoFG).

Another restriction concerning the period applies in case of a tenant's insolvency proceedings. After the opening of the tenant's insolvency proceedings was requested, the tenancy contract may not be terminated by the landlord because of default in paying the rent arising before the opening of the insolvency proceedings was requested or because of degradation of the tenant's financial situation (section 112 InsO). Deviating agreements excluding or limiting the application of this provision in advance are invalid (section 119 InsO). For a default in rent payment that arises after the request to open the insolvency proceedings, the prohibition to terminate the tenancy no longer applies.<sup>976</sup> Terminations based on other breaches of contract remain also unaffected by this prohibition and are therefore permitted at any time.<sup>977</sup> As distinguished from commercial tenancies, the insolvency administrator has no special right of termination based on the opening of the tenant's insolvency proceedings in case of a residential tenancy. Instead of a termination right, he is entitled to declare that claims becoming due upon expiry of three months after the opening may not be asserted in the insolvency proceedings (section 109 (I 2) InsO).

- after sale including public auction ("emptio non tollit locatum"), or inheritance of the dwelling

In case of inheritance of the dwelling, the heirs of the owner or landlord enter into existing tenancy contracts pursuant to the principle of universal succession (section 1922 (I) BGB). Since there is no special right of termination, the heirs can only terminate the contract according to the general rules.

The same applies if the dwelling is disposed of by the owner (section 566 BGB). Thus, the acquirer of the residential space has to prove a justified interest or a compelling reason to give valid reason of notice.

As distinguished from the two latter cases, the new owner of a dwelling that was sold within a compulsory action is entitled to terminate existing tenancies within the statutory notice period (section 57a ZVG). However, this special right of termination applies only when the new owner gives notice on the first date possible, that is, after an admissible period of time to consider the whole situation. Otherwise, the acquirer loses his termination right (section 57a (II) ZVG). If the tenant however participated in the costs incurred in the construction or the maintenance of the premises, the special right to terminate the tenancy is excluded (section 57c ZVG).

- Requirement of giving valid reasons of notice: admissible reasons

Giving valid reason of notice usually requires that the landlord specifies the reason in a notice of termination, which has to be in writing and shall contain a reference to the tenant's right of objection under section 574 (section 568, 569 (IV), 573 (III) BGB). Following section 314 (III) BGB, the landlord must give notice within a reasonable period after ob-

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<sup>976</sup> BGH, NZM 2002, 859; BGH, NZM 2005, 538 (540).

<sup>977</sup> Ibid.

taining knowledge of the reason for termination in order not to lose his right to terminate. Regarding the period, the BGH has held that a period of five months is still reasonable.<sup>978</sup> If the landlord wants to terminate the tenancy for extraordinary reasons, a valid termination concerning the violation of contractual duties further requires an unheeded warning notice (section 543 (III 1) BGB).

Finally, the landlord is able to give valid notice only if termination is not regarded as an abuse of rights.<sup>979</sup> For example, the landlord is prohibited from giving notice based on an unapproved subletting when he is obliged to give permission.<sup>980</sup> The same applies if the landlord terminates the tenancy because of default in payment prior to the expiry of the payment deadline set by him.<sup>981</sup>

- Objections by the tenant

Pursuant to section 574 (I) BGB, the tenant may object to the notice of termination and demand continuation if termination of the tenancy would be a hardship for him or his family that is not justifiable even considering the justified interest of the landlord. In particular, advanced age<sup>982</sup> or serious diseases<sup>983</sup> of the tenant are considered as such a hardship to the extent that they would make removal impossible. Additionally, a hardship is also assumed if appropriate substitute residential space cannot be procured on reasonable terms (section 574 (II) BGB). The tenant must declare the objection in writing to the landlord at the latest two months prior to the date the tenancy is to be terminated (section 574b (I 1, II 1) BGB). Upon demand of the landlord, the tenant should provide information on the reasons for the objection (section 574b (I 2) BGB).

Provided all these requirements are met, the tenancy is continued as long as it is appropriate (section 574a (I 1) BGB). In case the landlord cannot be reasonably expected to continue the tenancy under the previously applicable contract terms, the tenant may then demand its continuation only with an appropriate amendment of the terms (section 574a (I 2) BGB). If an agreement cannot be reached, the duration and the terms under which the tenancy is continued are determined by judicial decision (section 574a (II 1) BGB). The decided duration usually amounts to between six months and a maximum of three years.<sup>984</sup> Upon expiry of this period, the tenant may demand a further continuation of the tenancy only due to unforeseen circumstances (section 574c (I) BGB). However, if it is uncertain from the beginning when the circumstances causing the hardship are expected to cease, the tenancy may be continued for an indefinite period of time (section 574a (II 2) BGB).

However, the tenant cannot object if the landlord is entitled to terminate the tenancy for cause without notice (section 574 (I 2) BGB). Since fixed-term tenancies may be only terminated before the agreed date by an immediate notice, sections 574-574c BGB apply with the proviso that the continuation of the tenancy may be demanded at most until the contractually specified date of termination (section 575a (II) BGB). The right to object to the notice of termination is also excluded in the case of the specific tenancy contracts stated in section 549 (II) BGB.

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<sup>978</sup> BGH, NZM 2009, 314.

<sup>979</sup> Cf. examples regarding termination due to default in paying the rent: Blank, in: *Schmidt-Futterer*, s. 543 BGB, rec. 128-133.

<sup>980</sup> BGH, NJW 2011, 1065; LG Hamburg, ZMR 2001, 973.

<sup>981</sup> AG Bonn, WuM 1992, 478.

<sup>982</sup> LG Bochum, NZM 2007, 452.

<sup>983</sup> BGH, NZM 2005, 143.

<sup>984</sup> Cf. Weidenkaff, in: *Palandt*, s. 574a BGB, rec. 2; Gramlich, *Mietrecht*, s. 574a BGB.

- Does the tenant have “prolongation rights”, i.e. the statutory right to stay for an additional period of time (outside the execution procedure)?

In general, the tenant has a prolongation right under the prerequisites of section 545 BGB. Accordingly, the tenancy is extended for an indefinite period of time in case the tenant continues to use the leased property after the end of the tenancy period. This applies only to the extent that neither the tenant nor the landlord has declared his intention to the contrary to the other party within two weeks. The period commences for the tenant upon continuation of use and for the landlord at the point of time when he obtains knowledge of the continuation. However, this prolongation right is dispositive and may be therefore excluded in the tenancy agreement. The tenant may also stay for an additional, appropriate period of time if the tenancy is continued because of a justified objection to the ordinary notice of termination (section 574a (I) BGB). Finally, the tenant may demand an extension of the tenancy for an indefinite period of time, provided the tenancy is entered into for a definite period of time and the reason that allowed the landlord to conclude such a fixed-term contract ceases during the tenancy period (section 575 (III 2) BGB).

- Challenging the notice before court (or similar bodies)
  - In particular claims for extension of the contract or for granting of a period of grace under substantive or procedural law

In case the tenancy has been terminated for ordinary reasons, the tenant has a right to object to notice of termination pursuant to section 574 (I) BGB. If the tenant can prove that termination would be a hardship for him or his family that is not justifiable even considering the justified interest of the landlord, the tenancy is continued as long as it is appropriate (section 574a (I) BGB). The continuation of the tenancy, its duration and terms are determined by a judge to the extent that an agreement between landlord and tenant cannot be reached (section 574a (II) BGB). If it is uncertain when circumstances providing the basis for the hardship can be expected to cease, it may be even specified by judicial decision that the tenancy is extended for an indefinite period of time.

In addition to objecting to the notice of termination, the tenant may also request during the court proceeding to be allowed to stay for a reasonable additional period of time (sections 721 (I 1), 794a (I 1) ZPO). The time limit to vacate the dwelling can be extended, but may not amount to longer than one year in total (section 721 (III 1, V 1), 794a (II 1, III 1) ZPO). Beyond that, the tenant has another chance to avoid or to delay eviction by filing another request during the compulsory execution proceedings (section 765a (I) ZPO). Accordingly, the court may reserve, prohibit or temporarily stay the measure of compulsory enforcement, provided that eviction would entail a hardship that is *contra bonos mores*. Regarding this extension, the court is not bound to a legal time limit (usually a fixed period of time; only in exceptional cases, e.g. the tenant is at risk of committing suicide, the court may stay the eviction for an indefinite period)<sup>985</sup>.

- **Termination for other reasons**
  - Termination as a result of execution proceedings against the landlord (in particular: repossession for default of mortgage payment)

Pursuant to section 57 ZVG, the rights of the tenant in case of a compulsory enforcement are subject to same rules as if the dwelling has been disposed of, but in accordance with sections 57a, 57b ZVG. Thereby, the person who has acquired the plot of land by auction

<sup>985</sup> BVerfG, NZM 2005, 657.

takes over the rights and duties that arise under the tenancy agreement (section 566 (I) BGB analogue). But in contrast to the case described in section 566 BGB, this person has a special right to terminate the tenancy within the statutory notice period (section 57a (1) ZVG). Termination is excluded, however, if it is not declared at the earliest possible date (section 57a (2) ZVG). This applies also if the tenant participated in the costs incurred in the construction or the maintenance of the premises (section 57c ZVG).

- Termination as a result of urban renewal or expropriation of the landlord, in particular:
  - What are the rights of tenants in urban renewal? What are the rules for re-housing in case of demolition of rental dwellings? Are tenants interested parties in public decision-making on real estate in case of urban renewal?

The regulations on the execution of urban (re-)development measures (*städtebauliche Sanierungs- und Entwicklungsmaßnahmen*) are laid down in chapter two of the Federal Building Code (section 136-191 BauGB). Urban redevelopment measures are defined in section 136 (II) BauGB as measures by means of which an area is substantially improved or transformed with the purpose of alleviating urban deficits. Their preparation and execution shall be explained to and discussed with owners, tenants, lessees and any other affected persons at the earliest possible opportunity (section 137 BauGB). They shall be encouraged to involve themselves throughout the process of rehabilitation and the implementation of the physical measures required for redevelopment, and shall be given any possible assistance. On the other hand, owners and tenants are obliged to provide the municipality with any information which may be necessary in order to prepare and execute redevelopment measures (section 138 BauGB).

When realizing the aims and purposes of the redevelopment require the termination of a tenancy, the municipality has a right to terminate with a period of not less than six months (section 182 (I) BauGB). But the municipality may only terminate a tenancy on residential space where suitable replacement accommodation is available for the tenant and his household members at reasonable terms (section 182 (II 1) BauGB). If the tenancy has been terminated, the tenant is to be granted financial compensation of an appropriate amount to the extent that he has suffered property loss as a consequence of premature termination (section 185 (I) BauGB). To this extent, the municipality is liable to make compensation (section 185 (II) BauGB). The method of compensation is determined by the provisions on compensation in case of expropriation, with the result that it is to be paid in one instalment (section 99 (I) BauGB). Instead of terminating a tenancy, the municipality may also extend it where this is required to implement the social plan (section 186 BauGB).

The re-housing of tenants in case of demolition of rental dwellings is however executed in accordance with the Police and Regulatory Law of the respective *Land*.

## 6.7. Enforcing tenancy contracts

	<b>Tenancy type 1 = private rental market</b>	<b>Tenancy type 2 = housing with a public task</b>	<b>Tenancy type 3 = coop- eratives</b>	<b>Ranking from strongest to weakest regulation</b>
<b>Eviction</b>	- Requirements: title; court certificate of enforceability; service			

<b>procedure</b>	- Responsibility: usually the bailiff - Procedure: removing the tenant from possession and putting the landlord into possession, especially by replacing the door lock		
<b>Protection from eviction</b>	- the court may grant a reasonable period of maximum one year to vacate the dwelling - the court may also reserve, prohibit or temporarily stay the measure of compulsory enforcement without a legal time limit, provided eviction entails an immoral hardship	- the court may grant a reasonable period of maximum one year to vacate the dwelling - the possibility to reserve compulsory enforcement without a legal time limit is not applicable	
<b>Effects of bankruptcy</b>	- tenancy continues to exist, but to the benefit of the insolvency estate		

- **Eviction procedure: conditions, competent courts, main procedural steps and objections**

After termination of the tenancy, the tenant is obliged to return the rented property (section 546 (I) BGB) and the residential space must be delivered vacated, i.e. clear of contributed things. If the tenant does not fulfil this obligation, the landlord can submit an action to vacate the dwelling to the local court which lies within the district where the immovable property is situated (sections 23 (no. 2a) GVG, 29a (I) ZPO).<sup>986</sup>

Pursuant to the recently introduced section 227 (IV) BGB, matters concerning the vacating of dwellings have to be carried out quickly and with priority.

Subsequent to the legal proceedings, the judgement can be enforced provided that these three requirements are on hand: title; court certificate of enforceability; service. The general provisions on the enforcement of judgements are laid down in sections 704 et seq. ZPO. Accordingly, the compulsory enforcement of judgements can be only pursued on those that are final and binding or that have been declared provisionally enforceable, i.e. the landlord needs an enforceable legal document (*Vollstreckungstitel*). Judgements delivered in disputes between landlord and tenant are to be declared provisionally enforceable (without any provision of security), if they concern the permission to use the dwelling, the use or the vacating of same, the continuation of the tenancy based on sections 574 et seq. BGB, or the retention of objects introduced into the dwelling by the tenant (section 708 (no. 7) ZPO). Apart from judgements, compulsory enforcement may be also pursued based on a settlement as a further enforceable legal document (section 794 (I no. 1) ZPO). Furthermore, the compulsory enforcement will be in general only pursued based on an execution copy of the judgement furnished with the court certificate of enforceability (*Vollstreckungsklausel*) (section 724 (I) ZPO). This certificate is to be added to the execution copy of the judgement at its end, is to be signed by the records clerk (*Urkundsbeamten*) of the court registry, and is to be furnished with the court seal (section 725 ZPO). Beyond that, the persons against whom the enforcement is sought must be designated by name in the judgement or in the court certificate of enforceability attached

<sup>986</sup> As already outlined above in 6.1. 'Court structure'.



to it. Finally, compulsory enforcement may be commenced only if the judgement has already been served or is served currently (section 750 (I 1) ZPO).

Ordering enforcement measures and the assistance with such measures is the responsibility of the local courts as the courts responsible for execution (section 764 (I) ZPO). In general, the local court in the district of which the enforcement proceedings are to be performed is responsible for the execution (section 764 (II) ZPO).

If all these requirements are met, the landlord is entitled to enforce the judgement through the bailiff (*Gerichtsvollzieher*) according to section 753 (I) ZPO. Pursuant to section 885 ZPO, the bailiff has to announce the eviction at least three weeks in advance. If the tenant does not voluntarily vacate the dwelling within this time, the bailiff then removes the tenant and puts the landlord into possession. Movable objects that are not the subject of the compulsory enforcement must be removed and physically submitted to the tenant or to one of his family or household members. If neither the tenant nor another person is present, the bailiff takes the objects at the cost of the tenant to the storage office for attached objects or ensures its safekeeping in another way. Should the tenant fail to redeem his possessions within a period of one month after the dwelling has been vacated or should he redeem them without paying the costs within a period of two months, the bailiff sells the objects and lodges the proceeds. Objects for which there is no obvious interest in or possibility of storage will be destroyed.

Finally, those objects that are exempted from attachment, and regarding which it is not expected that they will generate any realization proceeds, have to be surrendered upon the tenant's request without further ado.

Actually, the costs of the enforcement have to be borne by the tenant (section 788 (I 1) ZPO), but the landlord has to pay an advance of money, which covers the expected accruing costs (section 4 (I) of the Law on Costs for Bailiffs (*Gerichtsvollzieherkostengesetz*)). The advance must include the costs arising from forcing the door open as well as from packing, transporting and storing the tenants' things.<sup>987</sup> Altogether, it can amount to EUR 3,000, for which the landlord normally will not be reimbursed, since the tenant is often destitute in case of an eviction.<sup>988</sup>

Considering these huge costs, the so-called *Berliner Räumung*<sup>989</sup> was incorporated into the Code of Civil Procedure by section 885a (I) ZPO in the context of the last tenancy law reform. This kind of eviction limits compulsory enforcement to the mere obtainment of possession and minimizes therefore the costs for the landlord.<sup>990</sup> With regard to the tenant's things placed in the dwelling, the landlord may assert his landlord's right of lien over them.

Secondly, the possibility to evict possessors other than the tenant by injunction (*einstweilige Verfügung*) was introduced into the Code of Civil Procedure (section 940a (II) ZPO). This applies in so far as the landlord obtained knowledge of other possessors only after the hearing has been closed. Apart from that, the landlord needs an enforceable legal document against every person who lives in the dwelling in order to evict them as well (section 750 (I) ZPO).<sup>991</sup>

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<sup>987</sup> Cf. Streyll, in: *Schmidt-Futterer*, s. 546 BGB, rec. 134.

<sup>988</sup> Cf. Bieber, in: *MüKo-BGB*, Vol. 3, s. 546, rec. 30.

<sup>989</sup> BGH, NZM 2009, 660; BGH, NZM 2006, 817; BGH, NZM 2006, 149.

<sup>990</sup> BT-Drucks. 17/10485, 15.

<sup>991</sup> BT-Drucks. 17/10485, 33 et seq..

- **Rules on protection (“social defences”) from eviction<sup>992</sup>**

In order to prevent hardship for the tenant, there are special provisions protecting the tenant from the enforcement of eviction judgements or settlements. First, the court has to allow the tenant to avert enforcement by providing security or by lodgement, provided that the tenant requested it since the enforcement would entail a disadvantage for him that it is impossible to compensate or remedy (section 712 (I) ZPO).<sup>993</sup> Besides, the court may direct that the judgement shall be provisionally enforceable only against provision of security by the landlord (section 712 (II) ZPO).

Secondly, the court may grant, *ex officio* or upon a tenant's request, a reasonable period to vacate the dwelling (section 721 (I 1) 794a (I 1) ZPO). If the vacating is based on a judgement, the tenant has to make the request prior to the close of the hearing upon which the judgement is handed down (section 721(I 2) ZPO). The request in case of a settlement must however be filed at the latest two weeks prior to day on which the dwelling is to be vacated (section 794a (I 2) ZPO). The time limit for vacating the dwelling may be extended or shortened at the request of either the landlord or the tenant (sections 721 (III 1), 794a (II 1) ZPO). In total, the period set for vacating may not amount to more than one year (sections 721 (V 1), 794a (III 1) ZPO). Fixed-term tenancies according to section 575 BGB and tenancies within the meaning of section 549 (II no. 3) BGB are however exempted from this special rule (sections 721 (VII 1), 794a (V 1) ZPO). If however a fixed-term tenancy is terminated based on extraordinary reasons, the period for vacating the dwelling may be granted at the longest until the time contractually agreed as the end of the tenancy relationship (sections 721 (VII 2), 794a (V 2) ZPO).

After this time limit has passed, there is a third chance for the tenant to avoid or to delay eviction during the compulsory execution proceedings. Pursuant to section 765a (I 1) ZPO, the competent court may reserve, prohibit or temporarily stay the measure of compulsory enforcement, at the request of the tenant, if the eviction entails a hardship that due to very special circumstances is immoral, *contra bonos mores*. Such a hardship is assumed, if the tenant is incapable of moving out because of diseases that pose a risk to his health or life,<sup>994</sup> e.g. committing suicide.<sup>995</sup> In general, impending homelessness does not constitute a hardship in this sense, since the tenant is responsible to find a new dwelling within the period of time set by the court and there exists also public accommodation for homeless persons. Nevertheless, public authorities may intervene and make the judgement temporarily unenforceable by committing the tenant in the “previous” dwelling<sup>996</sup> if there is no available place or if leaving the dwelling is not reasonable for the tenant for health reasons.<sup>997</sup> The request is to be filed at the latest within two weeks prior to the date set for vacating the dwelling, unless the grounds on which the request is based came about only after this time or the tenant was prevented from filing the request in due time through no fault on his own (section 765a (III) ZPO). In contrast to the extension pursuant to sections 721, 794a ZPO, there is no legal time limit for the period of time to vacate the dwelling set by the court in case of section 765a ZPO. This rule on protection from eviction is however not applicable to tenancies with cooperatives.<sup>998</sup>

<sup>992</sup> Cf. A. Lehmann-Richter, in: *Schmidt-Futterer*, bef. s. 712 ZPO, rec. 1-22.

<sup>993</sup> The same applies during an appeal proceedings pursuant to ss. 719 (I 1), 707 ZPO.

<sup>994</sup> Cf. Reismann, WuM 2007, 361 (363).

<sup>995</sup> BVerfG, NZM 2005, 657; cf. Blank, in: *Schmidt-Futterer*, s. 765a ZPO, rec. 8-23.

<sup>996</sup> As outlined above in 5. ‘Human Rights’.

<sup>997</sup> Cf. Ewer & von Detten, NJW 1995, 353 (357).

<sup>998</sup> BGH, NZM 2009, 916.

As a last resort, the tenant may finally file an action raising an objection to the claim being enforced (*Vollstreckungsabwehrklage*) pursuant to section 767 (I) ZPO. It is targeted at the assessment that the compulsory enforcement is inadmissible. But such an action may be asserted only insofar as the grounds on which it is based arose after the close of the hearing that was the last opportunity for objections to be asserted (section 767 (II) ZPO).

The tenant is entitled to make use of all these possibilities for protection from eviction, even if he e.g. failed to request protection pursuant to section 721 ZPO in time.<sup>999</sup> If the court grants protection according to these provisions, it does not result in the continuation of the tenancy contract, but only the court's permission to continue using the dwelling without a contract.<sup>1000</sup> The tenant is therefore in default of his duty to return the dwelling, so that the landlord may for the duration of retention demand as compensation the agreed rent or the rent that is customarily paid for comparable items in the locality (section 546a (I) BGB). In general, the landlord may also assert further damages provided that the tenant is responsible for the late return (sections 546a (II), 571 (I) BGB). But if the tenant is granted a period of time before vacating the dwelling pursuant to section 721, 794a ZPO, he is not liable to compensate further damages until the end of the period (section 571 (II) BGB).

- **May rules on the bankruptcy of tenant-consumers influence the enforcement of tenancy contracts?**

In general, the tenancy continues to exist if the tenant is bankrupt, but with effect to the insolvency estate (section 108 (I) of the Insolvency Code (*Insolvenzordnung*, InsO)<sup>1001</sup>). With regard to cooperative dwellings, the administrator (*Insolvenzverwalter*) or an obligee of the tenant may not even terminate his membership in the cooperative.<sup>1002</sup> However, if the insolvency proceedings were opened prior to the handover of the dwelling, the administrator as well as the landlord may withdraw from the tenancy contract (section 109 (II) InsO). Both of them have to state at the request of the other party within two weeks whether they intend to use their right to withdraw. Otherwise, they lose their right. If the administrator withdraws from the tenancy, the landlord may claim damages for premature termination of contract.

Provided the tenancy has been withdrawn or terminated and compulsory enforcement is necessary, section 89 (I) InsO states that individual insolvency creditors may not execute upon the insolvency estate or upon the debtor's other property during the insolvency proceedings. But this prohibition is not applicable in case of an eviction, since the removal of the tenant's things does not impair the insolvency estate.<sup>1003</sup>

## **6.8. Tenancy law and procedure "in action"**

The practical role of private rented housing can only be realistically assessed when the practical functioning of the legal system in our field ("tenancy law in action") is taken into account:

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<sup>999</sup> Cf. Lehmann-Richter, in: *Schmidt-Futterer*, bef. s. 712 ZPO, rec. 7,8 with further references.

<sup>1000</sup> BGH, NJW 1953, 1586.

<sup>1001</sup> InsO of 05-10-1984 (BGBl. I 2866); an official English translation of the current Insolvency Code is available at: [http://www.gesetze-im-internet.de/englisch\\_inso/](http://www.gesetze-im-internet.de/englisch_inso/) (last retrieved: 12-12-2013).

<sup>1002</sup> Cf. s. 67c of the Law on Cooperatives (*Genossenschaftsgesetz* in its version of 1-10-2006 (BGBl. I 2230)).

<sup>1003</sup> Cf. Streyl, in: *Schmidt-Futterer*, s. 546 BGB, rec. 132.

- What is the legal status and what are the roles, tasks and responsibilities of associations of landlords and tenants?

The German Tenant Association (*Deutscher Mieterbund e.V.*, DMB)<sup>1004</sup> is the governing body of over 320 tenant associations and legally organized as a registered association in terms of section 21 BGB. The DMB focuses its activity on the political representation of the interests of tenants and is therefore an important contact for the German legislature as well as for the administration. In this context, the DMB advocates the maintenance and expansion of social tenancy law, affordable rents, an efficient housing allowance, a sufficient housing supply and the continuous promotion of housing with a public task. Another important field of activity is finally to inform the public on tenancy- and housing-related questions by regular publications on the internet and in magazines. The main task of the local tenant associations consists as well in representing the interests of tenants. For this purpose, they offer their members comprehensive legal advice, help with tenancy related disputes and often an insurance against legal costs. In 2012, about 1.2 million legal advices were carried out by them, of which 95% could be settled out of court.<sup>1005</sup> Another main task of the local associations is participation in municipal housing policy and in urban development measures. The membership fee currently amounts to between EUR 40 and EUR 90 per year, plus a non-recurring entrance fee of about EUR 15.

The counterpart for landlords is the Association for the Protection of Owners (*Zentralverband der deutschen Haus-, Wohnungs- und Grundeigentümer e.V.*, Haus und Grund Deutschland).<sup>1006</sup> It is the governing body of over twenty-two regional and nine-hundred local landlord associations and, similar to the DMB, is legally organized as a registered association. Apart from comprehensive legal advice, Haus und Grund offers to manage its members' properties, to place them on the market by advertisements and to assess their value. Besides, members obtain upon request information on the solvency of prospective tenants and can get insurance against legal costs on favourable conditions, which includes even the high costs for the bailiff in case of eviction. The membership fee for landlords who own one dwelling amounts from EUR 40 to EUR 60 per year, plus a non-recurring entrance fee of about EUR 25.

- What is the role of standard contracts prepared by association or other actors?

After the takeover by the National Socialists in 1933, tenant- and landlord-organisations negotiated a standard tenancy contract (*Einheitsmietvertrag*), which was published in 1934 and applicable until the end of the Second World War. In 1976, another model tenancy contract was published by the Federal Ministry of Justice. But this model matters meanwhile only with regard to its general schedule for aesthetic repairs.<sup>1007</sup> Nowadays, standard contracts prepared by tenants and landlords associations, lawyers, estate agents and specialized publishers take on the important role instead. These contracts are available for download in the internet<sup>1008</sup> as well as in written form in bookshops. Although tenancy contracts do not have to be in writing in order to be effective, most of the

<sup>1004</sup> [http://www.mieterbund.de/aufgaben\\_ziele.html](http://www.mieterbund.de/aufgaben_ziele.html) (last retrieved: 23-03-2014).

<sup>1005</sup> Cf. DMB, press release of 30-12-2013, *Beratungs- und Prozessstatistik 2012*, available at: [http://mieterbund.de/index.php?id=325&tx\\_ttnews%5BbackPid%5D=&tx\\_ttnews%5Bsword%5D=&tx\\_ttnews%5Bttnews%5D=23912&cHash=2bd7b3826e19211279f78a19325f10b1](http://mieterbund.de/index.php?id=325&tx_ttnews%5BbackPid%5D=&tx_ttnews%5Bsword%5D=&tx_ttnews%5Bttnews%5D=23912&cHash=2bd7b3826e19211279f78a19325f10b1) (last retrieved: 23-03-2014).

<sup>1006</sup> [http://www.hausundgrund.de/vermieten\\_und\\_verwalten.html](http://www.hausundgrund.de/vermieten_und_verwalten.html) (last retrieved: 23-03-2014).

<sup>1007</sup> As outlined above in 6.4. 'Repairs'.

<sup>1008</sup> The standard contract of the DMB is available under:

[http://www.mieterbund.de/fileadmin/pdf/mietvertrag/Wohnungs-Mietvertrag\\_online.pdf](http://www.mieterbund.de/fileadmin/pdf/mietvertrag/Wohnungs-Mietvertrag_online.pdf); contracts of the landlord associations are only available for registered members; ancillary forms are available at: [http://www.hausundgrund.de/haus\\_und\\_grund\\_infoblaetter.html](http://www.hausundgrund.de/haus_und_grund_infoblaetter.html) (last retrieved: 23-03-2014).

two to three million contracts that are concluded every year are laid down in written form by using standard contracts.<sup>1009</sup>

- How are tenancy law disputes carried out? Is tenancy law often enforced before courts by landlords and tenants and/or are – voluntary or compulsory – mechanisms of conciliation, mediation or alternative dispute resolution used?

In 2011, ca. 274,000 cases concerning the law on tenancy rules were heard in front of the local courts and ca. 11,300 in front of the regional courts.<sup>1010</sup> That represents ca. 23.5% of all civil law cases carried out in front of local courts in 2012 and 19.5% of the cases that were heard in front of the regional court as court of appeal. These percentages show a high potential of conflicts in tenancies.<sup>1011</sup> Besides the possibility to bring cases concerning tenancy law to courts, there are other ways to get an out-of-court settlement (*Vergleich*) between tenant and landlord. On the one hand, tenants and landlords associations have founded conciliation boards (*Schlichtungsstellen*).<sup>1012</sup> Some of them are acknowledged as conciliation authorities by the Ministry of Justice of the respective *Land*. Only decisions and settlements of these conciliation boards can be executed according to section 794 (I no. 1) ZPO. On the other hand, practitioners offer mediation as a method to settle a dispute amicably by finding an agreeable solution for both parties.<sup>1013</sup> The results of these procedures however are not enforceable.<sup>1014</sup> There are no data on the number of cases brought to mediation per year, except for the number of legal advices carried out by the DMB (about 1.2 million; 95% could be settled out of court)<sup>1015</sup>.

Beyond that, section 15a of the Introductory Act to the Civil Procedure Code (*Einführungsgesetz zur Zivilprozessordnung*)<sup>1016</sup> empowers the *Länder* to establish a mandatory pre-trial conciliation for pecuniary disputes, if the amount in dispute is less than EUR 750. Most of them have already made use of this competency, introduced in 1999,<sup>1017</sup> up to the present date.<sup>1018</sup> In these *Länder*, it is now mandatory to undertake this conciliation before submitting the case to court. Certain cases, especially those which concern rent increases or accountings of service charges, lend themselves to conciliations, while claims to eviction are not really suitable.<sup>1019</sup> In 2012, 97 cases were carried out by this

<sup>1009</sup> <http://www.mieterbund.de/index.php?id=99> (last retrieved: 23-03-2014).

<sup>1010</sup> Cf. Federal Statistical Office, *Statistics on Judicature 2012*, available at: [https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Zivilgerichte2100210127004.pdf;jsessionid=87623699071484227A665F633DC2AA9B.cae2?\\_blob=publicationFile](https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Zivilgerichte2100210127004.pdf;jsessionid=87623699071484227A665F633DC2AA9B.cae2?_blob=publicationFile) 18, 58 (last retrieved: 23-03-2014).

<sup>1011</sup> One reason for this high number of tenancy-related procedures may be the fact that many tenants and landlords are members of the tenants or landlords associations which provide legal advice as well as legal protection insurance with the result that it will not cost them anything except the membership fee to bring the case to court.

<sup>1012</sup> Cf. only the conciliation boards in Schleswig-Holstein: <http://www.schleswig-holstein.de/MJKE/DE/Justiz/DasIstIhrRecht/SchlichtenStattRichten/Schlichtungsstellen/mieterbund.html>; in Düsseldorf/North-Rhine Westphalia:

[http://www.streitschlichtung.nrw.de/streit/streitsuch\\_rest.php?gem=Aachen&fall=5&such2=Suche+starten](http://www.streitschlichtung.nrw.de/streit/streitsuch_rest.php?gem=Aachen&fall=5&such2=Suche+starten); and in Hamburg: <http://www.hamburg.de/streitschlichtung/> (last retrieved: 23-03-2014).

<sup>1013</sup> Mediationsgesetz of 21-07-2012 (BGBl. I 1577).

<sup>1014</sup> Differently the draft (s. 796d ZPO-E), that provided the enforceability of mediation results.

<sup>1015</sup> As already mentioned above under 6.8. 'Associations of landlords and tenants'.

<sup>1016</sup> Gesetz, betreffend die Einführung der Zivilprozessordnung of 30-01-1877 (RGBl. 244).

<sup>1017</sup> Gesetz zur Förderung der außergerichtlichen Streitbeilegung of 15-12-1999 (BGBl. I 2400).

<sup>1018</sup> Baden Württemberg (GBl. 2000, 470); Bavaria (GVBl. 2000, 268); Brandenburg (GVBl. I 2000, 134); Hesse (GVBl. I 2001, 98); Lower Saxony (Nds. GVBl. 2009, 482); Mecklenburg-Western Pomerania (GBl. 1990, 1527); North-Rhine-Westphalia (GV. NRW 2010, 30); Rhineland-Palatinate (GVBl. 2008, 204); Saarland (Amtsbl. I 2001, 532); Saxony-Anhalt (GVBl. LSA 2001, 214); Schleswig-Holstein (GVBl. 2001, 361, corr. 2002, 218).

<sup>1019</sup> Cf. U. Boysen, *Die vorgerichtliche Streitschlichtung im Mietrecht*, NZM 2001, 1009 (1012).



pre-trial conciliation and ended nevertheless in front of a local court.<sup>1020</sup> In 2011 and 2010, there were still over 200 cases.<sup>1021</sup>

If the case is however brought to court, the court of first instance – the local court – shall work towards an out-of-court settlement in every station of the process (278 (I) ZPO). For this purpose the court has to hold in particular a conciliatory hearing before the actual hearing, unless the parties have already undertaken a conciliation procedure under the law of the *Länder* (section 278 (II) ZPO). For the conciliation proceedings the court can refer the parties to a judge appointed therefor, who is not authorized to decide (*Güterichter*) pursuant to section 278 (IV) ZPO.

In 2012, about 49,000 cases concerning tenancy law (ca. 18%) heard in front of the local courts ended up in a settlement and 44,600 cases (ca. 16.3%) in a judgement.<sup>1022</sup> But most of these cases (103,5000  $\triangleq$  ca. 37.8%) carried out by the local courts ended up in a default judgement, in a judgement based on an acknowledgement by the defendant or based on a waiver having been declared (*Versäumnis-, Anerkenntnis- und Verzichtsurteil*).<sup>1023</sup>

According to a statistic of the DMB, most tenancy law cases that have been brought to court in 2012 concerned breaches of contract (26.6%), operating costs (19.9%), the security deposit (17.3%) or rent increases (15.0%).<sup>1024</sup>

- Do procedures work well and without unreasonable delays? What is the average length of procedures? Are there peculiarities for the execution of tenancy law judgements (e.g. suspensions of, or delays for, eviction)?

In 2012, the average length of tenancy-related procedures in front of the local courts amounted to 4.4 months.<sup>1025</sup> If a judgement was necessary, it amounted to 7.6 months.<sup>1026</sup> Thus, the length of procedures related to tenancy law is nearly in the average of all procedures concerning civil law, which amounted in 2012 to 4.7 months and in case of a judgement to 7.1 months. In 2007, the average length of tenancy-related procedures still amounted to 7.1 months and if a judgement was needed even to 11.3 months.<sup>1027</sup> Considering this, it can be said that procedures work nowadays without unreasonable delays. For the period of the proceedings, the tenant is of course obligated to pay the agreed rent or the rent that is customarily paid for comparable items in the locality (section 546a (I) BGB).

As already mentioned above, the enforcement of eviction judgements or settlements is subject to special rules on the protection against execution.<sup>1028</sup> First, the court may direct, upon the tenant's request, that the tenant is allowed to avert enforcement by providing security or by lodgement as well as that the judgement shall be provisionally enforceable

<sup>1020</sup> Cf. Federal Statistical Office, *Statistics on Judicature 2012*, 35.

<sup>1021</sup> Cf. Federal Statistical Office, *Statistics on Judicature 2011*, available at:

[https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Zivilgerichte2100210117004.pdf?\\_\\_blob=publicationFile](https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Zivilgerichte2100210117004.pdf?__blob=publicationFile), 35 and 2010, available at:

[https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Zivilgerichte2100210107004.pdf?\\_\\_blob=publicationFile](https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Zivilgerichte2100210107004.pdf?__blob=publicationFile), 35 (last retrieved: 23-03-2014).

<sup>1022</sup> Cf. Federal Statistical Office, *Statistics on Judicature 2012*, 35.

<sup>1023</sup> Ibid.

<sup>1024</sup> Cf. DMB, press release of 30-12-2013, *Beratungs- und Prozessstatistik 2012*.

<sup>1025</sup> Ibid.

<sup>1026</sup> Ibid.

<sup>1027</sup> Cf. Federal Statistical Office, *Statistics on Judicature 2007*, available at:

[https://www.destatis.de/GPStatistik/receive/DEHeft\\_heft\\_00005358](https://www.destatis.de/GPStatistik/receive/DEHeft_heft_00005358); 35 (last retrieved: 23-03-2014).

<sup>1028</sup> As outlined above in 6.7. 'Rules on protection from eviction'.

only against provision of security by the landlord (section 712 ZPO). The amount of the security to be provided must include the amount of the whole enforceable claim.<sup>1029</sup>

Secondly, the court may grant, upon request of the tenant or *ex officio*, a reasonable period of time to vacate the dwelling (sections 721 (I 1), 794a (I 1) ZPO). The time limit for vacating can be extended, but may not amount to longer than one year in total (section 721 (III 1, V 1), 794a (II 1, III 1) ZPO). During this period, the tenant is of course still obligated to pay the agreed rent or the rent that is customarily paid for comparable items in the locality (section 546a (I) BGB). If the rent payment by the tenant may not be ensured, granting a time limit for vacating the dwelling is unreasonable for the landlord.<sup>1030</sup>

Finally, the tenant has a third chance to avoid or to delay eviction by filing another request during the compulsory execution proceedings (section 765a (I) ZPO). Accordingly, the court may reserve, prohibit or temporarily stay the measure of compulsory enforcement without a legal time limit, provided that eviction entails a hardship that is *contra bonos mores*.

The obligation to pay the rent does not end until the tenant has actually moved out.<sup>1031</sup>

- Are there problems of fairness and justice? Are there problems of access to courts especially for tenants? What is the situation concerning legal fees, legal aid and insurance against legal costs?

Generally<sup>1032</sup> the costs of litigation, including the legal fees of the winning party and also the court fees, have to be borne by the losing party (section 91 (I) ZPO). To ensure fair and effective access to justice, personally and economically disadvantaged parties who are unable to pay the costs of litigation can apply for legal aid (*Prozesskostenhilfe*) according to sections 114 et seq. ZPO. Legal aid is granted if the prosecution or their defence has sufficient prospects of succeeding and does not seem frivolous (section 114 (1) ZPO). Furthermore, it has to be approved separately at each level of jurisdiction (section 119 (I) ZPO). If the legal proceedings require parties to be represented by lawyers, the party shall be assigned a lawyer who is willing to so represent the party and whom the party has selected (section 121 (I) ZPO). The effects of granting legal aid are that (i) the *Bund* or *Land* cash office is able to assert legal fees against the party exclusively in accordance with the provisions made by the court (ii) the party is released from the obligation to provide a security deposit for the costs of the proceedings and (iii) the lawyer is prohibited from asserting claims for remuneration against the party (section 122 (I) ZPO). However, this does not affect the obligation to reimburse the opponent for the costs it has incurred (section 123 ZPO), i.e. the party, who receives legal aid and loses the litigation, has nevertheless to pay the costs of the winning party.

Apart from the possibility to apply for legal aid, many tenants have legal protection insurance (*Rechtsschutzversicherung*) that covers all kinds of legal costs (i.e. court fees, costs for experts and witnesses, lawyer's fee – their own legal costs plus those of the opposing party).<sup>1033</sup> Members of tenant associations are often already insured regarding tenancy disputes because of their membership, since the insurance is usually included in the membership fee. This fee amounts only between EUR 40 and EUR 90 per year.

<sup>1029</sup> Cf. R. Lackmann, in: MüKo-ZPO, s. 709, rec. 4 (Munich: Verlag Franz Vahlen, 2013).

<sup>1030</sup> OLG Stuttgart, NZM 2006, 880.

<sup>1031</sup> Cf. Lackmann, in: MüKo-ZPO, s. 721, rec. 11.

<sup>1032</sup> One exception states s. 93b ZPO.

<sup>1033</sup> Cf. Wurmnest, *German Report*, 17.



Considering these possibilities, it can be said that access to courts is not a problem for tenants in Germany.

Not a problem, but just an obstacle, the tenant has to deal with in some *Länder* is the pre-trial conciliation. Where the *Länder* have introduced this mechanism, it is mandatory to undertake the conciliation before submitting the case to court.

- How about legal certainty in tenancy law? (e.g.: are there contradicting statutes, is there secondary literature usually accessible to lawyers etc?)

Due to the great importance of the rental housing market, German tenancy law is a comprehensive field of law, which is frequently the subject of law reforms. The consequent amendments create however legal uncertainty in tenancy law. This is also reflected in the high number of court decisions. Nearly 25% of all civil law cases, carried out in front of local courts, are related to disputes on tenancy law. This extensive case law characterizes on the other hand the national tenancy law, which leads also to a legal uncertainty. In addition, the case law of the different courts in Germany is not consistent. Thus, many questions concerning the application and interpretation of tenancy law require a conclusive clarification that can be only caused by the legislature or decisions of the Federal Court of Justice. But even the BGH itself contributes often to legal uncertainty in tenancy law, e.g. by declaring over three-quarters of all terms on cosmetic repairs as ineffective, with the result that landlords nowadays do not know how to assign their implementation legally to the tenant.

- Are there “swindler problems” on the rental market (e.g. flats fraudulently advertised on the internet as rental offers by swindlers to whom the flats do not belong)?

There are “swindler problems” on the German rental market in form of fraudulent rental offers advertised on the internet.<sup>1034</sup> Typically, these swindlers allure with rental offers for dwellings, which are attractively located in the inner-city, anyhow very cheap and equipped with high-quality furnishing. They advertise such offers usually for dwellings located in metropolises with a tight rental market, like Berlin, Frankfurt a. M., Hamburg and Munich. The most common method of rent scam is the so-called advance fee fraud (*Vorkassebetrug*): The putative owner of the dwelling pretends to live abroad and to be therefore prevented from appearing in person for viewing the dwelling. He demands by e-mail from the prospective tenant to transfer a deposit as for instance by DHL, Western Union or Rent.com or to deliver it in the form of cash in offices of shops. After receiving the money, the key delivery shall take place, which will not happen of course.

The internet portals that publish rental offers inform prospective tenants on their websites about current and common methods of rent scam.<sup>1035</sup> Besides, the operators of these portals try to identify suspicious advertisements by using technical filters and if necessary deactivate them as well as ban the corresponding account.

Apart from that, there exists also a blog, where more than six thousand dubious email addresses and many examples of fraudulent advertisements are listed.<sup>1036</sup> Furthermore, it is advisable for tenants to make sure whether the estate agent, provided the dwelling is offered by one, is a member of the German Real Estate Association or not, since the job

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<sup>1034</sup> Cf. F. Kotteder, *Das Geschäft mit der Wohnungsnot*, Süddeutsche Zeitung of 26-06-2013, available at: <http://www.sueddeutsche.de/muenchen/immobilienportale-geschaeft-mit-der-wohnungsnot-1.1704592> (last retrieved 23-03-2014).

<sup>1035</sup> <http://www.sichere-immobiliensuche.de/>; <http://www.immonet.de/service/sicher-kaufen-und-mieten.html>; <http://www.schutz-vor-immobilienbetrug.de/> (last retrieved: 23-03-2014).

<sup>1036</sup> <http://wohnungsbetrug.blogspot.de/> (last retrieved: 23-03-2014).

title is not legally protected and a membership of the IVD confirms the agent as a professional and qualified service provider.

- Are there areas of “non-enforcement” of tenancy law (such as legal provisions having become obsolete in practice)?

The legislature endeavours to find out areas of “non-enforcement” emerging especially because of tenancy law reforms and abolishes corresponding legal provisions. This applies e.g. to section 564c o.v. BGB, which became obsolete during the tenancy law reform in 2001 and its associated introduction of qualified fixed-term tenancies laid down in the new section 575 BGB. With regard to the current provisions on tenancy law, section 544 BGB can be mentioned as a provision being obsolete in practice.<sup>1037</sup> Accordingly, the parties of a tenancy contract that has been signed for a period of more than thirty years have a special right of termination after thirty years have passed. This provision is not relevant to tenancies on residential space for the following reasons: Tenancy contracts are almost never entered into for a limited period of over thirty years, since the parties usually do not want to be bound by contract for such a long time under exclusion of their right to give ordinary notice. In addition, its scope of application has been further restricted by the introduction of the qualified fixed-term tenancy laid down in section 575 BGB.<sup>1038</sup> The landlord will hardly be able to prove one of the three reasons for the fixed-term over a period of thirty years with the result that the limitation would be ineffective and the tenancy is deemed to have been entered into for an indefinite period of time (section 575 (1 2) BGB).

- What are the 10-20 most serious problems in tenancy law and its enforcement?

#### (1) Tenancy Law

- Use of standard contracts by the landlord or real estate agent: the provisions of the contract are often not geared to the particular tenancy; furthermore, the provisions are frequently formulated to the advantage of the landlord; therefore, the tenant needs legal knowledge or legal advice in order to know whether the contractual provisions are effective or not.
- Clauses on cosmetic repairs: The wide case law regarding the effectiveness of clauses on cosmetic repairs creates legal uncertainty.
- Operating costs: Every second invoice of advance payments for operating costs apportioned to tenants is incorrect,<sup>1039</sup> e.g. because the landlord invoices expenses which are not defined as apportionable operating costs or since he does not calculate the apportionment in accordance with the statutory provisions.
- Parabolic antenna: The right of the tenant to install a parabolic antenna is still controversial, especially with respect to German tenants who are usually not entitled to do so (discrimination of nationals).
- Amount of rent reduction: there are reference points based on comparable court cases, but it depends on the individual case; therefore, no legal certainty regarding the amount of rent the tenant may reduce because of a material or legal defect of the dwelling.

<sup>1037</sup> Cf. Blank, in: *Blank/Börstinghaus*, s. 544, rec. 1; Bieber, in: *MüKo-BGB*, Vol. 3, s. 544, rec. 1.

<sup>1038</sup> Cf. S. Lammel, in: *Schmidt-Futterer*, s. 544 BGB, rec. 3.

<sup>1039</sup> [http://www.mieterbund.net/verlag/br\\_zweite\\_miete.html](http://www.mieterbund.net/verlag/br_zweite_miete.html) (last retrieved: 23-03-2014).

- Application of transitional provisions: Pursuant to Article 229 section 1 EGBGB, tenancy contracts entered into prior to September 2001 are still subject to the abolished tenancy law provisions. Thus, one must always distinguish between contracts concluded prior to and after this date. For instance, old fixed-term tenancies may still be easily renewed (Article 229 section 3 (III) EGBGB, section 564c BGB (o.v.)), while nowadays the landlord must prove one of three specific reasons in order to be able to limit the duration of the tenancy (section 575 BGB).

## (2) Enforcement of Tenancy Law<sup>1040</sup>

- Enforceable legal document: The landlord needs an enforceable legal document against every person who lives in the dwelling (spouses; civil partner; subtenant) in order to be able to evict them by way of a compulsory enforcement (section 750 (I) ZPO); Partial solution: the recently introduced possibility to evict possessors other than the tenant by injunction to the extent that the landlord obtained knowledge of them only after the hearing has been closed (section 940a (II) ZPO).
- Eviction in case of squatting: Pursuant to sections 130 no. 1, 920 (I), 936, 940a (II); 750 ZPO, compulsory enforcement may be commenced only if the persons for and against whom it is to be performed have been designated by name. With regard to squatting, the names of the squatters are however often unknown, due to the fact that squatters frequently change their residence.
- Animals in the compulsory enforcement: It is controversial whether the procedure prescribed in section 885 (II-IV) ZPO is applicable to animals or not, since animals must not only be accommodated, but also provided with food etc.<sup>1041</sup> If so, the bailiff needs special knowledge in order to take and accommodate the animals in accordance with animal welfare.<sup>1042</sup>
- Obligation of the bailiff to documentation: According to the recently introduced section 885a ZPO, the bailiff is obligated to document all obvious things he discovers during the enforcement measure. Even though the documentation may also be carried out by taking photos, it causes the bailiff a lot of work to make sure that all things are recorded in order to avoid liability for violation of official duty (section 839 (I) BGB, Article 34 GG).<sup>1043</sup>
- Rules on protection from eviction: Due to the several possibilities for tenants to be protected from eviction (sections 721, 794a, 765a ZPO), compulsory enforcement can be delayed considerably to the disadvantage of the landlord.
  - average length of tenancy-related procedures: 7.6 months
  - protection from eviction during the procedure: max. 1 year
  - protection from eviction during the compulsory enforcement: in exceptional cases the court may even stay the eviction for an indefinite period of time<sup>1044</sup>
- Tenants in risk of committing suicide: The landlord must tolerate when public authorities accommodate the tenant, who is in risk of committing suicide, in his "previous" dwelling for health reasons.

<sup>1040</sup> Cf. W. Schuschke, *Aktuelle Probleme zur Räumungsvollstreckung*, NZM 2012, 209-217.

<sup>1041</sup> Positive: BGH, NZM 2012, 620.

<sup>1042</sup> Cf. Schuschke, NZM 2012, 209 (212).

<sup>1043</sup> Ibid, 213.

<sup>1044</sup> BVerfG, NZM 2005, 657.

Apart from the mentioned cases, there are no further serious problems in tenancy law and its enforcement.

- What kind of tenancy-related issues are currently debated in public and/or in politics?
  - Brokerage fee: Distribution, who has to bear which amount of the brokerage fee in case the landlord has commissioned the estate agent.
  - Amount of rent: Ceiling for the amount of rent in case of new tenancy contracts, which may not exceed 10% of the reference rent customary in the locality.
  - Rent increase: The *Land* governments shall be legitimated to determine regions with a tight rental market in which the rent may not be raised within four (instead of three) years by more than 15%.
  - Smoking: To what extent smoking inside the dwelling belongs still to the contractual use, so that claims for damages and termination would not be justified.
  - Parabolic antenna: Does the landlord have to tolerate the installation of a parabolic antenna, even though the tenant could receive the relevant TV channels via internet? And is it reasonable for the tenant to refer to the internet in order to inform himself?
  - Tax depreciation: The possibility of reducing balance depreciation in order to promote the construction of rental housing shall be brought back into use.

## 7. Effects of EU law and policies on national tenancy policies and law

### 7.1. EU policies and legislation affecting national housing policies

- EU social policy against poverty and social exclusion

There are three EU-Directives concerning the prevention of poverty and social exclusion also with regard to housing: the Directive 2003/109/EC<sup>1045</sup> concerning the status of third-country nationals who are long-term residents, the Directive 2003/86/EC<sup>1046</sup> on the right to family reunification, and the Directive 2009/50/EC<sup>1047</sup> on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment. The former requires equality of treatment with housing (Article 11 (1f)), while the second provides that the reunification applicant shall prove to have a habitable and large enough dwelling (Article 7 (1a)). Both directives were transposed into national law by the Law on the Transposition of EU-Directives concerning the Right of Residence or of Asylum<sup>1048</sup>. The third directive prescribes also equal treatment with housing (Article 14 (1g)) and was implemented by the Law on the Transposition of the Highly-Qualified-Directive<sup>1049</sup>.

- energy saving rules

Concerning energy saving rules, the EU-Directive 2010/31/EU<sup>1050</sup> about the energy performance of buildings as well as the EU-Directive 2012/27/EU<sup>1051</sup> on energy efficiency af-

<sup>1045</sup> Directive of 25-11-2003 (OJEU L 16/44).

<sup>1046</sup> Directive of 22-09-2003 (OJEU L 251/12).

<sup>1047</sup> Directive of 25-05-2009 (OJEU L 155/17).

<sup>1048</sup> Law of 19-08-2007 (BGBl. I 1970).

<sup>1049</sup> Law of 01-06-2012 (BGBl. I 1224).

<sup>1050</sup> Former relevant directive: Directive 2002/91/EC.

fect the national housing policy.<sup>1052</sup> Accordingly, all new buildings shall be nearly zero-energy buildings (*Niedrigstenergiegebäude*) by the end of 2020. That means that these buildings must have a very high energy performance, and that the nearly zero or very low amount of energy required should be covered to a significant extent by energy from renewable sources. In addition, every owner of new and also of existing residential buildings is required to have an energy performance certificate (*Energieausweis*). This certificate assesses a building according to energy criteria either on the basis of its energy required (new buildings or building repairs) or on its energy consumption (existing buildings).

- fundamental freedoms
  - e.g. the Austrian restriction on the purchase of secondary homes and its compatibility with the fundamental freedoms;
  - cases in which a licence to buy house is needed - is this compatible with the fundamental freedoms?

There are two EU-Directives concerning fundamental freedoms which affect the German housing policy. First, there is the EU-Directive 2004/38/EC<sup>1053</sup> on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (*Freizügigkeitsrichtlinie*), which includes a right of free movement (Article 4,5) and residence for at least three months (Article 6,7). Therefore, the directive deals mainly with the fundamental freedom of movement according to Article 21 TFEU as well as with the general prohibition of discrimination on grounds of nationality laid down in Article 18 TFEU. It was transposed into German law by the Law on the General Free Movement of EU citizens (*Freizügigkeitsgesetz/EU*, *Freizüg/EU*)<sup>1054</sup>.

Related to this directive, the Regulation (EEC) 1612/68<sup>1055</sup> and the Recommendation 65/379/EEC<sup>1056</sup> of the Commission are to be named. The purpose of both is to ensure and promote the fundamental freedom of free movement for workers as laid down in Article 45 TFEU. While the Regulation provides equal treatment in housing and access to the lists of housing applicants for workers moving within the EU, the Recommendation concerns primarily the construction and provision of more social dwellings for these workers and their families.

Beyond that, the EU-Directive 2010/13/EU<sup>1057</sup> concerning the provision of audiovisual media services as well as the Commission Communication<sup>1058</sup> concerning the use of satellite dishes have an effect on the national tenancy law. Accordingly, the Member States are obligated to ensure freedom of reception and to not restrict transmissions on their territory of audiovisual media services from other Member States (Article 3 (1)). The directive was transposed into national law by the Interstate Treaty on Broadcasting (*Rundfunkstaatsvertrag*, *RStV*)<sup>1059</sup>, which has been ratified in all sixteen *Länder*. German courts have held that the landlord has to tolerate the installation of a parabolic antenna if a foreign tenant can gain access to television channels in his native language only by using

<sup>1051</sup> Former relevant directive: Directive 2006/32/EC.

<sup>1052</sup> As outlined above in 6.1. 'Regulation on energy saving'.

<sup>1053</sup> Directive of 29-04-2004 (OJEU L 158/77).

<sup>1054</sup> *Freizüg/EU* of 30-07-2004 in its version of 19-08-2007 (BGBl. I 1970).

<sup>1055</sup> Regulation of 15-10-1968 (OJEC L 257/2).

<sup>1056</sup> Recommendation of 07-07-1965 (OJEC L 137/27).

<sup>1057</sup> Directive of 10-03-2010 (OJEU L 95/1).

<sup>1058</sup> COM 2005, 351 final.

<sup>1059</sup> *RStV* in its current version of 15-12-2010; ratified in all sixteen *Länder* by *Land* law.

satellite television.<sup>1060</sup> With regard to the German fundamental rights, the interest of a foreign tenant to inform himself without hindrance from generally accessible sources (Article 5 (I) GG) takes precedence over the property guarantee of the landlord (Article 14 (I) GG).<sup>1061</sup> This precedence follows also from the freedom to provide services pursuant to Article 56 TFEU as well as from the freedom to receive and impart information as laid down in Article 10 (I) of the ECHR and Article 11 (I) CFR.<sup>1062</sup>

Since courts restrict such precedence to cases in which the tenant cannot inform himself via cable television, it is in dispute if this case law conforms to the European provisions.<sup>1063</sup> Furthermore, courts have held that it is principally reasonable and adequate for German tenants to inform themselves via internet, cable or terrestrial television.<sup>1064</sup> This case law leads therefore to discrimination of nationals (*Inländerdiskriminierung*), which is also contrary to European law.<sup>1065</sup> Only if the tenant can prove a higher need for information, e.g. due to his profession, that cannot be satisfied through other media sources, he can claim permission for the installation of a parabolic antenna.<sup>1066</sup>

## 7.2. EU policies and legislation affecting national housing law<sup>1067</sup>

- consumer law and policy

The EU-legislation affecting national tenancy law concerns mainly consumer law, e.g. the Directive 2011/83/EU<sup>1068</sup> on consumer rights, which has been transposed into German law in 2013 by a law that will enter into force on 13 June 2014.<sup>1069</sup> It repeals the Directive 85/577/EEC on the protection of consumers in respect of contracts negotiated away from business premises as well as the Directive 97/7/EC on the protection of consumer in respect of distance contracts.<sup>1070</sup> While the latter one includes tenancy contracts explicitly (Article 3 (1)), the directive on doorstep transaction excludes them from its scope (Article 3 (2a)). But the German legislation went beyond the European level, as permitted by Article 8 of Directive 85/577/EEC, by including also tenancy contracts. The national transposition of these former directives is now laid down in sections 312-312f BGB<sup>1071</sup>, which are part of the subtitle 'Particular types of sale'. E-commerce contracts within the meaning of section 312g BGB constitute another of these particular types of sale.<sup>1072</sup> This provision was incorporated into the BGB in order to transpose the Directive 2000/31/EC on electronic commerce, which also includes tenancy contracts (Article 9 (2a)). Finally, the Directive 2008/122/EC on the protection of consumers in respect to certain aspects of

<sup>1060</sup> As outlined above in 5. 'Human Rights'.

<sup>1061</sup> BGH, NJW 2010, 436 (437).

<sup>1062</sup> Cf. W. Hau, JZ 2010, 553 (557); different BGH, NZM 2006, 98.

<sup>1063</sup> D. Dörr, WuM 2002, 347 et seq..

<sup>1064</sup> BVerfG, NJW 1993, 1252 (1253); OLG Frankfurt, NJW 1992, 2490; AG Frankfurt a.M., ZMR 2005, 458.

<sup>1065</sup> Critical already: BGH, NJW 2004, 937 (939).

<sup>1066</sup> VerfGH Berlin, NZM 2002, 560; opposite view: AG Frankfurt a. M., ZMR 2005, 458.

<sup>1067</sup> Cf. F. G. Rips, *Europäische Vorgaben für das deutsche Mietrecht*, WuM 2004, 175-180.

<sup>1068</sup> Directive of 25-10-2011 (OJEU L 304/64).

<sup>1069</sup> Gesetz zur Umsetzung der Verbraucherrechterichtlinie und zur Änderung des Gesetzes zur Regelung der Wohnungsvermittlung of 20-09-2013 (BGBl. I 3642); (BT-Drucks. 17/12673).

<sup>1070</sup> As outlined above in 6.2. 'Ancillary duties of both parties in the phase of contract preparation and negotiation'.

<sup>1071</sup> Former transpositions: Law on Revocation in case of Doorstep Transactions as amended on 29-06-2000 (BGBl. I 955); Law on Distance Contracts (FernAbsG) of 27-06-2000 (BGBl. I 897).

<sup>1072</sup> Cf. also the Teleservices Act (TMG) of 26-02-2007 (BGBl. I 179).

time-share and long-term holiday products has to be mentioned in this context. Its provisions were transposed into national law by sections 481-485a BGB.<sup>1073</sup>

Due to the transposition of these directives, the tenant has a right of revocation under national law pursuant to section 355 BGB, if the tenancy contract was concluded by a doorstep transaction (section 312 BGB) or only by use of means of distance communications (section 312d BGB) as well as in case of a time-share agreement or a contract relating to a long-term holiday product (section 485 BGB). However, such a right of revocation requires always that the landlord is an entrepreneur. The period in which the tenant has to declare the revocation is usually fourteen days (section 355 (II) BGB), but if the tenant has not been instructed on his right to revoke in accordance with the requirements of section 360 BGB, the right of revocation does not expire (section 355 (IV 3) BGB). Additionally, the landlord must provide in all these cases, except for the doorstep transaction, preliminary contract information pursuant to Article 242 section 1, 246 EGBGB. Otherwise, the revocation period does not commence (sections 312d (II), 312g (VI), 485a (II) BGB).

Beyond that, the EU-Directive 93/13/EEC on unfair terms in consumer contracts affects national tenancy law insofar as the control of these terms is also applicable to tenancy contracts. But pursuant to its Article 1, the control of contractual terms shall only apply to contracts between an entrepreneur and a consumer. The national provisions, which are now laid down in section 305-310 BGB,<sup>1074</sup> go nevertheless beyond the scope of the directive by including also tenancy contracts with landlords who are not qualified as entrepreneurs (section 305 (I) BGB).<sup>1075</sup> Additionally section 310 (I) BGB extends the scope of application also to standard terms which are used in a contract with an entrepreneur as the tenant.<sup>1076</sup> Since almost all tenancy contracts in Germany are concluded on the basis of pre-formulated standard contracts,<sup>1077</sup> consumer law at least concerning standard business terms is relevant to tenancies.

- competition and state aid law

Regarding competition law, there are two EU-Directives influencing the national tenancy law, provided that the landlord is an entrepreneur or an estate agent is involved: Directive 2006/114/EC<sup>1078</sup> concerning misleading and comparative advertising and Directive 2005/29/EC<sup>1079</sup> concerning unfair business-to-consumer commercial practices in the internal market. The latter provides in its Article 2 (c) explicitly that immovables are products in terms of this directive. Both directives were transposed into national law by an amendment of the Law on Unfair Competition (UWG).

- tax law

Regarding tax law, there is no EU legislation affecting the German tenancy law for the following reasons: Pursuant to Article 113 TFEU, the Council is only entitled to adopt provisions for the harmonization of legislation concerning indirect taxes like turnover taxes and excise duties. But income from lease is exempted from turnover taxes according

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<sup>1073</sup> Law to Modernize the Provisions on Time-share Agreements, Agreements on Long-term Holiday Products as well as Resale and Exchange Products of 17-01-2011 (BGBl. I 34).

<sup>1074</sup> Former Transposition: Law on Standard Business Terms (AGB-Gesetz) as amended on 29-06-2000 (BGBl. I 946).

<sup>1075</sup> Cf. Hau, JZ 2010, 553 (555).

<sup>1076</sup> Cf. J. Basedow, in: *MüKo-BGB*, Vol. 2, bef. s. 305, rec. 18 et seq..

<sup>1077</sup> Cf. Hannemann, in: *Münchener Anwaltshandbuch Mietrecht*, s. 10, rec. 1.

<sup>1078</sup> Directive of 12-12-2006 (OJEU L 376/21).

<sup>1079</sup> Directive of 11-05-2005 (OJEU L 149/22).



to section 4 no. 12 of the Value Added Tax Act (*Umsatzsteuergesetz*, UStG)<sup>1080</sup> with the result that EU legislation relating to this tax is not relevant to the national tenancy law. Income from lease is rather subject to the personal income tax (section 2 (I 1 no. 6) EStG), which belongs again to the direct taxes. In the absence of a special competence for the approximation of laws regarding direct taxes, Article 115 TFEU must be reverted to. Accordingly, the Council may issue directives in order to approximate those regulations of the Member States directly affecting the establishment or functioning of the internal market, but only acting unanimously in accordance with a special legislature procedure. Because of these prerequisites, there are only a few directives on direct taxes like the Directive on Mergers or the Parent-Subsidiary Directive, which bear nevertheless no relation to tenancy law.

- energy saving rules

With regard to energy saving rules, the German tenancy law is as well as the national housing policy influenced by the Directives on the energy performance of buildings and on the energy efficiency.<sup>1081</sup> Pursuant to sections 555d (I), 555b no. 1 BGB, tenants have generally to tolerate measures taken to save energy with lasting effect. If the landlord has carried out such energy-saving measures, he may increase the annual rent by 11% of the costs spent on the dwelling (section 559 (I) BGB).

- private international law including international procedural law

There are three regulations concerning private international law including international procedural law, which affect the national law and the determination of the applicable law in case of related disputes: the Regulation (EC) 593/2008<sup>1082</sup> on the law applicable to contractual obligations (Rome I), the Regulation (EC) 1346/2000<sup>1083</sup> on insolvency proceedings (EUInsR) and the Regulation (EC) 44/2001<sup>1084</sup> on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (Brussels I).

The Regulation Rome I determines in its Article 4 (1c) that contracts relating to a tenancy of immovable property are governed by the law of the country where the property is situated (*lex rei sitae*). An exception applies for temporary tenancies: If the landlord and the tenant have their habitual residence in the same country, the law of this country is applicable (Article 4 (1d)). Nevertheless, the parties are allowed to choose the law the tenancy shall be governed by (Article 3 (1)). Such a choice of law takes precedence over the legal connection in Article 4. Apart from that, there exists with Article 6 (1) another legal connection for consumer contracts which often apply to tenancy contracts. Accordingly, consumer contracts between a natural person and a professional are governed by the law of the country where the consumer has his habitual residence. In that case, a choice of law, which has the result of depriving the consumer of the protection afforded to him by the law that would have been applicable on the basis of Article 6 (1), is prohibited (Article 6 (2)). But tenancy contracts are explicitly excluded from the scope of application (Article 6 (4c)). The overriding mandatory provisions of the law of the forum apply nevertheless according to Article 9 (2), which means that national premises are still subject to the national mandatory provisions on the protection of tenants irrespective of the applicable con-

<sup>1080</sup> UStG in its version of 21-02-2005 (BGBl. I 386).

<sup>1081</sup> As outlined above in 6.5. 'Rent increase after renovation measures' and 'Maintenance measures and improvements'.

<sup>1082</sup> Rome I of 17-06-2008 (OJEU L 177/6 corr. L 309/87).

<sup>1083</sup> EUInsR of 29-05-2000 (OJEC L 160/1).

<sup>1084</sup> Brussels I of 22-12-2000 (OJEC L 12/1).

tract law.<sup>1085</sup> Furthermore, Article 11 (5) prescribes that the requirements of form for tenancies of immovable property are also subject to the *lex rei sitae* if those requirements are mandatory and if they are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract.

The *lex rei sitae* is also the applicable law for the effects of cross-border insolvency proceedings on contracts conferring the right to make use of immovable property (Article 8 EUInsR).

And finally the Regulation Brussels I provides as well that the international jurisdiction in proceedings which have tenancies of immovable property as their object lies with the court where the property is situated (Article 22 (no. 1)). An exception applies for tenancies concluded for temporary private use for a maximum period of six consecutive months. In that case the courts of another Member State have also the jurisdiction provided that both parties are domiciled there. This exemption clause concerns especially tenancies on holiday flats and homes as well as on dwellings rented by foreign students or employees.<sup>1086</sup> The regulation of this specific tenancy is based on a decision of the European Court of Justice in the 1980ies.<sup>1087</sup> In that case a German landlord had let a flat in his Italian holiday villa for a period of three weeks to a German tenant. Afterwards the landlord sued the tenant in the regional court of Berlin for damages and for the payment of outstanding incidental charges. The European Court of Justice refused the international jurisdiction of the German court based on art 16 (no. 1) of the Brussels Convention, which provided the exclusive jurisdiction where the property is situated. Therefore, the two Germans were required to seek their right in Italy.

- anti-discrimination legislation

As already outlined above,<sup>1088</sup> the two EU-Directives on the principle of equal treatment as well as the German act of transposition (AGG) affect the national tenancy law to the extent that the landlord is restricted in his choice of a tenant due to the prohibition of discrimination on grounds of sex or of racial or ethnic origin.

- constitutional law affecting the EU and European Convention of Human Rights

With regard to constitutional law affecting the EU and the ECHR as well as the national tenancy law, there are only the following fundamental rights to be named:<sup>1089</sup> First, Article 14 (I) GG as well as Article 1 of Protocol 1 ECHR lay down the protection of property, which guarantees every person a peaceful enjoyment of his possessions; secondly, Articles 2 (I), 6 (I) GG and Article 8 (I) ECHR provides a right for private and family life, which includes on the European level also the protection of home and on the national level the right of the spouse, the civil partner and the children to move in the dwelling together with the tenant; and finally, Article 5 (I) GG as well as Article 10 (I) ECHR grant every person the right to inform himself, which means with respect to tenancy law that tenants should be allowed to install a parabolic antenna in order to be able to receive information regardless of frontiers. This conclusion is also a result of the freedom to provide services as laid down in Article 56 (I) TFEU. Nevertheless, the BGH has held that the freedom of infor-

<sup>1085</sup> Cf. K. Thorn, in: *Palandt*, Art. 9 Rom I-VO, rec. 8.

<sup>1086</sup> Cf. Hau, JZ 2010, 553 (557).

<sup>1087</sup> Case 241/83 Rösler./ Rottwinkel.

<sup>1088</sup> Cf. 6.3. 'Restrictions on choice of tenant - anti-discrimination issues'.

<sup>1089</sup> Cf. 5. 'Human Rights'.

mation does not take precedence over the landlord's property right in general, even considering the European regulations.<sup>1090</sup>

- harmonization and unification of general contract law (sources such as the Common European Sales Law, the Common Frame of Reference or the Principles of European Contract Law)<sup>1091</sup>

Apart from the directives on the harmonization of consumer contract law, there are also measures concerning the harmonization and unification of general contract law, just as the Proposal of the European Commission for a Regulation on a Common European Sales Law (CESL)<sup>1092</sup>. According to its Article 5, the CESL may be used for sales contracts, contracts for the supply of digital content and related service contracts. Since tenancy contracts are not included by the scope of application, the CESL do not affect the national tenancy law.

Furthermore, the Draft Common Frame of Reference (DCFR)<sup>1093</sup>, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law, has to be mentioned in this context. The academic DCFR shall on the one hand function as a possible model for a political Common Frame of Reference and on the other hand it shall promote knowledge of private law in the jurisdictions of the EU as well as sharpen awareness of the existence of a European private law. It contains in its Book IV Part B thirty-one provisions on the lease of movable property. Although the lease of immovables is not dealt with, basic rules such as the obligation of the landlord to surrender and maintain the leased property in a condition required by the contract (3:102; 3:104), the right to rent reduction (4:102) and the mandatory takeover of the tenancy contract by the acquirer (7:101), which apply as well to tenancy contracts, are included by the draft.

Another example for harmonization and unification of general contract law are finally the Principles of European Contract Law (PECL)<sup>1094</sup>, which have been prepared by the Commission European Contract Law (*Lando-Commission*). These principles are intended to be applied as general rules of contract law in the EU (Article 1:101). Therefore, they include rules on the formation, validity, interpretation and contents of contracts as well as on the performance of obligations resulting from these contracts and on remedies for non-performance of such obligations. Provided the landlord and the tenant opt for the application of these principles, the tenancy contract, different from section 550 (1) BGB, never needs to be concluded in writing pursuant to Article 2:101. Furthermore, a tenancy contract entered into for an indefinite period of time may be ended by either party by giving notice of reasonable length without any further explanation (Article 6:109). In contrast, under German tenancy law the landlord has to prove a justified interest in termination of the tenancy (section 573 (II) BGB).

Down to the present day, neither the DCFR nor the PECL have any impact on national tenancy law or related jurisprudence.

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<sup>1090</sup> BGH, NZM 2006, 98.

<sup>1091</sup> Cf. Schmid & Dinse, 11 et seq..

<sup>1092</sup> COM 2011, 635 final.

<sup>1093</sup> C. Von Bar, E. Clive & H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR)* (Munich: Sellier, 2009); the outline edition is available at: [http://ec.europa.eu/justice/policies/civil/docs/dcf\\_r\\_outline\\_edition\\_en.pdf](http://ec.europa.eu/justice/policies/civil/docs/dcf_r_outline_edition_en.pdf) (last retrieved: 23-03-2014).

<sup>1094</sup> O. Lando & H. Beale (eds.), *Principles of European Contract Law*, (The Hague: Kluwer Law International, Parts I and II, 2000, Part III, 2003; available at: [http://frontpage.cbs.dk/law/commission\\_on\\_european\\_contract\\_law/PECL%20engelsk/engelsk\\_partI\\_og\\_II.htm](http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm) (last retrieved: 23-03-2014).

### 7.3. Table of transposition of EU legislation

DIRECTIVES	TRANSPONITON GER-MANY	RELATED SUBJECT	PART QUES-TION-NAIRE
<b>CONSTRUCTION</b>			
Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply and public service contracts (OJEC L 134/114).	Two-part transposition: Package of immediate measures (Vergabe- und Vertragsordnung für Leistungen in Federal Gazette ( <i>Bundesanzeiger</i> , BAnz.) 100a of 30 May 2006; Vergabeordnung für freiberufliche Leistungen in BAnz. 94a of 18 May 2006; Vergabe- und Vertragsordnung für Bauleistungen in BAnz. 94a of 13 May 2006) + Act of 20 April 2009 to Modernize the Public Procurement Law (BGBl. I 790; BT-Drucks. 16/11428).	A special allocation procedure is envisioned for contractors when the target is the design or construction of social housing (Article 34).	
Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products (OJEEC L 40/12); <b>repealed by the Regulation (EU) 305/2011</b> of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC (OJEU L 88/5).	Building Products Act as amended on 28 April 1998 (BGBl. I 812) repealed with effect from 1 July 2013; New Building Products Act of 5 December 2012 (BGBl. I 2449).	About construction products: free movement and the certificates required.	
<b>TECHNICAL STANDARDS</b>			
<b>Energy efficiency</b>			
Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJEU L 315/1).	Law to amend the EnEG of 04-07-2013 (BGBl. I 2197) + Regulation to amend the EnEV of 18-11-2013 (BGBl. I 3951).	Energy savings targets imposed to the State. It also deals with public bodies' buildings and others that re-	6.1. 'Regulation on energy saving'.

		quire greater energy savings.	
Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings (OJEU L 153/13).		Improvement of the energy performance of new and existing buildings.	
Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products (OJEU L 153/1).	Law on Energy Labelling (EnVKG) of 10 May 2012 (BGBl. I 1070) + Regulation on Energy Labelling (EnVKV) as amended on 10 May 2012 (BGBl. I 1070).	Labelling and basic information for users of household electric appliances.	
Commission Delegated Regulation (EU) 874/2012 of 12 July 2012 supplementing <b>Directive 2010/30/EU</b> of the European Parliament and of the Council with regard to energy labelling of electrical lamps and luminaries (OJEU L 258/1).	Current transposition of the previous Commission Directive 98/11/EC of 27 January 1998 (OJEC L 71/1): Regulation on Energy Labelling (EnVKV) as amended on 26 November 1999 (BGBl. I 2372) in its current version of 10 May 2012 (BGBl. I 1070).		
Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJEU L 140/16).	European Implementation Act concerning Renewable Energies (EAG EE) of 12 April 2001 (BGBl. I 619).	Promotion of the use of renewable energy in buildings.	
Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJEU L 211/55).	Act Reforming Energy Economic Provisions (Energiewirtschaftliche Vorschriften-NeuregelungsG) of 26 July 2011 (BGBl. I 1554).	Basic standards for electricity sector.	
<b>Heating, hot water and refrigeration</b>			
Commission Delegated Regulation (EU) 626/2011 of 4 May 2011 supplementing <b>Directive 2010/30/EU</b> of the European Parliament and of the Council with regard to energy labelling for air conditioners (OJEU L 178/1).	Annex 2 of the Regulation on energy Labelling (EnVKV) in its current version of 10 May 2012 (BGBl. I 1079-1080).	Labelling and information to provide about air conditioners.	

Commission Delegated Regulation (EU) 1060/2010 of 28 September 2010 supplementing <b>Directive 2010/30/EU</b> of the European Parliament and of the Council with regard to energy labelling of household refrigerating appliances (OJEU L 314).		Labelling and information to provide about household refrigerating appliances.	
Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJEU L 211/94).	Act Reforming Energy Economic Provisions (Energiewirtschaftliche Vorschriften-NeuregelungsG) of 26 July 2011 (BGBl. I 1554).	Basic legislation about natural gas in buildings and dwellings.	
Council Directive 82/885/EEC of 10 December 1982 amending Directive 78/170/EEC on the performance of heat generators for space heating and the production of hot water in new or existing non-industrial buildings and on the insulation of heat and domestic hot-water distribution in new non-industrial buildings (OJEEC L 378/19); <b>repealed by Directive 2005/32/EC</b> of the European Parliament and of the Council of 6 July 2005 establishing a framework for the setting of ecodesign requirements for energy-using products ( <b>OJEC L 191/29</b> ).	Transposition of the repealing Directive 2005/32/EC: Law on ecodesign of energy-using products of 27 February 2008 (BGBl. I 258).	Legislation about heating and hot water in dwellings and buildings.	
<b>Household Appliances</b>			
Commission Delegated Regulation (EU) 392/2012 of 1 March 2012 supplementing <b>Directive 2010/30/EU</b> of the European Parliament and of the Council with regard to energy labelling of household tumble driers (OJEU L 123/1).	Regulation of the Federal Government on the Implementation of the Law on Energy Labelling (EnVKG) of 23 May 2013 (Printed Matter of the Federal Council (BR-Drucks.) 438/13).	Labelling and information to provide about tumble driers.	
Commission Delegated Regulation (EU) 1059/2010 of 28 September 2010 supplementing <b>Directive 2010/30/EU</b> of the European Parliament and of the Council with regard to energy labelling of household dishwashers (OJEU L	Annex 2 of the Regulation on Energy Labelling (EnVKV) in its current version of 10 May 2012 (BGBl. I 1079-1080).	Labelling and information to provide about dishwashers.	

314/1).			
Commission Delegated Regulation (EU) 1061/2010 of 28 September 2010 supplementing <b>Directive 2010/30/EU</b> of the European Parliament and of the Council with regard to energy labelling of household washing machines (OJEU L 314/47).		Labelling and information to provide about washing machines.	
Commission Delegated Regulation (EU) 1062/2010 of 28 September 2010 supplementing <b>Directive 2010/30/EU</b> of the European Parliament and of the Council with regard to energy labelling of televisions (OJEU L 314/67).		Labelling and information to provide about televisions.	
Commission Directive 2003/66/EC of 3 July 2003 amending Directive 94/2/EC implementing Council Directive 92/75/EEC with regard to energy labelling of household electric refrigerators, freezers and their combinations (OJEU L 170/10).		Labelling and information to provide about household electric refrigerators and freezers.	
Commission Directive 2002/40/EC of 8 May 2002 implementing Council Directive 92/75/EEC with regard to energy labelling of household electric ovens (OJEC L 128/45).	Annex 1 of the Regulation on Energy Labelling (En-VKV) in its current version of 10 May 2012 (BGBl. I 1070).	Labelling and information to provide about household electric ovens.	
Commission Directive 96/60/EC of 19 September 1996 implementing Council Directive 92/75/EEC with regard to energy labelling of household combined washer-driers (OJEC L 266/1).		Labelling and information to provide about household combined washer-driers.	
<b>Lifts</b>			
European Parliament and Council Directive 95/16/EC of 29 June 1995 on the approximation of the laws of the Member States relating to lifts (OJEC L 213).	Regulation on Lifts (12. ProdSV) in its current version of 8 November 2011 (BGBl. I 2178).	Legislation about lifts.	
<b>Boilers</b>			
Council Directive 92/42/EEC of 21 May 1992 on efficiency requirements for new hot water boilers fired with liquid or gaseous fuels, amended by Council Directive 93/68/EEC of 22 July 1993 (OJEEC L 73).	Regulation on the Transposition of the Hot Water Boilers Directive of 28 April 1998 (BGBl. I 796).	Legislation about boilers.	
<b>Hazardous substances</b>			



Directive 2011/65/EU of the European Parliament and of the Council of 8 June 2011 on the restriction of the use of certain hazardous substances in electrical and electronic equipment (OJEU L 174/88).	Regulation on restriction of the use of certain hazardous substances in electrical and electronic equipment (ElektroStoffV) of 19 April 2013 (BGBl. I 1111).	Legislation about restricted substances: organ pipes of tin and lead alloys.	
<b>CONSUMERS</b>			
Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 99/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJEU L 304/64). ( <i>Verbraucherrechte-Richtlinie</i> )	Gesetz zur Umsetzung der Verbraucherrechterichtlinie und zur Änderung des Gesetzes zur Regelung der Wohnungsvermittlung of 20-09-2013 (BGBl. I 3642); law will enter into force on 13 June 2014.	Information and consumer rights; Legislation referred to procurement of services, car park; Immovables are excluded: lease of housing, but not of premises.	6.2. 'Ancillary duties of both parties in the phase of contract preparation and negotiation'.
Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJEU L 337/11).	Law on the Amendment of Telecommunication-Provisions of 3 May 2012 (BGBl. I 958).	Consumer protection in the procurement of communications services.	
Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJEU L 110/30).	No transposition so far; Possible transposition by amendment of the Law on Unfair Competition (UWG) and the Law on Action for an Injunction ( <i>Unterlassungsklagengesetz</i> ) <sup>1095</sup> .	Action for an injunction of Directives (Annex I) aimed at the protection of the collective interests of consumers.	
Directive 2008/122/EC of the European Parliament and of the	Law to Modernize the Provisions on Time-share	Contracts relating to the	4.2. 'Regulatory types

<sup>1095</sup> Unterlassungsklagengesetz in its version of 27-08-2002 (BGBl. I 3422; corr. I 4346).

Council of 14 January 2009 on the protection of consumers in respect of certain aspects of time-share, long-term holiday product, resale and exchange products (OJEU L 33/10).	Agreements, Agreements on Long-Term Holiday Products as well as Resale and Exchange Products of 17 January 2011 (BGBl. I 34); in particular sections 481-485a BGB and Article 242 section 1 EGBGB.	purchase of the right to use immovable properties on a timeshare basis.	of tenure without a public task'+ 6.2. 'Ancillary duties of both parties in the phase of contract preparation and negotiation'.
Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (OJEU L 376/21).	Law on Unfair Competition (UWG) as amended on 3 March 2010 (BGBl. I 254).	Misleading advertising and unfair business-to-consumer practices; Im-movables are products in terms of Directive 2005/29/EC (Article 2 (c)).	7.2. 'Competition Law'.
Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament, and of the Council and Regulation (EC) 2006/2004 of the European Parliament and of the Council (OJEU L 149/22).			
Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (OJEU L 178/1).	Teleservices Act (TDG) of 22 July 1997 (BGBl. I 1870); repealed by the new Teleservices Act (TMG) of 26 February 2007 (BGBl. I 179); section 312g BGB and Article 246 section 3 EGBGB.	Contracting by electronic means; Rental contracts are included (Article 9 (2a)).	6.2. 'Ancillary duties of both parties in the phase of contract preparation and negotiation'.
Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJEC L 144/19) <b>repealed by Directive 2011/83/EU</b> of the European Parliament and of the Council of 25 October 2011 on consumer rights (OJEU L 304/64) with effect from 13 June 2014.	Law on Distance Contracts (FernAbsG) of 27 June 2000 (BGBl. I 897); repealed with effect from 1 January 2002 by the Law to Modernize the Law of Obligations (BGBl. I 3138); now laid down in sections 312b-312f BGB and Article	Contracts relating to immovables are excluded, except from lease (Article 3 (1)).	

	246 sections 1,2 EGBGB.		
Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJEEC L 95/29).	Law on Standard Business Terms (AGB-Gesetz) as amended on 29 June 2000 (BGBl. I 946); repealed with effect from 1 January 2002 by the Law to Modernize the Law of Obligations (BGBl. I 3138); now laid down in sections 305-310 BGB.	Unfair terms.	6.3. 'Control of contractual terms'.
Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJEEC L 371/31) <b>repealed by Directive 2011/83/EU</b> of the European Parliament and of the Council of 25 October 2011 on consumer rights ( <b>OJEU L 304/64</b> ) with effect from 13 June 2014. ( <i>Haustürgeschäfte-Richtlinie</i> )	Law on Revocation in case of Doorstep Transactions as amended on 29 June 2000 (BGBl. I 955); repealed with effect from 1 January 2002 by the Law to Modernize the Law of Obligations (BGBl. I 3138); now laid down in sections 312, 312a BGB.	Information and consumer rights. Legislation referred to procurement of services. Tenancy contracts are excluded from its scope (Article 3 (2 a)).	6.2. 'Ancillary duties of both parties in the phase of contract preparation and negotiation'.
<b>HOUSING LEASE</b>			
Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations - <b>Rome I</b> (OJEU L 177/6 corr. L 309/87).	Article 4 (1 c) determines that contracts relating to a tenancy of immovable property are governed by the law of the country where the property is situated ( <i>lex rei sitae</i> ).	Law applicable (Article 4 (1c, d), Article 11 (5)).	7.2. 'Private International Law'.
Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (OJEC L 12/1) - <b>Brussels I</b> .	The jurisdiction lies with the court of the Member State where the property is situated.	International jurisdiction in proceedings which have tenancies of immovable property as their object (Article 22 (no. 1)).	7.2. 'International Procedural Law'.
Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings (OJEC L 160/1) - <b>EUInsR</b> ; Proposal of the Commission on the amendment of the EUInsR of 12-12-2012 (COM 744 final).	<i>Lex rei sitae</i> is the applicable law for the effects of cross-border insolvency proceedings on contracts conferring the right to make use of immovable property.	Law applicable in Insolvency Proceedings (Article 8).	7.2. 'Private International Law'.
Commission Regulation (EC) 1920/2001 of 28 September 2001		CPI harmonization: Estate	

laying down detailed rules for the implementation of Council Regulation (EC) 2494/95 as regards minimum standards for the treatment of service charges proportional to transactions values in the harmonized index of consumer prices and amending Regulation (EC) 2214/96 (OJEC L 214/1).		agents' services for lease transactions (Article 5).	
Commission Regulation (EC) 1749/99 of 23 July 1999 amending Regulation (EC) 2214/96 concerning the sub-indices of the harmonized indices of consumer prices (OJEC L 214/1).		CPI harmonization: Lease, housing preservation and repair, water and other services (subscript 4).	6.4. 'Index-oriented increase clauses'.
Council Regulation (EC) 1687/98 of 20 July 1998 amending Commission Regulation 1749/96 concerning the coverage of goods and services of the harmonised indices of consumer prices (HICP) (OJEC L 214/12).			
Commission Regulation (EC) 2214/96 of 20 November 1996 concerning harmonized indices of consumer prices: transmission and dissemination of sub-indices of the HICP (OJEC L 137/27).			
Recommendation 65/379/EEC: Commission Recommendation of 7 July 1965 to the Member States on the housing of workers and their families moving within the Community (OJEC L 137/27).		Discrimination on grounds of nationality; Equality in granting housing, aids, subsidies, premiums or tax advantages to workers who have moved within the EU.	7.1. 'Fundamental Freedoms.
<b>DISCRIMINATION</b>			
Council Directive 2004/113/EC of 13 December 2004 on the principle of equal treatment between men and women in the access to and supply of goods and services (OJEC L 373/37).	General Act of Equal Treatment (AGG) of 14 August 2006 (BGBl. I 1897).	Discrimination on grounds of sex.	6.3. 'Restrictions on choice of tenant - antidiscrimination issues'.
Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment be-		Discrimination on grounds of racial or ethnic	

tween persons irrespective of racial or ethnic origin (OJEC L 180/22).		origin.	
<b>IMMIGRANTS OR COMMUNITY NATIONALS</b>			
<p>Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJEU L 95/1); repealing the former Directive 89/552/EEC and its amending Directive 2007/65/EC (Article 34).</p> <p>Cf. also Commission Communication on the Application of the General Principles of Free Movement of Goods and Services - Concerning the Use of Satellite Dishes (COM 2001, 351 final).</p>	<p>Interstate Treaty on Broadcasting (RStV) in its current version of 15 December 2010 (ratified in all sixteen <i>Länder</i>).</p>	<p>Member States shall ensure freedom of reception and shall not restrict re-transmissions on their territory of audiovisual media services from other Member States (Article 3 (1)).</p>	<p>5. 'Human Rights'; 7.1. 'Fundamental Freedoms'.</p>
<p>Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (OJEU L 155/17).</p>	<p>Law on the Transposition of the Highly-Qualified-Directive of 1 June 2012 (BGBl. I 1224).</p>	<p>Equality of treatment with housing (Article 14 (1g); However, Member States may impose restrictions (Article 14 (2)).</p>	<p>7.1. 'EU social policy against poverty and social exclusion'.</p>
<p>Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJEU L 158/77). (<i>Freizügigkeitsrichtlinie</i>)</p>	<p>Law on the General Free Movement of EU citizens (FreizügG/EU) of 30 July 2004 (BGBl. I 1950) in the version of 19 August 2007 (BGBl. I 1970).</p>	<p>Discrimination on grounds of nationality; Free movement (Article 4,5) and residence (Article 6,7) for European citizens and their families.</p>	<p>7.1. 'Fundamental Freedoms'.</p>
<p>Council Directive 2003/109/EC of 25 November 2003 concerning the</p>	<p>Law on the Transposition of EU-Directives concern-</p>	<p>Equality of treatment with</p>	<p>7.1. 'EU social policy</p>

status of third-country nationals who are long-term residents (OJEU L 16/44).	ing the Right of Residence or of Asylum of 19 August 2007 (BGBl. I 1970).	housing (Article 11 (1f)).	against poverty and social exclusion'.
Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJEU L 251/12).		The reunification applicant shall prove to have a habitable and large enough dwelling (Article 7 (1a)).	
Regulation (EEC) 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJEEC L 257/2).		Equal treatment in housing and access to the housing applicants' lists (Article 9, 10 (3)).	6.3. 'Restrictions on choice of tenant - antidiscrimination issues'.
<b>INVESTMENT FUNDS</b>			
Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and Regulations (EC) 1060/2009 and (EU) 1095/2010 (OJEU L 174/1).	Draft Law of the Federal Government of 6 February 2013 (BT-Drucks. 17/12294); passed by the <i>Bundestag</i> on 16 May 2013.	Real estate investment funds.	2.3. 'Relevance of tenancy contracts to professional and institutional investors'
<b>MORTGAGES</b>			
Proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property of 31 March 2011 (COM 2011/0142 final).		Credit agreements secured by a mortgage or by another security, loans to purchase a property and certain credit agreements aimed at financing the renovation of a property.	

## 8. Typical national cases (with short solution)<sup>1096</sup>

### 8.1. Keeping animals

Tenant T wants to keep a guide dog in his one-room apartment, because he became blind. According to a clause of his tenancy contract, the keeping of cats and dogs is strictly prohibited without exception. Is T nevertheless allowed to keep a guide dog?

(cf. BGH, NZM 2013, 378 for therapy dogs)

Keeping animals belongs to the fundamental right to free development enshrined in Article 2 (1) GG. Therefore, a general prohibition to keep animals of any kind is ineffective. Although the tenancy contract includes only a prohibition to keep cats and dogs, the clause is nevertheless void pursuant to section 307 (1) BGB, since it provides no exception. Where a contractual agreement is missing, the decision whether the tenant is allowed to keep an animal or not depends on each individual case, in particular with regard to the number and kind of animals, the size of the dwelling as well as special needs of the tenant. In this case, the small size of the dwelling and the special need of T due to his blindness have to be taken into account. Especially, the latter seems to be so substantial that T has to be allowed to keep a guide dog, even if he just lives in a one-room apartment.

### 8.2. Parabolic antenna

T is Russian, but has lived in Germany for almost twenty years. He wants to install a parabolic antenna, since he cannot receive TV channels from his home country by using either the existing cable television or the internet. Even an additional decoder or subscription would not make it possible to receive these channels. Does landlord L have to tolerate the installation?

(cf. BGH, NZM 2005, 335)

L has to tolerate the installation of a parabolic antenna, provided that T's right to inform himself without hindrance from generally accessible sources (Article 5 (1) 1 GG) takes precedence over his property guarantee (Article 14 (1) GG). Such precedence is assumed if it is impossible for the tenant to receive TV channels from his home country even by using cable television or the internet. The interest of a foreign tenant to be informed about the events in his country is not lessened by the fact that he has lived in Germany for many years. Thus, T's right to freedom of information outweighs L's property right, with the result that L has to permit the installation of a parabolic antenna by T. This conclusion is also in accordance with European law, namely Article 10 (1) ECHR and Article 11 (1) CFR. Nevertheless, L still has the right to determine the place where the antenna shall be fixed as well as to be indemnified from all costs.

#### Variation:

Would the solution be different, if T were German and wants to be informed about events in other countries due to a general interest?

(cf. BerlVerfGH, NZM 2002, 560)

Principally, it is reasonable and adequate for a German tenant to inform himself via internet, cable or terrestrial television. Only if he can prove a higher need for information, e.g.

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<sup>1096</sup> Method of selection: specific problems with regard to German tenancy law.



due to his profession, that cannot be satisfied through other media sources can he claim permission for the installation of a parabolic antenna, but this is still the exception. Since T has only a general interest in being informed about events in other countries, he is not allowed to install a parabolic antenna without permission of L. Although this conclusion leads to discrimination of nationals, it still complies with the established judicature.

### **8.3. Double lease**

Subsequent to the conclusion of a tenancy contract with T1, L concludes another tenancy contract over the same dwelling with T2, who is willing to pay a higher rent. T1 moves in first. Which claims does T2 have against L and does L have any claims against T1?

(cf. KG Berlin, NZM 2008, 889)

First of all, both tenancy contracts are effective, since contractual relationships under the law of obligations take effect only *inter partes*. Therefore, T1 as well as T2 can demand the handover of the dwelling. On the other hand, L can choose to whom he wants to surrender the dwelling. Nevertheless, if one of the tenants moves into the dwelling, he is entitled to possession and the landlord loses his right of choice. Consequently, L has no claims against T1. He is instead liable to T2 due to the initial legal defect of the dwelling. Based upon this defect, T2 may demand damages in lieu of performance, regardless of whether L is responsible or not (section 536a (I) i.c.w. 536 (III, I) BGB). Besides, T2 is of course released from his obligation to pay the rent, since L does not grant him use of the dwelling (section 537 (II) BGB), and he may for the same reason terminate the tenancy without notice period (section 543 (II no. 1) BGB).

### **8.4. Qualified fixed-term tenancy contract**

In 2012, T and L concluded a fixed-term tenancy contract for a period of three years, which contains the following clause: "The tenancy is entered into for a fixed period of three years and ends effective 30 June 2015. The tenant is informed that the contract cannot be continued beyond this date, because the landlord intends to use the dwelling as the case may be as a dwelling for himself". In 2013, T terminates the tenancy ordinarily with the statutory notice period of three months, since he wants to move in together with his girlfriend. L does not accept notice of termination making reference to the mutual exclusion of the right to terminate, which is implied by a fixed-term tenancy. Is T nevertheless entitled to terminate the contract before the agreed date in 2015?

(cf. AG Düsseldorf, NZM 2005, 702; AG Augsburg, WuM 2004, 541)

Since the last principal tenancy law reform in 2001, the duration of a tenancy contract may only be limited by agreeing a qualified fixed-term tenancy, i.e. the landlord has to prove actual need in the sense of one of the three reasons stated by section 575 (I) BGB. Accordingly, a fixed-term tenancy is permitted *inter alia*, if the landlord upon termination of the tenancy period wishes to use the premises as a dwelling for himself, members of his family or his household. Furthermore, the landlord has to notify the tenant in writing of the reason for the fixed term when the agreement is entered into, and the serious intention to implement the stated reason has to be reflected in the contractual provisions. Although L informed T in writing at the time of concluding the tenancy contract about his intention to use the dwelling for himself, the clause of the tenancy contract does not reflect the serious intention to do so, since it just states that L plans to use the dwelling "as the case may be". Thus, the tenancy could not be entered into for a fixed period of three

years. A reinterpretation of such a defective fixed-term tenancy into a tenancy contract, which excludes the right of termination for a limited period of time, is not possible either.

The tenancy contract applies rather for an indefinite period of time and can be therefore terminated by extraordinary as well as by ordinary notice. Therefore, T is already entitled to terminate the tenancy with the statutory notice period of three months in 2013.

### **8.5. Cosmetic repairs**

The standard tenancy contract between T and L contains the following clause on the execution of cosmetic repairs:

“The tenant is obligated to carry out necessary cosmetic repairs at his own expense by professionals. Usually, the kitchen and the bath room have to be renovated every three years, the toilet, corridor, hall, the living as well as the sleeping rooms every five years and the storage room every seven years.”

After three years, T terminates the tenancy contract ordinarily with the statutory notice period of three months. Since he uses the dwelling just for having a place to sleep and to take a shower, T wants to move out without carrying out any cosmetic repairs. May L however require T to renovate the kitchen and the bath room according to the agreed schedule in the tenancy contract?

(cf. BGH, NZM 2010, 615)

Pursuant to section 535 (I 2) BGB, it is up to the landlord to maintain the dwelling in its condition for the tenancy period. Therefore, the tenant is not responsible for modifications to or deteriorations of the dwelling brought about by use in conformity with the contract (section 538 BGB). However, it is common practice that the landlord assigns the obligation to carry out cosmetic repairs to the tenant. Regarding such an agreement, a fixed schedule, when which room should be renovated, is ineffective, since the scope of the duty to renovate depends primarily on the degree of the real wear and tear. If the schedule provides however just common periods for the execution of renovation measures, the assignment to the tenant is effective. Although the tenancy contract between L and T contains such a general schedule, the clause is nevertheless entirely void, because it requires that the cosmetic repairs have to be carried out by professionals. Thus, T is prohibited from making use of the more cost-effective alternative to do the renovation on his own. Such a clause would disadvantage the tenant unreasonably and is therefore ineffective pursuant to section 307 (I) BGB. Consequently, L cannot demand the renovation of the kitchen and the bath room from T.

### **8.6. Subletting**

T1 is living alone in an apartment with two living rooms. Since he became unemployed, he wants to sublet one of these rooms to T2 in order to still be able to pay the rent in the future. However, L refuses permission for the subletting, because he fears that T2 will not be able to pay part of the rent either due to his insolvency proceedings. Is T1 nevertheless allowed to sublet a room to T2?

(cf. LG Berlin, WuM 1993, 344)

Pursuant to section 540 (I) BGB, the tenant is not entitled to sublet the dwelling without the consent of the landlord. If the tenant wants however to sublet just a part of the residential space, he may demand permission from the landlord under the conditions of section 553 (I) BGB, which is *lex specialis* for residential tenancies. Accordingly, the landlord

must approve the subletting, provided that the tenant acquires, after entering into the tenancy, a justified interest in permitting a third party to use part of the dwelling. The tenant has an especially justified interest in subletting, if he needs financial support in order to still be able to pay the rent. T1 wants to sublet part of his rented dwelling, since he cannot afford the rent anymore due to his unemployment. In case of a legitimate interest, the landlord may only refuse his permission provided there is a compelling reason in the person of the third party. L fears that T2 will not be able to pay part of the rent because of his insolvency proceedings. But the solvency of the subtenant does not constitute a compelling reason in this sense, since the subletting causes only a contractual relationship between the subtenant and the main tenant. Consequently, L has to permit T1 to sublet one room to T2.

### 8.7. Rent increase

T is renting an apartment in Munich. After the first rent increase of 10% in January 2013, L wants to increase the rent again up to the reference rent customary in the locality. In January 2014, L declares therefore in writing and with reference to the list of representative rents for Munich to T his rent increase demand of ten per cent. Although there exists an expert list of representative rents containing information on this apartment, L uses just the simple list of representative rents to justify his demand. Does T have to owe the increased rent from the beginning of April 2014?

(cf. LG Munich I, NZM 2002, 781)

Pursuant to section 558 (I) BGB the landlord may demand approval of an increase in rent up to the reference rent customary in the locality (*ortsübliche Vergleichsmiete*) if, at the time when the increase is to occur, the rent has remained unchanged for fifteen months. It can be made at the earliest one year after the most recent rent increase and must be declared and justified to the tenant at least in text form (section 558a (I) BGB). Then, the tenant will owe the increased rent from the beginning of the third month after receipt of the demand (section 558b (I) BGB). By demanding the increase in rent in writing after exactly twelve months and with reference to the list of representative rents for Munich, L met in principle the requirements of a rent increase under section 558 (I) BGB.

But section 558 (III) BGB provides furthermore that the rent may not be raised within three years by more than 20% or even 15% in regions which can be determined by the *Land* government. Since May 2013, the lower capping limit of 15% is applicable in Munich. The proposed rent increase of altogether 20% within two years exceeds this limit. However, the demand is only void to the extent the capping limit is exceeded i.e. the demand is capped to the legal limit of 15% with the result that L can only increase the rent by 5%.

The rent increase demand is nevertheless entirely void, because it did not refer to the existing expert list of representative rents for Munich, which contains information for the dwelling rented by T. Pursuant to section 558a (III) BGB the landlord is obligated to communicate such information even if he wishes to support his rent increase by other means of justification. L has however just used the general list of representative rents in order to justify his demand. Therefore, T has neither to approve the rent increase nor to owe the increased rent.

## **8.8. Termination because of personal needs**

T is renting an apartment from L on the basis of a tenancy contract unlimited in time. After four months, L terminates the tenancy on grounds of personal needs, since his mother became in need of care as a result of a long serious illness. Therefore, L wants his mother to move into the apartment, which lies next to his house, in order to be able to care for her. The impairment of his mother's state of health was already foreseeable at the time of concluding the tenancy contract with T. Is the notice of termination effective?

(cf. AG Bremen, NZM 2008, 730)

Pursuant to section 573 (II no. 2) BGB, the landlord may give ordinary notice if he needs the premises as a dwelling for himself, members of his family or of his household. In order to be able to undertake care for his sick mother, L wants her to move into the apartment, which lies next to his house, but is rented by T. Thus, L can prove actual need for a family member. A termination on grounds of personal needs is however an abuse of rights if the landlord could have foreseen his needs at the time of concluding the tenancy contract. This applies at least in so far as notice is given within the first three years of the tenancy. L's mother was already seriously ill, when L entered into the tenancy contract with T. L should have instead concluded a fixed-term tenancy pursuant to section 575 (I no.1) BGB, which may be entered into if the landlord wishes to use the dwelling for himself, his family or household members. Therefore, notice of termination is ineffective (section 242 BGB).

## **8.9. Insane tenant**

T is insane as well as at high-risk of committing suicide. Due to his mental illness he disturbs the domestic peace by insulting the other tenants and making loud noise especially during the night time. Therefore, after several unheeded warning notices, L terminates the tenancy without notice pursuant to sections 543 (I), 569 (II) BGB. Alternatively, he gives also ordinary notice pursuant to section 573 (I) BGB, since he does not want to continue the tenancy any longer under these circumstances. Is notice of termination effective, and if so, are there special rules on protection from eviction?

(cf. BGH, NZM 2005, 300; NZM 2004, 430 (431))

In general, the landlord is entitled to terminate the tenancy without notice pursuant to sections 543 (I), 569 (II) BGB, if the tenant disturbs the domestic peace in such a way that the landlord cannot reasonably be expected to continue the tenancy until the end of the notice period. But in case the tenant is at serious risk of committing suicide, an extraordinary termination is ineffective, also because the tenant cannot object to the termination and demand continuation of the tenancy when the landlord is entitled to terminate without notice (section 574 (I 2) BGB). Nevertheless, an ineffective extraordinary termination may be reinterpreted into an ordinary notice of termination pursuant to section 140 BGB, provided the landlord expresses his intention to terminate the contract in any case. Since L declared that he wants to terminate the tenancy in the alternative for the general ordinary reason of a justified interest in termination, a reinterpretation of the ineffective extraordinary termination is permitted. L can therefore terminate the tenancy ordinarily with the statutory notice period of three months.

But T may object to the ordinary notice of termination and demand continuation of the tenancy pursuant to section 574 BGB, if he can prove that termination of the tenancy would be a hardship for him that is not justifiable. Beyond that, there are also special

regulations laid down in sections 721 (I), 794a (I), 765a (I) ZPO, which protect the tenant from the enforcement of eviction judgements or settlements. Accordingly, the court may grant a reasonable period to vacate the dwelling as well as subsequently reserve, prohibit or temporarily stay the measure of compulsory enforcement, provided the eviction entails a hardship that is immoral. Such an immoral hardship is especially assumed if the eviction puts the tenant's life or health at risk, e.g. severe illness (also mentally); great age connected with health restrictions; imminent childbirth.

### 8.10. Deceased tenant

T1, who is neither married nor living in a civil partnership, maintains a joint household with his only son T2 for ten years. When T1 dies, T2 wants to adopt the tenancy contract, which had been concluded only with his father as tenant. However, L terminates the tenancy immediately after obtaining knowledge of the death of T1, since he does not want T2, who had been sentenced to imprisonment and is addicted to drugs, to live in his dwelling anymore. Despite his personal problems, T2 has always fit into the house community without any complaints. Must T2 nevertheless vacate the dwelling?

(cf. BGH, WuM 2010, 431)

If the tenant dies, the tenancy is continued first of all with the other tenants provided the contract has been entered into with more than one tenant (section 563a (I) BGB). Since T1 was the only contractual partner, section 563 BGB is however applicable. Accordingly, specific persons, like the spouse, the civil partner as well as the children of the tenant, who maintain a joint household with him, succeed to the tenancy. T1 was neither married nor living in a civil partnership. Hence, it is his son T2, who succeeds to the tenancy upon the death of T1 (section 563 (II) BGB). Then, L is principally committed to continue the tenancy with T2, unless he is entitled to terminate the contract because of a compelling reason in the person of the successor (section 563 (IV) BGB). Such a compelling reason is assumed if the landlord cannot be reasonably expected to continue the tenancy with the successor due to personal animosity, insolvency or feared serious disturbance of the domestic peace. The mere facts that T2 had been sentenced to imprisonment and is addicted to drugs cannot however constitute a compelling reason in this sense, especially because he has always fit into the house community without any problems. Consequently, L has no right to terminate the tenancy, and thus T2 does not have to vacate the dwelling.

## 9. Tables

### 9.1. Literature

#### Literature concerning Housing Policy

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- Civil Partnership Act (*Lebenspartnerschaftsgesetz*) of 16-02-2001 (BGBl. I 266).
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- Law against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*, UWG) of 27-05-1896 (RGBl. 145) in the version of its promulgation on 3-03-2010 (BGBl. I 254).
- Law on Apartment Ownership (*Wohneigentumsgesetz*, WEG) of 15-03-1951 (BGBl. I 175, corr. 209).
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- Law on State Funding of Housing and Housing Construction (*Wohnraumförderungsgesetz*, WoFG) of 13-09-2001 (BGBl. I 2376); applies only for those *Länder* that have not yet enacted own regulations.
- Law on the General Free Movement of EU citizens (*Freizügigkeitsgesetz/EU*, Freizüg/EU) of 30-07-2004 in its version of 19-08-2007 (BGBl. I 1970).
- Law on the Improvement of Tenancy Law (*Mietrechtsverbesserungsgesetz*, MRVG) of 4-11-1971 (BGBl. I 1745).
- Regulation on Operating Costs (*Betriebskostenverordnung*, BetrKV) of 25-11-2003 (BGBl. I 2346).
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- Principles of European Contract Law (PECL):  
[http://frontpage.cbs.dk/law/commission\\_on\\_european\\_contract\\_law/PECL%20engelsk/engelsk\\_partI\\_og\\_II.htm](http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm).

### 9.2. Cases – chronological order as quoted in the report

Case	Short Description
OLG Karlsruhe, WuM 1985, 77.	Contracts of use with a cooperative are regarded as ordinary tenancy contracts.
OLG Stuttgart, NJW-RR 1991, 1226.	In case of a tenancy with a cooperative, the tenant may be at least relocated if the dwelling is not fully occupied and needed for a bigger family.
AG Düsseldorf, NJW-RR 1990, 1429.	The landlord cannot require the tenant to conclude private third-party liability insur-



	ance.
OLG Frankfurt a. M., NJOZ 2008, 2000.	An agency fee of over 12% is way too high in case of a casual residential premise.
BVerfG, NJW 1975, 1691 (1692); NJW-RR 2004, 1657 (1662); NJW 2009, 2267 (2275).	The aim of the welfare state is provide for the minimum standards allowing for a life in dignity.
BVerfG, NJW 2005, 1927 (1930); NJW 2010, 505.	Article 1 (I) GG in conjunction with the welfare state imperative forms a claim for state aid in order to ensure the subsistence level.
BVerfG, NJW 2010, 505 (508).	The claim for subsistence level aid shall cover the need to secure the physical existence, thus accommodation, as well as the possibility to cultivate interpersonal contacts.
BVerfG, NJW 1993, 2035.	“Third party effect” of fundamental rights between private actors; The tenant’s right of occupancy relating to the dwelling leased by him is also considered as property within the meaning of Article 14 (I 1) GG.
BayVerfGH 15, 49 (56); 42, 28 (32); 58, 94 (104); BerlVerfGH, NVwZ-RR 1997, 202.	The provisions on a right to housing laid down in the <i>Land</i> constitutions of Bavaria and Berlin do not include a subjective right in terms of having a claim to it.
BayVerfGH 5, 122 (125).	Previous decision according to which every person has a real subjective right to housing space.
BVerfG, NVwZ 1987, 203.	The protection of the urban milieu contained in section 172 BauGB is an instrument of protection against displacement.
OVG Lüneburg, BauR 1983, 432.	The protection of the milieu includes the protection of the population of a health resort against the conversion of dwellings into numerous holiday apartments.
BVerwG, NVwZ 1998, 503	Section 172 BauGB does not restrict itself only to socially weaker layers of the society but applies to all kinds of population.
Commission Decision of 28-11-2005 (OJEU L 312/67).	Social housing subsidies are qualified as a service of general economic interest not to be affected by competition rules (Article 106 (II) TFEU).
BVerfG, DWW 2006, 127; ZKF 2006, 213.	The tax on the owner-used condominium complies with the Constitution.
OLG Cologne, NJW-RR 1995, 751; OLG Cologne, NZM 2000, 111; BGH, NJW 2008, 2333.	Gratuitous surrender of residential space between family members qualified as a gratuitous loan agreement under section 598 BGB.
BGH, NJW-RR 1986, 877.	The classification whether a mixed tenancy contract is subject to the rules on residential tenancies or on commercial takes place by means of the main focus theory.

RGZ 59, 326 (328); 91, 60 (65 et seq.); 105, 213 (218); 170, 1 (6 et seq.).	Acknowledgement of tenants as possessors with all attached protection rights.
BVerfG, NJW 1985, 2633; BVerfG, NJW 1964, 1848.	The intention of the legislature was and is to create a social tenancy law.
BVerfG, NJW 1993, 2035.	“Third party effect” of fundamental rights between private actors; The tenant’s right of occupancy relating to the dwelling leased by him is also considered as property within the meaning of Article 14 (I 1) GG.
BVerfG, NJW 1958, 257.	Fundamental rights are “objective principles” forming a value system that must be given effect in all areas of the legal system.
BVerfG, NJW 1974, 1499.	Article 14 (II) GG obliges the German legislature to consider the interests of tenants properly in case of new regulation the tenancy law.
BVerfG, NJW 2000, 2658.	Tenants can rely on Article 14 (I) GG the approval to structural changes or other installations in order to make the use of the leased object fit for handicapped people.
OVG Lüneburg, NJW 2010, 1094.	Public authorities are entitled to order that a tenant, who is in risk of becoming homeless, may stay in the dwelling despite a valid termination of the tenancy.
BGH, NJW 2006, 505; BGH, NJW 2006, 508; BVerfG, NZM 2005, 657; BVerfG, NJW 1998, 295.	If the tenant is in risk of committing suicide, the execution of an eviction can be ceased for an indefinite period of time because of the fundamental right to life and physical integrity (Article 2 (II 1) GG).
BVerfG, NJW-RR 1993, 1358.	Regarding the guarantee of property, the tenant’s way of life may not be placed over the way of life of the landlord.
BVerfG, NZM 1999, 659.	The landlord himself can decide how much residential space he and his relatives need.
OLG Düsseldorf, NJW 1990, 1676.	Loud celebrations are not covered by the fundamental right to free development pursuant to Article 2 (I) GG.
KG Berlin, NZM 2009, 736; AG Berlin-Lichtenberg, NZM 2008, 802.	The installation of a video camera by the landlord for surveillance of the entrance area or the lift infringes the right of personality of the tenant.
OLG Saarbrücken, NZM 2007, 168.	Keeping pets inside the dwelling is protected by Article 2 (I) GG.
BGH, NJW 1993, 1061 (1062).	A general prohibition to keep pets of any kind is ineffective.
BGH, NJW 2008, 218 (220).	Nondisturbing pets are allowed inside the dwelling without the permission of the landlord.
	The prohibition of keeping dogs and cats in

BVerfG, WuM 1981, 77.	the dwelling does not infringe the fundamental right to free development.
BVerfG, NJW 1954, 1404.	The protection of personality is enshrined in the human dignity (Article 1 (I) GG) and the right to free development (Article 2 (I) GG).
OLG Düsseldorf, NJW 1994, 1971.	Regarding the general right of personality, the landlord is not permitted to take pictures of the residential property without the consent of the tenant.
BVerfG, NJW 1994, 1147; BGH, NJW 2010, 436.	Landlords have to tolerate the installation of a parabolic antenna by the tenant.
BVerfG, NZM 2005, 252; BGH, NZM 2005, 335; LG Krefeld, NZM 2007, 246; LG Konstanz, NZM 2002, 341.	Landlords can refer their foreign tenants to use cable television if it is possible in this way to gain access to television channels of their home country.
BVerfG, NZM 2013, 376; LG Cologne, WuM 2001, 235.	To realize the tenant's right to inform himself, the landlord does not have to permit the most economic alternative.
BVerfG, NJW 1990, 1593.	There are no constitutional concerns against the analogous application of section 569a (I) BGB (old version) to cohabitants.
BGH, NJW 1993, 999.	Section 569a (I) BGB (old version) is analogously applicable to cohabitants.
BVerfG, WuM 2001, 111.	The tenant has to tolerate that a court-appointed expert enters the dwelling.
VerfGH Thuringia, NZM 2004, 416.	The landlord is allowed to gain access to the dwelling, if he worries about the tenant for comprehensible reasons.
BGH, NZM 2006, 98.	The freedom of information does not take precedence over the landlords' property right in general even considering European law regulations.
OLG Munich, NJW-RR 2002, 631.	An extraordinary termination by the landlord cannot be based on an event that is dated back to more than a half year.
LG Munich II, WM 1989, 181; LG Hannover, NJW-RR 1992, 659.	In spite of the immediate effect of an extraordinary termination, the tenant has a time period of one to up to two weeks to vacate the dwelling.
BFH, NJW 1985, 1184.	A dwelling is defined as the entirety of single or connected rooms in residential or other buildings, which are externally closed, intended for residential purposes and enable the running of an own household.
RGZ 59, 326 (328).	The tenant's right to possess the dwelling is regarded as another right under section 823 (I) BGB, that provides a liability in damages in case of infringements.

BGH, NJW 1989, 2247; NJW 2009, 1408.	The definition of terms “minor maintenance works” and “cosmetic repairs” is determined by section 28 II. BV, which is actually only applicable to housing with a public task.
VGH Munich, NVwZ-RR 2000, 660.	Minimum size of a one room flat = sixteen square metres.
BFH, judgement of 20-06-1985, Az. III R 71/83 (BStBl. II 582).	A dwelling must be at least twenty-three square metres in size to be a dwelling under the law of taxation.
BFH, judgement of 30-04-1982, Az. III R 33/80 (BStBl. II 671).	In student halls of residence or nursing homes a size of twenty square metres is sufficient for a dwelling.
AG Hamburg, NZM 1999, 1056.	The tenancy contract is valid regardless of whether the dwelling is habitable or not.
BGH, NJW 1987, 3196.	The concealment of commercial advertisements as private offers, placed by estate agents, is a misleading commercial practise (section 5 UWG).
BGH NZM 2002, 910 (913).	The provisions about the pre-emption right (section 463 et seq. BGB) are applicable by analogy to a pre-rent right.
OLG Hamm, WuM 1997, 364.	The move-in of the spouse, the civil partner or the children of the tenant belongs to the contractual use of the dwelling.
BayObLG GE 1997, 1463.	The move-in of domestic servants and nursing staff belongs to the contractual use, too.
BVerfG, WuM 1993, 104.	The landlord has to accept the change of several members if he contracts with a group sharing a flat.
BGH, NJW 1996, 315.	The confiscation of residential space to accommodate a person who will otherwise become homeless causes only a relationship under public law.
BGH, NZM 2009, 853.	The landlord is not obligated to issue his previous tenant a certificate that there are no rent arrears.
LG Landau, ZMR 1985, 127.	Questions about the civil status of prospective tenants are legitimate.
LG Munich I, NZM 2009, 782.	Landlords are entitled to ask potential tenants for information concerning their solvency.
LG Wuppertal, WM 1999, 39.	The landlord is entitled to terminate the tenancy without notice if the tenant lied about his solvency.
BGH, NJW 1991, 2411.	The tenant has a “right to lie” if the question of the landlord infringes his personal rights.
AG Witzenhausen, WuM 1997, 333.	The landlord may only demand a contract

	fee up to the amount of costs coverage.
AG Hamburg, NZM 1999, 460.	Excessive fees for the conclusion of a tenancy contract can be reclaimed from the landlord.
LG Hamburg, WuM 1990, 62.	A contract fee of about EUR 50 is reasonable.
LG Hamburg, WuM 2009, 452.	An agreement on a fee for the conclusion of the tenancy within the frame of standard business terms is ineffective.
OLG Cologne, NJW 2010, 1676.	Exemplary case for discrimination with regard to tenancy contracts.
BGH, NZM 2010, 121; NJW 1960, 2142.	Principle of equal treatment in tenancies with cooperatives.
BGH, NZM 2010, 615; OLG Stuttgart, NJW-RR 1993, 1422.	A clause which obligates the tenant to execute cosmetic repairs by craftsmen is unfair and therefore ineffective pursuant to section 307 (I) BGB.
BGH, NJW 2006, 2116.	A clause according to which the tenant is obliged to remove all wallpapers or
OLG Hamm, NJW-RR 1991, 844.	to renew carpets at the end of the tenancy is void.
BGH, NJW 1991, 1750 (1752).	Legitimacy of clauses on the assignment of minor maintenance works.
OLG Hamburg, NJW-RR 1991, 1167; AG Braunschweig, ZMR 2005, 717.	Ceilings concerning costs that shall be borne by the tenant for minor maintenance works.
BGH, NJW 1992, 1759.	The tenant may not be obligated to do maintenance works on his own.
BGH, NZM 2006, 505.	The statutory pre-emption does only apply to the first disposal after apartment ownership has been established.
BGH, NZM 2006, 796 (797); BGH, NJW 1994, 315 (316).	The period of time to make use of the statutory pre-emption right does not begin until the tenant is informed about the real and entire content of the certain purchase agreement.
RGZ 81, 146 (150).	The mortgage extends even to claims for rent that are founded by new tenancy contracts entered into after the creation of the mortgage.
BGH, NZM 2003, 984.	If the estate agent himself is the owner of the offered dwelling or a party of the management company of the dwelling the claim to a brokerage fee is excluded.
BGH, NZM 2008, 687.	The contract must also be in writing in case of a tenancy unlimited in time but under exclusion of the right to terminate ordinarily for a period of more than one year.
BGH, NZM 2004, 454.	The habitable surface is determined by II.

	BV or WoFIV, which are also applicable to residential space on the private rental market.
BGH, NZM 2005, 500; NJW 2004, 3115; NJW 2004, 1947.	If the habitable surface deviates from the agreed surface to more than 10% to the negative, the tenant may reduce the rent.
BGH, NZM 2007, 594.	If the actual surface exceeds the surface stated in the tenancy agreement to not more than 10%, the latter still provides the basis for rent reduction.
LG Dresden, WuM 2001, 336.	Absence of a warranted fitted kitchen entitles the tenant to rent reduction.
LG Frankfurt a.M., WuM 1996, 532.	Home offices are allowed in a dwelling that has been mainly let for residential purposes,
LG Munich, ZMR 2007, 278.	while offices and shops with active customer traffic are not permitted.
BGH, NJW 2004, 56; BayOblG WuM 1984, 13.	A tenant needs the permission of the landlord if he intends to take his cohabitee or other family members into the dwelling.
AG Freiburg, WuM 1987, 144; LG Hamburg, NJW 1986, 320.	In principle, tenants should be allowed to fix posters outside, even if it is a political one.
LG Tübingen, NJW 1986, 321; BVerfG, NJW 1958, 259.	If a political poster causes a disturbance of the domestic peace, it has to be removed.
OLG Cologne, ZMR 2007, 617.	Bankruptcy as compelling reason to terminate the tenancy with the entering spouse.
LG Frankfurt, WuM 1981, 39 (40); OLG Hamm, NJW 1982, 318.	Personal or economic interests of a tenant can cause a legitimate interest to sublet part of the residential space.
BGH, NJW 1985, 130 (131).	The mere wish of the tenant to sublet a part of the dwelling to a third party is not sufficient in context of section 553 (I) BGB.
LG Hamburg, WM 1983, 261; AG Charlottenburg, MM 1986, no. 7-8, 41.	Financial needs cause a justified interest of the tenant to sublet part of the dwelling.
LG Berlin, WuM 1993, 344.	The solvency of the subtenant is irrelevant for the landlord, since a subletting causes a liability only between subtenant and main tenant.
OLG Hamm, NJW 1983, 48; OLG Karlsruhe, NJW 1987, 1952; BGH, NJW 1993, 2528.	Judgements concerning the overcrowding of dwellings.
BGH, NZM 2008, 167.	A sublease is effective, even if the landlord has not approved the subletting.
BGH, NJW 2011, 1065; LG Hamburg, ZMR 2001, 973.	The landlord is not entitled to terminate the tenancy because of an unjustified subletting in which he has to accept the subtenant.
BVerfG, NJW 1991, 2272.	A commercial subletting, which leads to an exclusion of the tenant's protection rights,

	is an abuse of rights.
LG Berlin, GE 2004, 1028; BGH, NJW 1996, 838; BGH, NJW 1964, 1853.	In case of unjustified subletting, the landlord cannot claim the rent which the tenant charged the subtenant for the sublet.
LG Halle, ZMR 2006, 534.	A fixed-term tenancy may include a prolongation clause, if it provides prolongation for an indefinite period of time.
BGH, NZM 1999, 138.	Since the right of residence is independent from the underlying obligatory agreement, it remains unaffected by the termination of the obligatory contract.
OLG Hamburg, NZM 1999, 363, KG Berlin, NZM 2001, 283.	It is sufficient that the housing shortage existed at the time of concluding the tenancy contract.
BGH, NZM 2004, 381.	The housing shortage has to be the cause for the agreement on the excessively high rent.
BGH, NJW 1982, 896.	A striking disproportion between performance and consideration is to be assumed if the landlord demands a rent in excess of 50% of the rent charged for comparable dwellings.
BGH, NJW 1984, 722; BVerfG, NJW 1994, 993	An agreement on an excessive rent is only partial invalid to the extent, that just the excessive amount can be claimed back.
BGH, NZM 2010, 661; BGH, NZM 2010, 664.	Regarding the period for paying the rent, Saturday is not considered as a working day.
BGH, NZM 2003, 716.	Rental claims are isolated transferable.
BGH, NJW 1993, 3195.	Section 648 BGB requires works which are essential with respect to the renewal or preservation of the building.
OLG Rostock, DWW 2013, 237; LG Berlin, GE 2011, 1310; BGH, NZM 2009, 660; OLG Koblenz, NZM 2004, 39.	Landlord's pledge.
AG Hamburg-St. Georg, WuM 2010, 37; LG Görlitz, WuM 1997, 682.	The agreement on a stepped-rent is void, if the clause only indicates the increase per square metre or
BGH, NZM 2012, 416.	as a percentage.
BGH, NJW 2013, 1876.	If a surety-ship shall serve as deposit, the maximum limit of three monthly rents does not apply.
BGH, NZM 2007, 769; BGH, NZM 2004, 417 (418).	The apportionment of utilities to the tenant can be agreed with reference to section 556 BGB or section 2 BetrKV.
BGH, NZM 2012, 455.	An adjustment of advance payments due to increases in prices for utilities is only effective, if the previous statement of operating costs was correct in form and content.



BGH, NZM 2009, 482.	After termination of the tenancy, the landlord is principally no longer obligated to supply the dwelling with water, heating or electricity.
LG Koblenz, WuM 2012, 140; AG Berlin-Schöneberg, NZM 2011, 72.	The landlord must still provide basic supplies, if the tenant is granted a period to vacate the dwelling pursuant to sections 721, 794a, 765a ZPO.
LG Frankfurt Oder, NJW-RR 2002, 803.	Disruption of supply on part of the utility company.
AG Saarbrücken, WuM 2007, 506, different: LG Regensburg, NZM 2010, 360.	The ceiling of section 551(I) BGB is also applicable to acquisition of shares in business regarding tenancies with cooperatives.
BGH, NZM 2004, 613; BGH, NJW 1989, 1853.	The total amount of several agreed security deposits may not exceed the limit of three rents.
BGH, NJW 2013, 1876; LG Kiel, NJW-RR 1991, 1291.	Section 551 (I) BGB is not applicable to deposits which are granted by the tenant or a third party to the landlord to avoid a termination.
LG Mannheim, WuM 1996, 269.	The landlord is only entitled to make use of the deposit if his claim is undisputed, legally recognized or obviously justified.
BGH, NJW 1972, 625.	If the landlord has legally made use of the deposit, he has a claim to restock against the tenant.
BGH, NJW 2006, 1422 (1423); BGH, NJW 1987, 2372; OLG Düsseldorf, WuM 2003, 621.	Usually, the landlord has to return the deposit within six months after termination of the tenancy. But the period depends on the particular circumstances.
AG Brandenburg, NJOZ 2008, 2135; BGH, NJW 1989, 2247.	Requirements for a valid assignment of minor maintenance works to the tenant.
BGH, NJW 2004, 2586.	A fixed schedule regarding the assignment of aesthetic repairs as a duty of the tenant is ineffective.
BGH, NZM 2012, 527; BGH, NZM 2008, 926.	If the tenancy contract provides a schedule using the words “regularly”, “usually” or “in general”, the assignment is effective.
BGH, NZM 2007, 355; NJW 2006, 3778.	A clause after which the tenant must pay the costs for cosmetic repairs proportionately on the basis of inflexible periods is void.
BGH, NJW 2013, 2505.	Clauses, which commit the tenant to pay the costs for aesthetic repairs according to an estimate of a painter company, are void.
BGH, NJW 1992, 3226 (3228); BGH, WuM 1970, 791 (792).	A liability under a guarantee for the readiness of occupancy is excluded without a corresponding agreement.

OLG Düsseldorf, DWW 1993, 197.	Since the handover of the dwelling is a cardinal duty of the landlord, an exclusion of liability fails due to section 307 (I) BGB.
BGH, MDR 1962, 398.	In case of a double lease, both tenants can demand the handover of the dwelling independent of the chronology.
KG Berlin, NZM 2008, 889; OLG Schleswig, MDR 2000, 1428; OLG Cologne, ZMR 1998, 696; OLG Frankfurt, ZMR 1997, 22.	If the landlord has concluded more than one tenancy contract with different tenants for the same dwelling, he can choose to whom he wants to surrender the dwelling.
BGH, NJW 1961, 917.	If the previous tenant does not move out, since he has still a right of possession, the dwelling has a legal defect.
OLG Düsseldorf, NZM 1999, 24; MDR 1990, 725.	If the previous tenant is however no longer entitled to use the dwelling, the rights of the new tenant comply with the general rules.
OVG Bremen, NordÖR 1998, 121.	Example for a demolition order in case of a residential building that has been built without an exceptional permission.
OLG Düsseldorf, ZMR 1992, 536; BGH, NJW 1963, 341 (342).	With regard to section 537 (I) BGB, all reasons within the tenant's scope of risk which prevent him from making use of the residential space are to be borne by him
BGH, NJW 2010, 1133 (1134).	The application of the prevailing subjective notion of defects in case of rental objects.
LG Berlin, GE 2013, 552; LG Frankfurt a.M., WuM 2007, 316.	Noise due to extensive construction works at the neighbouring plot is regarded as material defect of the dwelling;
AG Bergisch-Gladbach, WuM 2003, 29.	noisy disputes during the night time in the dwelling next door as well.
LG Munich I, NZM 2005, 339.	General noise caused by children is not considered as material defect.
BGH, NZM 2011, 198.	The landlord may not be exposed to any claims due to defects which are only imputed to the sphere of the tenant.
BGH, NZM 2004, 776.	A defect is trivial if it is easy to recognize and to remedy and its removal entails only low costs.
BGH, NZM 2005, 699; NZM 2005, 455; KG Berlin, NZM 2004, 70.	The amount of rent reduction has to be calculated on the basis of the gross rent.
BGH, NZM 2008, 279.	If the tenant remedies a defect on his own although the requirements of section 536a (II) are not met, he is not entitled to any compensation.
BGH, NZM 2002, 116.	The landlord cannot even exclude his liability for defects caused by negligence.
BGH, ZMR 2002, 899; ZMR 1992, 241.	Solely the strict liability for initial defects can be excluded.
AG Friedberg, WuM 1991, 276.	The tenant may demand from a third party

	to vacate the dwelling (section 862 (I) BGB).
LG Essen, WuM 1998, 278; BGH, NJW 1987, 831 (833); WuM 1966, 763.	The landlord is obliged to prevent the tenant from disturbances caused by other tenants, neighbours or third parties
BVerfG, NZM 2004, 186.	Considering the protection of the tenants' right of occupancy (Article 14 (I) GG) and the inviolability of home (Article 13 (I) GG), tenants have the right to be left alone in their rented dwelling.
AG Cologne, WuM 1986, 86.	The landlord has to announce the inspection at least twenty-four hours in advance.
AG Berlin-Schöneberg, GE 2007, 453; AG Saarbrücken, ZMR 2005, 372; AG Münster, NZM 2001, 1030; LG Stuttgart, ZMR 1985, 273.	The landlord is entitled to inspect the dwelling every one or two years without any concrete reason.
LG Munich II, NZM 2009, 277; AG Bonn, NZM 2006, 698.	The landlord has no general right of inspection.
LG Berlin, NZM 2000, 543.	The tenant can terminate the tenancy pursuant to section 543 (I) BGB if the landlord enters the dwelling by means of an own key.
OLG Düsseldorf, DWW 1998, 342.	The landlord cannot legally lock a tenant out of the rented dwelling, even if he could terminate the tenancy due to arrears of rent.
KG Berlin, NJW 1967, 1915.	If the tenant is deprived of possession by unlawful interference, he may require possession to be restored pursuant to section 861 (I) BGB.
BGH, NZM 2008, 78.	The landlord has to observe the principle of economic efficiency in case of measures and decisions affecting the operating costs borne by the tenant.
LG Berlin, GE 2009, 1625; AG Leipzig, NZM 2002, 20; AG Bad Hersfeld, WuM 1996, 708; AG Berlin-Hohenschönhausen, GE 2004, 301.	Number of payments without any reservation that is required to assume an approval of the rent increase.
BGH, NZM 2012, 154.	In case of minimal structural alterations or if refusal of approval would be for other reasons contrary to the principle of good faith and trust, the tenant has a claim to permission.
BVerfG, NJW 1994, 2143.	If a foreign tenant cannot get access to television channels of his home country even by using cable television, he is allowed to install a parabolic antenna.
KG Berlin, NZM 2008, 39; BerlVerfGH, GE 2007, 1178; opposite view: AG Frankfurt a.M., ZMR 2006, 449.	The interest of a foreign tenant to be informed about the events in his home country is not lessened by the fact that he has

	lived in Germany for many years or has German citizenship.
BGH, NZM 2013, 647; LG Hallo, ZMR 2013, 536; LG Berlin, GE 2012, 1169; LG Wuppertal, NZM 2012, 725.	The possibility to receive TV channels via internet should be taken into account when weighing between Article 5 (I 1) and Article 14 (I) GG.
AG Frankfurt a.M., ZMR 2005, 458.	Discrimination of German tenants compared to those German tenants who are allowed to install a parabolic antenna due to their foreign background.
VerfGH Berlin, NZM 2002, 560.	A German tenant may only claim permission for the installation of a parabolic antenna when he can prove a higher need for information that cannot be satisfied through other media sources.
OLG Karlsruhe, NJW 1993, 2815.	If the tenant wants to fix a parabolic antenna, the landlord has the right (i) to determine the place where the antenna shall be fixed, (ii) to be indemnified from all costs and (iii) to demand a deposit for the costs of a removal.
LG Hamburg, WuM 2002, 666; LG Freiburg, WuM 1997, 175.	The decision whether to permit the keeping of animals or not has to be made on a case-by-case basis
BGH, NZM 2013, 378.	A general prohibition of keeping cats and dogs inside the dwelling is ineffective.
LG Paderborn, NZM 2000, 710.	Smoking in an excessive way does not belong to the contractual use of residential space.
LG Cologne, NZM 1999, 456.	However, smoking in a general way, is contractual.
AG Düsseldorf, Az. 24 C 1355/13.	The landlord may terminate the tenancy due to the fact that cigarette smoke leads to an unreasonable odour nuisance for the other tenants of a multiple dwelling.
BGH, NZM 2006, 691.	In principal, the landlord cannot claim for compensation for damages due to smoke.
BGH, NZM 2008, 318.	But if damages due to nicotine can't be removed by aesthetic repairs, the tenant is liable for damages.
LG Berlin, WuM 2011, 155.	Tenants, who are exposed to an unreasonable stench originated from the unhygienic condition of another dwelling, are entitled to a rent reduction.
AG Münster, WuM 2012, 372.	The landlord may terminate the tenancy if the tenant creates an unreasonable unhygienic condition in the dwelling.
AG Cologne, WuM 2004, 673.	The landlord may ban a guest of the tenant from house, provided the person has disturbed the domestic peace.

AG Frankfurt a.M., WuM 1995, 396.	A visit over a period of three months is regarded as permanent accommodation.
OLG Frankfurt a.M., NZM 2004, 950; LG Lübeck, NJW-RR 1993, 325; different if the dwelling is also rented for commercial purposes: AG Aachen, ZMR 2007, 41.	The tenant is not allowed to carry on prostitution in the rented dwelling.
AG Wiesbaden, WuM 1998, 315.	If a tenant carries on prostitution in his dwelling, other tenants are entitled to rent reduction,
AG Cologne, WuM 2003, 145.	and to termination without notice period.
BVerfG, NVwZ 2009, 905.	Prostitution inside a dwelling is prohibited, if the dwelling is located within a prohibition area.
BGH, NZM 2013, 456.	Commercial activities of the tenant, which are exercised in a solely for residential purposes rented dwelling and which emerge to the outside, do not have to be tolerated by the landlord.
BGH, NZM 2009, 658.	Landlords are however obligated to permit commercial activities if their effects are not beyond the scope of a usual residential use.
LG Kassel, DWW 2011, 336.	In case of removing an internal wall without the landlords' permission, the tenant takes the risk of a termination.
BayObLG, NJW 1984, 496; BayObLG, ZMR 1983, 352.	Whether the tenant may fix a pamphlet outside the dwelling or not depends on its consent and presentation.
BGH, NJW 1979, 2351; LG Arnsberg ZMR 1980, 182.	The tenant is not obligated to live in the rented dwelling.
BGH, NZM 2011, 151.	The tenant can even use the dwelling just as a storage place for his furniture.
AG Hamburg, NZM 1998, 477.	As long as the tenant still takes care of the dwelling, the landlord cannot terminate the tenancy for non-occupancy.
OLG Stuttgart, NJW-RR 1991, 1226; different: LG Cologne, WuM 1991, 589.	Obligation of the tenant to live in the dwelling in case of cooperative dwellings.
OLG Düsseldorf, NJOZ 2005, 1657.	It is not allowed to live permanently in houses located in areas within the meaning of section 10 (I) BauNVO.
AG Berlin-Schöneberg, judgement of 08-06-2012, Az. 19 C 166/12; AG Tempelhof-Kreuzberg, GE 2010, 416; AG Berlin-Lichtenberg, NZM 2008, 802; AG Aachen, NZM 2004, 339.	Even dummy camera can cause an infringement of the general right of personality, since the impression of being monitored suffices already.
OLG Cologne, NJW 2005, 2997.	Clandestine video surveillance is always prohibited.
LG Berlin, WuM 2005, 663.	The landlord has to prove a concrete imminent danger to his property.

LG Berlin, NZM 2001, 207.	Generally, it is reasonable for the landlord to protect his property by another way, like more frequent controls by the caretaker or the installation a locking system.
BGH, NZM 2011, 512.	Requirements for the lawful installation of a CCTV at a collective doorbell.
BGH, NZM 2003, 277.	The landlord is obliged to conclude a termination agreement, if the tenant can present a suitable new tenant to him.
BGH, NZM 2005, 419; BGH; NZM 2004, 216.	The tenant's right to terminate the tenancy can be excluded in the agreement up to four years (previously five years).
BGH, NJW 2007, 2177.	A fixed-term tenancy cannot be terminated due to ordinary reasons.
LG Bremen, WuM 2006, 621; LG Duisburg, NZM 2002, 214.	Mildew infestation in the dwelling to a substantial extent can justify an extraordinary termination based on a significant endangerment of health.
LG Berlin, GE 2009, 326.	Severe insults against the landlord can justify an extraordinary termination under section 543 (I) BGB.
AG Berlin-Tempelhof-Kreuzberg, GE 2010, 697.	The same applies for insults against employees of the landlord,
LG Munich I, WuM 2006, 524; LG Cologne, NJW-RR 1994, 909.	criminal acts,
AG Warendorf, WM 1996, 412.	threats and
BVerfG, NZM 2002, 61.	wilful wrong reported offences against the landlord.
BGH, NJW 2013, 20.	An ordinary notice due to default in payment in general requires that the tenant is in arrears with an amount of one monthly rent.
BGH, NJW 2008, 508.	A prior warning notice is not necessary in case of section 573 (II no. 1) BGB.
BGH, NJW 2010, 3775; NJW 2003, 2604.	In case of a termination for personal needs, the landlord is generally obligated to offer the tenant suitable replacement accommodation.
LG Berlin, MDR 1989, 1104;	Family members in sense of personal needs are parents,
OLG Karlsruhe, NJW 1982, 889	children,
BGH, NJW 2003, 2604;	brother and sister,
AG Cologne, WuM 1989, 250;	grandchildren,
LG Cologne, WuM 1994, 541;	parents-in-law,
LG Hamburg, WuM 1993, 50;	son- or daughter-in-law,
BGH, NJW 2010, 1290.	niece and nephew.
LG Hamburg, NZM 2011, 33.	Termination has to be based on a reliable plan for the future of the family member.
BayOblG, NJW-RR 1993, 979 (980): AG	Minimum duration the person must stay in

Cologne, WuM 1992, 250 (2 years not enough); LG Landau, NJW-RR 1993, 81 (1 year enough).	the dwelling in order to assume "personal need".
BGH, NZM 2005, 943; BGH, NZM 2013, 22.	Personal needs as a reason for termination means also commercial need.
BVerfG, NJW 1989, 970 (972).	A termination for personal needs is an abuse of rights if the landlord ought to have foreseen his needs at the time of concluding the tenancy contract.
BGH, NZM 2013, 419; BGH, NJW 2009, 1139 (1140).	In case of predictability, a termination because of personal needs within the first three years of the tenancy is an abuse of rights (to date five years).
BVerfG, NJW 1989, 972.	Admissible intention within the meaning of section 573 (II no. 3) BGB:
BGH, NZM 2009, 234.	selling the house or dwelling,
LG Hamburg, WuM 1989, 393.	demolishing the residential building,
AG Neustadt a.d. Aisch, ZMR 2008, 215.	dividing a large apartment into small ones,
BGH, NZM 2004, 25.	fundamental refurbishment measures.
	Cooperatives are entitled to termination if the membership of the tenant ends.
BGH, NZM 2009, 613.	Application of the restriction on notice of termination if rented residential space is sold to a plurality of acquirer in order to circumvent section 577a (I) BGB.
BGH, NZM 2002, 859; BGH, NZM 2005, 538 (540).	In case of a tenant's insolvency proceeding, the landlord may only terminate the tenancy because of defaults in rent payment that arise after the request to open the insolvency proceedings. Other reasons for termination are exempted from this restriction.
BGH, NZM 2009, 314.	The landlord does not lose his right of termination, even if he gives notice only after five months after obtaining knowledge of the reason for termination.
LG Bochum, ZMR 2007, 452.	Great age of the tenant is considered as hardship in terms of section 574 (I) BGB.
BGH, NZM 2005, 143.	The same applies to serious diseases.
BGH, NZM 2009, 660; BGH, NZM 2006, 817; BGH, NZM 2006, 149.	Limitation of the compulsory enforcement on the mere obtainment of possession.
BGH, NZM 2009, 916.	Section 765a ZPO is not applicable to tenancies with cooperatives.
BGH, NJW 1953, 1586.	Granting of protection from eviction establishes only the court permission to continue using the dwelling without a contract and not a continuation of the tenancy.
OLG Stuttgart, NZM 2006, 880.	If the rent payment by the tenant may not be ensured, granting a time limit for vacat-



	ing the dwelling is unreasonable for the landlord.
BGH, NZM 2012, 620.	The procedure prescribed in section 885 (II-IV) ZPO is also applicable to animals.
BVerfG NJW 1993, 1252 (1253); OLG Frankfurt, NJW 1992, 2490; AG Frankfurt a. M., ZMR 2005, 458.	The right to freedom of information (Article 5 (I) GG) is with regard to German tenants already ensured if they can inform themselves via internet, cable or terrestrial television.
BGH, NJW 2004, 937 (939).	Remark, whether the general refusal to allow German tenants the installation of a parabolic antenna is still sustainable.
Case 241/83 Rösler./. Rottwinkel.	Short-term tenancy and jurisdiction.
AG Düsseldorf, NZM 2005, 702.	If the landlord wants to conclude a fixed-term tenancy due to planned owner occupation, the serious intention to do so has to be reflected in the contractual provisions.
AG Augsburg, WuM 2004, 541.	The reinterpretation of a defective fixed-term tenancy into a tenancy contract, which excludes the right of termination for a limited period of time, is not possible.
LG Munich I, NZM 2002, 781.	If the landlord does not communicate information of an expert list of representative rents to justify a rent increase, although one exists, containing information for the dwelling, the demand is void.
AG Bremen, NZM 2008, 730.	A termination on grounds of personal needs is contrary to the requirements of good faith if the landlord could have foreseen his needs at the time of concluding the tenancy contract.
BGH, NZM 2005, 300.	Effectiveness of an extraordinary termination if the tenant is mentally ill.
BGH, NZM 2004, 430 (431).	Reinterpretation of an ineffective extraordinary termination into an ordinary termination.
BGH, WuM 2010, 431.	Solely the facts that the successor has been sentenced to imprisonment and is addicted to drugs do not entitle the landlord to terminate the tenancy extraordinarily pursuant to section 563 (IV) BGB if the successor has always fit into the house community without any problems.

### 9.3. Abbreviations

## A

**AG** – local court  
**AGB** – standard business terms  
**AGG** – General Act of Equal Treatment  
**ALR** – Prussian Civil Code  
**alt.** – alternative  
**Art.** – Article

## B

**BauGB** – Federal Building Code  
**BauNVO** – Land Utilization Ordinance  
**BBSR** – Federal Institute for Research on Building, Urban Affairs and Spatial Development  
**BDSG** – Data Protection Act  
**bef.** – before  
**BetrKV** – Operating Costs Order  
**BFH** – Federal Finance Court  
**BFW** – Federal Association of Free Real Estate Companies and Housing Associations  
**BGB** – German Civil Code  
**BGBI.** – Federal Law Gazette  
**BGH** – Federal Court of Justice  
**BMVBS** – Federal Ministry of Transport, Building and Urban Development  
**BMVI** – Federal Ministry of Transport and Digital Infrastructure  
**BRD** – Federal Republic of Germany  
**BR-Drucks.** – Printed Matter of the Federal Council  
**BT-Drucks.** – Printed Matter of the Federal Parliament  
**BVerfG** – Federal Constitutional Court  
**BVerwG** – Federal Administrative Court  
**II. BV** – II. Regulation on Housing Costs

## C

**ca.** – circa  
**CCTV** – closed circuit television  
**CDU** – Christian Democratic Union  
**CELS** – Common European Sales Law  
**CETS** – Council of Europe Treaty Series  
**cf.** – *confer*, compare  
**CFR** – Charter of Fundamental Rights of the European Union  
**cic** – *culpa in contrahendo*  
**CISG** – United Nations Convention on Contracts for the International Sale of Goods  
**CMBS** – Commercial Mortgage Backed Securities  
**corr.** – corrected  
**CPI** – consumer price index

## D

**DCFR** – Draft Common Frame of Reference  
**DDR** – German Democratic Republic  
**DMB** – German Tenant Association

**DTZ** – Debenham Thouard Zadelhoff

## **E**

**ECHR** – European Convention of Human Rights

**ECtHR** – European Court of Human Rights

**ed.** – edition

**eds.** – editors

**e.g.** – *exempli gratia*; for example

**EGBGB** – Introductory Act to the German Civil Code

**etc.** – *et cetera*

**et seq.** – *et sequens*, and the following one

**EC** – European Community

**ECJ** – European Court of Justice

**EEC** – European Economic Community

**EnEG** – Law on Energy Saving in Buildings

**EnEV** – Regulation on Energy Saving

**EStG** – Law on Income Tax

**EU** – European Union

**EU-SILC** – European Union Statistics on Income and Living Conditions

## **F**

**FernAbsG** – Law on Distance Contracts

**fn.** – footnote

**FreizügG/EU** – Law on the General Free Movement of European citizens

## **G**

**GdW** – Federal Association of German Housing Associations and Real Estate Companies

**GewO** – German Industrial Code

**GG** – German Basic Law

**GVG** – Court Constitution Act

## **H**

**Haus und Grund Deutschland** – Association for the Protection of Owners

**HeizkostenVO** – Regulation on the Calculation of Heating Costs

## **I**

**ibid.** – *ibidem*

**i.c.w.** – in conjunction with

**i.e.** – *id est*; that is

**InsO** – Insolvency Code

**IVD** – German Real Estate Association

## **K**

**KfW** – Reconstruction Credit Institute

**KG** – Higher Regional Court in Berlin

## **L**

**LG** – regional court  
**LVerfG/VerfGH** – Constitutional Court of each *Land*

## **M**

**max.** – maximum  
**min.** – minimum  
**MRVG** – Law on the Improvement of Tenancy Law

## **N**

**NMV** – Law on rent Calculation  
**no.** – number

## **O**

**OJ** – Official Journal  
**OLG** – Higher Regional Court  
**OVG** – Higher Administrative Court

## **P**

**PDS** – Party of Democratic Socialism  
**PECL** – Principles of European Contract Law  
**OVG/VGH** – Higher Administrative Court

## **R**

**rec.** – recital  
**REIT** – Real Estate Investment Trust  
**RGBL** – Imperial Law Gazette  
**RMBS** – Residential Mortgage Backed Securities  
**RStV** – Interstate Treaty on Broadcasting  
**RGZ** – *Reichsgericht* Judgements

## **S**

**s.** – section  
**SCHUFA** – General Credit Protection Agency  
**SPD** – Social Democratic Party of Germany  
**ss.** – sections  
**sqm** – square metre  
**StGB** – German Criminal Code

## **T**

**TFEU** – Treaty on the Functioning of the European Union  
**TMG** – Teleservices Act  
**TV** – television

## **U**

**UStG** – Value Added Tax Act

**UWG** – Law against Unfair Competition

**V**

**var.** – variant

**VAT** – value added tax

**VGH/OVG** – Higher Administrative Court

**Vol.** – Volume

**VVG** – Insurance Contract Act

**VwGO** – Code of Administrative Court Procedure

**W**

**WEG** – Law on Apartment Ownership

**WiStG** – Economic Offences Act

**WoBauG** – Housing Act

**WoBindG** – Law on Commitments regarding Rent Increases and Occupancy

**WoFG** – Law on State Funding of Housing and Housing Construction

**WoFIV** – Regulation on Habitable Surface

**WoGG** – Law on Housing Allowance

**WoVermittG** – Regulation on Housing Agency

**Z**

**ZPO** – Code of Civil Procedure

**ZVG** – Act on Compulsory Auction of Immovable Property