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

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National Report for

SWITZERLAND

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National Report for Switzerland

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1.1 General features

With a size of 41,285 square kilometres, Switzerland is one of the smallest countries in Europe. Only 31% of the total surface area is suitable for human settlement, the rest consists of mountains, lakes, forests and alpine meadows.[1] Settlement and circulation areas cover currently 7.4% of the surface and are increasing.[2] Every second, almost one square meter of additional land is used for settlement purposes. In 2007, each individual required an average area of 407m² for settlement purposes (residential use, traffic, industrial sites, recreation areas, etc.). The area of settled land is expanding faster than the population, because of the increasing number of households, rising personal living space requirements, and the increasing percentage of detached houses for one or two families.[3] The average per-capita living space increased from 34m² in 1980 to 44m² in 2000.[4]

At the end of 2012 the permanent resident population of Switzerland reached a total of 8,039,100.[5] The definition of the permanent resident population includes all Swiss nationals with permanent abode in Switzerland, all foreigners with a residence- or permanent residence permit, or a short stay permit for a minimum period of twelve cumulative months. Additionally, since 2010, it also includes persons in the asylum process who have resided in Switzerland for a total of at least twelve months.[6] The Swiss population has more than doubled in the last century. The Spanish flu in 1918 and the exodus caused by the economic recession in 1975-1977 were the only two events to cause a decline in the number of the Swiss population since the foundation of modern Switzerland in 1848.[7]

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).

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[1] E. Hauri, V. Steiner & M. Vinzens, *Human settlement in Switzerland, Spatial Development and Housing* (Berne: FOH, 2006), 6.
[2] Survey for the land-use map (Arealstatistik) of 2004/09 (Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/02/03/blank/data/01.html [last retrieved 2 December 2013]).
[3] Hauri, Steiner & Vinzens, *Human settlement in Switzerland,* 9; Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/02/03/blank/key/siedlungsflaeche_pro_einwohner.html (last retrieved 2 December 2013).
[4] Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/21/02/ind32.indicator.70401.290102.html?open=702#702 (last retrieved 2 December 2013).
[5] Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/en/index/themen/01/02/blank/key/05.html (last retrieved 2 December 2013).
[6] Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/01/11/def.html#resultstart (last retrieved 2 December 2013).
[7] Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/en/index/themen/01/02/blank/key/bevoelkerungsstand.html (last retrieved 2 December 2013).

Housing production and construction costs

About three quarters of the Swiss dwelling stock was built after the Second World War to meet the increasing demand for dwellings resulting of the rapidly growing number of households. Although not suffering from wartime destruction, Switzerland thus has a comparatively new and modern housing stock.[8] Both world wars were followed by a housing shortage because of decreased construction activity during the wars. As a reaction to rising prices, due to supply not meeting demand, the Federal Council enacted rules to protect tenants and regulate rents (see section 5).

Construction costs have increased from 1969 to 2005 by about 330%. This increase is mostly due to higher actual building costs, but also due to changed laws and standards, as well as rising demands of comfort. Residential housing construction costs in Switzerland are considerably higher than in all neighbouring countries.[9] The total construction spending reached over CHF 61 billion in 2012. About one third of these costs were spent by the public sector and the rest by the private sector.[10]

The number of single family houses increased from 1990 to 2011 by more than a third to a total of 953,813 houses. The number of multifamily houses rose in the same time from 330,493 to 426,112, whereby more than two thirds of the new multifamily houses were built in the second half of this time period. The number of houses with mixed use (mostly residential buildings with secondary commercial use) slightly decreased in the last decade to a total of 276,939 in 2011.[11]

In 1990 there were a total of 3,159,977 housing units[12] in Switzerland and ten years later there were almost 410,000 units more. Until another ten years later, the number of housing units increased again by over half a million to a total of 4,079,060 in 2010, and 4,131,342 units in 2011.[13]

The demand for dwellings decreased in the beginning of the 1990s, because incomes were stagnating and the population increased only slowly. Nevertheless the housing production remained at a high level and peaked in 1994 with more than 47,000 new homes. As a result, the vacancy rate increased sharply and real-estate

[8] E. Werczberger, 'Home Ownership and Rent Control in Switzerland', *Housing Studies*, vol. 12 no. 3 (1997): 342; Table 'Bewohnte Wohnungen nach Bewohnertyp und Bauperiode' (Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/22/lexi.topic.1.html (last retrieved 22 February 2014).

[9] Zürcher Hochschule für angewandte Wissenschaften, 'Baukostenentwicklung in der Schweiz seit 1970 und deren Ursachen' (Grenchen: FOH, 2009), 4 and 7.

[10] Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/04/blank/key/bauausgaben0/nach_auftraggeber.html (last retrieved 2 December 2013).

[11] Table 'Gebäude nach Kategorie, Bauperiode und Geschosszahl' (Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/02/blank/key/gebaeude/art_und_groesse.html [last retrieved 2 December 2013]).

[12] As housing units count all rooms forming a constructional unit and having an own access (either from outside or from inside of a building, like a staircase). The housing unit has a kitchen or kitchenette. A single-family house with a secondary suite ('Einliegerwohnung') is counted as multi family dwelling. All dwellings are taken into account, private- and collective households alike (Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/11/def.html [last retrieved 2 December 2013]).

[13] Table 'Wohnungen nach Zimmerzahl und Wohnfläche' (Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/02/blank/key/wohnungen/zimmerzahl_und_flaeche.html [last retrieved 2 December 2013]).

prices dropped. From 1996 onwards housing production collapsed, falling to its lowest point in 2002 with fewer than 29,000 new buildings.[14]

From 1998 onward, the demand for housing increased again, mainly due to population growth as a result of higher immigration. While in 1997 the Swiss resident population increased only by a good 15,000 persons, in 2002 it increased by 58,000 persons. And since 2008 the population growth has levelled out at approximately 85,000 persons or roughly one percent a year. Concerning population growth, Switzerland is one of the most dynamic countries in Europe.[15]

Only in 2003 the housing production reacted to the increased demand for dwellings and between 2006 and 2012, 40,000-47,000 new dwellings were built a year.[16] The vacancy rate had peaked in 1999 at 1.85% and was rapidly reduced as a result of the increased demand for dwellings and lies at around one percent since 2003.[17]

Home ownership rate

The home ownership rate in Switzerland is very low. After dropping from 37% in 1950 to 29% in 1970 as a result of strong immigration of labour forces, it has been rising ever since but is still comparatively low.[18] The rate increased from 31.3% in 1990 to 34.6% in 2000 and 36.8% in 2012.[19]

There are significant differences in the home ownership rates of urban and rural areas. The canton Geneva and the canton Basel-City, consisting mainly of urban areas, have home ownership rates of only 17.5% and 14.9% respectively, while in predominantly rural cantons the home ownership percentages rise to 55.2% in Jura and 56.8% in Valais. The rates of nineteen of the twenty-six cantons are above the Swiss national average, reflecting the heavy influence of the low rates of the cantons Basel-City, Geneva and Zurich.[20]

One of the reasons why the home ownership rate in Switzerland is still so low is that it has been possible to purchase condominium ownership (*Stockwerkeigentum*) in all of Switzerland only since 1965 (before 1965 it was only possible in the canton Valais, which still now has the highest home ownership rate in Switzerland). This has resulted in extraordinarily low rates of home ownership especially in cities, where there is a high ratio of apartment buildings. The number of condominiums is increasing rapidly; in 2000 there were already twice as many and in 2011 more than

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[14] Hauri, Steiner & Vinzens, *Human settlement in Switzerland*, 43 f. See also section 2.5 – Current figures on repossession.

[15] Hauri, Steiner & Vinzens, *Human settlement in Switzerland*, 45; Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/01/02/blank/key/bevoelkerungsstand.html (last retrieved 2 December 2013).

[16] Hauri, Steiner & Vinzens, *Human settlement in Switzerland*, 45; Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/04/blank/key/Wohnungsbau/neu-_und_umbau.html (last retrieved 2 December 2013).

[17] Hauri, Steiner & Vinzens, *Human settlement in Switzerland*, 45; Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/02/blank/key/leerwohnungen/entwicklung.html (last retrieved 2 December 2013).

[18] S. Fahrländer, *Hedonistische Immobilienbewertung, Eine empirische Untersuchung der Schweizer Märkte für Wohneigentum 1985 bis 2005* (Munich: Martin Meidenbauer Verlagsbuchhandlung, 2007), 1.

[19] Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/03/blank/key/bewohnertypen/nach_region.html (last retrieved 2 December 2013).

[20] Hauri, Steiner & Vinzens, *Human settlement in Switzerland*, 38; Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/03/blank/key/bewohnertypen/nach_region.html (last retrieved 2 December 2013).

three times as many units as in 1990. Another reason for the low home ownership rate is that the rental market functions well and housing units of good quality are available.[21] Furthermore, house prices (especially for single-family houses which are preferred by owner-occupiers) are relatively high compared to the available income, due to scarcity of developable land and high construction quality standards.[22] Also, at 23.3% in 2012, foreigners – who are less likely to own a housing unit in Switzerland than Swiss nationals – make up a big part of the resident population. In 2011, only about 6.4% of the owner-occupying households, but 25.7% of all rental households were foreign households.[23]

The transformation of rental dwellings into owner-occupation is very moderate, since it is not encouraged by policy and also not common practice. Tenants have no statutory right of pre-emption on their rental dwellings and the state's housing stock is too small to make a difference if the state-owned dwellings were sold out.[24]

The low home ownership rate does, however, not result from a lack of desire of being homeowners: According to a survey in 2002, 73% of the respondents preferred owning to renting.[25]

- 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)

Migration within the country

On average, 5.7% of the population change their residence within Switzerland a year. Between 1998 and 2002 more people moved to cities than to rural areas. Before and after that period, the trend was vice versa.[26]

Immigration and Emigration

At the end of 2012, 23.3% of the permanent resident population of Switzerland were foreigners, the high percentage being a result of big waves of immigration, restrictive naturalization policy and high birth and low death rates of the foreign population. 85.1% of these 1,870,000 foreigners living in Switzerland were of European origin, and three quarters of those were nationals of an EU or EFTA member state. The largest groups of foreigners are nationals of Italy (15.6%), Germany (15.2%) and

[21] Hauri, Steiner & Vinzens, *Human settlement in Switzerland*, 38.
[22] S. C. Bourassa & M. Hoesli, 'Why Do the Swiss Rent?', *The Journal of Real Estate Finance and Economics*, vol. 40:3 (2010): 287 and 293; 'Baukostenentwicklung in der Schweiz seit 1970 und deren Ursachen', 7.
[23] Hauri, Steiner & Vinzens, *Human settlement in Switzerland*, 38; Federal Office for Housing, 'Personenfreizügigkeit und Wohnungsmarkt Schweiz, Entwicklung 2011', (Berne: FOH, 2012), 2.
[24] J. E. Van Wezemael, 'Switzerland', in *Management of Privatised Housing: international policies & practice*, ed. V. Gruis, S. Tsenkova & N. Nieboer (Wiley-Blackwell, 2009), 113.
[25] U. Bieri, *Wohneigentumsförderung erwünscht, konkrete Umsetzung umstritten* (Berne: gfs.bern, 2002), 25. Although on the other hand, according to a survey in 2006, 96% of the population is satisfied or even very satisfied with their actual living situation (U. Bieri, *Grundsätzliche Zufriedenheit, punktueller Verbesserungsbedarf und dezidierte Vorstellungen rund um die eigene Wohnsituation, Schlussbericht "Wohnmonitor" im Auftrag des HEV Schweiz* [Berne: gfs.bern, 2006]). See also section 1.4– Quality of housing in general, SILC-Statistics.
[26] J. Chételat & P. Dessemontet, *Monitoring Ländlicher Raum Schweiz, Themenkreis V1: Wanderungen zwischen Stadt und Land* (Berne: ARE, 2006), 2 f.

Portugal (12.7%). About 16.5% of all resident aliens originally come from one of the successor states of former Yugoslavia.[27]

In 2012, 149,100 people immigrated into Switzerland and 103,900 emigrated. About 16% of those who immigrated and 28% of those who emigrated were Swiss nationals. In the same year, 90,500 nationals of EU-27 or EFTA countries immigrated into Switzerland and 48,600 emigrated. Of the remaining European countries, there were 10,200 people immigrating and 6,000 emigrating.[28]

Swiss population grows rapidly (see above). In February 2014 the Swiss people adopted the popular initiative 'Gegen Masseneinwanderung'[29], which aimed at stopping mass immigration. According to these new constitutional provisions – which are formulated in a very open way and have to be implemented by the Federal Council and parliament within three years – immigration should be restricted by means of quantitative limits and quotas. [30] Until the end of 2014 a draft law shall be submit for public consultation. Since the text of the initiative contradicts the agreement on the free movement of persons, this agreement has to be renegotiated.[31] Until the new implementation legislation is in force, the agreement on the free movement of persons remains in place. Also, entitlements already granted continue to be valid.[32]

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?

In Switzerland, statistical data is provided by the Federal Statistical Office (FSO).[33]

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[27] Table 'Ständige ausländische Wohnbevölkerung nach Staatsangehörigkeit' (Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/01/07/blank/key/01/01.html [last retrieved 2 December 2013]).

[28] Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/01/07/blank/key/02/01.html (last retrieved 2 December 2013)

[29] The text of the initiative is available on the website of the Federal Chancellery (http://www.admin.ch/ch/d/pore/vi/vis413t.html [last retrieved 20 February 2014]).

[30] Press Release Federal Council, 9 February 2014, 'Change in immigration system: Yes to popular initiative aimed at stopping mass immigration'.

[31] A termination of the agreement on the free movement of persons could not be done isolated from other agreements with the EU (Bilateral Agreements I of 1999, which contain agreements mainly about liberalisation and market opening, see website of the Directorate for European Affairs http://www.europa.admin.ch/themen/00500/index.html?lang=en [last retrieved 20 February 2014]).

[32] Press Release Federal Council, 14 February 2014, 'Von-Wattenwyl-Gespräche vom 14. Februar 2014'.

[33] The Buildings and Dwellings survey used to be part of the population census that took place every ten years. Since 2009 however, the system has changed and the data is now provided by the Buildings and Dwellings statistic (BDS), which is based on the Federal Register of Buildings and Dwellings (which includes all buildings totally or partially used for habitation and is based on the data of the population census in the year 2000 and updated on the basis of reports of the cantonal and municipal construction authorities about all dwellings which have been built, converted or demolished since 2001 [Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/00/05/blank/01/03.html, last retrieved 2 December 2013]) combined with data from the harmonized registers of residents and the structural survey of the population census (Federal Statistical Office,

In 2011 there were 4,131,342 housing units in Switzerland. 85.6% of them were in permanent use, the rest were only temporarily or not at all inhabited.[34] Of these 3,534,508 permanently inhabited housing units, there were only 36.8% owner-occupied.[35] The predominant tenure structure is renting.

1.4 Types of housing tenures

- Describe the various types of housing tenures.

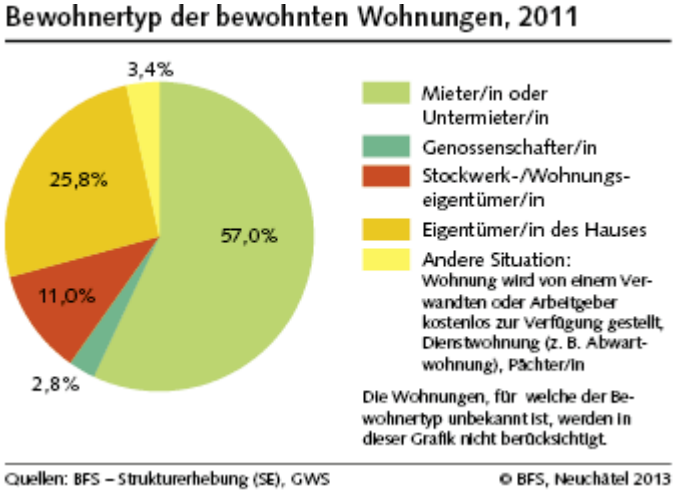

Figure 1: Types of housing tenures[36]

In 2011, 36.8% of the dwellings were owner-occupied. A good 70% of all owner occupiers owned a house in full- or co-ownership, the rest had condominium ownership.

The share of dwellings inhabited by rental tenants was 59.8% in 2011, whereby almost 5% of them were living in apartments of cooperatives they were a member of.

- Home ownership
  - How is the financing for the building of homes typically arranged (e.g. own equity, mortgage based loan, personal loan, mix, other)
  - Restituted and privatized ownership in Eastern Europe

Financing of owner-occupied housing – overview

Home ownership is typically financed with own equity combined with mortgage loans. The household mortgage debt to GDP ratio is one of the highest in Europe, at about 120% in 2012.[37] In 2003, 83% of the owner-occupied dwellings were with mortgage. Of the dwellings built after 2000, even 96% are with mortgage.[38] This high

http://www.bfs.admin.ch/bfs/portal/de/index/infothek/erhebungen__quellen/blank/blank/gws/01.html [last retrieved 2 December 2013]).

[34] The other housing units were either second homes or not occupied. Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/03/blank/key/bewohnertypen/entwicklung.html (last retrieved 2 December 2013); Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/02/blank/key/wohnungen/zimmerzahl_und_flaeche.html (last retrieved 2 December 2013).

[35] See section 1.2 – Home ownership rate.

[36] Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/03/blank/key/bewohnertypen/entwicklung.html (of 2 December 2013).

[37] M. Ball, *European Housing Review 2012* (London: RICS, 2012), 64.

[38] F. Gerheuser, *Wohnausgaben der Eigentümerhaushalte, Ergebnisse der Mietpreis-Strukturerhebung 2003* (Neuchâtel: FSO, 2006), 8.

percentage is in part due to the fact that mortgage interests can be deducted from the taxable income.[39] According to a study published in 2013, half of the participating homeowners would repay partly or in whole their mortgage debt if tax deductions could not be made anymore.[40]

Own equity

Next to savings and loans from relatives and friends and anticipatory succession, own equity can also be raised by early withdrawal of pension fund assets of the occupational pension scheme or tax privileged savings of the private pension schemes if the so financed property is self-inhabited and used as principal residence:

Early withdrawal of pillar 2 and 3a assets

The occupational pension scheme (the so called 'second pillar') [41] and the Private pension schemes (the 'third pillar') [42] are two of the three pillars of the Swiss social security system (Art. 111 s. 1 Federal Constitution[43]). The occupational pension scheme and the Federal Old-age, Survivors' and Invalidity Insurance (the 'first pillar')[44] together are meant to ensure the maintenance of the former living-standard in jointly providing about sixty percent of the last salary. [45]

Pillar 2[46] and pillar 3a[47] capital can be withdrawn in advance for the purchase or construction of owner-occupied residential property (including condominium-ownership) and for the repayment of mortgages, as well as for the acquisition of

[39] Federal Tax Administration, 'Kurzer Überblick über die Einkommenssteuer natürlicher Personen' (Berne: SSK, 2011), 8.

[40] Y. Seiler Zimmermann, *Nutzung von Vorsorgegeldern zur Finanzierung von selbstgenutztem Wohneigentum, Eine deskriptive Analyse* (Luzern: Verlag IFZ – Hochschule Luzern, 2013). The study included the answers of 8,274 home owners.

[41] The second pillar is mandatory for salaried persons whose annual income exceeds a certain threshold (In 2013 this is CHF 21,060). Additional to this, the salaried person – among other things – has to be subject to the fist pillar insurances and have a job contract that exceeds three months. For self-employed persons it is not mandatory, but a minimal insurance on an optional basis exists.

[42] The third pillar is voluntary and divided into two parts: the bound voluntary insurance (pillar 3a) and the personal savings (pillar 3b). The latter includes savings accounts, life insurances, etc., provides no tax privileges and is under no restriction on disposition. Savings in pillar 3a are subject to a reduced tax rate and (as well as pillar 2 savings) can only be withdrawn before the normal retirement age under certain restricted conditions, for example for buying a self-occupied home or repayment of mortgages for such property. For salaried persons, pillar 3a supplements the first two pillars; to the self-employed, the third pillar is of more importance since it is a substitute for the second pillar (Federal Social Insurance Office, http://www.bsv.admin.ch/themen/vorsorge/00039/00419/index.html?lang=de [last retrieved 2 December 2013]).

[43] Federal Constitution of the Swiss Confederation (Bundesverfassung der Schweizerischen Eidgenossenschaft, Const., SR 101).

[44] The first pillar is mandatory for everybody and covers the basic needs (insurance of the risks of old age, disability, loss of income).

[45] Federal Social Insurance Office, http://www.bsv.admin.ch/themen/vorsorge/00039/00335/index.html?lang=en (last retrieved 2 December 2013).

[46] Art. 30c Federal Law on Occupational Old Age, Survivors' and Invalidity Pensions (Bundesgesetz über die berufliche Alters-, Hinterlassenen- und Invalidenvorsorge, BVG, SR 831.40); Ordinance on the use of occupational pension fund assets to promote home ownership (Verordnung über die Wohneigentumsförderung mit Mitteln der beruflichen Vorsorge, WEFV, SR 831.411).

[47] In 2005 about 40% of the working population subject to taxation contributed to the pillar 3a scheme. The withdrawal for home ownership purposes is subject to a reduced tax rate (M. Baur et al., *Wohneigentumspolitik in der Schweiz, Bericht der Eidgenössischen Steuerverwaltung des Bundesamtes für Sozialversicherungen und des Bundesamtes für Wohnungswesen* [Berne: FTA, 2010], 18 f.).

share certificates in housing cooperatives or shares of a tenant public limited company under the condition of occupying one of the apartments financed this way.[48] An early withdrawal can only be made for property which is used by the insured person (and family) as a principal residence. If the property is sold again, the amount withdrawn has to be paid back, unless the property is transferred to another pension fund beneficiary.[49]

In 2007 and 2008, each year about 35,000 persons made early withdrawals from the second pillar savings. In total, CHF 2.6 billion were withdrawn per year. The average amount of the early withdrawal lies between CHF 70,000 and 75,000.[50] According to an analysis by the Federal Social Insurance Office in 2003, early withdrawals are particularly often made by threshold households, which otherwise probably would not have been able to purchase or construct residential property.[51]

The early withdrawal of pillar 2 and 3a assets shall enable persons with low capital but the prospect of increasing income to acquire home ownership. This can bear risks if, for example, an unanticipated increase of interest rates raises the housing costs or an economic downturn leads to dismissals or wage cuts. This may force the homeowners to sell the properties if they are not able to pay the amortization and interest rates. Rising housing costs also have the effect that there is less money left to rebuild the pillar 2 or (mostly for self-employed) pillar 3a assets, which can lead to massive reductions of the living standard once in retirement.[52]

Mortgage loans

For financing a property, at least twenty percent of the capital cost or property value has to be paid from own assets, for banks usually provide mortgage loans of up to eighty percent: a first mortgage of 65% of the capital and a second mortgage of 15%, with a higher interest rate.[53]

Mortgage loans are provided by ordinary banks since there are (except for the Bond Issuing Cooperative for the Non-Profit Housing Builders) no private or public institutions dedicated exclusively to financing residential housing.[54]

In 2012 the Swiss Bankers Association drew up a new self-regulatory system saying that a borrower has to make a minimum down payment of ten percent out of equity capital not originating from pledging or withdrawing second pillar assets (see below).

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[48] Of all early withdrawals of second pillar assets, one third was used for amortization of mortgages, almost 29% were used to finance a new house or apartment and 22% for an already existing one. 15% were used for renovations and expansion of home ownership and only 0.7% were used for acquisitions of share certificates in housing cooperatives or shares of a tenant public limited company (D. Hornung et al., 'Wirkungsanalyse der Wohneigentumsförderung mit Mitteln der beruflichen Vorsorge', *Beiträge zur sozialen Sicherheit, Forschungsbericht Nr. 17/0* [Berne: FSIO, 2003], 19).

[49] Federal Social Insurance Office, http://www.bsv.admin.ch/themen/vorsorge/00039/03134/index.html?lang=de (last retrieved 2 December 2013); Art. 3 s. 3 Ordinance on the tax deductibility of contributions to recognized forms of benefit schemes (Verordnung über die steuerliche Abzugsberechtigung für Beiträge an anerkannte Vorsorgeformen, BVV 3, SR 831.461.3)

[50] Baur et al., 42 f. (Annex 2: 'Statistik über die Vorbezüge von Geldern der beruflichen Vorsorge im Rahmen der Wohneigentumsförderung'). There are no figures on early withdrawals of pillar 3a assets available.

[51] Hornung et al., *Wirkungsanalyse der Wohneigentumsförderung mit Mitteln der beruflichen Vorsorge*,15.

[52] Y. Seiler Zimmermann, 'Vorsorgegelder zur Finanzierung von Wohneigentum: Wie und von wem werden sie beansprucht?' *Die Volkswirtschaft, Das Magazin für Wirtschaftspolitik* 5 (2011): 59 f.

[53] Hauri, Steiner & Vinzens, *Human settlement in Switzerland*, 60.

[54] Hauri, Steiner & Vinzens, *Human settlement in Switzerland*, 60.

Additionally, the mortgage is to be paid down to two thirds of the loan value within a maximum of twenty years. These regulations were approved by the Swiss Financial Market Supervisory Authority FINMA as a minimum regulatory standard, which makes it binding for all banks as of 1 July 2012. This measure is intended to prevent low-income households from purchasing residential property that they could not actually afford and then subsequently losing it, together with their pension assets, in a real estate crisis.[55]

Pledging of pillar 2 and 3a assets

Vested benefits of the pension fund account[56] and of the private retirement savings account of pillar 3a[57] can be pledged as collateral to finance a larger mortgage than the standard 80%. With pledging instead of withdrawing them, the retirement assets are not being reduced and therefore, as long as the mortgage interest rates are paid, the full benefits are preserved. On the other hand, the higher level of debt leads to higher interest rates and usually also to higher amortization payments.[58] Pledging of pillar 2 and 3a funds plays a less significant role than early withdrawals.[59]

Indirect amortization

Instead of repaying the mortgage loan directly to the bank, the borrower often has the possibility to amortize the loan indirectly by paying the rates into their own pillar 3a account, to which the bank has a preferred claim. This way of amortization can be advantageous for the borrower if the income earnings of the pillar 3a assets together with the tax advantages exceed the advantages of the lower mortgage rate of a loan with direct amortization.[60]

(Mortgage guarantee co-operative)

According to the Federal Act for the promotion of Affordable Housing (WFG)[61] there are two types of support for (normal) home ownership provided: interest-free or low-interest loans and guarantees for bank mortgages by two cooperatives that are co-founded by the Swiss government. These guarantees are backed by a state counter-guarantee. However, the first type of support never came into effect because of the 2003 relief program for the federal budget, and the second type of support is currently suspended because of the low demand for it.[62]

[55] Press release Swiss Financial Market Supervisory Authority, 6 January 2012, 'Mortgage financing: FINMA recognizes new minimum standards'; http://www.swissbanking.org/en/home/dossiers-link/issues/hypothekarmarkt.htm (last retrieved 2 December 2013).
[56] Art. 30b BVG.
[57] Art. 4 s. 2 BVV 3 in conjunction with Art. 30b BVG.
[58] Seiler Zimmermann, *Vorsorgegelder zur Finanzierung von Wohneigentum: Wie und von wem werden sie beansprucht?*, 59.
[59] Seiler Zimmermann, *Vorsorgegelder zur Finanzierung von Wohneigentum: Wie und von wem werden sie beansprucht?*, 62; Hauri, Steiner & Vinzens, *Human settlement in Switzerland*, 64.
[60] S. C. Bourassa, M. Hoesli & D. Scognamiglio, 'Housing Finance, Prices and Tenure in Switzerland', *Journal of Real Estate Literature*, vol. 18 no. 2 (2010): 272.
[61] Bundesgesetz über die Förderung von preisgünstigem Wohnraum (WFG, SR 842). See also section 3.6 Subsidization.
[62] Hauri, Steiner & Vinzens, *Human settlement in Switzerland*, 63 f.; Federal Office for Housing, http://www.bwo.admin.ch/themen/wohnraumfoerderung/00150/00152/index.html?lang=de (last retrieved 12 December 2013). See also section 3.6 Subsidization.

Building loan contract (*Bausparvertrag*)

Tax privileged building loan contracts are prohibited by the Tax Harmonisation Act since 2005.[63] In 2012 there were two popular initiatives concerning building loan contracts: The 'Bauspar-Initiative' would have given the cantons the possibility to promote home ownership via building loan contracts, and the 'Eigene vier Wände dank Bausparen'-initiative was intended to oblige the confederation and the cantons to make mandatory tax deductions for building savings deposits for the first-time purchase of self-inhabited home ownership.[64] The Swiss people voted down both initiatives following the opinion of the Federal Council, that the existing means already sufficiently met the constitutional obligation of promotion of home ownership.[65]

In some cantons however, home ownership is currently still promoted via direct payments at the first-time purchase of self inhabited homes and/or via bank-specific special conditions. The canton Basel-Land furthermore has tax privileges for bound savings. These privileges must be given up now that the two above-mentioned initiatives were voted down.[66]

- Intermediate tenures
  - Are there intermediate forms of tenure classified between ownership and renting? e.g.
    - Condominiums (if existing: different regulatory types of condominiums)
    - Company law schemes: tenants buying shares of housing companies
    - Cooperatives

Rights in rem – Ownership

Full ownership

Apart from full ownership by one person, several persons may hold ownership of an object together:

Co-ownership

According to Art. 646 s. 1 Swiss Civil Code (CC)[67] 'co-ownership exists where several persons own a share in an object which is physically undivided.' The persons are not in a pre-existing legal relationship to each other and every co-owner owns a purely arithmetical share of the property. One co-owner's right of disposal of the share is independent from the others.[68] If a co-owner wants to sell the share however, the

[63] Bundesgesetz über die Harmonisierung der direkten Steuern der Kantone und Gemeinden (StHG, SR 642.14); K. Delbiaggio & G. Wanzenried, *Bausparen: Eine ökonometrische Wirkungsanalyse kantonaler Bausparmodelle* (Berne: FOH, 2009), 1.
[64] Fact sheet 'Bauspar-Initiative' (Berne: FDF, 2012); Fact sheet 'Eigene vier Wände dank Bausparen' (Berne: FDF, 2012).
[65] The 'Bauspar-Initiative' was voted down with 55.8% of all votes (http://www.admin.ch/ch/d/pore/va/20120311/index.html [last retrieved 2 December 2013]); the Initiative 'Eigene vier Wände dank Bausparen' was voted down with 68.9% of the votes and also by all cantons (http://www.admin.ch/ch/d/pore/va/20120617/index.html [last retrieved 2 December 2013]).
[66] Delbiaggio & Wanzenried, 2 f.; Leaflet 'Aktuelles zum Bausparen' (Liestal: Steuerverwaltung Kanton Basel-Land, 2012).
[67] SR 210.
[68] Except for co-ownership of spouses (Art. 201 s. 2 CC).

other co-owners have a right of pre-emption.[69] Co-ownership is mainly located in rural areas, but also in periurban and touristic municipalities.[70]

Time-sharing:

In Swiss property law, there are no specific rules on time-sharing of property. However, holiday homes for example can be in co-ownership, with the co-owners agreeing in the rules on the use and administration of the property on which one of them has the right to use the home on what dates.[71]

Condominium ownership

'Condominium is a form of co-ownership of immovable property that gives the co-owner the exclusive right to make sole use of specific parts of a building thereon and design the interior of such parts' (Art. 712a s. 1 CC). Where there are no specific rules for condominium ownership, the rules of co-ownership are applicable. Every person holds co-ownership of the whole property. In addition to this, every condominium unit is connected with a special right for the owner to make exclusive use of this part of the building (self-contained individual storeys or parts of a storey with own access).[72] Also terraced houses can be in condominium ownership.[73] Condominium owners are allowed to manage, use and design the structure of their parts of the building as they wish as long as no other condominium owner is affected or the common parts of the buildings, fittings and installations are damaged or impaired.[74] In legal relations, a condominium is considered an individual parcel of land.[75] Condominium owners have the right of disposal of their share of the property like a sole owner. In contrast to co-ownership, the other condominium owners of a property have no statutory right of pre-emption. However, such a right can be agreed on by the condominium owners and entered under priority notice in the land register.[76]

Condominium ownership of primary residences is mainly located in touristic municipalities, where in 2000 almost every fifth housing unit was inhabited by condominium owners as principal residence. Also many condominiums are located in suburban and periurban municipalities.[77]

Joint ownership (Gesamteigentum)

Joint ownership only applies if a community of joint owners already exists before the property is obtained and is especially applicable to spouses who agreed on community property, to communities of heirs and to simple partnerships. Each joint

[69] C. Brunner & J. Wichtermann, *Basler Kommentar zum Schweizerischen Privatrecht, Zivilgesetzbuch II (Art. 457-977 ZGB, Art. 1-61 SchlT ZGB)*, 4th ed. ed. H. Honsell, N. P. Vogt & T. Geiser (Basel: Helbing Lichtenhahn, 2011), Art. 646 CC § 1 and 21.
[70] According to an analysis of the Gebäude- und Wohnungserhebung 2000, this might be in consequence of traditional division of inheritances (H.-R. Schulz & P. Würmli, *Miete und Eigentum, Detailauswertung Gebäude und Wohnungserhebung 2000* [Basel: FSO & FOH, 2004], 70).
[71] Brunner & Wichtermann, *BSK ZGB*, Art. 646 § 6 f. However, this possibility is not entirely undisputed.
[72] Art. 712b s. 1 CC; R. Bösch, *BSK ZGB*, Vor Art. 712a-t CC § 5 and 6.
[73] M. Pellascio, *ZGB Kommentar – Schweizerisches Zivilgesetzbuch*. 2nd ed. ed. J. Kren Kostkiewicz, P. Nobel, I. Schwander & S. Wolf (Zurich: Orell Füssli, 2011), Art. 712a CC § 6.
[74] Art. 712a s. 2 CC.
[75] J. Schmid & B. Hürlimann-Kaup, *Sachenrecht,* 4th ed. (Zurich: Schulthess, 2012), 253.
[76] Art. 712c s. 1 CC; Schmid & Hürlimann-Kaup, *Sachenrecht*, 260.
[77] Schulz & Würmli, 71.

owner owns a part of the property not externally divided.[78] The community of joint owners has no legal personality.[79]

Limited rights in rem (*Beschränkte dingliche Rechte*) – Personal Servitudes (*Personaldienstbarkeiten*)

Usufruct (Nutzniessung)

According to Art. 755 s. 1 CC, 'the usufructuary has the rights of possession, use and enjoyment of the object.' The owner only has bare ownership of the object. The usufructuary can, for example, rent out the object to a third party without the consent of the owner. On the other hand, it is the usufructuary who has to bear most of the costs and must preserve the object.[80]

Concerning residential properties, the main application of the usufruct is the usufruct granted to the surviving spouse of the estate of the deceased and the house or apartment in which the spouses lived.[81]

Right of residence (Wohnrecht)

The right of residence is similar to the usufruct, but the beneficiary only has the right to live in all or part of the building without full enjoyment of the object. Unless otherwise provided, the provisions of the law of the usufruct are applicable. The right of residence is non-transferable and non-inheritable. The beneficiary of the right of residence has to cover only the normal maintenance-costs of the dwelling.[82]

The right of residence is also similar to a rental contract; the main difference being that the rental contract gives an obligatory right while the right of residence gives a real property right.[83]

Company law schemes

Tenant public limited company (Mieteraktiengesellschaft)

Holding shares of a corporation combined with a rent (or a right defined in the statutes) for an apartment held by this corporation can be economically close to condominium ownership. Instead of a real right, however, the tenant's rights are based only on the rental contract with the corporation and the rights as a shareholder. Before the introduction of condominium ownership at the national level in 1965, tenant public limited companies played a role, especially in the French-speaking part of Switzerland.[84]

Cooperatives and other non-profit housing organizations

Concerning the organizations involved in the construction of public utility housing (*gemeinnütziger Wohnungsbau*, non-profit housing), see also section 3.6 Subsidization. Most of the non-profit housing providers profited at some point from

[78] Art. 653 s. 3 CC; Schmid & Hürlimann-Kaup, *Sachenrecht*, 189 f.
[79] Where a legal entity acquires ownership of a property, it is in full ownership of that legal entity.
[80] Schmid & Hürlimann-Kaup, *Sachenrecht*, 361 f.
[81] Schmid & Hürlimann-Kaup, *Sachenrecht*, 365; R. M. Müller, *BSK ZGB*, Art. 765 CC § 6. See also Art. 219 s. 2, 244 s. 2, 473 s. 1 and 612a s. 2 CC.
[82] Schmid & Hürlimann-Kaup, *Sachenrecht*, 365 – 367; M. Mooser, *BSK ZGB*, Art. 776 CC § 10.
[83] Schmid & Hürlimann-Kaup, *Sachenrecht*, 367.
[84] A. Koller, 'Wesen und Strukturen des Schweizerischen Stockwerkeigentums', *AJP* (2004): 933 f.; 'Botschaft zur Besteuerung bei der Liquidation von Mieter-Aktiengesellschaften und zur Änderung der Besteuerung von Immobilien-Anlagefonds mit direktem Grundbesitz' of 12 May 1999 (BBl 1999 5966), 5970.

direct or indirect support by the state.[85] Therefore, in this report non-profit housing is generally considered to be housing with a public task.

Financing of cooperative housing:

Apart from the mortgage loans from banks, which can be increased by some federal aid measures (see below and section 3.6 Subsidization), own equity is to be raised by the members of the cooperative. If these members intend to live in the cooperative-apartments, equity can also be withdrawn from the pillar 2 or 3a assets[86] (see above).

Federal aid is provided in terms of a working capital fund financed by the confederation and operated by two umbrella organizations representing the non-profit housing providers, a mortgage guarantee co-operative for non-profit housing also operated by these two umbrella organizations and a bond issuing co-operative raising funds for non-profit housing entities. For further information about these federal aids, see section 3.6 Subsidization. Another source of financing is self-help provided by foundations financed with contributions from other non-profit housing entities with the aim of supporting non-profit housing entities in purchasing and constructing or renovating cooperative dwellings.[87]

In addition to federal aid, several cantons, cities and municipalities have their own means of supporting non-profit housing organizations (see section 3.6 Subsidization).

- 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?

For rental tenures which are subsidized *directly* – that is only by means of the WEG[88], since the means of direct subsidization of the currently applicable WFG are suspended (see section 3.6 Subsidization) – the rent is under regulatory control and determined by the Federal Office for Housing (FOH) and the tenant can have the legality of the rent or rent adjustments reviewed by the FOH.[89] Disputes about accessory charges, however, are subject to the ordinary procedure.[90]

Rental tenures supported through *indirect* subsidization (for example by advantageous loans for organizations involved in the construction of non-profit housing) are subject to the ordinary procedure.[91]

Apartments subsidized by cantons or municipalities are subject to provisions made by these administrations.[92]

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[85] M. Landolt, 'Wer profitert, trägt Verantwortung', *www.hev-schweiz.ch*, 14 September 2011.
[86] Art. 30b BVG and Art. 4 s. 2 BVV 3 in conjunction with Art. 30b BVG.
[87] http://www.wbg-schweiz.ch/finanzierung.html (last retrieved 2 December 2013); http://www.wohnbaugenossenschaft-gruenden.ch/wie_finanzieren.html (last retrieved 2 December 2013).
[88] Housing construction and Housing Ownership Promotion Act (Wohnbau- und Eigentumsförderungsgesetz, WEG, SR 843).
[89] Art. 17a Ordinance on the Housing construction and Housing Ownership Promotion Act (Verordnung zum Wohnbau- und Eigentumsförderungsgesetz, VWEG, SR 843.1); 'Empfehlungen für die Ausgestaltung von Mietverträgen nach dem WEG' (Berne: FOH, 2013).
[90] Art. 54 WFG and Art. 54 in conjunction with 59 s. 5 WFG.
[91] Art. 54 WFG in conjunction with Art. 10 ff. WFG. See also section 3.6 Subsidization, for information about indirect subsidization and section 6.1 – Court structure in tenancy law.
[92] For information about cantonal and municipal subsidies, see section 3.6 Subsidization.

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

  (Please be brief here as the questionnaire returns to this question under 3)

For the direct financing for the building of rental housing there are no particularities in the Swiss system.[93] For the indirect financing there are several options, like the Swiss real estate funds (which are the most popular, with a market capitalization of about thirty billion Swiss francs), real estate public limited companies (market capitalization: about thirteen billion Swiss francs) and investment foundations (market capitalization: about twenty-six billion Swiss francs). In recent years, these forms of indirect real estate investments have grown considerably.[94]

Concerning the financing for buildings of non-profit housing organizations, see section 3.6 Subsidization.

- What is the market share (% of stock) of each type of tenure 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 meters 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

Types of buildings

In 2011, there were a total of 1,656,864 buildings, used in whole or in part for habitation. 83.3% of these were residential buildings (57.6% single-family houses and 25.7% apartment buildings), 11.8% were residential buildings with secondary commercial use (integrated shops, workshops or the like) and 4.9% were commercial buildings with secondary residential use (factories, office buildings or the like with integrated dwellings). Most of these buildings were two to four-storey buildings and only a few high-rise buildings with more than five storeys.[95] About half of all the buildings used in whole or in part for habitation are situated in one of the five most populated cantons (Zurich, Bern, Aargau, Vaud, St. Gallen).[96]

In 2000, 67% of all rental tenants and almost 85% of all cooperative members lived in multifamily homes exclusively used for habitation, about 5% of the tenants and the cooperative members lived in single family homes, about 23% of the tenants and almost 9% of the cooperative members lived in primarily residential buildings and the rest in primarily non-residential buildings. Of all owner-occupiers (sole- as well as co-ownership), almost 72% lived in a single family home, about 14% lived in a

[93] See also section 1.4 – Which actors own these dwellings.
[94] D. Maksimovic, 'Product range of indirect real estate investments', *UBS Real Estate Focus, The real estate market in Switzerland* (January 2013): 33.
[95] Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/02/blank/key/gebaeude/art_und_groesse.html (last retrieved 2 December 2013).
[96] Statistik Schweiz, 'Bau- und Wohnungswesen 2011, Bau- und Wohnbaustatistik 2011, Gebäude- und Wohnungsstatistik 2011, Leerwohnungsstatistik vom 1. Juni 2012' (Neuchâtel: FSO, 2012),15.

multifamily house, 12% lived in primarily residential buildings and the rest in primarily non-residential buildings.[97]

Construction period

One of five buildings existing in 2011 was built before 1919 and more than half of all buildings (54.4%) were built before 1971. Single family homes are generally speaking younger than other residential buildings; of all single-family houses only 46.3% were built before 1971. On the other hand, buildings with mixed use are mostly older.[98]

Almost half of the housing units owned by condominium owners were built after 1990, while only every fourth house owners' dwelling was built in this time. Owner occupied dwellings are in general a bit younger than rental or co-operative-dwellings, only about 16% of the rental dwellings and about 14% of the co-operative dwellings were built after 1990.

Construction period / Type of dwelling	- 1919	1919-1945	1946-1970	1971-1980	1981-1990	1991-2000	2001-2010	unknown	Total
Rental apartments	16,3	9,4	33,4	14,1	10,7	9,1	6,8	0,2	100% = 1,955,685 dwellings
Co-operative-apartments	4,1	15,4	49,5	12,2	4,7	7,4	6,4	0,3	100% = 100,487 dwellings
Owner occupied Condominiums	7,6	3,3	12,0	15,5	14,9	20,5	25,9	0,3	100% = 373,474 dwellings
Owner occupied houses	16,7	10,0	20,2	13,2	14,1	13,0	12,6	0,2	100% = 891,431 dwellings
Total	15,5	9,1	27,9	13,9	11,9	11,3	10,3	0,2	100% = 3,505,616 dwellings

Table 1: Percentage of dwellings in 2010, according to type of tenure and construction period[99]

Number of rooms and living space

In 2011, 54.5% of the total 4,131,342 housing units were of average size, with a living space of 60-119m². In rural areas housing units contain rather more rooms and a bigger living space than in urban areas. In 2010 the average living space of a housing unit in urban areas was 96m² and in rural areas 105m², whereas the Swiss

[97] Statistik Schweiz, STAT-TAB, 09.3 – Wohnverhältnisse: 'Wohnungen nach Kantonen, Anzahl Zimmer, Belegungsart, Bewohnertyp, Gebäudekategorie und Eigentümertyp, 2000'.
[98] Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/02/blank/key/gebaeude/bauperiode.html (last retrieved 2 December 2013); 'Bau- und Wohnungswesen 2011', 18.
[99] Figures according to table 'Bewohnte Wohnungen nach Bewohnertyp und Bauperiode' (Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/22/lexi.topic.1.html (last retrieved 22 February 2014).

average was 99m². More than half of all housing units in Switzerland have three or four rooms. In rural areas, every third housing unit had five or more rooms. In general, there is a trend toward building bigger apartments with more rooms.[100]

Owner occupied housing units have more rooms and a bigger living space than rented ones. In 2010 more than half of the owner-occupied apartments, but only about 9% of the rental apartments had five or more rooms.[101] Almost every third rental apartment has three rooms, another 27% have four rooms. Also apartments of co-operatives mostly have three (35%) or four (32%) rooms. About 44% of all owner-occupied condominiums have four rooms, about one fifth have three and another fifth have five rooms. Almost two thirds of the owner occupied houses have five or more rooms, another third have four rooms. Only few owner occupied condominiums and houses have two rooms and very few only one. Concerning the number of rooms of a dwelling in Switzerland, only actual living areas (such as for example living room, bedrooms and children's rooms) are taken into account. Kitchens, bathrooms, corridors and the like are not counted separately as rooms.[102]

Number of Rooms / Type of dwelling	1	2	3	4	5	6+	un-known	total
Rental apartments	5,9	16,4	32,3	27,3	7,0	2,1	9,1	100% = 1,955,685 dwellings
Co-operative-apartments	2,4	12,7	35,2	31,6	5,5	1,1	11,6	100% = 100,487 dwellings
Owner occupied Condominiums	0,8	4,8	21,5	43,7	19,5	6,6	3,1	100% = 373,474 dwellings
Owner occupied houses	0,3	1,5	7,3	24,0	34,0	31,7	1,3	100% = 891,431 dwellings
Total	3,7	10,9	24,2	28,2	15,6	10,8	6,5	100% = 3.505.616 dwellings

Table 2: Percentage of dwellings in 2010, according to type of tenure and number of rooms [103]

[100] Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/02/blank/key/wohnungen/zimmerzahl_und_flaeche.html (last retrieved 2 December 2013); 'Bau- und Wohnungswesen 2011', 21-23.
[101] Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/03/blank/key/bewohnertypen/nach_flaeche_und_zimmerzahl.html (last retrieved 2 December 2013).
[102] Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/11/def.html (last retrieved 17 February 2014).
[103] Figures according to table 'Wohnverhältnisse nach Bewohnertyp und Zimmerzahl' (Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/22/lexi.topic.1.html (last retrieved 2 December 2013).

Household size

36.5% of the total of 3,534,500 private households in Switzerland (2011 estimate) are single-person and 32.4% two person households. The average size of a household is shrinking constantly and was estimated at 2.2 persons in 2011.[104] Correlating with the shrinking size of households, the occupancy rate is decreasing. In 1970, each room held 0.79 persons while in 2000 it was only 0.59 persons per room. At that same time, more than half of the population held two or more rooms per person while about six percent lived in homes with an occupancy rate of more than one person per room.[105]

Availability of hot running water and central heating

In 2011, about 0.4% of all buildings used in whole or in part for habitation (permanently, temporarily or not at all inhabited) had no hot running water (0.5% of the single family houses and 0.06% of the multifamily houses[106]).[107] 86.9% of the buildings were equipped with central heating and in total 99.8% of all buildings were equipped with heating.[108]

Quality of housing in general

The quality of rental apartments in Switzerland in general is good and comparable to owner-occupied apartments.[109] Also the standards of rental dwellings in Switzerland are generally high: a fully fitted kitchen is normally included and in multi-family houses – if no washing machine is provided inside of the dwellings – there are shared laundry facilities.[110]

According to the Statistics on Income and Living Conditions SILC from 2012, the whole population has access to a bath/shower/toilet and only 0.1% does not have a toilet for the exclusive use to their own household. The overcrowding rate was 5.9% in 2011, being one of the lowest in Europe.[111] The large majority of the interviewed households are satisfied with their housing situation, with over 40% even choosing the maximum 'ten' on a scale. Only 2% of the households interviewed rate the level of satisfaction with the housing as less than the average 'five'.[112]

[104] Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/en/index/themen/01/04/blank/key/haushaltsgroesse.html (last retrieved 2 December 2013).
[105] Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/03/blank/key/wohndichte/entwicklung.html (last retrieved 2 December 2013); Hauri, Steiner & Vinzens, *Human settlement in Switzerland*, 42.
[106] A multi family house is considered to have hot running water if the majority of the dwellings are equipped with it.
[107] Statistik Schweiz, STAT-TAB, 09.2 – Gebäude und Wohnungen: 'Energiebereich: Gebäude nach Kanton, Gebäudekategorie, Bauperiode, Heizungsart und Warmwasserversorgung sowie deren Energieträger'.
[108] Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/02/blank/key/gebaeude/heizung.html (last retrieved 2 December 2013).
[109] Federal Office for Housing, Briefing 'Wie viele Haushalte haben in der Schweiz Wohneigentum und warum sind es nicht mehr?' (Berne: FOH, 2005), 3.
[110] F. Hämmerli, *Hallo Schweiz! Ein Handbuch für Einwanderer* (Zurich: K-Tipp, 2010), 39 f.
[111] For the definition of 'overcrowding rate', see http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Glossary:Overcrowding_rate (last retrieved 16 December 2013).
[112] SILC Statistics: Income and living conditions – Variables – Swiss personal data – Variable CPQ130: Satisfaction with the housing.

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

Wohnungen nach Eigentümertyp

	1990		2000	
	absolut	in %	absolut	in %
Wohnungen total	**3'159'977**	**100,0**	**3'569'181**	**100,0**
Privatperson(en)	2'172'795	68,8	2'617'011	73,3
Bau- oder Immobiliengesellschaft	233'106	7,4	132'024	3,7
Wohnbaugenossenschaft	143'458	4,5	161'945	4,5
Versicherung	108'850	3,4	118'584	3,3
Immobilienfonds	43'674	1,4	58'306	1,6
Personalvorsorgeeinrichtung	185'622	5,9	181'743	5,1
Andere Stiftung	39'778	1,3	44'365	1,2
Verein	14'223	0,5	15'141	0,4
Gemeinde, Kanton, Bund	85'006	2,7	84'088	2,4
Anderer Eigentümertyp	133'465	4,2	155'974	4,4

Quelle: Volkszählung 2000

Table 3: Dwellings according to type of ownership[113]

In 2000 there was a total of 1,462,167 buildings and 3,569,181 housing units in Switzerland. Most of the buildings (88.6%) and housing units (73.3%) were owned by private persons. The second largest share of housing units was owned by staff pension funds (5.1%) followed by cooperatives (4.5%), construction- and real estate companies (3.7%) and insurance companies (3.3%). State ownership of housing units on the other hand was very low at 2.4%. Non-commercial foundations and associations together owned 1.6%.

In 2000, 3,027,829 of all housing units were used as primary residence. 1,929,448 or 63.7% of these were being used as rentals. 57.4% of those rental dwellings used as primary residence were owned by private persons, 8.4% were owned by staff pension funds, 7.9% by cooperatives, 5.7% by construction- and real estate companies and 5.5% by insurance companies. 3.4% were state-owned, 2.6% were owned by real estate funds and 2.5% by non-commercial foundations and associations, and 6.5% by 'others'.[114]

The percentage of dwellings owned by staff pension funds is especially high due to regulations on investments the law contains for pension funds, which say that the investments must be cautious and the available capital must be spread among various investment categories. The return shall be corresponding to that in the monetary, financial and real estate markets. Also, the ability to pay benefits and vested benefits when required must be granted by making investments for the short, the medium and the long term.[115]

[113] Dwelling owners: Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/02/blank/key/wohnungen/eigentuemer.html (of 2 December 2013); building owners: Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/02/blank/key/gebaeude/eigentuemer.html (last retrieved 2 December 2013).

[114] F. W. Gerheuser, *Eidgenössische Volkszählung 2000, Wohnversorgung und Wohnverhältnisse, Entwicklungen 1990-2000* (Neuchâtel: FSO, 2004), 27 and 31.

[115] Art. 71 s. 1 BVG and Art. 51 ff. Ordinance on Occupational Old Age, Survivors' and Invalidity Pensions (Verordnung über die berufliche Alters-, Hinterlassenen- und Invalidenvorsorge BVV 2, SR

In 2013, in the city of Zurich, almost half of all dwellings were owned directly by private persons, such as individuals, condominium communities or communities of heirs.[116] Most of these private persons rent out dwellings and are small-scale landlords: 60% of them own only one building and 90% own up to five buildings. 45% rent own up to five dwellings and another 48% rent own six to 30 dwellings. [117]

1.5 Other general aspects

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

The *Swiss Tenants' Association* is the umbrella organization of all cantonal tenants' associations. These are furthermore organized into three umbrella associations: the Association of Tenants in German-speaking (*Deutschschweiz*), in French-speaking (*Romandie*) and in Italian-speaking Switzerland (*Tessin*). In total, the Swiss Tenants' Association counts 200,000 members, more than half of which are in the German-speaking part. It is a non-profit organization without State support, representing tenants' interests towards landlords' associations as well as the Swiss and regional parliaments and authorities. Additionally, it offers its members legal advice services, also covering portions of legal expenses and non-members legal advice against a fee.[118]

The *Swiss Landlords Association (Hauseigentümerverband Schweiz) HEV* aims to promote, preserve and represent the interests of home-, land and condominium-owners, by political means as well as by legal advising.[119] It counts more than 310,000 members.[120] French-speaking and Italian-speaking Switzerland have their own landlord associations ('Federation romande immobiliere' and 'camera ticinese dell'economia fondiaria'), working in cooperation with each other.

The *Swiss Real Estate Association SVIT* is a non-profit lobby group for real estate service providers. Among other things, it operates on political and economic lobbying and provides services for its members. In 2013 over 2,000 real estate companies with about 20,000 employees were members of the SVIT.[121]

The two umbrella organizations 'Wohnbaugenossenschaften Schweiz'[122] and 'Wohnen Schweiz'[123] represent the non-profit housing providers and operate the state subsidization of non-profit organizations (see section 3.6 Subsidization).

831.441.1); Federal Social Insurance Office (http://www.bsv.admin.ch/themen/vorsorge/00039/00336/index.html?lang=en [last retrieved 18 February 2014]).

[116] In total, about three quarters of the housing stock of the city of Zurich is (directly or indirectly) owned by private persons.

[117] P. Ilg, *Private Hauseigentümer: Der schlafende Riese im Mietwohnungsbau, Eine empirische Untersuchung zur Aktivierung der Potenziale in der Stadt Zürich* (Zurich: HEV Zürich, 2013), 1 and 11 f.

[118] R. Hug, R. Mühlebach & M. Töngi, *Schweizerischer Mieterinnen- und Mieterverband Deutschschweiz SMV/D, Porträt* (Zurich: Schweizerischer Mieterinnen- und Mieterverband Deutschschweiz, 2010), 3, 5 and 7 (available at http://www.mieterverband.ch/fileadmin/alle/Dokumente/Broschueren/MV-Dokumente/MV_Portr._2010_rgb.pdf [last retrieved 2 December 2013]).

[119] Art. 2 HEV-Statutes (available at http://www.hev-schweiz.ch/home/kategorien/?tx_ttnews[tt_news]=955&tx_ttnews[pointer]=9&cHash=7db79f33f3f9179b9f6c56f000e7689c [last retrieved 2 December 2013]).

[120] http://www.hev-schweiz.ch/home/ein-starker-verband/ (last retrieved 2 December 2013).

[121] http://www.svit.ch/en/svit-switzerland/portrait.html (last retrieved 2 December 2013).

[122] www.wbg-schweiz.ch (last retrieved 3 December 2013).

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

In Switzerland, the percentage of vacant dwellings is very low. The total number of vacant housing units in 2013 was 40,008 (thereof 31,666 proposed for rent and 8,342 for sale). This equals a vacancy rate of 0.96%. The rate and the number of vacant housing units decreased from 2007 to 2009 and then increased until 2013.[124] The definition of vacant dwellings according to the Swiss statistic includes flats or single-family houses, principal residences as well as holiday homes and second residences, furnished or not, which are fit for full-year habitation and proposed for rent (for a term of at least three months) or purchase, on 1 June, the day of the annual survey.[125]

There are considerable differences in the vacancy rates of the different cantons. The highest rates in 2013 were in the canton Jura (2.01%) and the canton Solothurn (1.87%). The lowest rates were in the canton Basel-Stadt (0.33%) and in the cantons Zug (0.35%) and Geneva (0.36%).[126] Also, there are big differences in vacancy rates between urban and rural areas. The vacancy rate of 2013 in the city of Zurich for example was only 0.11%, while the rate for the whole canton Zurich was 0.6%.[127]

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

Since tenancy contracts do not have to be registered (taxes on rental payments are levied as part of the income of the landlord) and, in general, there are very few formal requirements and the rights of the tenant do not depend on the compliance of the landlord with formal requirements, there are no important black market phenomena in the Swiss rental market.

Summary table 1: Tenure structure in Switzerland 2011

Home ownership	Renting		Other	Total
Houses: 25.8% Condo-miniums: 11%	With a public task: 2000 estimate (Cooperatives excl.): 3.8% of all dwellings (5.9% of all rental dwellings) Without a public task: 2000 estimate: 52% of all dwellings (94.1% of all rental dwellings)	Cooperatives	e.g. usufructuary lease, 'Dienstwohnungen' or where the apartment is loaned for free by relatives or employers	
36.8%	57%	2.8%	3.4%	100%

[123] www.wohnen-schweiz.ch (last retrieved 3 December 2013).
[124] Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/02/blank/key/leerwohnungen/entwicklung.html
[125] P. Thalmann, 'Housing Market Equilibrium (almost) without Vacancies', *Urban Studies* vol. 49 no. 8 (2012): 1644; Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/11/def.html (last retrieved 2 December 2013).
[126] Federal Office for Housing, http://www.bwo.admin.ch/dokumentation/00101/00104/index.html?lang=de (last retrieved 2 December 2013).
[127] https://www.stadt-zuerich.ch/prd/de/index/statistik/bauen_und_wohnen/gebaeude_und_wohnungen/leerwohnungszaehlung.secure.html (last retrieved 2 December 2013).

The data in this table is of 2011, except for the estimation of the percentage of renting with/without a public task (2000 estimate). Condominium ownership in Switzerland is considered as actual ownership and in the statistics usually included in the home ownership rate.

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?

As mentioned above, the vacancy rate in Switzerland is extraordinarily low at 0.94%. According to the Swiss Federal Supreme Court, housing shortage (*Wohnungsmangel*) starts from a vacancy rate of less than 1 to 1.5% and extreme housing shortage (*Wohnungsnot*) from 0.5%.[128] According to the Association of Tenants in German-speaking Switzerland, the housing market is considered relaxed at a vacancy rate of at least 1.5%.[129]

A low vacancy rate however does not necessarily indicate a severe insufficiency in the market supply of rental housing.[130] Also with a low vacancy rate, high mobility, as a sign against housing shortage, is possible. According to estimations, about 480,000 households in Switzerland were moving in 2010, thus in 13% of the dwellings tenants changed. In the city of Zurich, even 19% of the dwellings had new tenants in 2010.[131] Coordinated dates for termination of rental contracts facilitate housing mobility in Switzerland.[132] Most of the dwellings are proposed for rent while still occupied. Tenants may only terminate their contract on another date than determined in the contract or without observing the term of notice if they propose a replacement tenant for their apartment. Tenants may also be willing to pay the rent for both their old and their new dwelling for one or two months when moving, and therefore neither dwelling is considered vacant.[133]

In 2011 the supply growth in the rental housing sector was not big enough to cover the growth of households, which had effects on the rental prices. A big part of the total construction costs were invested in home ownership, which has an influence

[128] BGE 124 I 127 E. 2c; the term housing shortage for example has an influence on the competences of the Cantons to make a form obligatory when contracting any new lease (Art. 270 s. 2 CO).
[129] R. Birrer, 'Wo die Wohnungsnot am grössten ist', *Tages-Anzeiger*, 6 September 2012.
[130] See also Statement of the Federal Statistical Office on the article 'Online-Artikel vom 4. Oktober 2010 auf der Website www.homegate.ch: Jährlich finden in der Schweiz 500'000 Umzüge statt'.
[131] Estimation made on basis of mail forwarding orders received by the Swiss Post (Zürcher Kantonalbank, 'Liquider Wohnungsmarkt in den Städten', *Immobilien aktuell* [November 2011]: 8).
[132] Art. 266c of the Swiss Code of Obligations (Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches [Fünfter Teil: Obligationenrecht], CO, SR 220) refers to dates fixed by local custom, which vary from municipality to municipality (often at the end of each quarter or end of every month except December). The parties of the contract are however free to agree on different terms.
[133] Thalmann, *Housing Market Equilibrium*, 1645. Consider also the narrow definition of vacant dwellings in Switzerland (see section 1.5 – Number [and percentage] of vacant dwellings)

especially on foreigners coming to Switzerland, since they typically rent an apartment at first instead of buying.[134]

As a special case, in the canton Geneva, because of the spatial development policy, the supply of apartments falls well short of the demand and for immigrants and internal migrants with lower incomes, it is very difficult to find apartments on Swiss territory, which is why many reside in the border area in France. In 2009, about one fifth of all people employed in Geneva were cross border commuters. This problem concerns more and more not only foreigners, but also Swiss citizens find it increasingly hard to find an apartment.[135]

A survey of 2009 investigated the perception of the population toward housing shortage in their respective canton: 42% felt the housing shortage was high or even very high. 38% felt housing shortage was low and 7% felt it was non-existent. 13% indicated that they do not know. Four years before that, in the survey of 2005, only 33% of the population questioned indicated that housing shortage was high or very high. At that time the actual vacancy rate was in fact lower than in 2009. The perception of housing shortage also correlates with the actual vacancy rate in the different cantons: where the vacancy rate is in fact lower, housing shortage was also perceived to be higher.[136]

The Swiss housing market changed with the entry into force of the Agreement on the free movement of persons with the EU/EFTA in 2002. Subsequently, more people from EU member states, who belong generally to a higher income group than immigrants from non EU member states, immigrate into Switzerland. This leads to a shortage of rental housing in the upper segments and, because of intensified renovation works, subsequently also in the lower segments.[137] With the adoption of the popular initiative 'Gegen Masseneinwanderung', which aimed at stopping mass immigration, in February 2014 the Swiss population decided on a change in immigration policy.[138]

Concerning effects of the crisis since 2007, see section 2.5.

- 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?

According to a scenario of the FSO in 2008, the number of private households will continue to increase up to 3.9 million in 2030, which is 20% more than the estimated number of households in 2005 (3.2 million). This is expected mainly due to a further increase in the number of single and two-person households; the number of residents in Switzerland is estimated to grow within the same period of time by only 9%.[139] According to another, intermediate, scenario of the FSO in 2010 the population in Switzerland will grow until 2055 and then stabilise at around nine million

[134] 'Personenfreizügigkeit und Wohnungsmarkt Schweiz, Entwicklung 2011', 4.
[135] Hauri, *Beobachtung des Wohnungsmarkts*, 81.
[136] P. Thalmann, *Die Wahrnehmung der Wohnungsnot steigt, Univox Wohnen 2009* (Zurich: gfs-zürich/Ecole polytechnique fédérale de Lausanne, 2009).
[137] E. Hauri, 'Beobachtung des Wohnungsmarkts: Mehr ausländische Konkurrenz', *terra cognita* 14 (2009): 79 f.
[138] See also section 2.1.
[139] Federal Statistical Office, 'Haushaltsszenarien, Entwicklung der Privathaushalte zwischen 2005 und 2030' (Neuchâtel: FSO, 2012), 1.

residents.[140] These estimations were made before the acceptance of the popular initiative 'Gegen Masseneinwanderung' (see above). Also, in 2012 a popular initiative 'Stopp der Überbevölkerung – zur Sicherung der natürlichen Lebensgrundlage', aiming at restricting the increase of the Swiss population to 0.2% a year was initiated. It is however not yet decided when this initiative will be voted on.[141]

- 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 home ownership rate in Switzerland in 2011 was at 36.8%.[142] In 2000, only about 13% of the non-Swiss households owned their own dwelling, while 39% of all Swiss households were homeowners.[143]

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%).

Eurostat SILC[144]

According to the Eurostat SILC data, the percentage of the *disposable household income* used as housing costs (*Wohnkosten*) overall was 24.8% in 2012.[145] The share of housing costs in disposable household income for households whose income is above sixty percent of the median equivalized income is 21.1%, the share of housing costs for households whose income is below these sixty percent, is 44.2%.[146]

In 2012, 12% of all Swiss residents and 16.6% of the tenants who rented at market price lived in households that spend 40% or more of their equivalized disposable income on housing.[147]

National data

In 2011, Swiss residents spent in average 15.4% of their *gross income* on housing for their principal residence (including net rent or mortgage rate, accessory charges and energy).[148]

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[140] R. Kohli, A. Bläuer Hermann & J. Babel, *Szenarien zur Bevölkerungsentwicklung der Schweiz, 2010-2060* (Neuchâtel: FSO, 2010), 21.
[141] Press Release Federal Council, 29 May 2013, 'Der Bundesrat empfiehlt, die „ECOPOP-Initiative" ohne Gegenvorschlag abzulehnen'.
[142] See section 1.2. – Housing production and construction costs.
[143] Hauri, Steiner & Vinzens, *Human settlement in Switzerland*, 38.
[144] Please note that the data in this statistic does not correspond to the data used in some other reports (since they have more accurate data) and that the percentage of the housing costs compared to the disposable household income in this statistics may be set relatively high (see for example the German report, in which the ratio is stated to be 22.5% in 2010 [German Report section 2.2 – Prices and affordability] while the ratio for Germany in the SILC statistic is set at 27.5% in the same year).
[145] Eurostat, SILC (http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc_mded01&lang=de [last retrieved 3 December 2013]).
[146] Eurostat, SILC (http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do [last retrieved 09 January 2014]).
[147] Eurostat, SILC (http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Housing_statistics [last retrieved 3 December 2013]).

Durchschnittlicher Mietpreis von Mieter- und Genossenschafterwohnungen nach Zimmerzahl (in Franken)

	1990	2000	2011	2011 VI*
Durchschnittlicher Mietpreis	820	1'059	1'306	4
1-Zimmer-Wohnungen	492	598	743	9
2-Zimmer-Wohnungen	641	814	1'026	7
3-Zimmer-Wohnungen	761	976	1'242	5
4-Zimmer-Wohnungen	945	1'198	1'506	7
5-Zimmer-Wohnungen	1'249	1'526	1'844	17
6 und mehr Zimmer-Wohnungen	1'626	1'978	2'348	56

* Vertrauensintervall: ± (in Fr.)

Table 4: Average rent of rental- and cooperative apartments[149]

The average net rent price (without accessory charges) in 2011 was CHF 1,306. A one room apartment cost in average CHF 743, two rooms CHF 1,026, three rooms CHF 1,242, four rooms CHF 1,506, five rooms CHF 1,844 and six and more rooms CHF 2,348. In urban areas the average rent was CHF 1,337 and in rural areas CHF 1,150 (whereby it should be kept in mind that dwellings in rural areas contain rather more rooms and bigger living space than in urban areas, see section 1.4 – Quality of housing provided).[150]

The average accessory charges of the principal residences (homeowners and tenants, only principal residences) in 2011 are CHF 183.50.[151] In 2003 accessory charges for rental tenants were in average CHF 150, thus 12.6% of the gross rent of CHF 1.266 at that time.[152]

The average rent per square meter in 2003 was CHF 14.0, whereas the range between the cantons went from CHF 10.0 in Jura to CHF 16.3 in Zurich and CHF 16.8 in Zug.[153]

Average rent prices increased from 1939 to 2010 by more than 900% while overall prices increased by about 650%.[154]

According to a study in 2006, 70% of all tenants questioned found the relation between rent and performance just adequate, while 24% found their rent too high in comparison to the performance. 4% find the performance is higher than the rent they pay. There are no significant differences between the different income groups.

[148] Federal Statistical Office, 'BFS Aktuell, Haushaltsbudgeterhebung 2011' (Neuchâtel: FSO, 2013) 28.
[149] Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/03/blank/key/mietpreise/nach_zimmerzahl.html (of 3 December 2013).
[150] Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/09/03/blank/key/mietpreise/nach_region.html (last retrieved 3 December 2013).
[151] 'BFS Aktuell, Haushaltsbudgeterhebung 2011', 28.
[152] Table 'Nettomiete, Nebenkosten, Bruttomiete und Miete pro Quadratmeter nach der Anzahl Zimmer' (Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/05/22/lexi.html [last retrieved 3 December 2013]).
[153] Table 'Durchschnittlicher Mietpreis pro m2 nach Zimmerzahl' (Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/05/06/blank/key/einfuehrung.html [last retrieved 3 December 2013]).
[154] C. Becker Vermeulen, 'Measuring change in rents for accommodation over time: a look at the past and the future', *ValueS* 2 (2011): 20.

However, there are differences according to the different regions of Switzerland: Tenants in German-speaking Switzerland are generally more pleased with the rent-performance rate than tenants in French- and Italian-speaking Switzerland.[155]

- To what extent is home ownership attractive as an alternative to rental housing?
- What were the effects of the crisis since 2007?

According to a study of the Zurich University of Applied Sciences, only up to ten percent of the rental tenants would have the financial means to afford home ownership and therefore realistically have an actual choice between renting and owning. [156] The Swiss Landlords Association estimates that it would take an average household about ten years to save enough assets for the down payment of a single family house (20% of the purchase price).[157]

However, since at the moment the mortgage interest rates are low, it would be attractive to invest in home ownership. Also, home ownership is considered a safe investment.[158]

According to a study of Credit Suisse in 2013, the ongoing housing costs for condominiums have fallen significantly in the period of 2008 to 2012 because of reductions in interest rates. Therefore the average annual financial costs were more advantageous for new buyers than for renters and were in 2013 'less than half the annual rent for a comparable apartment'. This increases the demand for home ownership, which leads to steep price increases. [159]

Concerning effects of the crisis since 2007 see section 2.5 Effects of the current crisis.

2.3 Tenancy contracts and investment

- Is the return (or Return on Investment [RoI]) for rental dwellings attractive for landlords-investors?
  - In particular: What were the effects of the crisis since 2007?

According to Credit Suisse, Swiss real estate investments are attractive: The total return from direct investments reached 9.2% in 2012 and the total return on the stock market for listed Swiss real estate funds was at 6.3%.[160] According to a study of the Zurich School of Management and Law, the nominal annual return on residential rental investment in the period of 2001 to 2010 was close to six percent.[161]

However, according to the UBS Real Estate Bubble Index for the first quarter of 2013, purchasing an apartment or single-family home for rental purposes is losing

[155] Bieri, *Schlussbericht "Wohnmonitor"*, 19.
[156] T. Lattmann, 'Wohnen: Eigentum ist günstiger als Miete', *Saldo,* 8 June 2010; see also section 1.2 – Home ownership rate: the vast majority of the tenants would rather like to be home owners.
[157] M. Landolt, 'Wohneigentum – für viele ein Traum', *www.hev-schweiz.ch*, 23 September 2013 (the estimation is based on the results of a study by Credit Suisse in 2007).
[158] R. Haase & R. Weinert, 'Gibt es eine Wende im Immobilienmarkt?', *Die Volkswirtschaft, Das Magazin für Wirtschaftspolitik* 6 (2012): 59 f.
[159] Credit Suisse, 'The Swiss Real Estate Market 2013, Structures and Prospects', *Swiss Issues Real Estate* (March 2013), 4 and 8 f.
[160] Credit Suisse, 'The Swiss Real Estate Market 2013, Structures and Prospects', 55 and 60.
[161] Study of the Zurich School of Management and Law, cited in: Boligøkonomisk Videncenter, *The Private Rented Sector in the New Century – A Comparative Approach,* (Copenhagen: University of Cambridge, 2012), 193.

attraction.[162] The risks and efforts associated with the investment in non-owner-occupied dwellings for private investors who only invest in one single object are considered high compared to the expected net return. The net return is expected higher for renovated old buildings than for new buildings. The profitability also increases with the number of objects, since the risks of the investment and the administrative expenses can be optimised.[163]

- 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?
    - 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 introduction of REITS in Switzerland was discussed by the Committee for Economic Affairs and Taxation of the National Council on the occasion of the preparation of the Collective Investment Schemes Act[164] in 2006, but rejected in the course of the discussion because of tax related questions which could not be solved unless discussed and decided on in the course of broader fiscal reforms.[165]

Securitization of tenancies in general is of no practical relevance in Switzerland.[166]

According to WEBER, it would be possible for the parties to a tenancy contract to designate the law of another country applicable on a tenancy contract; the landlords however would not do so, assumedly because of the liberal tenancy law in Switzerland.[167]

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?)?

There is a variety of insurances that can be concluded. The most important ones for homeowners are building insurance, personal liability insurance and household insurance:

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[162] UBS, 'Swiss real estate market, Swiss Real Estate Bubble Index: 1Q 2013', 2.

[163] J. Zulliger, 'Vermieter werden, Mit Wohnbesitz Geld machen?', *Beobachter* 8/2012 (11 April 2012); According to "beobachter.ch" experts say that the profitability increases from five to six apartments. See also: J. Zulliger, 'Die Rendite kann man mit der Lupe suchen', *K-Geld* 5/2006 (25 October 2006); A. Leiser, 'Die Mietpreise liegen heute oft unter den Kaufpreisen', *UBS Magazine*, 25 July 2011.

[164] Federal Act on Collective Investment Schemes (Bundesgesetz über die kollektiven Kapitalanlagen, SR 951.31).

[165] Postulate Nr. 05.3646 of National Council member Hans Kaufmann 'REIT-Zulassung in der Schweiz', submitted to the Federal Council 6 October 2005 (available at http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20053646 [last retrieved 18 March 2014]).

[166] Information provided by M. Baumann, Raiffeisen Bank, in electronic correspondence from 1 April 2014.

[167] R. Weber, 'Mieterschutz in der Schweiz', in *Soziales Mietrecht in Europa*, ed. P. Oberhammer, A. Kletecka & A. Wall (Vienna: Springer, 2011), 209. However, other authors say that compared to other countries tenure security is high (Boligøkonomisk Videncenter, *The Private Rented Sector in the New Century – A Comparative Approach*, 195) and landlord-tenant law provides substantial protections for renters (Bourassa, Hoesli, Scognamiglio, 'Housing Finance, Prices, and Tenure in Switzerland', 280).

Building insurance (*Gebäudeversicherung*) and earthquake insurance

In almost all of the twenty-six cantons, building insurance is mandatory. In nineteen cantons mandatory insurance is offered by a cantonal monopoly insurer under public law. The insurance premium is calculated according to the insured value of the building, which is usually their reinstatement value, and lies around 0.03% upwards.[168] In the other cantons mandatory or voluntary insurance is offered by private insurance companies. The insurance covers damages on the building from fires and natural hazards (hail, storm, floods, avalanches, rock fall, etc.) but not from earthquakes. For the cantons with mandatory insurances the cantonal building insurers would render voluntary payments in case of an earthquake. In the other cantons, the private insurance companies offer voluntary earthquake insurance.[169]

(Building) liability insurance (*[Gebäude]haftpflichtversicherung*)

Liability insurance is not mandatory but important for homeowners and tenants. It covers personal injuries and material damages of third parties. For owner-occupied residential property, the personal liability insurance of the homeowner includes building liability insurance. The same applies to a landlord who lives in one of his apartments if the building has only up to three apartments. If the building has more apartments or if the landlord does not live in one of the apartments, it is recommended to additionally conclude a building liability insurance policy.[170]

Household insurance (*Hausratversicherung*)

Household insurance is not mandatory and covers damages on household goods from fire, water, natural hazards, breakage of glass and theft.[171] For homeowners household insurance is more expensive than for tenants, since damage made by the tenant in his own apartment is covered by his private liability insurance.[172]

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

Real estate agency services for sale of property

In every third sale of real estate, a broker is involved.[173] The broker´s fee can be fixed in the contract, if, however, it is not stipulated, it is fixed according to the tariff of fees where such exist, and otherwise by custom (Art. 414 CO). Excessive fees for identifying an opportunity to enter into or facilitating a purchase of land or buildings can be reduced to an appropriate amount by the court (Art. 417 CO). In this case, the judge will compare the stipulated fee with a customary commission fee. For overbuilt properties, this would be 1 to 2, and exceptionally 3% of the purchase price and for unbuilt properties 3 to 5%.[174]

[168] See O. Paco, 'Gebäudeversicherungsprämien auch 2012 unverändert', *Der Zürcher Hauseigentümer*, 11/2011 and the webpages of the cantonal building insurances.
[169] Federal Office for the Environment, http://www.bafu.admin.ch/erdbeben/07655/index.html?lang=de (last retrieved 3 December 2013).
[170] 'Versicherungen, Das müssen Hauseigentümer wissen', *Beobachter*, 7/2009 (1 April 2009).
[171] 'Versicherungen, Das müssen Hauseigentümer wissen', *Beobachter*, 7/2009.
[172] 'Der beste Schutz für Ihre Siebensachen', *K-Tipp*, 9/2002 (1 May 2002).
[173] J. Zulliger, 'Wenn mit Makler, dann mit makellosem Vertrag', *K-Geld*, 04/2007 (29 August 2007).
[174] C. Ammann, *Basler Kommentar zum Schweizerischen Privatrecht, Obligationenrecht I (Art. 1-529 OR),* 5th ed. ed. H. Honsell, N. P. Vogt & W. Wiegand (Basel: Helbing Lichtenhahn, 2011), Art. 417 CO § 5; BGer of 5 July 2005, 4C.121/2005 E. 4.2.

Real estate agency services for rental of property

Traditional real estate agents are not very often involved in the conclusion of rental contracts.

In general, the parties to an agency agreement may stipulate any given commission.[175] The cantons are allowed to establish additional regulations concerning real estate agency services, but only a few cantons did so. Today, Zurich is the only canton that still has regulations in force. With effect of beginning of 2012, Zurich abolished the authorization requirement for professional brokers.[176] Still in force is a regulation about the remuneration for the services of professionals and non-professionals, saying that the maximum fee including all expenses must not exceed 75% of a monthly net rent.[177]

According to the freedom of contract, and since the rules on rent increases do not apply to pre-contractual negotiations, landlord and tenant are free to agree on extra payments, such as for example for the drafting of the contractual documents, as long as these payments are directly connected with the use of the rented premises (see section 6.5 – Limitations on freedom of contract through regulation, Tie-in transactions).[178]

Property administration companies

More present than traditional real estate agents in the Swiss rental market are property administration companies, taking care of not only finding new tenants and preparing the contracts but also about other duties of the landlord as agreed in the contract, such as for example collecting the rent, taking care of repairing damages or representing the landlord in case of legal claims of the tenant, up to comprising all tasks related to the dwelling and the tenancy.[179]

2.5 Effects of the current crisis

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

During the financial crisis in 2007 Switzerland did not face a real estate crisis as other European countries did. The Swiss mortgage and real estate market has grown significantly for several years now.[180] As a measure against the overheating of the

[175] It is however unclear, whether Art. 417 CO, which provides the possibility for the debtor to request the court to reduce an excessive fee where an individual employment contract or the purchase of land or buildings is concerned, can be extended to tenancy contracts (A. Furrer & D. Vasella, *Swiss Report – Tenancy Law and Procedure in the EU* (Florence: EUI, 2005), 16 f.).

[176] http://www.zh.ch/internet/de/aktuell/news/medienmitteilungen/2011/300-4_wohnraeume_inkraftsetzung.html (last retrieved 3 December 2013).

[177] § 229a Einführungsgesetz zum Schweizerischen Zivilgesetzbuch (LS 230, Canton of Zurich); The provision is only applicable for leases of residential premises for which the provisions governing challenges to unfair rents are applicable. This excludes luxury apartments or 'single-occupancy residential units with six or more bedrooms and reception rooms', 'premises made available with public sector support for which rent levels are set by a public authority' and 'holiday homes hired for three months or less' (Art. 253a s. 2, 253b s. 2 and s. 3 CO). For further infomation, see *Amtsblatt Zürich, KR-Nr. 365/2005* (1794-1796).

[178] Furrer & Vasella, *Swiss Report*, 16.

[179] Art. 204 s. 3 ss. c CPC. See also 6.2 – Services of estate agents.

[180] However, the price level is still below the level at the end of the 1980s shortly before the bursting of the Swiss real estate bubble and the real estate crisis in the 1990s and the growth was not as dynamic as in the US or in GB before the financial crisis; See also I. Barnetta & D. S. Gerber, 'Die Entwicklung des Schweizer Immobilienmarktes – und die Rolle des Staates', *Die Volkswirtschaft, Das Magazin für Wirtschaftspolitik* 5 (2011): 54.

market, the Federal Council activated a counter-cyclical capital buffer in February 2013, which requires banks to hold an additional equity capital of one percent of the issued mortgage credits from 30 October 2013 on. With this measure, the giving of mortgage credit shall be made less attractive for banks compared to the giving of other credits.[181] Additionally, since mid-2012, the banks are allowed to provide mortgage loans only if the borrower invests at least ten percent of own, non-pension fund assets (see also section 1.4 – Financing of owner-occupied housing).

Switzerland had a real estate crisis in the beginning of the 1990s. As a result of this crisis, mortgage underwriting criteria were reinforced, since the banks were willing to finance only eighty instead of the previous ninety percent of the property value.[182]

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

There are no nationwide figures on repossession available. However, since there was no actual real estate crisis in 2007, seizures of housing was not an increased problem during that time. During the crisis in the beginning of the 1990s there were also not excessively many owner occupied houses seized, because of help from the banks in case of difficulty to repay mortgage interests and because the owner occupiers cut back on private consumption.[183]

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

See above – Mortgage credit restrictions.

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?)

In 2011, 5,864,000 people, thus 73.7% of the Swiss population, were living in urban areas. Urban areas include cities (more than 10,000 inhabitants) and agglomerations (connected areas of more than one community with a total of 20,000 inhabitants, including a core city with, among other criteria, a certain minimum amount of jobs and jobs per working people[184]). More than one third of the Swiss population lives in one of the five biggest agglomerations: Zurich, Basel, Geneva, Berne and Lausanne. From 1981 to 1998 the population in rural areas grew faster than the population in urban areas, but this trend changed in 1999, since then growth of population in urban areas is faster than in rural areas.[185]

At the time of the population census in 2000, the home ownership rate in Switzerland was at 34.6%. In urban areas it was at 28.8% and in rural areas at 53.2%. This

[181] SNB. 'Monetary policy report', Quarterly Bulletin vol. 31, 1 (2013): 29; S. Schmid, 'Bundesrat ergreift Massnahmen gegen Immoblase', *Tages-Anzeiger*, 13 February 2013.
[182] Bourassa, Hoesli, Scognamiglio, ‚Housing Finance, Prices, and Tenure in Switzerland, 270 f.
[183] F. Pfiffner, '40 Milliarden einfach "verbrannt"', *Neue Zürcher Zeitung*, 27 November 2011. See also section 1.2 – Housing production and construction costs.
[184] See Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/regionen/11/geo/analyse_regionen/04.parsys.0002.downloadList.00021.DownloadFile.tmp/agglodefdt.pdf (last retrieved 3 December 2013).
[185] Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/01/02/blank/key/raeumliche_verteilung/agglomerationen.html (last retrieved 3 December 2013).

equals a growth of the home ownership rate since 1990 of 3.5% in urban areas and 2% in rural areas. The home ownership rate in big cities (Basel, Berne, Geneva, Lausanne and Zurich) in 2000 was at 7.9% and in their surrounding areas at 33.6%. In agglomerations with medium-sized cities the rate was at 34.6%.[186]

- Are the different types of housing regarded as contributing to specific, mostly critical, "socio-urban" phenomena, in particular ghettoization and gentrification

In international comparison, ghettoization is generally not a big problem in Switzerland and also in bigger cities there are no mono-ethnic quarters.[187] Also, for example in Zurich (which contains a large number of cooperative dwellings), cooperative housing estates (*Genossenschaftssiedlungen*) are quite well socially mixed.[188]

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

Phenomena of squatting do exist, mainly in cities with a lack of cultural or residential areas. In October 2011 for example, there were twenty-five immovable properties occupied by squatters in Zurich and two properties were occupied in Basel.[189]

Squatting fulfils the elements of trespassing (Art. 186 SCC[190]). In several cities however, the owner can have the property evacuated through the police only if he meets specific conditions, for example that he plans to use the property again after the evacuation and therefore has already concluded a contract with a third person about the premises or that a legally binding building- or demolition permit exists and that the construction work will begin immediately after the evacuation of the property. This shall ensure that an expensive evacuation procedure is not useless due to squatters subsequently occupying the property again.[191]

In some cases the owner of the property and the squatters negotiate the conditions of the squatting, until the property will be used by the owner again.[192] Instead of leaving the property empty, more and more property owners decide to search for interim solutions, such as renting the buildings out for very low rents, for example as art studios, to avoid squatters.[193]

An extraordinary adverse possession is only possible after thirty years of uninterrupted and unchallenged possession of an immovable property which is either not recorded in the land register or where its owner is not evident from the land register or was declared or presumed dead at the beginning of the thirty-year period.[194]

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[186] Gerheuser, *Eidgenössische Volkszählung 2000*, 8 and table A7.
[187] See section 3.4 – Measures/incentives to prevent ghettoization.
[188] 'Stadtblick 21, Wohnen in Zürich' (Zurich: Stadtentwicklung Stadt Zürich, 2010) 8.
[189] M Zech, 'Besetzerszene, "Die Polizei kann und sollte nicht alles verhindern"', *Tages Woche*, 28 October 2011.
[190] Swiss Criminal Code of 21 December 1937 (Schweizerisches Strafgesetzbuch, SR 311.0).
[191] F. Baumgartner, 'Mietfreies Wohnen, Künstler statt Hausbesetzer', *Neue Zürcher Zeitung*, 10 August 2012; Leaflet 'Hausbesetzungen in der Stadt Zürich' (Zurich: Stadtpolizei Zürich, 2006) 1.
[192] W. Grundlehner, 'Hausbesetzer als Faktor im Immobilienmarkt', *Neue Zürcher Zeitung*, 23 November 2011.
[193] Baumgartner, 'Mietfreies Wohnen, Künstler statt Hausbesetzer'. *Neue Zürcher Zeitung*.
[194] Art. 662 s. 1 and 2 CC. Also, a registration as new owner may only be made by court order on expiry of a publicly notified period for objections (Art. 662 s. 3 CC).

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

Renting in Switzerland is not stigmatised. However, a large majority of Swiss residents prefers home ownership to renting (see section 1.3 Current situation). For the ones who could afford home ownership, the decision of whether to rent or buy/build a home is dominated by economic deliberations.[195]

Summary table 2

	Home ownership	Renting **with a public task**	Renting **without a public task**	Etc.
Dominant public opinion	For those who could afford home ownership, the decision whether to buy or not is dominated by economic deliberations, since rental dwellings of good quality are available.	Renting is not stigmatised. In most of the cooperative houses there is a good social mix and the dwellings are of good quality.	Renting is not stigmatised	
Contribution to gentrification?				Generally few problems with gentrification
Contribution to ghettoization?				Generally few problems with ghettoization

3 Housing policies and related policies

3.1 Introduction

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

Providing the population with housing is largely a task for the private sector. Non-profit housing providers, mainly cooperatives, are self-help organisations built upon private initiatives. They are supported by the state to get creditworthiness and low-interest loans since they usually do not have the 20% equity capital demanded by banks in order to being granted a mortgage loan (see section 3.6 Subsidization).[196]

[195] Van Wezemael, 111.
[196] E. Hauri, 'Wohnungspolitik des Bundes: Optimierung ohne sofortige Markteingriffe', *Die Volkswirtschaft, Das Magazin für Wirtschaftspolitik* 6 (2013): 12; Hauri, Steiner & Vinzens, *Human settlement in Switzerland*, 60; Van Wezemael, 109.

The subsidization of tenants on Federal level is subject-related; persons in need are supported with social assistance provided as an amount of money. Object-related subsidies (other than by non-profit housing organisations) are currently only provided on cantonal and municipal level and only to a very limited extent.[197]

Investing in the maintenance of rental dwellings is one way to optimise taxes and an important reason for private individuals to do so. Furthermore, value conservation measures can be deducted from the taxable income; private landlords and cooperatives can therefore optimise taxes by investing in maintenance projects annually, which also assures a good maintenance of the housing stock.[198]

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

Federal and cantonal Constitutions

Art. 41 s. 1 ss. e Federal Constitution, endeavouring to ensure that 'anyone seeking accommodation for themselves and their family can find suitable accommodation on reasonable terms' is a social objective (*Sozialziel*) of the Confederation and the cantons. Social objectives are not of absolute character and give no direct right to state benefits.[199] Therefore there is no actual 'right to housing' anchored in the Constitution.[200] Art. 108 and 109 Constitution however contribute to achieving the social objective:

Art. 108 Const. serves as a basis for the Housing construction and Housing Ownership Promotion Act (WEG) and the Federal Act for the promotion of Affordable Housing (WFG).[201]

Art. 109 s. 1 Const. created the obligation for the confederation to legislate against abuses in tenancy matters. This mandate was implemented in the Code of Obligations, especially in the sections about protection against unfair rents or other unfair claims by the landlord and about the protection against termination of leases (Art. 269 ff.).[202] The Confederation also exercised its legislative power delegated under Art. 109 s. 2 Const. and implemented a law on frame lease agreements and the declaration of their general applicability.[203]

On a cantonal level, only in few constitutions a right to housing is enshrined. Some constitutions mention it as a social objective, but most of the constitutions do not

[197] See section 3.6 Subsidisation.
[198] Van Wezemael, 123 f.
[199] Art. 41 s. 4 Const.
[200] M. Bigler-Eggenberger, *Die schweizerische Bundesverfassung (SG-Kommentar)*. 2nd ed., ed. B. Ehrenzeller, P. Mastronardi, R. J. Schweizer & K. A. Vallender (Zurich/St. Gallen: Dike/Schulthess, 2008), Art. 41 Const. § 61; A popular initiative concerning the establishment of a right to housing in the Constitution was voted down in 1970 (http://www.admin.ch/ch/d/pore/vi/vis91.html [last retrieved 9 December 2013]).
[201] For further information about the WEG and WFG, see section 3.6 Subsidization.
[202] G. Biaggini, *Bundesverfassung der Schweizerischen Eidgenossenschaft* (Zurich: Orell Füssli, 2007), Art. 12 Const. § 3 and 5.
[203] Bundesgesetz über Rahmenmietverträge und deren Allgemeinverbindlichkeit (SR 221.213.15); Biaggini, *BV-Kommentar*, Art. 12 Const. § 6; For further information, see section 5 – Frame lease agreements.

mention it at all. However, in practice, explicitly stating the right to housing in the cantonal constitutions does not lead to a more effective protection.[204]

Art. 12 Const. gives every person living in Switzerland (including also illegal immigrants[205]) the right to emergency assistance when in need and unable to provide for themselves (*Nothilfe*). This aid is subsidiary to the possibilities of self-help, such as their own working capacity (as far as reasonable), financial support by relatives (Art. 328 CC) and social security benefits, for example of the unemployment insurance, old-age and survivors' insurance or the disability insurance.[206]

Social assistance benefits, which are more comprehensive than the emergency assistance, are provided by the cantons and municipalities (Art. 115 Const.). Among others, the purpose of social assistance is to ensure that basic necessities, which include shelter, are met.[207] Most of the cantons follow the guidelines of the Swiss Conference for Social Welfare (SKOS) on the form of social welfare. The SKOS is a professional association, consisting of representatives of municipalities, cantons and the Confederation and members of private social welfare organizations.[208] According to the SKOS-guidelines, the rent, including accessory charges, is part of the basic material security, and included in the financial benefits as long as it is within the local average.[209]

International Law

Whether the right to housing enshrined in Article 11 s. 1 UN Covenant I is self-executing is controversial in literature. The Federal Court considers the rights of the UN Covenant I in general non-self-executing.[210]

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?
- 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?

In Switzerland, there are three different political levels: the confederation, twenty-six cantons and about 2,400 municipalities. The cantons exercise all rights that are not

[204] P. Ling, 'Résiliation du bail et droit au logement en droit suisse, étude de l'effet horizontal d'un droit social', in *Human Rights at the Center*, ed. S. Besson, M. Hottelier & F. Werro (Zurich/Geneva/Basel: Schulthess, 2006), 659 f.
[205] Biaggini, *BV-Kommentar*, Art. 12 Const. § 3; although differentiations in the concrete amount according to the residence status can be made, see Biaggini, *BV-Kommentar*, Art. 12 Const. § 7.
[206] Bigler-Eggenberger, *SG-Kommentar*, Art. 12 Const. § 15-20 and 27.
[207] Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/en/index/themen/13/03/03.html (last retrieved 3 December 2013); Bigler-Eggenberger, *SG-Kommentar*, Art. 12 Const. § 13.
[208] Federal Social Insurance Office, http://www.bsv.admin.ch/themen/gesellschaft/00072/index.html?lang=en (last retrieved 3 December 2013); see also: http://www.skos.ch/ (last retrieved 3 December 2013).
[209] SKOS-guidelines 12/07, B.3-I, available at http://www.skos.ch/de/?page=richtlinien/konsultieren/ (last retrieved 3 December 2013). See also section 3.6 Subsidization.
[210] Ling, 656 f.

transferred to the Confederation by the Constitution (Art. 3 Const.). The autonomies of the municipalities are determined by the cantonal constitutions and laws.[211]

Housing

In Article 122 Constitution the responsibility 'for legislation in the field of civil law and the law of civil procedure', which includes tenancy law, is assigned to the Confederation. The substantive law is laid down mainly in the Swiss Code of Obligations and the Ordinance on the Lease and the Usufructuary Lease of Residential and Business Premises (VMWG)[212] and the procedural law in the Swiss Civil Procedure Code (CPC).[213]

The cantons on the other hand are generally responsible for the organization of the courts and the administration of justice in civil matters. Thus, the cantons can freely arrange the organization of the authorities in tenancy matters, except for the obligation to install a joint conciliation authority according to Article 200 s. 1 CPC.[214]

Art. 108 Constitution concerning the promotion of the construction of housing and home ownership gives the Confederation a parallel competence to the cantons. Thus, promotional measures as well as legislation concerning these measures can be taken by the Confederation and the cantons.[215] Art. 109 s. 1 Constitution concerning the legislation against abuses in tenancy matters on the other hand, leaves the cantons scarcely any leeway for own regulations. Concerning the declaration of general applicability of framework leases, the cantons have no leeway at all.[216]

On the federal level, the Federal Office for Housing (FOH), which is part of the Federal Department of Economic Affairs, Education and Research (EAER), is the Competence Centre for all questions concerning housing policy.[217] In collaboration with the Federal Office of Justice (FOJ), the FOH elaborates the legal bases in tenancy matters. Additionally, the FOH quarterly announces the reference mortgage rate, which is decisive for the determination of rents, conducts the procedures concerning the general applicability of frame lease agreements and plays a role according to the WEG and WFG (see section 3.6 Subsidization).[218]

Spatial planning

The construction and planning legislation is organized at all three political levels (national, cantonal and municipal). The Confederation lays down the principles on land-use and spatial planning and decides directly on some important matters.[219] The

[211] Art. 50 s. 1 Const.; U. Häfelin, W. Haller & H.Keller, *Schweizerisches Bundesstaatsrecht*, 8th ed. (Zurich: Schulthess, 2012), 318.
[212] Verordnung vom 9. Mai 1990 über die Miete und Pacht von Wohn- und Geschäftsräumen (SR 221.213.11).
[213] Schweizerische Zivilprozessordnung (SR 272).
[214] M. Blumer, *Gebrauchsüberlassungsverträge (Miete/Pacht)*, vol. VII/3 of *Schweizerisches Privatrecht*, ed. W. Wiegand (Basel: Helbing Lichtenhahn Verlag, 2012), N 189. See also section 6.1 – Conciliation proceedings.
[215] Biaggini, *BV-Kommentar*, Art. 108 Const. § 3; C. Alvarez, *SG-Kommentar*, Art. 108 Const. § 13.
[216] Biaggini, *BV-Kommentar*, Art. 109 Const. § 3 and 6; Alvarez, *SG-Kommentar*, Art. 109 Const. § 6 f. and 19 (for examples concerning cantonal competences in legislation against abuses in tenancy matters, see Alvarez, *SG-Kommentar*, Art. 109 Const. § 7.
[217] www.bwo.admin.ch (last retrieved 3 December 2013).
[218] Federal Office for Housing, http://www.bwo.admin.ch/themen/mietrecht/00158/index.html?lang=de (last retrieved 3 December 2013).
[219] Federal Law on Spatial Planning (Bundesgesetz über die Raumplanung RPG, SR 700). Swiss Planning Association. 'Spatial planning in Switzerland', Special Bulletin, Spatial planning in

responsibility for spatial planning and its implementation is in the competence of the cantons and the municipalities, for whom the division of responsibilities is defined in the cantonal constitutions.[220]

The Federal Council has to approve cantonal structure plans, as well as coordinate national tasks of regional relevance with those of the cantons and deal with 'issues largely within its own jurisdiction (transport infrastructure, defence, power lines, etc.)'.[221]

The division of competences between cantons and their municipalities is usually as follows: The canton is responsible for a structure plan (*Richtplan*), binding on authorities. Among other things, the structure plan especially determines the harmonisation of the activities of the Confederation, the cantons and the municipalities which have spatial impact in the area. The municipalities are responsible for spatial planning in the land use plans (*Nutzungsplan*), which are binding for landowners. They especially have to delimit building areas from the non-building areas and determine the type and extent of specific building use, respecting the plans of the higher state level.[222]

3.3 Housing policies

- What are the main functions and objectives of housing policies pursued at different levels of governance?
    - In particular: Does the national policy favour certain types of tenure (e.g. rented housing or home ownership (owner-occupation)?

According to Article 108 Federal Constitution the Confederation has to 'encourage the acquisition of the ownership of apartments and houses for the personal use of private individuals'. The Confederation does so by means of the early withdrawals of pension fund assets of pillar 2 and 3a for home ownership and an advantageous tax on imputed rental value. As mentioned above, the means of subsidization for home ownership under the WFG are suspended.[223]

In the context of the impact of free movement of persons, the Federal Council intends to support improvement of the promotion of non-profit housing, for example by facilitating access to construction land and measures in the field of spatial planning.[224]

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

There are no state measures against vacancies. The vacancy rate in Switzerland is generally very low and landlords have no incentives of leaving their dwellings vacant (rent regulation allows landlords to make profit: rents can be adjusted to inflation and cost increases and although tenure security is comparatively high, tenancy law allows the landlord to terminate the contract for a variety of reasons such as for

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Switzerland, 40th World Congress of ISoCaRP – International Society of City and Regional Planners in Geneva (Berne: ARE, 2004), 5.

[220] Hauri, Steiner & Vinzens, *Human settlement in Switzerland*, 24 f.

[221] Hauri, Steiner & Vinzens, *Human settlement in Switzerland*, 25.

[222] Swiss Planning Association, 'Spatial planning in Switzerland', 6-8; See also Articles 14 ff. RPG, with provisions about land use plans and especially the designation of building zones.

[223] For further information, see sections 1.4 – Financining of owner-occupied housing, 3.6 Subsidization and 3.7 Taxation.

[224] Hauri, *Wohnungspolitik des Bundes*, 13. See also section 3.6 Subsidization.

example comprehensive renovations or if the landlord needs the premises for himself or relatives).[225]

- Are there special housing policies targeted at certain groups of the population (e.g. elderly people, migrants, Sinti and Roma etc)?

Elderly people

Cantons and especially municipalities are responsible for rendering services to elderly people, such as supporting them in their everyday lives inside their own homes as well as in retirement and nursing homes.[226] Where for an elderly tenant who receives notice of termination of the rental contract moving to a home is the only option, this can also be considered by the judge in deciding about an extension of the lease (see also section 6.6 – Notice by the landlord, claims for extension of the contract).

Travellers

The number of designated areas to stay and for transiting is too low to meet the demand. [227] Undeveloped properties, which comprises areas to stay and for transiting for traveller communities are not covered by the provisions on protection of residential premises.[228]

Foreigners

See section 3.4 – Measures to prevent ghettoization.

3.4 Urban policies

- Are there any measures/ incentives to prevent ghettoization, in particular:
  - mixed tenure type estates[229]
  - 'pepper potting'[230]
  - 'tenure blind'[231]
  - 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 requirement of especially attractive localization as a condition to obtain building permit, condition of city contribution in technical infrastructure.

[225] Boligøkonomisk Videncenter, *The Private Rented Sector in the New Century – A Comparative Approach*, 193 & 195; Sections 6.5 – Rent regulation and 6.6 – Notice by the landlord.
[226] Federal Social Insurance Office, http://www.bsv.admin.ch/themen/kinder_jugend_alter/00068/ (last retrieved 3 December 2013).
[227] http://www.news.admin.ch/message/index.html?lang=en&msg-id=43142 (last retrieved 3 December 2013).
[228] BGer 4C.128/2006 of 12 June 2006, E. 2; Weber, *Mieterschutz in der Schweiz*, 208.
[229] 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.
[230] 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.
[231] This is a mechanism for providing social housing in a way that the financial status of the inhabitants is not readily identifiable form outside. It is used to avoid/minimize stigmatization and social exclusion which could be caused by living in a (openly identifiable) social stock.

Considering that Switzerland has one of the biggest percentages of foreigners of the resident population among European countries, the integration of foreigners is, on the whole, successful.[232]

The percentage of foreign people is much higher in urban than in rural areas. In 2000, the highest proportion of foreign people of the resident population was in the city of Geneva, at 43.8%. In some municipalities, more than 50% of the residents are foreigners. In international comparison however, the segregation of the foreign population in Swiss agglomeration communities is relatively low. Also, there are no mono-ethnic quarters.[233]

Foreign households run a bigger risk of living in bad conditions than Swiss households: Swiss people have in average 46.6m² of living space, while people from Africa, Asia and the former Yugoslavian countries and Turkey have only 27.3, 26.8 and 21.6m² of living space at their disposal, respectively.[234] A study for the city of Zurich with the data of the 2000 population census showed indications that certain foreign households are disadvantaged on the rental market.[235] A study of 2008 for Geneva and the city of Zurich showed that in average, a foreigner pays slightly more rent than a Swiss for the same dwelling (2.3% in Geneva and 2.6% in Zurich). The difference is bigger where only people with low educational level are concerned: In these cases a foreigner in Geneva pays on average 5.2% and in Zurich 6.8% more than a Swiss with low educational level.[236]

Measures to prevent ghettoization

Bigger cities have their own strategies concerning problematic districts, but in recent years economically and socially disadvantaged population groups moved from core cities to agglomeration communities. These municipalities and smaller and mid-sized cities have only little experience in dealing with immigrants who are not well integrated.[237]

According to the principle of subsidiarity, the Confederation has no direct competence concerning the development of cities and communities. Nevertheless, the Confederation has some competences related to the integration of foreigners, having an impact on this development. In supporting 'projets urbains', the Confederation aims to prevent ghettoization and improve safety and social cohesion:

[232] Federal Office for Migration, 'Bericht Integrationsmassnahmen, Bericht über den Handlungsbedarf und die Massnahmenvorschläge der zuständigen Bundesstellen im Bereich der Integration von Ausländerinnen und Ausländern per 30. Juni 2007' (Berne: FOM, 2007), 7.
[233] Federal Office for Migration, 'Probleme der Integration von Ausländerinnen und Ausländern in der Schweiz, Bestandesaufnahme der Fakten, Ursachen, Risikogruppen, Massnahmen und des integrationspolitischen Handlungsbedarfs' (Berne: FOM, 2006), 73.
[234] 'Probleme der Integration von Ausländerinnen und Ausländern in der Schweiz', 74 f.
[235] In total the rent-differences for one to five room dwellings are small, but foreign people live more often in districts with affordable housing supply, which drags down the average. Also, older households pay about 10-20% less for a dwelling with less than five rooms, and foreigners do not often stay in Switzerland after reaching retirement age, or they are naturalized Swiss citizens by then. (Press release city of Zurich, 8 June 2004, 'Zahlen ausländische Haushalte mehr Mietzins als schweizerische?').
[236] A. Baranzini et al., 'Do Foreigners Pay Higher Rents for the Same Quality of Housing in Geneva and Zurich?', *Swiss Journal of Economics and Statistics* 4 (2008): 723 f.
[237] 'Bericht Integrationsmassnahmen', 40.

up to 50% of the costs a municipality invests in a project to improve the quality of life and support residential areas with special needs are paid by the Confederation.[238]

Other measures against ghettoization are taken and/or financed by cantons and municipalities. The city of Zurich for example, owns about 9,000 apartments. Choosing tenants, among others, the city focuses on reaching a good social mix.[239] Also, about every fifth housing cooperative takes a good social mix into account when choosing new tenants.[240]

- Are there policies to counteract gentrification?

As a result of improvements of residential areas, the rents of renovated dwellings rise. This can lead to the effect that socially disadvantaged people cannot afford the rent anymore and are being displaced. To prevent this effect, town planning measures (such as preventing ghettoization by investing into property values in a neighbourhood) have to be linked to social measures.[241]

Another reason for gentrification in Switzerland is low taxes, which makes a municipality or a canton attractive for wealthy people and firms. As land prices and rents increase massively, many locals cannot afford living in the city or even the canton anymore. This problem emerged especially in the canton Zug. The city of Zug has recently established specific zones, where 50% of the area is reserved for affordable housing. The rent of dwellings built in these areas may not exceed a certain amount.[242]

In the last years there were several cantonal and municipal initiatives, with the purpose to counteract gentrification, for example with a fixed quota of non-profit dwellings.[243]

- 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?)

Provisions concerning structural safety and requirements for inhabited rooms are incorporated in cantonal and/or municipal building acts and are therefore diverse.[244]

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[238] Federal Office for Housing, http://www.bwo.admin.ch/themen/00235/00237/00286/index.html?lang=de (last retrieved 3 December 2013); 'Bericht Integrationsmassnahmen', 40 and 43.

[239] Verordnung der Stadt Zürich über die Grundsätze der Vermietung (LS 846.100), available at http://www.stadt-zuerich.ch/content/fd/de/index/liegenschaftenverwaltung/wohnungen.html (last retrieved 3 December 2013).

[240] D. Blumer, *Vermietungskriterien der gemeinnützigen Wohnbauträger in der Schweiz, Eine Studie zur Anwendung von Belegungsvorgaben und Einkommenslimiten bei 1000 gemeinnützigen Wohnbauträgern* (Berne: FOH, 2012),18.

[241] M. Schulte-Haller, *Soziale Mischung und Quartierentwicklung: Anspruch versus Machbarkeit* (Berne: Programms Projets Urbains, 2011), 5 and 19.

[242] E. Hass & S. Häne, 'Zug schafft Zonen für günstige Wohnungen', *Tages-Anzeiger*, 21 December 2010.

[243] Schweizerischer Mieterinnen und Mieterverband Deutschschweiz. '"Zugisierung" bald überall?' *Mieten&Wohnen* 9 (2010): 7: for example in Zurich: Popular initiative 'Wohnen für alle', Basel: 'bezahlbares und sicheres Wohnen für alle!'.

The provisions are for example about the size and height of the rooms, minimum size of windows compared to the size of the room, access to sanitary facilities and laundry facilities, requirement of a kitchen, ventilation or heating possibilities and insulation.[245]

A control of compliance with these provisions only takes place directly after the completion of a building or of renovation work. After that, only controls of some technical installations, such as heating installations[246] or an eventual elevator[247] are carried out regularly.

Apart from these regulations, a tenant can require from the landlord to maintain the apartment in a condition fit for its designated use, which is determined by the contractual agreement and the requirements for a normal use of the apartment.[248] Apart from defects attributable to the tenant or minor defects the tenant has to remedy himself, he can require the landlord to remedy defects of the object.[249]

In order for non-profit housing organisations to profit from indirect aid from the state, the dwellings to be built are evaluated according to their quality and the quality of the housing complex and its environment (see also section 3.6 Subsidization).

- 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?)

The competence for decisions about urban and communal development is generally at municipal level or divided between canton and municipalities.[250] See also section 3.4 – Measures to prevent ghettoization and policies to counteract gentrification.

3.5 Energy policies

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

The Confederation and the cantons started a buildings programme (*Gebäudeprogramm*), based on the Federal Act on the Reduction of CO_2 Emissions[251] in 2010. This programme is financed with a part of the CO_2 fee and cantonal promotion programmes in an amount of about CHF 280 to 300 million per annum. With this programme, the energy consumption and the CO_2 emissions shall

[244] See also: R. Stöcklin, *Sicherheit im Wohnungsbau – Vorschriften der Schweizer Kantone und des Fürstentums Liechtenstein zur baulichen Gestaltung von Geländern, Brüstungen und Treppen* (Berne: bfu – Swiss Council for Accident Prevention, 2011).
[245] See for example: Planungs- und Baugesetz Zürich § 300 ff. and Besondere Bauverordnung I Zurich § 8 ff.; Bauverordnung Berne Art. 63 ff.; Loi sur les constructions et les installations diverses Geneva Art. 52 ff. and Règlement d'application de la loi sur les constructions et les installations diverses; Bau- und Planungsgesetz Basel § 63 ff.
[246] These controls are due according to the Ordinance on Air Pollution Control (Luftreinhalte-Verordnung, SR 814.318.142.1).
[247] These controls are either due according to cantonal legislation (for example Besondere Bauverordnung I Zurich) or are carried out to ensure adequate maintenance as a result of the strict liability of property owners according to Art. 58 CO.
[248] Art. 256 s. 1 CO; Blumer, *Gebrauchsüberlassungsverträge,* N 624.
[249] For alternative rights of the tenant and further information about the tenant's rights in case of defects, see section 6.5 – Defects of the dwelling.
[250] 'Bericht Integrationsmassnahmen', 41.
[251] Bundesgesetz über die Reduktion der CO2-Emissionen vom 23. Dezember 2011 (SR 641.71).

be reduced by supporting energy-efficient renovation and the use of renewable energy in buildings.[252]

According to the Constitution and the Energy Act[253], the cantons regulate about efficient energy use in new and in existing buildings.[254] The Conference of Cantonal Energy Directors elaborated a catalogue of energy policy measures in 2008. In all cantons at least parts of these measures are in force. Measures concerning thermal insulation requirements and maximum percentages of non-renewable energies are in force in all cantons.[255]

As a rule, additional services provided by the landlord entitle the landlord to raise the rent. Many energy-related renovations are considered as such additional services. [256] For the tenants this can be unprofitable, since although the costs for heating and hot water may be reduced, the rent increase oftentimes exceeds these savings.[257]

Summary table 3

	National level	Cantons and Municipalities
Policy aims	1) Encourage the construction of housing and the acquisition of the ownership of apartments and houses for the personal use of private individuals 2) Encourage the activities of developers and organizations involved in the construction of public utility housing 3) Prevent abuses in tenancy matters	Various, different from canton to canton and from municipality to municipality.
Laws	1) BVG; BVV 3; WFG (means for promoting home ownership are suspended) 2) WFG (since 2003; before: WEG) 3) CO; VMWG	
Instruments	1) Early withdrawal of pension fund assets and tax advantages (advantageous imputed rent) 2) Indirect financial support of non-profit housing organisations 3) See section 6. Tenancy regulation and its context (Especially challenging initial rent, rent increases and termination of tenancy contracts; extension of the lease)	

[252] http://www.bfe.admin.ch/energie/00588/00589/00644/?lang=de&msg-id=42237 (last retrieved 3 December 2013); www.dasgebaeudeprogramm.ch (last retrieved 3 December 2013).
[253] Energiegesetz (SR 730.0).
[254] Art. 89 s. 4 Const.; Art. 9 s. 2 Energiegesetz.
[255] Swiss Federal Office of Energy, 'Stand der Energiepolitik in den Kantonen' (Berne: SFOE, 2012), 12.
[256] Art. 269a lit. b CO in conjunction with Art. 14 VMWG.
[257] D. Scruzzi, 'Mieten und Sanierungen, Bund prüft Mieterschutz wegen AKW-Ausstieg', *Neue Zürcher Zeitung*, 16 February 2013; According to Art. 14 s. 1 VMWG, the landlord can pass 50-70% of the costs of the renovation work to the tenant.

3.6 Subsidization

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

Federal Housing legislation in general

Article 108 s. 1 Constitution states that 'the Confederation shall encourage the construction of housing, the acquisition of the ownership of apartments and houses for the personal use of private individuals, as well as the activities of developers and organizations involved in the construction of public utility housing.' This gave the Confederation competence and obligation to legislate. As a result, the following two regulations, among others, were enacted: the Housing construction and Housing Ownership Promotion Act (WEG) and the Federal Act for the promotion of Affordable Housing (WFG):

Housing construction and housing ownership promotion Act (WEG)

The WEG was enacted in 1975 and served as basis for federal aid in construction and housing until the end of 2001. Aid which was granted based on this law will still be carried on for 25 years.[258]

Under the WEG direct federal aid was granted for about 107,000 dwellings. About one third of these subsidized dwellings were owner-occupied, one third were rental dwellings owned by cooperatives, foundations and public bodies and the rest were rental dwellings owned by other legal persons, private individuals and institutional investors. In addition, the construction or renovation of about 20,000 dwellings was subsidized indirectly by supporting non-profit housing organizations with means of guarantees, loans and equity participation.[259]

Since the mid-nineties, problems with the WEG system occurred. As a result of the continuing real estate crisis and the economic recession at the time, unexpected costs emerged, for example as the state became increasingly responsible for guarantees it had granted on mortgage loans. Another major problem of the subventions under the WEG was the need to raise the rent periodically, exceeding the cost-rent level to being able to reimburse the advance payments to the state. When construction costs dropped, the number of vacant dwellings increased, and the level of rents remained static or even decreased, and it was difficult for the subsidized dwellings to finding new tenants.[260]

Federal Housing Act (WFG)

In 2003, the Federal Housing Act (WFG) entered into force, succeeding the WEG. According to this statute, the Confederation promotes particularly the construction

[258] Federal Office for Housing, (http://www.bwo.admin.ch/themen/wohnraumfoerderung/00155/index.html?lang=de (last retrieved 3 December 2013).
[259] 'Botschaft über die Förderung von preisgünstigem Wohnraum' of 21. February 2002 (BBl 2002 2829) 2837; Art. 51 WEG.
[260] 'Botschaft über die Förderung von preisgünstigem Wohnraum', 2838-2840.

and the renovation of rental apartments for low income households, the access to home ownership, and activities of organizations involved in the construction of non-profit housing. These objectives shall be pursued by direct and indirect forms of assistance through the Swiss Federal Office for Housing (FOH). However, the means of direct support were first temporarily suspended in the course of the 2003 relief program for the federal budget[261], and in 2007 the Federal Council decided to dispense entirely with direct aid. Therefore, home ownership is (at the moment) not promoted by the WFG and the aid is limited to supporting organizations involved in the construction of non-profit housing.[262] The purpose of this aid is mainly to enable non-profit housing organizations to do construction and renovation work. The rent for dwellings rented out by these organizations is lower than the market rent because, since they operate on a non-profit level, only the cost rent is charged. In the city of Zurich for example, the rent of cooperative-dwellings are on average one fourth lower and in Basel-City one third lower than comparable dwellings on the market.[263] Also, to a limited extent, lower rents are supported by giving advantageous loans.[264] The non-profit housing entities are mainly housing co-operatives, but also foundations and public limited companies.[265] The state only provides public housing to a very limited extent.[266]

Subsidization of non-profit housing organizations

Non-profit landlords are not clearly identified in the statistical data. According to estimates, in 2000 however, cooperatives, foundations and the state together owned about 8.8% of all dwellings and 13.8% of all rental dwellings.[267] The percentage of public utility dwellings is higher in cities; the highest percentage is reached by the city of Zurich, at about 25% of all dwellings in 2009. These 25% include dwellings of cooperatives, of the city, of three public-trust foundations (promoting housing for the elderly, for large families and for preserving cost-efficient living and commercial space) and student-apartments (which make only about 1%).[268] The canton Geneva intends to increase the amount of public utility housing to 20% in the long term.[269]

[261] 'Botschaft zum Entlastungsprogramm 2003 für den Bundeshaushalt (EP 03)' of 2 July 2003 (BBl 2003 5615).
[262] Federal Housing Act 'WFG – Merkblatt 1: Übersicht über Ziele und Förderinstrumente' (Berne: FOH, 2013), 2; Botschaft zu einem Rahmenkredit für Eventualverpflichtungen in der Wohnraumförderung' of 10. August 2010 (BBl 2010 5557), 5558; Exception: agricultural property (see section 3.6 – Subsidization owner occupier).
[263] 'Stadtblick 21', 5; F. Kemeny & P. Laube, *Mietpreisraster* (Basel: Statistisches Amt des Kantons Basel-Stadt, 2012), 1.
[264] M. Gmünder et al., *Wohnraumförderung durch zinsgünstige Darlehen aus dem Fonds de Roulement: Analyse von Vollzug und Wirkungen, Kurzbericht* (Basel: FOH, 2012), 3 and 11.
[265] http://www.wohnbaugenossenschaft-gruenden.ch/wie_fuehren/weitere_gemeinnuetzige_bautraeger.html (last retrieved 3 December 2013).
[266] J. Lawson, 'The Transformation of Social Housing Provision in Switzerland Mediated by Federalism, Direct Democracy and the Urban/rural Divide', *European Journal of Housing Policy,* vol. 9, no. 1 (2009): 54.
[267] Statistisches Amt des Kantons Zürich, 'Genossenschaftlich wohnen, Die Wohnungen und die Bewohnerschaft von Baugenossenschaften im Kanton Zürich und der Schweiz im Spiegel der Volkszählungen 1970-2000', *Statistik.info* 20 (2004),10 and 13.
[268] 'Stadtblick 21', 10.
[269] http://www.ge.ch/logement/logement-utilite-publique/qu-est-ce.asp (last retrieved 3 December 2013); The term 'logement d'utilité publique' contains non-profit owners (state, cooperatives, foundations, etc.), relating the rent to the income of the tenant and relating the numbers of rooms of a housing unit to the number of people living in it.

The construction of public utility housing is supported by the Confederation under the WFG (non-profit housing organizations, such as co-operative housing, foundations, etc.). The direct means of assistance are not in force; indirect assistance is granted through a working capital fund, a mortgage guarantee cooperative and a bond issuing cooperative:

The *working capital fund (Fonds de roulement)*, is operated by the two umbrella organizations representing the non-profit housing providers.[270] Of this working capital fund, low-interest loans are granted in small sums for the residual financing of a project. The interest on these loans is always at least 1.5% below the market rate (but at least at 1.5%). The loan is secured by a mortgage subordinate to the mortgages of the banks. Projects applying for support are evaluated according to the Swiss Housing Evaluation System[271], a special instrument to plan, assess and compare residential buildings, taking into account the quality of the dwellings itself (size, number of rooms and windows, etc.), the housing complex (e.g. noise nuisance, building access) and its environment (e.g. transport connectivity, schools and recreation areas).[272] Additionally, new buildings must reach a certain energy-efficiency standard.[273] The non-profit housing organization has to be a member of one of the umbrella organizations to apply for a loan. The loans are usually granted for twenty years, the minimum being CHF 10,000 and the maximum CHF 30,000 per dwelling and CHF 2,000,000 per application.[274]

The *mortgage guarantee co-operative for non-profit housing (Hypothekar-Bürgschaftsgenossenschaft schweizerischer Bau- und Wohngenossenschaft)* is also operated by the two umbrella organizations and guarantees banks for up to 90% of loans for new buildings and renovations. The loans are secured by mortgage subordinate to the mortgages of the banks. The guarantees are backed by a state guarantee fund. This state counter-guarantee also allows non-profit housing organizations to access lower interest rates for second mortgages.[275]

The *Swiss bond issuing co-operative (Emissionszentrale für gemeinnützige Wohnbauträger)* raises funds for their members (non-profit housing entities) and grants them advantageous loans. The bonds are covered by a state guarantee and therefore granted a high credit rating. New buildings and renovations financed with such means must fulfil the same standards as projects financed with means of the working capital fund.[276]

Requirements in relation to potential tenants

If an organization benefits from only indirect aid, there are no requirements regarding the tenancy contract or the characteristics of the tenants. The only requirements regard the statutes of the supported non-profit housing organization: mainly to

[270] See section 1.5 – Umbrella groups.
[271] 'Wohnungs-Bewertungs-System' (Federal Office for Housing, http://www.bwo.admin.ch/wbs/index.html?lang=de [last retrieved 6 December 2013]).
[272] Lawson, 57; Hauri, Steiner & Vinzens, *Human settlement in Switzerland*, 70.
[273] The 'Minergie'-Standard, see http://www.minergie.ch/standard_minergie.html (last retrieved 19 March 2014).
[274] Federal Housing Act 'WFG – Merkblatt 2: Bundeshilfe an die Dachorganisationen des gemeinnützigen Wohnungsbaus und ihre Einrichtungen', (Berne: FOH, 2013) 2 und 3; http://www.wbg-schweiz.ch/finanzierung/darlehen.html (last retrieved 3 December 2013).
[275] 'WFG – Merkblatt 2: Bundeshilfe an die Dachorganisationen des gemeinnützigen Wohnungsbaus und ihre Einrichtungen', 3; Lawson, 58 (the guarantee is rarely used).
[276] 'WFG – Merkblatt 2: Bundeshilfe an die Dachorganisationen des gemeinnützigen Wohnungsbaus und ihre Einrichtungen', 4; Lawson, 59-60.

provide low-priced dwellings, limit dividend distribution, and forbid the payment of royalties.[277]

A representative study about voluntarily imposed conditions to the characteristics of the tenants by self-supporting[278] non-profit housing organizations was published by the FOH in 2012. It indicates that more than two thirds of all dwellings owned by such organizations have regulations about the number of tenants of a dwelling in relation to the number of rooms and/or the size of the dwelling,[279] and 21% of the dwellings are only rented out to people with a certain maximum income and asset (however, for 68% of the dwellings the income is considered in a non-binding way: the landlords prefer tenants which depend on inexpensive dwellings because of their economic situation).[280]

For rental tenures that received direct subsidization under the WEG,[281] there are certain requirements concerning the tenants. These federal subsidies are only paid if the potential tenants do not have incomes or wealth that exceeds certain limits, and there must be a minimum number of occupants per room.[282]

Subsidization tenant

Social assistance benefits are provided by the municipalities to individuals and families who are not able to make ends meet. According to the principle of subsidiarity, social assistance benefits are only granted to the extent that spouses and close relatives are financially not in a position to support them.[283] Based on Articles 12 and 115 of the Swiss Constitution, the cantons are obligated to regulate and provide social assistance. Among other things, the purpose of social assistance is to cover basic necessities, which includes housing costs. The amount of assistance is the difference between a person´s income and the 'existence minimum', which is calculated according to cantonal guidelines.[284] The 'existence minimum' comprises a fixed rate for food, clothing, personal care, etc., subject to whether the welfare recipient is single or married and living together with his or her spouse or partner and whether the recipient is living with or without children. This amount is elevated by the amount of the specific spending covering, among other expenses, the housing costs. Generally, the actual rent and accessory charges are taken into account unless it exceeds the personal needs of the tenant. In this case, the actual rent is only considered until the earliest date at which the tenant can terminate the rental contract and then reduced to a reasonable level.[285]

[277] For further requirements for these non-profit organizations see Art. 33 WFG in conjunction with Art. 37 Ordinance on the Federal Act fort he promotion of Affordable Housing (Verordnung über die Förderung von preisgünstigem Wohnraum, WFV, SR 842.1); 'WFG – Merkblatt 2: Bundeshilfe an die Dachorganisationen des gemeinnützigen Wohnungsbaus und ihre Einrichtungen', 2.

[278] Self-supporting in this sense means having received no direct subsidies (neither by the Confederation nor by Cantons or municipalities). These organizations may have received indirect subsidies.

[279] E.g. the number of tenants may not exceed the number of rooms by more than one.

[280] Blumer, *Vermietungskriterien der gemeinnützigen Wohnbauträger,* 5, 19 and 28.

[281] The direct means of subsidization under the WFG are suspended (see above).

[282] Art. 27b ff. VWEG.

[283] Article 328 CC.

[284] Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/13/03/03.html (last retrieved 3 December 2013).

[285] Examples of calculation of the 'existence minimum': Canton Zurich: http://www.ejpd.admin.ch/content/dam/data/wirtschaft/schkg/zh/14-zh-ks-d.pdf (last retrieved 3 December 2013); Canton Lucerne: http://www.steuerbuch.lu.ch/lustb_b2a_Erlass_Anhang_Notbedarf (last retrieved 3 December 2013).

In 2011, three percent of all Swiss residents and 4.2% of all households received social assistance. The highest quota of social assistance beneficiaries are amongst single parent households, with 17.4%.[286] Regarding these quotas it has to be considered that housing costs are only one component of the calculation of social assistance benefits. Additionally, these quotas are distorted by the fact that some cantons (twelve of the twenty-six cantons in 2012) offer means-tested housing benefits upstream to social assistance, in order to avoid people becoming dependent on the social assistance system. Altogether, cantons and municipalities spent almost CHF 43.8 million on such means-tested housing benefits in 2010.[287]

Two cantons (Zug and Vaud) allow deducting the rent payments from the taxable income in certain cases (see also section 3.7 – Taxes concerning tenants).

Subsidization owner-occupier

Home ownership is promoted by the Swiss Confederation as well as most of the cantons. Only seven cantons do not have statutory regulation about home ownership promotion or intend to provide such.[288]

On national level, home ownership is promoted by the possibility of early withdrawal or pledge of retirement funds, by a tax on imputed rental value which is set lower than the market rent and by the possibility of deductions on interest payments.[289] Although home ownership promotion is implemented in the Swiss government policy, its extent is not comparable to other European nations.[290]

Also for homeowners the calculation of the existence minimum in the context of social assistance contains the housing costs, such as the mortgage rates (excluding amortization) and the maintenance costs, unless these costs are unreasonably high.[291]

Since the implementation of direct forms of assistance has not occurred, there are currently no means of assistance for promoting home ownership under the WFG.[292]

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[286] 'Sozialhilfefälle und Sozialhilfeempfänger/innen und Sozialhilfequote nach Kantonen' (Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/13/03/03/key/02.html [last retrieved 3 December 2013] and 'Unterstützungsquote nach Haushaltstyp', Federal Statistical Office, http://www.bfs.admin.ch/bfs/portal/de/index/themen/01/04/blank/01/03/05.html [last retrieved 3 December 2013]).

[287] Statistik Schweiz, Finanzstatistik der bedarfsabhängigen Sozialleistungen, Schweiz – Wohnbeihilfen; 'Inventar und Finanzstatistik der bedarfsabhängigen Sozialleistungen, Das Wichtigste in Kürze' (Neuchâtel: FSO, 2012), 11; These benefits consist of additional benefits to the federal benefits according to the WEG, other object-oriented benefits, and subject-oriented, direct benefits to the tenants (G. Bonoli & F. Bertozzi, *Kantonale Wohnbeihilfen und Arbeitslosenhilfen, Abgrenzungskriterien für die Sozialhilfestatistik und das Inventar der bedarfsabhängigen Sozialleistungen* [Neuchâtel: FSO, 2007], 13) and only benefits that are based on cantonal laws ('Inventar und Finanzstatistik der bedarfsabhängigen Sozialleistungen, Das Wichtigste in Kürze', 4).

[288] Federal Office for Housing, http://www.bwo.admin.ch/themen/wohnraumfoerderung/00148/00337/index.html?lang=de (last retrieved 3 December 2013).

[289] See sections 1.4 – Financing of owner-occupied housing and 3.7 Taxation.

[290] Werczberger, 'Home Ownership and Rent Control in Switzerland', 345; Bourassa, Hoesli & Scognamiglio, 'Housing Finance, Prices, and Tenure in Switzerland', 265.

[291] See above, examples of calculation of the 'existence minimum' in the cantons Zurich and Lucerne.

[292] See section 1.4 – Financing of owner-occupied housing, mortgage loans; The only promotion of home ownership under the WFG is the financing of a working capital fund, administered by the foundation for the promotion of home ownership (*Stiftung zur Förderung von Wohneigentum*), which grants interest-free or low-interest loans only to owners and lessees of *agricultural* property. The possibility to back the guarantees of a mortgage guarantee co-operative for the promotion of home

Subsidies by cantons and municipalities

Autonomous from federal subsidization, various cantons and municipalities, especially bigger cities, maintain their own housing programs:

In the city of Zurich for example, every fourth dwelling is owned by the municipality or a cooperative. The rent for dwellings of cooperatives is about one fourth lower than on the private market.[293] The city concluded 27 contracts between 1994 and 2008, mainly with cooperatives, on giving land with a building right at a reduced price, which led to the construction of 1,177 dwellings. Another 1,050 dwellings are in planning (as of 2010).[294]

The city of Geneva holds a housing park of over 5,000 apartments which are rented out to people and families in need, with a rent calculated according to their income, assets and employment level.[295] In total, more than every fifth household in Geneva profits from either a subsidized apartment and/or direct rental aid.[296]

The city of Berne rents out 560 subsidized dwellings. However, a control recently carried out showed that more than half of these dwellings are inhabited by tenants who are not entitled to this kind of subsidy, because of their high income or assets or because the dwelling is too big for the number of people living there. Most of these tenants have now received notice of termination and for some the rental contract is being changed to a non-subsidized tenancy. It is now being discussed whether this object based subsidy system should be carried on.[297]

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

As mentioned above, the direct subsidies under the WFG never came into force because of budget law. The possibilities of early withdrawal of pension fund assets is criticised because of the risks they bear in case of unanticipated changes of the market (see section 1.4 – Financing of owner-occupied housing). The system of taxation on imputed rental value was subject to many political proposals at cantonal and federal level in the last decades (see section 3.7 Taxation).

Summary table 4

Subsidization of landlord	Non-profit housing providers (e.g. Cooperatives)
Subsidy before start of contract (e.g. savings scheme)	Indirect aid under the WFG: Low-interest loans and guarantees for loans with state counter-guarantee (carried out via a working capital funds, a mortgage guarantee cooperative and a bond issuing cooperative)
Subsidy at start of contract (e.g. grant)	
Subsidy during tenancy (e.g. lower-than market	Additional benefits (*Zusatzverbilligungen*) according to WEG (abolished in 2001, granted aid is still carried on).

ownership (*Rückbürgschaften zu Gunsten der Hypothekar-Bürgschaftsgenossenschaften für Wohneigentumsförderung*) is suspended because of lack of demand.

[293] 'Stadtblick 21', 5.

[294] 'Stadtblick 21', 11.

[295] http://www.ville-geneve.ch/themes/amenagement-construction-logement/logement/logements-sociaux/ (last retrieved 3 December 2013).

[296] Bourassa & Hoesli, *Why Do the Swiss Rent?*, 290.

[297] I. Troxler, 'Für Wohn-Zuschüsse statt Kontrollapparate', *Neue Zürcher Zeitung*, 25 February 2014.

interest rate for investment loan, subsidized loan guarantee)	

Summary table 5

Subsidization of tenant	
Subsidy before start of contract (e.g. voucher allocated before finding a rental dwelling)	
Subsidy at start of contract (e.g. subsidy to move)	Generally a social welfare recipient gets additional funds if moving into a cheaper apartment or into another municipality.
Subsidy during tenancy (in e.g. housing allowances, rent regulation)	Housing costs are covered by social assistance benefits.

Summary table 6

Subsidization of owner-occupier	
Subsidy before purchase of the house (e.g. savings scheme)	Funds of the occupational benefit plan and pillar 3a-funds, which can be used to finance the acquisition of self-occupied dwellings, are subject to a reduced tax rate.
Subsidy at start of contract (e.g. grant)	
Subsidy during tenure (e.g. lower-than market interest rate for investment loan, subsidized loan guarantee, housing allowances)	Tax on imputed rental value

3.7 Taxation

- What taxes apply to the various types of tenure (ranging from ownership to rentals)? In particular:
    - 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?
- 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)

The Confederation, the cantons and the municipalities each levy their own taxes. According to the Swiss federalist system, the Confederation can levy only the taxes the Constitution entitles it to. The cantons on the other hand are authorized to levy any type of tax which is not in the exclusive authority of the Confederation (such as for example the Value Added Tax).[298] The cantonal constitutions define the types of taxes the municipalities are entitled to levy.[299] These circumstances lead to a relatively complex tax system. In the following, the taxes somehow related to real estate, at the federal and cantonal levels are described.

Taxes concerning tenants

At the federal level and in almost all cantons, there is no special taxation on the rents paid by tenants. Only in the canton Vaud, there would be the possibility for the municipalities to levy a tax of a maximum of three percent on rentals to be paid by the tenant or the owner-occupier. Today however, none of these municipalities do so.[300]

In the cantons Zug and Vaud, in certain cases tenants can deduct the rent (or part of it) from their taxable income as a compensation for the rather low imputed rental value owner-occupiers have to pay tax for.[301]

Taxes concerning homeowners and landlords

The Confederation and all cantons and municipalities levy *income tax* for individuals and corporate income tax for legal entities.

Personal income tax is the most important type of tax and includes the imputed rent of owner-occupied housing (see below) and the income from immovable property, such as the rental income. Expenses related to the earning of income are deductible from the gross income. At the cantonal and municipal level, earnings from the sale of immovable property are exempt from income taxation, since they are subject to a special immovable property gains tax (see below). At the federal level, gains derived from the sale of immovable property from private assets are not subject to the direct federal tax.[302]

Corporate income tax at the federal level includes gains derived from the sale of immovable property. The tax affects two categories of legal entities which are subject to different tax rates. The tax for corporations such as joint stock companies, limited partnerships, and limited liability companies as well as cooperative societies is levied at a flat rate of 8.5% of the net income, while the tax for associations, foundations,

[298] In 1993 however, the Law on the harmonization of the direct taxation of cantons and municipalities (Bundesgesetz über die Harmonisierung der direkten Steuern der Kantone und Gemeinden, StHG, SR 642.14) entered into force, implementing formal but not material harmonization. Federal Tax Administration, 'Die geltenden Steuern von Bund, Kantonen und Gemeinden' (Berne: SSK, 2012), 2 f.
[299] Federal Tax Administration, 'Federal, Cantonal and Communal Taxes, An Outline on the Swiss System of Taxation' (Berne: FTA, 2013), 6; 'Die geltenden Steuern von Bund, Kantonen und Gemeinden', 1 f.
[300] 'Die geltenden Steuern von Bund, Kantonen und Gemeinden', 45. However, landlords must pay taxes for the rentals as part of their income (see below).
[301] 'Kurzer Überblick über die Einkommenssteuer natürlicher Personen', 10.
[302] 'Federal, Cantonal and Communal Taxes, An Outline on the Swiss System of Taxation', 11, 20 and 24.

public and ecclesiastical corporations, and institutions as well as investment trusts with direct real estate ownership is levied at a special flat rate of 4.25%.[303]

All cantons and municipalities levy *net wealth taxes* on individuals and almost all levy a tax on equity of legal entities. Subject to the wealth tax is total property with a cash value, which also comprises real estate. Documented outstanding debts can be deducted.[304] Paid-up capital and reserves are subject to the tax on equity.[305]

Also, the following taxes are levied only at cantonal and municipal level:

Almost all cantons levy an *inheritance tax* and a *gift tax*. In a few cantons, the municipalities also levy these taxes, but in most of the cantons, the municipalities receive a part of the tax levied by the canton.[306] Usually, the closer the deceased and the inheriting person were related, the lower the tax rate. In all cantons, the transfer of wealth to the spouse, and in most cantons also the transfer to direct offspring, is tax free.[307]

In most of the cantons gains derived from the sale of immovable property of legal entities are part of the corporate income tax. For individuals, it depends on whether the property that was sold was part of the business assets or private assets. In the first case, most of the cantons as well as the confederation add the gain to the income which is taxed with the personal income tax or the corporate income tax, respectively. In the second case, there is no tax on the gains on federal level but an *immovable property gains tax* (*Grundstückgewinnsteuer*) in all of the cantons.[308] The longer a property was held before sold again, the lower the tax rate, and in more than half of the cantons, the tax is progressively indexed to the amount of the profit. Under certain circumstances the tax liability is postponed until the next tax-relevant transaction, for example, if the property changed its owner by inheritance or if a self-inhabited property was sold and the proceeds were used to buy or build a new self-inhabited property.[309]

Real estate tax (*Liegenschaftssteuer*) is known at cantonal and/or municipal level. About half of all cantons regulated a real estate tax additional to the wealth and equity tax, although these already include real estate. Subject to the tax is the market value of the property without deduction of debts. About one third of the cantons have systems where a real estate tax is to be paid instead of income and wealth taxes or equity tax, respectively, for the real estate if it is a higher sum or similar. The rest of the cantons do not levy real estate tax. The tax rates range from 0.2 to 3 per mill of the real estate's market value. [310]

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[303] 'Federal, Cantonal and Communal Taxes, An Outline on the Swiss System of Taxation', 12; Art. 49 in conjunction with 68 und 71 f. Federal Act on Direct Federal Taxation (Bundesgesetz über die direkte Bundessteuer DBG, SR 642.11).
[304] 'Federal, Cantonal and Communal Taxes, An Outline on the Swiss System of Taxation', 20; Art. 13 StHG.
[305] 'Federal, Cantonal and Communal Taxes, An Outline on the Swiss System of Taxation', 22; Art. 29 StHG.
[306] Federal Tax Administration, 'Die Erbschafts- und Schenkungssteuern' (Berne: SSK, 2013), 3.
[307] 'Federal, Cantonal and Communal Taxes, An Outline on the Swiss System of Taxation', 23; 'Die Erbschafts- und Schenkungssteuern', 21.
[308] Federal Tax Administration, 'Kurzer Überblick über die Grundstückgewinnsteuer' (Berne: SSK, 2012), 2; The cantons are obliged to tax gains from the sale of immovable property (Art. 2 I d StHG).
[309] Art. 12 s. 3 and 5 StHG.
[310] Federal Tax Administration, 'Die Liegenschaftssteuer' (Berne: SSK, 2011), 1 and 11 f.; Die geltenden Steuern von Bund, Kantonen und Gemeinden, p. 41.

Real estate transfer tax (*Handänderungssteuer*) is levied in all cantons except Zurich and Schwyz by the cantons and/or the municipalities. The tax is assessed on the purchase price, and is to be distinguished from the charges owed for the use of the services of the public administration.[311] In many cantons, the transfer of a property in case of inheritance is not charged with a real estate transfer tax or taxed at a lower rate.[312] Usually the tariff is proportional and in most cantons and municipalities set between 1-3% of the purchase price.[313]

Tax on imputed rental value

The tax on imputed rental value was introduced as part of the income tax to grant equal treatment of rental tenants and homeowners to compensate the fact that homeowners can deduct costs related to the use of the property, such as mortgage interest payments and maintenance costs, although in most of the cantons the tenants cannot deduct the rent from their taxable income. The tax on imputed rental value is controversial in Switzerland and was subject to many political proposals at cantonal and federal level.[314]

Subject to the tax is the owner-occupier of the property, covering the principal residence of the owner as well as holiday homes.[315]

Only the net income of the property is taxable. The owner may deduct from the gross imputed rental value all expenses made in order to gain profit from the immovable property (payment of debt interests to a third party, maintenance costs, property insurance premiums, a small extent of administrative costs and in some cantons also the real estate tax). Since 2001, the total deduction is limited to a maximum of the extent of the taxable income plus CHF 50,000.[316]

Calculating the gross imputed rent is difficult and varies from canton to canton. To grant equal treatment of renters and homeowners, the gross imputed rental value should be as high as the market rent. On the other hand, Article 108 Constitution states that home ownership shall be promoted, which is why in practice the imputed rental value is set lower than the market rent.[317] Also, the Confederation and cantons allow negative net imputed rental values: Where the deductions exceed the imputed rent, the taxable income is reduced.[318]

From another point of view, particularly compared to countries where mortgage interest payments can be deducted without taxation of imputed rent, the tax on imputed rental value combined with the high house prices relative to household incomes and wealth is considered to be an important cause of the low home ownership rate in Switzerland.[319]

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

Landlords are not especially encouraged to enter the rental market. Since value-preserving investments can be deducted from the taxable income, landlords may optimise taxes by investing in the rental property and keeping them in good shape.

[311] Federal Tax Administration, 'Die Handänderungssteuer' (Berne: SSK, 2009), 1 f.
[312] 'Die Handänderungssteuer', 2.
[313] 'Die geltenden Steuern von Bund, Kantonen und Gemeinden', 42.
[314] Federal Tax Administration, 'Die Besteuerung der Eigenmietwerte' (Berne: SSK, 2010), 2-4.
[315] 'Die Besteuerung der Eigenmietwerte', 7.
[316] 'Die Besteuerung der Eigenmietwerte', 20-26; Art. 33 s. 1 ss. a DBG.
[317] 'Die Besteuerung der Eigenmietwerte', 5.
[318] Baur et al.,20.
[319] Bourassa & Hoesli, *Why Do the Swiss Rent?*, 286 and 292.

Value-adding investments, which entitle the landlord to raise the rent,[320] are generally not deductible. Value-adding *energy efficient* renovations however, are deductible from the taxable income and entitle the landlord to raise the rent.[321]

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

Tax morale in Switzerland is generally considered high. In any case, since there is no obligation to register tenancy contracts but taxes are imposed on the income of the landlord, tax evasion has no influence on the contractual relation between landlord and tenant and does not affect the rental market.

Summary table 7

	Homeowner	Landlord	Tenant
Taxation at point of acquisition	- Inheritance- or gift tax - Real estate tax (about half of all cantons) - Real estate transfer tax (almost all cantons)		-
Taxation during tenure	Personal income tax (tax on imputed rental value, which contains an element of subsidy)	Personal income tax (rent = income)	-
	Net wealth tax	Net wealth tax	
Taxation at the end of occupancy	- immovable property gains tax		-

4 Regulatory types of rental and intermediate tenures[322]

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)?

The tenancy regulations in the Code of Obligations and in the VMWG are generally applicable to all leases of residential premises (including the lease of cooperative dwellings). Not considered as such residential premises are for example camping-sites and rooms in retirement homes and the like.[323] Furnished rooms[324] are also subject to the provisions about the lease of residential and commercial premises, only with shorter notice period and different termination dates.[325]

The provisions concerning the lease of residential premises are not applicable to holiday homes rented out for a maximum period of three months. The provisions on

[320] See section 6.5 – Rent regulation.
[321] L. Schneider et al., *Steuerliche Anreize für energetische Sanierungen von Gebäuden, Studie der interdepartementalen Arbeitsgruppe* (Berne: FTA, 2009), 13 f.
[322] **I.e. all types of tenure apart from full and unconditional ownership.**
[323] Blumer, *Gebrauchsüberlassungsverträge*, N 139.
[324] To be distinguished from a one-room apartment: the latter is usually not furnished and has an own kitchen/kitchenette and bathroom. (D. Lachat et al., *Mietrecht für die Praxis,* 8th ed. [Zurich: Schweizerischer Mieterinnen- und Mieterverband / Deutschschweiz, 2009], 528). See also section 6.3 – Specific tenancy contracts.
[325] Art. 266e CO; Blumer, *Gebrauchsüberlassungsverträge*, N 140.

protection against unfair rents and against termination of leases of residential and commercial premises are thus not applicable.[326]

Tenants of luxury dwellings (apartments and single-occupancy residential units with six or more bedrooms and reception rooms) are not protected by the provisions on protection against unfair rents. Whether a dwelling is considered as luxurious depends on an overall impression, but contains mostly extraordinary comfort, such as a swimming pool, a private lift or extraordinary large rooms. The criteria of luxury and the minimum number of rooms are cumulative. The provision is interpreted in a restrictive manner; there are only few housing units that are subject to this exemption.[327]

Agricultural leases are subject to a special law (Bundesgesetz vom 4. Oktober 1985 über die landwirtschaftliche Pacht; LPG).[328]

The applicability of the provisions on termination of tenancy contracts is controversial when it comes to mixed contracts. In general, the provisions about termination of the part of the contract which prevails (rental contract or employment contract) are applicable. Concerning contracts combining property maintenance duties with a tenancy for the janitor, however, there is a tendency towards application of tenancy law.[329]

For apartments which were subsidized with direct subventions under the WEG there are certain requirements concerning the choice of the tenant (see section 3.6 Subsidization) and the rent is under regulatory control. The provisions on protection against unfair rents are thus not applicable (Art. 253b s. 3 CO). The legality of the rent or rent adjustments can only be reviewed by the FOH and are not subject to the ordinary procedure (see section 1.4 – Rental tenures).

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.[330]
    - Different types of private rental tenures and equivalents:
        - Rental contracts
            - Are there different intertemporal tenancy law regimes in general and systems of rent regulation in particular?

No.

            - Are there regulatory differences between professional/commercial and private landlords?
                - Briefly: How is the financing of private and professional/commercial landlords typically arranged

[326] Art. 253a s. 2 CO.
[327] Lachat et al., *Mietrecht für die Praxis*, 56 f.
[328] P. Heinrich, *Handkommentar zum Schweizer Privatrecht, Vertragsverhältnisse Teil 1: Innominatkontrakte, Kauf, Tausch, Schenkung, Miete, Leihe,* 2nd ed., ed. M. Müller-Chen, C. Huguenin & D. Girsberger (Zurich/Basel/Geneva: Schulthess, 2012), Art. 253b CO § 1.
[329] Lachat et al., *Mietrecht für die Praxis*, p. 36 f. See also section 6.3 – Tenancy contracts distinguished from functionally similar agreements.
[330] 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.

(e.g. own equity, mortgage based loan, personal loan, mix, other)

Concerning the rental tenancy, there is no difference whether the tenant contracts with a private or a professional/commercial landlord. Concerning the financing of an apartment to be rented out, there is currently no state-promotion for profit-oriented professional/commercial landlords[331] or for private landlords, since early withdrawal or pledging of pension fund assets is only possible for self-inhabited property. Concerning the promotion of non-profit housing organizations, see section 3.6 Subsidization.

- Apartments made available by employer at special conditions

See section 4.1 Classifications of different types of regulatory tenures.

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

If the same rented rooms serve residential and commercial purposes, the prevalent use determines the rules applicable (for example a restaurant rented with a dwelling for the innkeeper is subject to the rules on commercial tenancies). However, to a large extent, the same rules which are applicable on the lease for residential use are also applicable on the lease for commercial use.[332]

- Cooperatives

Since most of the cooperatives have profited from indirect subsidization at some point, contracts for cooperative dwellings are considered as tenure with a public task (see section 1.4 – Intermediate tenures, Cooperatives).

- Company law schemes

Company law schemes other than cooperatives have lost importance since the introduction of condominium ownership on national level in 1965 (see also section 1.4 – Intermediate tenures).

- Real rights of habitation

The right of residence (Art. 776 ff. CC) is a real right and not subject to the tenancy-law regulations (see also section 1.4 – Intermediate tenures).

- Any other relevant type of tenure

See section 1.4 – Intermediate tenures and section 6.3 – Tenancy contracts.

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
  - Housing association tenancies
  - Social tenancies

[331] For the promotion of non-profit landlords, see section 3.6 Subsidization.

[332] Lachat et al., *Mietrecht für die Praxis*, 64 f.:The statutory notice period and the maximum extension period for commercial leases are longer than for residential leases (Art. 266c f. and 272b s. 1 CO); the tenant of commercial property has the right to transfer the contract to a third person (Art. 263 CO); the landlord of commercial property has a special lien on chattels located on the leased premises (Art. 268 CO).

- Public renting through agencies
- Privatized or restituted housing with social restrictions
- Public entities (e.g. municipalities) taking over private contracts, typically for poor tenants to counteract homelessness
- Etc.

The stock of dwellings owned by the state is very small at 2.4% of all dwellings and 3.4% of all rental dwellings in 2000.[333] The regulations are not uniform in Switzerland but made by the cantons and municipalities.

The non-profit housing entities are mainly housing co-operatives, but also foundations and public limited companies.[334] The tenancy contracts with these entities are subject to the ordinary tenancy law regulations. See also section 3.6 – Non-profit housing organizations.

- Specify for tenures with a public task:
  - selection procedure and criteria of eligibility for tenants
  - typical contractual arrangements, and regulatory interventions into rental contracts

Non-profit housing providers are mostly supported by the state only indirectly and therefore no eligibility criteria for tenants are prescribed by the state. However, for about 72% of their dwellings the non-profit organizations voluntarily imposed as binding criteria regulations about the minimum number of tenants of a dwelling in relation to the number of rooms (and/or the size of the dwelling) and/or regulations about the maximum income and assets of the tenant.[335]

State owned housing is organized by cantons and municipalities. The cities of Zurich and Berne for example have income- and asset-limits as well as provisions concerning the minimum of persons per room.[336]

  - opportunities of subsidization (if clarification is needed based on the text before)

Social assistance benefits for persons in need are granted by the state independently from the type of landlord. The actual housing costs (if not excessive) are taken into account (see also section 3.6 – Subsidization tenant).

  - from the perspective of prospective tenants: how do I proceed in order to get “housing with a public task”?

In order to get social assistance benefits, a person in need may make an application to the municipality of residence.

State owned dwellings are subject to criteria set by the specific owner, which differs from municipality to municipality.

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[333] See section 1.4. – Which actors own these dwellings.

[334] http://www.wohnbaugenossenschaft-gruenden.ch/wie_fuehren/weitere_gemeinnuetzige_bautraeger.html (last retrieved 3 December 2013).

[335] Blumer, *Vermietungskriterien der gemeinnützigen Wohnbauträger,* 4.

[336] City of Zurich: http://www.stadt-zuerich.ch/wohnungen (last retrieved 12 January 2014); City of Berne: http://www.bern.ch/leben_in_bern/wohnen/wohnen/angebot/guenstig (last retrieved 12 January 2014).

Cooperative dwellings are usually offered on the private rental market and tenants also become members. Some cooperatives have waiting lists. Tenants that are already members of a cooperative are usually preferred for other dwellings of the same cooperative.

Summary table 8

Rental housing **without a public task** (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	Main characteristics 57.4% of all rental dwellings are privately owned; 8.4% are owned by staff pension funds; 7.9% by cooperatives; 5.7% by construction- and real estate companies; 5.5% by insurance companies; 3.4% by the state; 2.5% by non-commercial foundations and associations.
1) Luxury dwellings 2) Holiday homes rented out for a maximum period of three months	1) Not protected by the provisions on protection against unfair rents. 2) Provisions concerning the lease of residential and commercial premises (and therefore the provisions on protection against unfair rents and against termination of leases of residential and commercial premises) are not applicable.
Rental housing for which a **public task** has been defined (provision of housing that is not determined by the free market, but any form of state intervention)	
1) Rental dwellings subsidized directly under the WEG 2) Municipal tenancy 3) Housing association tenancy	1) Certain requirements concerning the choice of the tenant; Special procedure before the FOH; rent is under regulatory control and determined by the FOH before the rental contract is signed. 2) Different from canton to canton and municipality to municipality 3) Non-profit housing providers that profited only of indirect aid often voluntarily set up criteria concerning potential tenants

- For which of these types will you answer the questions in the following sections; which regulatory types are important in your country?

Direct subsidies were only granted under the former act on housing promotion and are now abolished and state-owned dwellings are subject to cantonal and/or municipal regulation. Mostly, the same regulations about protection of the tenant (except for rent control) are applicable for all dwellings. The large majority of the rental dwellings (also cooperative dwellings) did not profit of *direct* subsidies and are therefore subject to the ordinary tenancy law regulated mainly in the Code of Obligations and in the Ordinance on the Lease and the Usufructuary Lease of Residential and Business Premises VMWG. This will be the type of tenure described in the following sections.

5 Origins and development of tenancy law

- What are the origins of national tenancy law and where was and is it laid down (civil code, special statute, case law)?
- 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)
- What were the principal reforms of tenancy law and their guiding ideas up to the present date?

The substantive law about rental contracts is laid down mainly in the Swiss Code of Obligations and the Ordinance on the Lease and the Usufructuary Lease of Residential and Business Premises (VMWG) and the procedural law in the Swiss Civil Procedure Code (CPC).[337]

Origins and development of national tenancy law

The revised Swiss Constitution of 1874[338] established the basis for a Swiss Code of Obligations entering into force in 1882 and including provisions about the lease of residential premises.[339] These provisions were about the definition of the lease, formal requirements, the contracting partners' obligations and the termination of the contract.[340] Those rules were also incorporated into the revised Code of Obligations of 1911[341], with a few additions, such as the possibility for the tenant to withdraw from the contract in case of defects hazardous to health. At this time, there were no provisions about protection from unfair rent increases or terminations of the lease.[342]

The law of 1911 remained unchanged until 1970, but was applied without additions only between 1912-1914 and 1926-1936. The rest of the time – during the wars and in their aftermath – several emergency decrees concerning rent control or monitoring were enacted because of the housing shortage resulting from the decrease in private construction activity during these periods.[343] During the sixties, the rent control and monitoring measures were gradually given up. In 1970 however, as a replacement for the also abandoned restrictions on the right of the landlord to terminate the contract, the possibility to request a judicial extension of the lease was introduced.[344]

In 1972 a new article in the constitution stated that the Confederation shall adopt provisions for the protection of tenants against unfair rents.[345] Already that same year, a corresponding federal resolution was enacted.[346] The provisions were

[337] Schweizerische Zivilprozessordnung, SR 272.
[338] Federal Constitution of the Swiss Confederation (Bundesverfassung der Schweizerischen Eidgenossenschaft), Const., SR 101.
[339] F. T. Petermann, *Die Entwicklung des schweizerischen Mietrechts von 1881 bis 1989*. Dissertation (University of St. Gallen, 1997), 5 and 13.
[340] H. Rohrbach, *Die Entwicklung des schweizerischen Mietrechts von 1911 bis zur Gegenwart* (Berne: FOH, 2012), 3; for further information see Petermann, 15-44.
[341] Federal Act on the Amendment of the Swiss Civil Code, Part Five: The Code of Obligations (Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches, Fünfter Teil: Obligationenrecht), CO, SR 220.
[342] Petermann, 53; Rohrbach, 3.
[343] Rohrbach, 3 ff.; for further information to these emergency decrees see Rohrbach, 4-7.
[344] Rohrbach, 7; Today Art. 272 ff. CO.
[345] Art. 34 septies Abs. 2 alt BV.
[346] Befristeter Bundesbeschluss über Massnahmen gegen Missbräuche im Mietwesen of 30 June 1972; Verordnung über Massnahmen gegen Missbräuche im Mietwesen of 10 July 1972.

applicable only in certain municipalities with housing shortages, as denoted by the cantons. Rent increases may have been challenged as unfair before a conciliation authority.[347] This federal resolution was first limited to five years but then extended several times until the entry into force of the new tenancy law in 1990. In 1987 the scope of application was extended throughout Switzerland, independently from housing shortage (see below).[348]

In 1973 and in 1982, two popular initiatives concerning tenant's protection were launched. The first initiative and the counter-proposal of the Federal Council were rejected in 1977 by the people and the cantons. The second initiative for constitutional revision was withdrawn in 1986 for the benefit of the counter-proposal, which was accepted: In addition to the prolongation of the before mentioned federal resolution and its extension throughout Switzerland, the protection from unfair rent increases and the possibility to request extension of the lease were integrated into the text of the constitution.[349]

Since 1977 (before the submission of the second above mentioned initiative), the Federal Council appointed a commission of experts to develop proposals for a complete revision of the Swiss tenancy law. The revision was discussed and adopted in parliament in 1987-1989 and entered into force in 1990:[350]

The tenancy law of 1990 improved the protection of tenants against unwarranted eviction and the rights of the tenant due to defects in the rental property. For example, the possibility for the tenant to deposit the future rent payments as an instrument to pressure the landlord to remedy a defect was introduced[351] and the landlord's special liens on chattels located on the rented premises as security for rent was restricted to only commercial premises.[352] A new feature was furthermore that if a housing unit is sold, the rental contract is transferred to the new owner, who may only terminate the rental contract extraordinarily if he claims an urgent need of the premises for himself, his close relatives or in-laws[353].[354]

Former and still ongoing reform efforts of the current tenancy law

Soon after the entry into force of the new tenancy law, several reform efforts were made by tenants as well as by landlords. Often criticized were and still are the rules governing the calculation of rents: Independent of the concrete financing of a specific housing unit, the possibility of rent increases and reductions is linked to mortgage interest rates (the reference mortgage rate is published quarterly by the FOH). An initiative by the Swiss Tenants' Association in 1997[355] and the parliamentary counter-proposal which proposed changing the existing system were voted down by the Swiss voters and the states.[356] In 2005, the Federal Council submitted for public consultation (*Vernehmlassungsverfahren*) another attempt to change this system, proposing a dual system whereby the parties may choose between the index model

[347] Compare today's Art. 270b s. 1 CO.
[348] Rohrbach, 7 ff.
[349] Rohrbach, 9 f; Today Art. 109 Const.
[350] Rohrbach, 9 and 11.
[351] Art. 259g CO.
[352] Art. 268 CO.
[353] Art. 261 s. 2 ss. a CO.
[354] Rohrbach, 12.
[355] Initiative 'Ja zu fairen Mieten' of March 14, 1997.
[356] E. Hauri, V. Steiner & M. Vinzens, *Human settlement in Switzerland, Spatial Development and Housing* (Berne: FOH, 2006), 56.

(rent adjustments linked to the Swiss index of consumer prices) and the economic rent model (rent adjustments linked to the average mortgage interest rate).[357] According to the results of the public consultation, the project was abolished. Some changes however were made on the level of ordinances: The Ordinance on the Lease and Usufructuary Lease of Residential and Business Premises (VMWG)[358] unified the average mortgage interest rate on a national level, calculated by the Swiss National Bank, and established energy related renovations as value-adding investments which justify rent increases.[359]

In 2010 another attempt to revise the tenancy law failed: Although tenants and landlords associations agreed on certain points, among others the necessity of decoupling of the rent from the average mortgage interest rate, particularly the extent of the indexing and the choice of the applicable index were controversial.[360]

Frame Lease Agreements

In 1996 the Law on Frame Lease Agreements entered into force.[361] The competence to rule on the matter was given to the Confederation already in 1972, but at this time, no agreement could be reached. In 2001 two frame lease agreements were declared generally applicable by the Federal Council, one for western Switzerland and the other only for the canton Vaud. For both frame lease agreements, the declaration of general applicability is in effect until mid-2014.[362] With consent of the Federal Council, frame lease agreements can deviate from certain mandatory provisions of the Code of Obligations (for example of rules about sub-rental or duration of rentals with index-linked rent).[363]

- Human Rights:
    - To what extent and in which fields was tenancy law since its origins influenced by fundamental rights enshrined in
        - the national constitution
        - international instruments, in particular the ECHR
    - Is there a constitutional (or similar) right to housing (droit au logement)?

Concerning fundamental rights, see above and section 3.1 – Role of the constitutional framework of housing.

[357] Hauri, Steiner & Vinzens, *Human settlement in Switzerland,* 57.
[358] Verordnung über die Miete und Pacht von Wohn- und Geschäftsräumen, VMWG, SR 221.213.11.
[359] Rohrbach, 23 f. The reference interest rate is calculated based on the average mortgage interest rate (http://www.bwo.admin.ch/themen/mietrecht/00282/ [3 December 2013]); see section 6.4 – Rent payment
[360] Rohrbach, 25 f. and 28.
[361] Bundesgesetz über Rahmenmietverträge und deren Allgemeinverbindlicherklärung, SR 221.213.15.
[362] Rohrbach, 19 ff.
[363] It is however not possible to deviate from the mandatory provisions listed in Art. 3 s. 3 and 4 RMG (required form of notice [Art. 266l-266o CO]; some provisions about unfair rent and other unfair claims by the landlord [Art. 269 and 269d CO]; continued validity of lease during challenge proceedings [Art. 270e CO]; some provisions about protection against termination of leases [Art. 271, 273 s. 1, 4 and 5 and 273a s. 1 CO]; request for rent reduction and challenge to rent increases [Art. 270a f. CO]). For further information about frame-lease agreements, see D. Lachat et al., *Mietrecht für die Praxis,* 8th ed. (Zurich: Schweizerischer Mieterinnen- und Mieterverband / Deutschschweiz, 2009), 46 ff.

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 (e.g. 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])

The tenancy agreement has to cover the essential issues, in particular the object of the lease and its use, and the amount of rent. Tenancy contracts are mostly concluded in writing, although in most cantons no particular form is necessary and a contract could also be concluded orally or by implication (see section 6.3 – Formal requirements). Most of the provisions concerning rental contracts are semi-mandatory for the benefit of the tenant (see below). A contract is qualified according to its contents and not according its designation: if the true and common intention of the parties is to have a landlord-tenant relation, the rules about rental contracts are applicable even if the parties name the contract differently or used inexact expressions in error or in trying to subject the contract to different regulations.[364]

Apart from extraordinary reasons for termination set forth in the law (such as for example arrears of payments), the landlord may also give notice of termination without a specific reason, as long as it does not contravene the principle of good faith. Where notice is given by the landlord, the tenant generally has to react within 30 days to make use of his rights to challenge the notice of termination and request extension of the lease (see section 6.6 – Notice by the landlord).

In general, landlord and tenant are free in negotiating the rent. However, the tenant may challenge the initial rent and rent increases under certain conditions, where the rent is unfair (see section 6.4 – Rent payment).

Rules concerning the habitability of a dwelling are made on cantonal and municipal level and differ throughout Switzerland (see section 3.4 – Control and regulation of the quality of private rental housing).

- 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)

Civil law, which includes tenancy law, and civil procedure are state law. The cantons are responsible for court organization, but obliged by state law to install a joint conciliation authority. See also section 3.2 Governmental actors.

- 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?

Generally, the rental contract gives the tenant only an obligatory right, with effects only between the contracting parties. Art. 261b s. 1 CO however, gives the parties the possibility to enter the tenancy under priority notice in the land register and thus the tenancy contract may be invoked against any rights subsequently acquired (Art. 959 s. 2 CC[365]). In concrete terms this obliges every future owner to allow the property to be used in accordance with the tenancy (Art. 261b s. 2 CO). This

[364] Art. 18 s. 1 CO.
[365] Swiss Civil Code of 10 December 1907 (Schweizerisches Zivilgesetzbuch), CC, SR 210.

provision lost significance with the rent law reform in 1990, where the principle 'Kauf bricht Miete' was abolished: since the alienation of the property does not break the lease anymore, the only remaining effect of Art. 261b CO is that the exceptional right of the new owner to terminate the rental contract if he claims an urgent need of the premises for himself, his close relatives or in-laws according to Art. 261 s. 2 CO (see also section 6.6 – Notice by the landlord) can be eliminated. Occasionally, this is still done where long-term leases are concerned.[366]

- 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 substantive tenancy law is regulated on national level, mainly in the Code of Obligations and the VMWG. The cantons have competence to legislate in the field of substantive tenancy law only where the national law allows so (for example concerning the possibility to render the use of a form for conclusion of tenancy contracts mandatory[367] or concerning additional provisions about the deposit or other means of security[368]).

Most of the rules in Swiss tenancy law are mandatory or semi-mandatory. Clauses that violate mandatory rules are void. Clauses violating semi-mandatory rules are void if they are to the detriment of the weaker party, typically the tenant.[369]

Many procedural rules and formal requirements are *mandatory* (e.g. rules concerning the challenge to rent and challenge to notice, the security deposit, the deposit of rent and the entry under priority notice in the land register). Also, the scope of application of tenancy law and certain definitions are regulated by mandatory rules (definition of the rental contract, rental for a limited and indefinite duration, rent, unfair rent and accessory charges). The parties cannot waive the right to extraordinary notice for good cause, the rights of the landlord in case of bankruptcy of the tenant or the rights of protection of the tenant in case of change of ownership and conferral of limited rights in rem to a third party. Certain tie-in transactions are void and the parties to the contract may not waive in advance their right to set off claims arising from the tenancy. The tenant must always inform the landlord of defects which he is not obliged to remedy himself and must tolerate works intended to remedy defects or repair or prevent damage. The provisions about renovations and modifications of the premises are also mandatory as well as the rule that a termination will be effective as of the next termination date, if the prescribed notice period or termination date is not observed.[370]

A few rules are of *dispositive* nature and as such free to be modified by the parties. The charges and taxes can be transferred to the tenant (if this is considered in calculating the rent).[371] Sometimes the possibility to modify a rule is explicitly

[366] M. Blumer, *Gebrauchsüberlassungsverträge (Miete/Pacht)*, vol. VII/3 of *Schweizerisches Privatrecht*, ed. W. Wiegand (Basel: Helbing Lichtenhahn Verlag, 2012), N 83; B. Hürlimann-Kaup, *Grundfragen des Zusammenwirkens von Miete und Sachenrecht* (Zurich: Schulthess, 2008), 305.
[367] Art. 270 s. 2 CO, see also section 6.3 – Formal requirements.
[368] Art. 257e s. 4 CO, see also section 6.6.4 – Deposit.
[369] Lachat et al., *Mietrecht für die Praxis*, 43.
[370] Blumer, *Gebrauchsüberlassungsverträge*, N 158-161.
[371] R. Weber, *Basler Kommentar zum Schweizerischen Privatrecht, Obligationenrecht I (Art. 1-529 OR),* 5th ed. ed. H. Honsell, N. P. Vogt & W. Wiegand [Basel: Helbing Lichtenhahn, 2011], Art. 256b OR § 4.

mentioned in the law, for example the possibility for the parties to agree on a longer notice period or a different termination date.[372] Also, the parties can freely agree on payment deadlines. [373] The tenant is free to renounce in advance to claim appropriate compensation for a significant increase in value of the object as a result of renovations or modifications he made with the consent of the landlord.[374]

The rest of the legal provisions are *semi-mandatory* and can only be modified to the benefit of the tenant.

For a list of mandatory, semi-mandatory and dispositive rules of the rules concerning the rental of residential property, see Lachat et al., *Mietrecht für die Praxis*, 731.[375]

Where the tenancy law does not regulate a problem exhaustively, the provisions of the general part of the Code of Obligations are applicable, especially the provisions about the conclusion of a contract (Art. 1 ff. CO), about the default of obligor (Art. 102 ff. CO), time limits (*Verjährung*, Art. 127 ff. CO) and joint and several obligations (Art. 143 ff. CO).[376] Whether the tenancy law regulates a problem exhaustively or not is a question of interpretation and can be controversial.[377]

- 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?

Conciliation proceedings

In general, before litigation, an attempt at conciliation before a conciliation authority is mandatory (Art. 197 CPC). For disputes relating to the lease of residential (or business) premises, the cantons are obliged to install a special joint conciliation authority (*paitätische Schlichtungsbehörde*), which comprises a chairperson and one representative of tenants and landlords each (Art. 200 s. 1 CPC). Also, the conciliation authority provides legal advice to the parties (Art. 201 s. 2 CO).

Exceptions to the principle of attempting at conciliation before litigation are listed in Art. 198 CPC (e. g. for summary proceedings and certain actions arising from the Federal Act on Debt Enforcement and Bankruptcy [DEBA][378]). Thus, in clear cases, actions for eviction can be made without conciliation (Art. 257 CPC, see below). Also, for 'financial disputes with a value in dispute of at least 100,000 CHF the parties may mutually agree to waive any attempt at conciliation' (Art. 199 CPC).

The parties are also free to replace the conciliation proceedings by mediation (Art. 213 s. 1 CPC); the costs of mediation however are borne by the parties (Art. 218 s. 1 CPC). Where the parties jointly request so, an agreement reached through mediation

[372] Art. 256b and 266a CO.
[373] Art. 257c CO.
[374] Art. 260a s. 3 CO; BGE 124 III 149 E. 5.
[375] With the introduction of the Swiss Civil Procedure Code in 2011 the Art. 274-274g were repealed. The legal nature of Art. 257h s. 3 part 2 and Art. 260 s. 2 part 2 CO is controversial (see also Weber, *BSK OR*, Art. 257h CO § 7).
[376] Lachat et al., *Mietrecht für die Praxis*, 44.
[377] For example whether the landlord is allowed to terminate the lease because of breach of contract where no specific reason for termination according to tenancy law is given, for example where the tenant keeps an animal although the contract forbids it (A. Maag, 'Die Bundesgerichtspraxis zur ausserordentlichen Kündigung nach Art. 257f OR bei Vertragsverletzungen', *MRA* (2006): 134).
[378] Bundesgesetz über Schuldbetreibung und Konkurs, SR 281.1.

may be approved by the conciliation authority or court and thus have the same effect as a legally binding decision (Art. 217 CPC).[379]

Hearing

Before the conciliation authority there are no actual proceedings for the taking of evidence (*Beweisverfahren*). However, the conciliation authority may consider physical records presented and conduct an inspection (the latter however being rare in practice). Where it considers a proposed judgment or a decision (see below), it may also take other evidence unless this will substantially delay the proceedings (Art. 203 s. 2 CPC).

The duration of the proceedings must not exceed twelve months. Within this period and with the consent of the parties, the conciliation authority may hold additional hearings (Art. 203 s. 4 CPC).

The hearing is generally not public. In disputes relating to the lease of residential and business property however, the conciliation authority may allow full or partial public access if there is a public interest (Art. 203 s. 3 CO). The proceedings are confidential and the statements of the parties may not be used subsequently in court proceedings, unless a proposed judgment or a decision by the conciliation authority is concerned (Art. 205 CPC).

End of proceedings

The conciliation authority may end the conciliation process with either an *agreement* between the parties (Art. 208 CPC), the *authorisation to proceed* (Art. 209 CPC) or in some cases with a *proposed judgment* (Art. 210 f. CPC) or a *decision* (Art. 212 CPC):

If the parties reach an *agreement*, the settlement, the acceptance of the claim or the unconditional withdrawal of the action have the effect of a binding decision (Art. 208 CPC).

If no agreement is reached, the conciliation authority can *grant authorisation to proceed*. In general, the authorisation is granted to the plaintiff. In derogation from this, if a rent increase is challenged, it is the landlord who needs to proceed to enforce his claim.[380] Once the authorisation to proceed is granted, the action has to be filed within thirty days (Art. 209 s. 4 CPC).[381]

The conciliation authority is authorised (but not obliged) to *submit a proposed judgment to the parties* in all financial disputes where the value in dispute does not exceed CHF 5,000, plus, independently from the value in dispute, in disputes relating to the lease of residential and business premises if they concern the deposit of rent, protection against abusive rent, protection against termination or the extension of the lease (Art. 210 s. 1 ss. b and c CPC). If the parties do not want the proposed judgment to have the effect of a binding decision, they have to reject it (without statement of grounds) within twenty days of written notification (Art. 211 s. 1 CPC). If the proposed judgment is rejected in a case of the above mentioned disputes relating

[379] Information sheet 'Informationsblatt zum mietrechtlichen Schlichtungsverfahren nach der neuen Schweizerischen Zivilprozessordnung' (Berne: FOH, 2013), 3.
[380] Art. 209 s. 1 CPC; F. Bohnet, 'Le droit du bail en procédure civile suisse', *Séminaire de droit du bail* (2010): 32.
[381] In disputes other than leases of residential and business property or lease of agricultural property, the deadline is three months (Art. 209 s. 3 CPC). Judicial vacactions do already apply at this stage of the proceedings.

to the lease of residential and business premises, the authorisation to proceed is granted to the refusing party. In these cases, if the refusing party does not file an action in time, the proposed judgment has the effect of a binding decision (Art. 211 s. 3 CPC). In all other cases, where the proposed judgment is rejected, the authorisation to proceed is granted to the plaintiff (Art. 211 s. 2 CPC) and, if no action is filed, the claim is considered not to be asserted and the plaintiff suffers no prejudice.[382]

Where financial disputes with a value in dispute of up to CHF 2,000 are concerned, on request of the plaintiff the conciliation authority may render a *decision* on the merits (Art. 212 s. 1 CPC). The conciliation authority will usually only grant this request if the case is ready for decision already at the first appointment. If the conciliation authority closes the proceedings by rendering a decision, it acts as a real first decision-making authority. As a result, the decision of the conciliation authority can only be objected with the appellate court and if the plaintiff withdraws the action, he cannot file action on the same subject matter again, if the court has already served the statement of claim on the defendant and the defendant does not consent to its withdrawal (Art. 65 CPC).[383]

Parties in default

In general, the parties must appear in person at the conciliation hearing and may be accompanied by legal agent or a confidant (Art. 204 s. 1 and 2 CO). This applies on natural as well as legal persons.[384] Exceptions exist for persons domiciled outside the canton or abroad (Art. 204 s. 3 ss. a CO) and persons prevented from appearing due to illness or age or for other good cause (Art. 204 s. 3 ss. b CO). If simplified proceedings are applicable, the landlord can delegate the property manager to take part in the conciliation hearing (Art. 204 s. 3 ss. c CO).

If the plaintiff is in default in conciliation proceedings, the application for conciliation is deemed to have been withdrawn (Art. 206 s. 1 CPC). As long as there is no forfeiture period (*Verwirkungsfrist*) that the plaintiff has to respect (cf. for example the forfeiture period for challenging a notice of termination, see section 6.6), he can always file another application for conciliation.[385]

Where the defendant is in default, the conciliation authority proceeds as if no agreement had been achieved (Art. 206 s. 2 CPC).

Where both parties are in default, the proceedings will be dismissed as groundless (Art. 206 s. 3 CPC).

Litigation proceedings

The cantons are free to subject proceedings in tenancy matters to the ordinary court or to submit these disputes to a specialized rental court.[386] In some Cantons, for certain disputes between parties that are registered in a commercial registry, a specialised commercial court may be competent.[387]

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[382] Bohnet, 'Le droit du bail en procédure civile suisse', 36; When filing the claim again however, the plaintiff needs to initiate a new conciliation procedure.
[383] 'Botschaft zur Schweizerischen Zivilprozessordnung (ZPO)' of 28 June 2006 (BBl 2006 7221), 7334.
[384] BGer 4A_387/2013 of 17 February 2014, E. 4.3.
[385] Blumer, *Gebrauchsüberlassungsverträge*, N 232.
[386] Blumer, *Gebrauchsüberlassungsverträge*, N 189 f.
[387] Art. 6 CPC. This may for example be relevant where a company rents dwellings for its employees.

After the conciliation proceedings, in most tenancy matters the simplified proceedings according to Art. 243 ff. CPC are applicable. Where generally the simplified proceedings would be applicable in financial disputes only up to a value in dispute of CHF 30,000, in disputes concerning the lease of residential and business premises, simplified proceedings are applied regardless of the amount in dispute where they concern the deposit of rent, protection against abusive rent, protection against termination or the extension of the lease (Art. 243 s. 2 ss. c CPC). The court establishes the facts ex officio[388] in tenancy matters subject to the simplified proceedings (Art. 247 s. 2 ss. a and b.1).

In cases where the value in dispute is over CHF 30,000 and additionally none of the above mentioned aspects of tenancy law are concerned, ordinary proceedings are applicable (Art. 219 ff. CPC).

In *clear cases*, where the legal situation is clear and the facts are undisputed or immediately provable, the court can declare a case admissible under the summary procedure (Art. 257 s. 1 CPC). The requirements for qualifying a case as a "clear case" are set high. In summary proceedings, no conciliation proceedings are necessary (Art. 198 s. a CPC). Concerning the eviction of the tenant in clear cases, see section 6.7 – Eviction procedure.

Appellate Remedies

Cantonal Court

Within thirty days of service of a decision and grounds therefore (or the subsequent service of the statement of grounds), depending on the value in dispute, appeal (Art. 311 ff. CPC) or objection (Art. 319 ff. CPC) can be filed with the appellate court.[389] The grounds for appeal can be incorrect application of the law and incorrect establishment of the facts (Art. 310 CPC); the grounds for objection can be incorrect application of the law and obviously incorrect establishments of the facts (Art. 320 CPC). In general, the appeal suspends the legal effect and enforceability of the contested decision whereas the objection does not (Art. 315 s. 1 and 325 s. 1 CPC).

In summary proceedings (as applied on clear cases), the deadline for filing the appeal is only ten days and also the deadline for the answer to appeal is shortened (Art. 314 s. 1 CPC).

Federal Supreme Court

Where the value in dispute is at least CHF 15,000 appeal in civil matters (*Beschwerde in Zivilsachen*) can be filed with the Federal Supreme Court (Art. 74 s. 1 ss. a BGG[390]). Also, independently from the value in dispute, cases in which questions involving a fundamental question of law need to be assessed at the highest judicial level can be brought before the Federal Supreme Court (Art. 74 s. 2 BGG).[391]

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[388] According to this so called 'soziale Untersuchungsmaxime', the judge mainly has an enhanced duty to ask specific questions in order to help the parties to submit the necessary information and indicate means of evidence (T. Oberle, M. Sommer & P. Stathakis, *Die Schweizerische Zivilprozessordnung* (Zürich: HEV Schweiz, 2011), 19; Bohnet, 'Le droit du bail en procédure civile suisse', 46 f.).

[389] Art. 311 s. 1 and 321 s. 1 in conjunction with Art. 239 CPC. Appeal is admissible where the value in dispute is at least CHF 10,000 (Art. 308 s. 2 CPC).

[390] Federal Supreme Court Act (Bundesgesetz über das Bundesgericht), BGG, SR 173.110.

[391] The Federal Supreme Court admits a question as this important only very restrictively (BGE 133 III 493 E. 1.1). A question can for example be assessed by the Federal Supreme Court where it never assessed it before and the lower courts pass contradictory decisions, where there is reason to re-

Before the Federal Supreme Court, in particular a violation of federal law (federal constitution, federal acts and regulations), international law, cantonal constitutional law and inter-cantonal law can be objected.[392] Also, obviously incorrect establishments of the facts can be claimed (Art. 97 s. 1 BGG).

Where the above mentioned criteria are not fulfilled, a subsidiary constitutional appeal (*Subsidiäre Verfassungsbeschwerde*) would be possible, where the violation of constitutional rights (including rights granted by the ECHR) is claimed.[393]

Enforcement

Where the payment of a sum of money is owed, the enforcement is subject to the Federal Act on Debt Enforcement and Bankruptcy (Art. 335 s. 2 CPC).

Where other decisions are concerned, the enforcement is subject to the Articles 335-346 CPC:

Where a party requests it, already the court that renders the decision on a subject can order enforcement measures. The decision of this court[394] is then directly enforceable (Art. 337 s. 1 in conjunction with 236 s. 3 CPC). If this is not the case, a request for enforcement must be submitted to the enforcement court which decides in summary proceedings (Art. 338 s. 1 and 339 s. 2 CPC).

According to Art. 343 CPC, the court may issue a threat of criminal penalty for contempt of official orders (Art. 292 SCC); impose a disciplinary fine; order a compulsory measure (e.g. vacating an immovable property) or order performance by a third party.

Costs and Legal Aid

Court costs and party costs

In conciliation proceedings relating to the lease of residential premises, no court costs are charged and no party costs are awarded.[395] Whether decisions and proposed judgments by the conciliation authority are also free of court costs is unclear.[396]

In litigation proceedings generally court costs are charged and party costs are awarded (Art. 114 CPC e contrario).[397]

Legal Aid

An exemption from the obligation to pay advances and provide security and exemption from court costs can be granted if a person does not have sufficient

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evaluate settled case-law or where the lower court contradicted the current practice of the Federal Supreme Court ('Botschaft zur Totalrevision der Bundesrechtspflege' of 28 February 2001 [BBl 2001 4202], 4309 f.).

[392] Art. 95 BGG; H. Seiler, N. von Werdt & A. Güngerich, *Bundesgerichtsgesetz (BGG),* (Bern: Stämpfli, 2007), Art. 95 § 12 ff. BGG

[393] Art. 113 ff. BGG; Seiler, *BGG*, Art. 113 § 6 BGG.

[394] This decision must either be legally binding and the court has not suspended its enforcement or it is not yet legally binding but its early enforcement has been authorised (Art. 336 s. 1 CPC).

[395] Art. 113 s. 1 and s. 2 ss. c CPC; Court costs can nevertheless be charged if proceedings were initiated in a vexatious manner or in bad faith (Art. 115 CPC; D. Lachat, *Procédure civile en matière de baux et loyers* (Lausanne: ASLOCA, 2011), 53.

[396] Information sheet 'Informationsblatt zum mietrechtlichen Schlichtungsverfahren nach der neuen Schweizerischen Zivilprozessordnung', 2; J. Schmid & H. Stöckli, *Schweizerisches Obligationenrecht, Besonderer Teil* (Zurich: Schulthess, 2010), 163.

[397] Blumer, *Gebrauchsüberlassungsverträge*, N 180.

financial resources and the case does not seem devoid of any chances of success (Art. 117 and 118 s. 1 ss. a and b CPC). Additionally, a legal agent can be appointed by the court if this is necessary to protect the rights of the party concerned (Art. 118 s. 1 ss. c CPC).

Arbitration

An arbitration clause in rentals of residential property is only valid where the conciliation authority is appointed as arbitral tribunal (Art. 361 s. 4 CPC). Where the lease of holiday apartments for a maximum period of three months is concerned however, the parties are free to appoint other members to the arbitral tribunal.[398]

- 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)

There is no duty to register tenancy contracts.

- 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.

Requirements concerning inhabited rooms are made by the cantons and municipalities and are therefore diverse (see also section 3.4 – Means of control and regulation of the quality of private rented housing).

- Regulation on energy saving

Most of the measures upgrading the energy performance of a dwelling are also considered additional services within the meaning of Art. 269a s. b CO and therefore justify a rent increase (see section 6.5 – Rent increase after renovation measures).

6.2 Preparation and negotiation of tenancy contracts

Preliminary Note: We suggest that for each section (6.2 through 6.7) and each tenancy type some concluding remarks should be provided in a summary table about the rights and duties of tenant and landlord and the main characteristics (in telegram style).

Summary Table 9: Preparation and negotiation of tenancy contracts

Choice of tenant	Freedom of contract is limited by: - Anti-discrimination rules - family law (- Tenancy contract is transferred to new owner where the dwelling is sold) (- Where the tenant dies, the rental contract is transferred to his heirs)
Ancillary duties	The parties have to act in good faith, otherwise they may be liable for damages

- Freedom of contract
    - Are there cases in which there is an obligation for a landlord to enter into a rental contract?

[398] Blumer, *Gebrauchsüberlassungsverträge*, N 216.

In general, the principle of freedom of contract is applicable also on tenancy contracts. This freedom is restricted for the landlord only in the following situations:

Where a housing unit is sold, the rental contract is transferred to the new owner and the new owner therefore has to enter into the tenancy agreement (see section 5 Origins and development of tenancy law).

Concerning the lease of residential properties there is an obligation for the landlord to enter into a contract arising from family law: If the spouses[399] both are parties to the tenancy contract or if the spouse which is not party to the contract needs the family residence[400] because of the children or for other compelling reasons (as for example for health- or also employment related reasons) he can request the transfer of the rights and obligations under the tenancy contract to himself at court. The court decision however may not be inequitable for the other spouse.[401] The landlord has no right to object, but is secured by a joint and several liability of the previous tenant for payment of the rent up to the date on which the tenancy ends or may be terminated pursuant to the tenancy agreement or by law (but for a maximum period of two years; Art. 121 s. 2 CC). This provision is mandatory and cannot be excluded in the rental contract or in a marriage contract.[402]

If one spouse is the owner of the family residence and the other spouse relies on it because of the children or for other compelling reasons, the court can grant that other spouse a right of residence for a fixed term (if not inequitable for the homeowner), but no rental contract.[403]

Where the tenant dies, the rental contract is transferred to his heirs (see also section 6.6 – Notice by the tenant, Death of the tenant).

Concerning subletting, see section 6.4 – Parties to a tenancy contract.

Concerning commercial properties, a tenant has the right to transfer the rental contract to a third party with the landlord's written consent (Art. 263 s. 1 CO). The landlord however can only withhold the consent for good cause (Art. 263 s. 2 CO), for example because of the third parties financial situation or if he wants to use the premises for very different purposes than the current tenant. Where no good cause for withholding consent exists, the landlord has an obligation to contract with the third party (*Kontrahierungszwang*).[404]

- Matching the parties
    - How does the landlord normally proceed to find a tenant?

[399] The same applies to registered partners (Art. 32 Federal Law on Registered Partnerships of Same-Sex Couples [Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare], PartG, SR 211.231).
[400] A dwelling is considered the 'family residence', where it serves as the centre of the family life for married couples or registered partners with or without children (BGE 136 III 257 E. 2.1).
[401] Already before the divorce, a spouse can request the court to decide on the use of the home, although without effect on the tenancy contract [Art. 176 s. 1 subs. (1)].
[402] Lachat et al., *Mietrecht für die Praxis*, 490-493.
[403] Art. 121 s. 3 CC (see the text in the versions of the official Swiss languages; English language version contains an erroneous translation).
[404] P. Heinrich, *Handkommentar zum Schweizer Privatrecht, Vertragsverhältnisse Teil 1: Innominatkontrakte, Kauf, Tausch, Schenkung, Miete, Leihe*, 2nd ed. ed. M. Müller-Chen, C. Huguenin & D. Girsberger (Zurich: Schulthess, 2012), Art. 263 CO § 6; Lachat et al., *Mietrecht für die Praxis*, 480.

It is usual for the landlords to advertise dwellings on the internet and/or in newspapers. Cooperatives often have waiting lists.

- What checks on the personal and financial status are lawful and usual? In particular: May the landlord ask for a salary statement? May he resort to a credit reference agency and is doing so usual?

The Federal Data Protection Commissioner published recommendations about application forms for rental apartments based on the Federal Act on Data Protection[405] in 1994. These recommendations, which later were substantiated, say the following:[406]

The landlord may only require information from the tenant relevant to the selection of suitable tenants. These questions may vary depending on the type of the dwelling, for example student apartments or special apartments supported by the municipality for low-income households.

Always permitted are namely questions about name, address, date of birth, profession, employer of the person who signs the contract; whether the possible tenant is Swiss or not and if not, the kind of residence status and its expiry date; other persons wanting to live in the apartment (number of children, their age and sex; number of adults and whether and how they are related to each other and to the tenant); existing or intended sublease contracts; whether the apartment will be used as the family residence[407]; income brackets (steps of CHF 10,000 up to CHF 100,000) or questions about the relation of income to rent (e.g. whether the rent exceeds one fourth of the income); debt enforcements within the last two years and certificates of loss issued within the last five years; number of cars; pets; atypical sources of noise; if the last rental contract was terminated by the landlord and if yes, why; what is required from the apartment (desired premises). And, if explicitly marked as optional, the following questions are also allowed: place of work, name and address of the current landlord and references.

Under certain circumstances, further information can be asked from a potential tenant, for example if the landlord is obliged by law to report information of his tenants to the authorities or if there are statutory regulations for the property concerning potential tenants. Questions permitted under certain circumstances are for example concerning the confession, if the dwelling is owned by a catholic parish and shall be rented out only to Catholics[408]; concerning the marital status, if it is asked by the residents registration office or if there are statutory regulations of for example a catholic residential cooperative allowing the apartment to be rented out only to married couples; concerning detailed information about the income and the financial circumstances if there is an income limit in the statutes of a cooperative for tenants applying for an apartment; etc.

Always inadmissible are questions about how the potential tenant assesses the price-quality ratio of the apartment; questions about a possible membership in a

[405] Bundesgesetz über den Datenschutz, SR 235.1.
[406] Empfehlungen des Eidgenössischen Datenschutzbeauftragten vom 21. November 1994; see also: http://www.edoeb.admin.ch/datenschutz/00628/00653/00659/index.html?lang=de (3 December 2013).
[407] Whether the apartment is used as family residence or not is important for the landlord when it comes to formal reqirements when terminating the lease (see section 6.6 – Notice by the landlord). The question about the marital status in general however may only be asked under certain circumstances (see below).
[408] R. Spöndlin 'Was der Vermieter über Sie wissen darf und was ihn überhaupt nichts angeht', *Mieten&Wohnen* 7 (2010): 12.

tenant's protection organization; whether the potential tenant would be interested in certain tie-in arrangement, namely with an insurance policy; questions about pre-existing chronic illness; specific aspects of the financial situation exceeding the generally permitted questions, for example concerning hire-purchase agreements (*Abzahlungsverträge*) and leasing agreements (*Leasingverträge*), residual debts on furniture (*Restschuld auf Mobiliar*) and wage assignment (*Lohnzessionen*); whether the potential tenant is forced to conclude the contract because of the situation on the housing market.[409]

Information from third persons may only be asked from persons the potential tenant cited as references and only to confirm information already given by the tenant. Further questions may only be asked after informing and with the consent of the tenant. References may only be checked from persons who seriously come into question as tenant.

If an inadmissible question is asked of a potential tenant, he has the right to give incorrect information (*Recht zur Notlüge*), if the real answer or leaving the question unanswered could reduce the chances to being chosen as tenant. The landlord has no right to cancel or withdrawal from the contract if he finds out about the lie afterwards, since it is considered a legitimate self-defence against violation of personal rights.[410] If, however, the tenant lies where a question is concerned the landlord is allowed to ask, depending on the severity of the lie and its influence on the tenancy contract, the landlord may have a right to withdraw from the contract because of fraud.[411]

- 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?

The landlord may request the tenant to produce an excerpt from the debt enforcement register to prove the data about debt enforcements within the last two years and certificates of loss issued within the last five years.

As far as can be determined, there are no relevant blacklists of 'bad tenants'.[412] The collection and publication or the passing on of such data may be problematic with regard to data-protection provisions.[413]

- What checks may and does the tenant carry out on the landlord (e.g. to avoid being trapped by a swindler landlord)

See section 6.8 – Swindler problems.

- Services of estate agents (*please note that this section has been shifted here*)

[409] This question would be relevant for the landlord to know if the tenant intends to challenge the initial rent according to Art. 270 CO. The exercise of a statutory right may not influence the landlord's decision.
[410] D. Rosenthal, 'Datenschutz im Mietrecht', *mp* 3 (2012): 169 f.
[411] Spöndlin 'Was der Vermieter über Sie wissen darf und was ihn überhaupt nichts angeht', 13.
[412] Information provided by T. Herren, Zurich tenants' association, in telephone interview from 7 April 2014.
[413] See for example the recommendations issued by the Federal Data Protection and Information Commissioner concerning 'Mietercheck' in 2009 (available at http://www.edoeb.admin.ch/dokumentation/00153/00262/00284/index.html?lang=de [last retrieved 12 March 2014]).

- What services are usually provided by estate agents?
- 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?

More common than traditional estate agents are property management companies which, additionally to finding potential buyers or tenants and preparing the contracts, provide further services for the landlord during the tenancy, such as collecting rents, representing the landlord towards the tenants, neighbours and authorities, providing for caretaking, etc.[414]

Real estate agency services (rental and sale of property) are regulated by the provisions on brokerage contracts in the code of obligations (Art. 412 ff. CO). Property management contracts (*Liegenschaftsverwaltungsverträge*) are qualified as simple agency contracts (Art. 394 ff. CO).[415]

- What is the usual commission they charge to the landlord and tenant? Are there legal limitations on the commission?

In general, the parties are free to agree on any given commission. The cantons are allowed to establish provisions restricting this freedom, however, only the canton Zurich actually made such restrictions (see also section 2.4 – Role of real estate agents).

According to the Zurich Landlords Association, their fees for comprehensive property management services are around 4-5% of the net- and partially of the gross-rent.[416]

- Ancillary duties of both parties in the phase of contract preparation and negotiation ("culpa in contrahendo" kind of situations)

According to general contract law, the parties have to act in good faith (Art. 2 s. 1 CC). This implies that the parties have to negotiate seriously and to inform the other party of relevant facts unsolicited. According to the principle of culpa in contrahendo a party can be held responsible for damages if acting in bad faith.[417]

A prior mutual agreement about compensation in case of break-off of the contract negotiations (for example as a part of the application form) is void.[418]

6.3 Conclusion of tenancy contracts

Summary Table 10: Conclusion of tenancy contracts

Requirements for valid conclusion	Formal requirements: - In general: No form required - In some cantons: Form approved by the canton indicating the amount of rent of the previous tenancy is necessary for valid conclusion of the amount of rent. Substantive requirements: - Parties

[414] W. Fischer, 'Der Liegenschaftsverwaltungsvertrag', AJP (2000): 410 f.
[415] Fischer, 'Der Liegenschaftsverwaltungsvertrag', 400. This qualification is controversial in literature (Fischer, 'Der Liegenschaftsverwaltungsvertrag', 400 and 407).
[416] Video 'Immobilienverwaltung', available at http://www.hev-zuerich.ch/dienstleistungen/verwaltung/verwaltung.htm (last retrieved 13 March 2014).
[417] Blumer, *Gebrauchsüberlassungsverträge*, N 287.
[418] Blumer, *Gebrauchsüberlassungsverträge*, N 287.

	- Object of the tenancy - Use of the object - Corresponding obligation
Regulations limiting freedom of contract	- A contract with impossible, unlawful or immoral terms is (partly) void - Restricted possibilities of tie-in transactions (- General terms and conditions are limited by Art. 8 UWG)

- Tenancy contracts
    - distinguished from functionally similar arrangements (e.g. licence; real right of habitation; Leihe, comodato)

Usufructuary lease (*Pacht*, Art. 275 ff. CO)

In a usufructuary lease the lessee is granted the use of a productive object or right and the benefit of its fruits or proceeds whereas the tenant in a rental contract only has the right to use the object. Many provisions about the usufructuary lease refer to the provisions about the rental contracts.[419] Usufrucuary lease is for example relevant when it comes to lease of agricultural land or commercial premises including the business enterprises.[420]

Right of residence (*Wohnrecht*, Art. 776 ff. CC)

The right of residence is similar to the usufruct, but the beneficiary has only the right to live in all or part of the building without full enjoyment of the object. The participation on the maintenance costs depends on whether the right of residence is exclusive, in which case he bears the costs of ordinary maintenance or whether it is exercised jointly with the owner, in which case the owner bears the maintenance costs. It is also similar to a tenancy; the main difference being that the tenancy is an obligatory right while the right of residence is a real property right.[421]

Loan for use (*Gebrauchsleihe*, Art. 305 ff. CO)

Where a loan for use is agreed on, the lender makes an object available free of charge for the borrower, whereas the parties to a rental contract agree on a corresponding obligation for the use of the dwelling.[422]

Caretaker's contract (*Hauswartvertrag*)

Where a contract combines the right to live in a dwelling with the obligation to do the caretaking of the building (*Hauswartstätigkiet*), the (mixed) contract comprises aspects of tenancy law and labour law. In general, concerning the tenancy, the rules of tenancy law are applicable and concerning the caretaking of the building, labour law is applicable.[423] If an apartment is a necessary condition for the exercise of the

[419] M. Müller-Chen, D. Girsberger & A. Furrer, *Obligationenrecht – Besonderer Teil* (Zurich: Schulthess, 2011), 131.
[420] F. J. Kessler, *Handkommentar zum Schweizer Privatrecht, Vertragsverhältnisse Teil 1: Innominatkontrakte, Kauf, Tausch, Schenkung, Miete, Leihe*, 2nd ed. ed. M. Müller-Chen, C. Huguenin & D. Girsberger (Zurich: Schulthess, 2012), Art. 275 CO § 1.
[421] Schmid & Hürlimann-Kaup, *Sachenrecht*, 365 ff.
[422] Art. 253 CO.
[423] Lachat et al., *Mietrecht für die Praxis*, 36.

caretaking of the building (*Dienstwohnung*), it is controversial whether tenancy or labour law is applicable.[424]

Guest-accommodation contract (*Gastaufnahmevertrag*)

The guest-accommodation contract is a contract not falling under a specific classification (*Innominatvertrag*) and combines aspects of tenancy-, sale- and agency-contracts (e.g. retirement home). The significance of the provisions about tenancies depends on the specific case and is controversial.[425]

- 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.

There are no special rules for furnished *apartments*, for furnished *rooms* however, the notice of termination is shorter and there are termination dates at the end of a one-month period of the lease instead of a three-month period as for other residential premises (Art. 266e CO). A furnished room is defined as a single room which contains at least the furniture required for a minimum standard of living (bed, table, chair and cupboard).[426] A furnished room can contain a toilet and bath. If, however, a room also contains cooking facilities and covers all everyday needs, it is not qualified as a furnished room within the meaning of Art. 266e CO anymore (usually there are shared kitchens and bathrooms).[427] A furnished room can be part of an apartment or a room with a completely separate entrance or also for example a permanently rented room in a guesthouse.[428] The shorter notice period was introduced because of the frequent changes of tenants in these types of dwellings and because moving without furniture is less inconvenient.[429]

- Requirements for a valid conclusion of the contract
  - Formal requirements

In general, a contract can be concluded without observing any formal requirements, unless the law prescribes a particular form (Art. 11 s. 1 CO). For rental contracts, the law does not prescribe any such form and whereas written agreements are common practice, a rental contract can also be concluded orally or by implication.[430] An agreement by implication may not be easily assumed, it can however be assumed for example if the landlord accepts payments from the user of the premises without

[424] Blumer, *Gebrauchsüberlassungsverträge*, N 18. According to some authors, only labour law should be applicable (B. Cocchi, 'Die Kündigung der Dienstwohnung', *mp* (1995): 56); According to other authors, the caretaker living in a 'Dienstwohnung' profits of the protection by the mandatory provisions of the tenancy law (Weber, *BSK OR*, Art. 253a-253b CO § 17).
[425] Lachat et al., *Mietrecht für die Praxis*, 38; Blumer, *Gebrauchsüberlassungsverträge*, N 20.
[426] Weber, *BSK OR*, Art. 266e CO § 1; Lachat et al., *Mietrecht für die Praxis*, 528. According to Higi, the room must also contain for example lighting, a wastepaper basket, curtains and also bed linen (P. Higi, *Kommentar zum schweizerischen Zivilrecht (Zürcher Kommentar), Bd. V/2b, Die Miete, Art. 266-268b OR*, 4th ed. (Zurich: Schulthess), 1995, Art. 266e CO § 32).
[427] Weber, *BSK OR*, Art. 266e CO § 1; Lachat et al., *Mietrecht für die Praxis*, 528.
[428] Higi, *ZK*, Art. 266e CO § 19.
[429] 'Botschaft zur Volksinitiative „für Mieterschutz", zur Revision des Miet- und Pachtrechts im Obligationenrecht und zum Bundesgesetz über Massnahmen gegen Missbräuche im Mietwesen (Botschaft zur Revision des Miet- und Pachtrechts)' of 27 March 1985 (BBl 1985 I 1389)1450; Higi, *ZK*, Art. 266e CO § 10.
[430] A. Furrer & D. Vasella, Swiss Report – Tenancy Law and Procedure in the EU (Florence: EUI, 2005), 5.

reservation.[431] Where apartments in a multi-dwelling building are concerned, the house rules, which comprise for example rules about quiet hours or about the use of the common laundry room, are oftentimes a component of the contract.[432]

The law provides the possibility for the cantons in the event of a housing shortage to make it mandatory to use a form approved by the canton on which the amount of rent of the previous tenancy is indicated when contracting any new rental contract.[433] This shall create transparency and give the tenant an idea about the adequacy of his own rent. Also, it gives the tenant the information necessary to decide whether he wants to challenge the initial rent or not.[434] If, however, there is an obligation to use a form and the landlord did not meet this requirement, the lease is still valid, only the agreement on the rent is invalid.[435] Currently (June 2013), seven cantons (Nidwalden, Zug, Zurich, Fribourg, Vaud, Neuchâtel and Geneva) have established an obligation for landlords to inform the new tenant of the amount of the rent of the previous tenancy on such a form.[436]

Where the entry of the tenancy in the land register under priority notice is agreed on, this has to be done in written form.[437]

- Is there a fee for the conclusion and how does it have to be paid? (e.g. 'fee stamp' on the contract etc.)

No.

- Registration requirements; legal consequences in the absence of registration

  Note: If relevant, please distinguish the various existing registers, e.g. land register, tax register, register of domicile.

Tenancy contracts do not have to be registered. The landlord however has to declare the rental payments as taxable income. The parties may agree on entering the tenancy in the land register under priority notice (see section 6.1 – Is the position of the tenant also considered as a real property right).

- Restrictions on choice of tenant - antidiscrimination issues
  - EU directives (see enclosed list) and national law on antidiscrimination

Anti-discrimination rules in Switzerland can be found in different laws:

Discriminating a candidate on the grounds of race, ethnic origin or religion is a criminal offence according to Swiss criminal law and punished with custodial sentence not exceeding three years or monetary penalty.[438] However, even if a landlord is sentenced for discriminating a candidate, this does not give the latter a right to move into the apartment.

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[431] Blumer, *Gebrauchsüberlassungsverträge*, N 295.
[432] F. Hämmerli, *Hallo Schweiz! Ein Handbuch für Einwanderer* (Zurich: K-Tipp, 2010), 42.
[433] Art. 270 s. 2 in conjunction with 269d CO.
[434] I. Spirig, 'Formularpflicht für Anfangsmietzins neu auch in Zürich', *Neue Zürcher Zeitung*, 25 October 2013.
[435] BGE 124 III 62 E. 2a; Heinrich, *CHK Miete*, Art. 270 CO § 7: The judge will set a reasonable rent (independently from the rent of the former tenant).
[436] Federal Office for Housing. 'Verzeichnis Formularpflicht für den Anfangsmietzins gemäss Artikel 270 Absatz 2 OR', as of 12 June 2013 (Berne: FOH, 2013).
[437] Art. 78 s. 3 Ordinance on the Real Estate Register (Grundbuchverordnung), SR 211.432.1.
[438] Art. 261bis SCC; G. Stratenwerth & W. Wohlers, *Schweizerisches Strafgesetzbuch, Handkommentar*, 3rd ed. (Berne: Stämpfli, 2013), Art. 261bis SCC § 17.

Whether the discrimination of a candidate because of race, ethnic origin, religion or national origin also constitutes an infringement of the personality according to Art. 28 CC is controversial.[439]

Other kinds of discrimination, for example because of gender[440], age or sexual orientation, may be considered an infringement of the personal rights of the potential tenant according to Art. 28 CC. Taking action against discrimination however is difficult, especially where, in times of housing shortage, it is difficult to prove that a rejection is based on discriminative aspects.

Where a landlord engages a real estate agent or a property management company and specifies to search a tenant according to discriminating aspects, the contract may be void according to Art. 20 CO.

The above applies to private persons as landlords. Where the state lets an apartment, it is bound by the non-discrimination principles of the constitution and international law.[441] The principle of non-discrimination in the Constitution has no general third-party effects ('Drittwirkung') on private contractual parties.[442] The ban on discrimination in Art. 8 is therefore only applicable to the state and not also to private persons. However, where the non-discrimination principle is transposed into a specific law (for example Art. 261bis SCC or Art. 6 of the Federal Law on Equal Rights for the Disabled[443]), also private persons are bound.[444]

- 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

Tenancy contracts have no special requirements concerning content and form. The minimum requirements of the content therefore derive mostly from general contract law: The parties have to agree at least on the essential terms of the tenancy contract, otherwise the agreement is not valid. If no agreement on secondary terms can be reached, those ones can be determined by the court subsequently (Art. 2 CC). The essential terms of a tenancy agreement are: the parties of the contract, the object of the tenancy, the use of this object and the corresponding obligation being received in return for providing the premises. If the parties agree on 'renting' the property without a corresponding obligation, the contract is not considered a rental contract, but a loan for use (Art. 305 ff. CO).[445] It is controversial if only agreeing that a corresponding obligation is owed is sufficient (part of the doctrine) or if the amount of the rent must be determined or determinable (Federal Supreme Court).[446]

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[439] T. Naguib, 'Rechtsratgeber Rassistische Diskriminierung' (Berne: FDHA – Fachstelle für Rassismusbekämpfung, 2009), 123.
[440] The Gender Equality Act (Federal Act on Gender Equality of 24 March 1995 [Bundesgesetz über die Gleichstellung von Frau und Mann, SR 151.1]) is focused on equality at work and has no impact on tenancy law.
[441] Art. 8 s. 2 Const., ECHR, UN Convenant I (Naguib, 121).
[442] However, a third-party effect is for example given concerning the right for equal pay for work of equal value of men and women (Biaggini, *BV-Kommentar*, Art. 8 § 33).
[443] Bundesgesetz über die Beseitigung von Benachteiligungen von Menschen mit Behinderungen (SR 151.3).
[444] Biaggini, *BV-Kommentar*, Art. 8 § 18.
[445] Furrer & Vasella, *Swiss Report*, 10. See above.
[446] Blumer, *Gebrauchsüberlassungsverträge*, N 303-316; BGE 119 II 347: If the parties did not reach an agreement about the amount of the rent, the rent can only be set by the court retroactively but not for the future.

Where terms of a contract are impossible, unlawful or immoral, the contract is (partly) void (Art. 20 CO). A tenancy contract may be impossible already at the time of the conclusion, where the dwelling is not inhabitable because of safety or building defects or because public law requirements are not met.[447] For those cases where performance got impossible only after the conclusion of the contract, see section 6.5 – Disruptions of performance prior to the handover of the dwelling, in the sphere of the landlord.

Tie-in transactions proposed by the landlord and linked to a lease of residential premises are void, where the conclusion or continuation of the tenancy is made conditional on such transactions and, under its terms, the tenant assumes an obligation towards the landlord or a third party which is not directly connected with the use of the rented premises (Art. 254 CO).[448] This prohibition covers for example key money the landlord demands or knows and agrees of, but it does not cover for example caretaker's contracts, which are declared as such or the obligation to buy cooperative shares.[449]

- control of contractual terms (EU directive and national law); consequences of invalidity of contractual terms

In 2012 the clause concerning general terms and conditions in the Swiss Unfair Competition Act (UWG)[450] was revised and the wording is now similar to Art. 3 s. 1 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.[451]

The scope of application of Art. 8 UWG in tenancy law is controversial, since it is not clear, whether rental contracts of residential premises are considered consumer contracts and whether the provision is applicable also to consumer-to-consumer contracts.[452]

General terms and conditions contradicting Art. 8 UWG are void.[453] In general, the tenancy contract is only partly void and the individual part of contract and the clauses of the general terms and conditions not contradicting Article 8 are still valid.[454]

There is no catalogue of clauses that may be unfair in general terms and conditions. Since the wording is derived by the EU-Directive however, the latter can be used to interpret Art. 8 UWG. Concerning tenancy law, it is expected that this clause will not have much impact, because many clauses in tenancy law are mandatory or semi-mandatory. [455]

- statutory pre-emption rights of the tenant

[447] BGer 4A_173/2010 of 22 June 2010, E. 2.1; Heinrich, *CHK Miete*, Art. 258 CO § 4; Blumer, *Gebrauchsüberlassungsverträge*, N 358.
[448] As a third party are considered persons who act instead and on behalf of the landlord (BGer 4C.161/2001 of 26 September 2001, E. 3).
[449] Blumer, *Gebrauchsüberlassungsverträge*, N 367 and 376. See also Art. 3 VMWG and Blumer, *Gebrauchsüberlassungsverträge* N 371 ff.
[450] Federal Act against Unfair Competition (Bundesgesetz gegen den unlauteren Wettbewerb), UWG, SR 241.
[451] T. Wetzel, M. Grimm & P. Mosimann, 'Die Anwendbarkeit von Art. 8 UWG auf AGB in Mietverträgen', *MRA* (2013): 6.
[452] Wetzel, Grimm & Mosimann, 9 f., with further references.
[453] Art. 2 UWG in conjunction with Art. 20 s. 1 CO.
[454] Art. 20 s. 2 CO; Wetzel, Grimm & Mosimann, 11 f.
[455] Wetzel, Grimm & Mosimann, 6 and 12.

There is no statutory pre-emption right of the tenant. Agreeing on a pre-emption right however is possible. Attempts to introduce a statutory pre-emption right for tenants were discussed but not introduced so far.[456]

- 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 restrictions to the homeowner to use the premises for himself, if it is financed or if the mortgage is secured with pension fund assets (see section 1.3 – Financing of owner-occupied housing).

6.4 Contents of tenancy contracts

Summary Table 11: Contents of tenancy contracts

Description of dwelling	- A party is not bound to a contract in which it entered under fundamental error - Whether a wrong indication of the habitable surface in a contract allows the tenant to reduce the rent depends on whether this indication was decisive for the tenant to enter the contract
Parties to the tenancy contract	Landlord/Tenant: - Natural persons; legal entities or partnerships; public authorities - Plurality of persons as landlord or as tenant are possible Landlord - Owner of the dwelling; person holding limited rights in rem at the dwelling; property administrator; tenant (subletting)
Duration	Contracts limited in time: - Not subject to special restrictions - No minimum duration required - Concluding a contract for the lifetime of one of the parties is possible / Concluding an eternal contract is not possible - To holiday homes rented for a maximum period of three months, the provisions about the lease of residential premises are not applicable - The admissibility of chain contracts in general is controversial
Rent	Rent of residential premises can be agreed freely, but unfair rents are revisable on initiative of the tenant within a certain period of time (provisions about protection against unfair rents: challenging the initial rent; challenging rent increases; request for rent reduction)
Deposit	Only the deposit in cash or negotiable securities is specially regulated by tenancy law. Other forms of security can also be agreed on (joint and several liability, contract of surety, etc.) - Security deposit covers all claims of the landlord towards the tenant arising from the tenancy - Maximum amount of deposit is three month's rent (incl. accessory charges) - Landlord has to deposit the security in a bank savings account in the tenant's name. The landlord has a lien on these assets

[456] http://www.parlament.ch/afs/data/d/bericht/2004/d_bericht_n_k12_0_20040415_0_20050204.htm (3 December 2013).

Accessory charges	- Actual outlays made by the landlord for services connected to the use of the property. The landlord must not make profit out of accessory charges - Accessory charges the landlord does not specify in the contract are considered covered by the rent. Simply referring to 'all accessory charges' in the contract or defining the accessory charges only in the general terms and conditions is not sufficient to transfer the costs to the tenant
Repairs	The landlord has to maintain the dwelling in a condition fit for its designated use The tenant has to repair: - Defects which are attributable to him and - Minor defects

- Description of dwelling; indication of the habitable surface (and consequences in case of the provision of wrong data)

Indication of wrong habitable surface as fundamental error

According to Art. 23 CO, a party is not bound by a contract which it entered under fundamental error. An error is considered fundamental, where it relates to specific facts which the party acting in error considered in good faith to be a necessary basis for the contract (Art. 24 s. 1 ss. 4 CO). In case of fundamental error, a contract could be declared only partly invalid, where the parties would also have concluded the contract with adjusted conditions.[457] In general, from an objective point of view the habitable surface is a necessary basis of a contract, especially because it is an important information to judge whether the rent is adequate or not (this applies especially with commercial-, but also with residential premises[458]). However, where the indication of the habitable surface in the contract was not decisive for the tenant to conclude the contract in a specific case, a wrong indication of it does not induce a fundamental error.[459] Concerning leases of residential premises, oftentimes the number of rooms is considered more important and in housing advertisements the habitable surface is sometimes not even indicated.[460]

Indication of wrong habitable surface as defect

Where the tenant has received an apartment which does not comply with the requirements for its designated use (which is agreed on in the contract), the tenant can request a reduction of the rent (Art. 258 s. 3 ss. a CO). Where the indication of the habitable surface of the dwelling is wrong, this only constitutes a defect, where either the landlord intended to give warranty about this size of the apartment or where the dwelling does not fulfil the requirements the tenant could reasonably rely on regarding its designated use. This for, the contract has to be interpreted according to the true and common intention of the parties (Art. 18 s. 1 CO). Where the landlord erroneously[461] indicated wrong data and the tenant visits the apartment before the

[457] BGE 135 III 537 E. 2.1.
[458] BGE 135 III 537 E. 2.2.
[459] BGer 4A.465/2010 of 30 November 2010, E. 5. In this case, an essential error was denied because the tenant visited the apartment before conclusion of the contract. He did not attempt to negotiate the rent and had urgent need of an apartment in this area.
[460] Hämmerli, 40.
[461] Where the landlord induced the tenant into the contract by fraud, the tenant is generally not bound by the contract (Art. 28 CC).

conclusion of the contract, the common intention of the parties would be the actual dwelling as seen.[462]

- 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)

To objects on residential and commercial premises of which the tenant has use, the provisions governing the lease of residential and commercial premises are also applicable. Apart from garages and attics, also premises for residential use can be such objects within the meaning of Art. 253a s. 1 CO.[463] A sufficient connection between a commercial and a residential premise which justifies the appliance of the same rules to both contracts exists if the 'secondary component' (*Nebensache*) serves the 'primary component' (*Hauptsache*) functionally and if the first is only rented out because of the contract on the latter. Also, the parties of both contracts have to be identical.[464] If for example an apartment for the innkeeper is rented out together with a restaurant, the rules about the commercial lease are applied to both premises.[465]

If the same dwelling is leased for residential and commercial purposes, the primary purpose of the dwelling determines whether the rules on residential or commercial lease apply.[466]

In general, it has to be stated that the lease of commercial and of residential premises are generally ruled by the same provisions; there are only two provisions which are exclusively applicable to the lease of commercial premises: The tenant has the right to transfer his lease to a third party (Art. 263 CO) and the landlord has a special lien on chattels located on the leased premises (Art. 268 CO). Additionally, some provisions are manifested differently: longer notice period and longer maximum period of extension for commercial leases (Art. 266c f. and 272b CO), and no maximum limit for security deposits (Art. 257e s. 2 CO).[467]

- Parties to a tenancy contract
    - Landlord:
        - Who can lawfully be a landlord?

The landlord can be the owner of the dwelling, a person holding a limited right in rem at the dwelling (e.g. usufruct or building right) or the property administrator renting out the dwelling in his own name. Also, the tenant can sublet his dwelling.[468]

Natural persons as well as legal entities or partnerships can be landlords. Under certain circumstances, also public authorities can be landlords (when the premises

[462] BGer 4A.465/2010 of 30 November 2010, E. 6.
[463] BGer 4C.43/2001 of 20 June 2001, E. 3c.
[464] BGE 125 III 231 E. 2a.
[465] Lachat et al., *Mietrecht für die Praxis*, 64.
[466] Heinrich, *CHK Miete*, Art. 253a CO § 3; The special provisions concerning the family residence however are also applicable if the commercial purpose prevails the residential purpose (Weber, *BSK OR*, Art. 253a CO § 14).
[467] M. Minder, *Die Übertragung des Mietvertrags bei Geschäftsräumen (Art. 263 OR), Einschliesslich des Verhältnisses von Art. 263 OR zum Fusionsgesetz (FusG)* (Dissertation, University of Zurich, 2010), 8.
[468] Lachat et al., *Mietrecht für die Praxis*, 16.

are in the so called 'Finanzvermögen').[469] Also, it is possible that a dwelling is rented out by more than one person, for example if it is owned by a community of heirs or if it is in co-ownership.[470] Also a minor or a person under guardianship can be a landlord, the contract concluded is however only valid with the consent of the legal representative.[471]

- Does a change of the landlord through inheritance, sale or public auction affect the position of the tenant?

When a property is alienated by the landlord, dispossessed in debt collection or bankruptcy proceedings, the rental contract passes to the acquirer together with ownership of the object. The landlord however has a right to extraordinarily terminate the contract.[472]

'On the death of the deceased, the estate in its entirety vests by operation of law in the heirs' (Art. 560 s. 1 CC, *Universalsukzession*). Since Art. 261 CO does not cover the change of ownership through inheritance, the relation between the tenant and the heirs of the landlord remains the same as with the landlord himself and there is no extraordinary right to terminate the contract.[473]

- Tenant:
  - Who can lawfully be a tenant?

The same persons and entities who can be landlords can also be tenants (see above). A multiplicity of tenants is also possible (see below).

- Which persons are allowed to move in an apartment together with the tenant (spouse, children etc.)?

If nothing is specified in the tenancy contract, family and relatives of the tenant are allowed to move in an apartment together with him.[474] However this is not possible if it would lead to an overcrowding of the dwelling (Art. 257f CO care and consideration, see section 6.6 – Notice by the landlord).[475] If changes in the tenant's family circumstances do not give rise to significant disadvantages to the landlord, a notice of termination by the landlord would contravene the principle of good faith.[476]

- 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

[469] For further information, see P. Higi, *Kommentar zum schweizerischen Zivilrecht (Zürcher Kommentar), Bd. V/2b, Die Miete, Art. 253-265 OR*, 3rd ed. (Zurich: Schulthess, 1994), Art. 253 CO § 20.
[470] Higi, *ZK*, Vorbemerkungen zum 8. Titel, § 103; Heinrich, *CHK Miete*, Art. 253 CO § 12; Lachat et al., *Mietrecht für die Praxis*, p. 16. Concerning the relation between a multiplicity of landlords and a tenant and the landlords amongst each other, see below (multiplicity of tenants).
[471] Blumer, *Gebrauchsüberlassungsverträge*, N 362. The legal representative may also approve retrospectively (Art. 19a CC).
[472] Art. 261 CO, for further information, see section 6.6 – Notice by the landlord.
[473] T. Göksu, *Handkommentar zum Schweizer Privatrecht, Erbrecht*. 2nd ed. Ed. P. Breitschmid & A. Rumo-Jungo (Zurich: Schulthess, 2012),Art. 560 CC § 5; Weber, *BSK OR*, Art. 261 § 2; Lachat et al., *Mietrecht für die Praxis*, 558.
[474] BGE 136 III 186 E. 3.1.2 and 3.2.2.
[475] Weber, *BSK OR*, Art. 257f CO § 1; M. Sommer, 'Ausserordentliche Kündigung wegen Verletzung der Pflicht des Mieters zur Sorgfalt und Rücksichtnahme nach Art. 257f Abs. 3 OR', *MRA* (1996): 73.
[476] Art. 271a s. 1 ss. f CO.

If the landlord has concluded separate contracts with several tenants, which is however rarely done in practice, they can terminate the contract independent of one another, and the landlord then chooses a new tenant, which cannot be refused by the other tenants.[477]

If the landlord has concluded one contract with a multiplicity of tenants, the tenants can only terminate the contract together.[478] On the other hand, one tenant moving out does not give the landlord a right to terminate the contract, and the tenant may sublet his room(s). However, it must be considered that the Federal Court recently decided that a notice of termination by the landlord may be justified where a tenant subleases the dwelling without intending to return.[479] The landlord may agree on concluding a new lease with the remaining tenant, but he is not obliged to do so. Where no agreement can be reached and a tenant wants to be released from his obligations, he may first dissolve the simple partnership between him and the other tenant(s), which exists for example in case of cohabitation or flat-sharing community (see below).[480]

Concerning cases of divorce or separation of registered partnerships see also section 6.2 – Freedom of contract. Concerning cases where one tenant is the main tenant and the others are subtenants, see below.

- 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)?

The tenant is allowed to sub-let his apartment or parts of it to a third party with the landlord's consent (Art. 262 s. 1 CO). The landlord can only refuse his consent for the following reasons stated in Art. 262 s. 2 CO:

- The tenant refuses to inform the landlord of the terms of the sublease (for example of the amount of the rent, who the subtenant is, the duration of the contract or whether the whole apartment or only some rooms are sub-let).[481]
- The terms and conditions of the sublease are unfair in comparison with those of the principal lease. The tenant especially has no right to make excessive profit of the sublease.[482]
- The sublease gives rise to major disadvantages for the landlord (for example if the apartment would be overcrowded or used for a considerably different purpose than agreed on in the principal contract).[483]

[477] Information provided by T. Herren, Zurich tenants' association, in telephone interview from 7 April 2014.
[478] Lachat et al., *Mietrecht für die Praxis*, 18.
[479] BGE 138 III 59 E. 2.
[480] Information provided by T. Herren, Zurich tenants' association, in telephone interview from 7 April 2014.
[481] Heinrich, *CHK Miete*, Art. 262 CO § 6; Lachat et al., *Mietrecht für die Praxis*, 466; Higi, *ZK*, Art. 262 CO § 40.
[482] H. Honsell, *Schweizerisches Obligationenrecht, Besonderer Teil*, 9th ed. (Berne: Stämpfli, 2010), 228; Heinrich, *CHK Miete*, Art. 262 CO § 6.
[483] Lachat et al., *Mietrecht für die Praxis*, 468 f.; Heinrich, *CHK Miete*, Art. 262 CO § 6; Higi, *ZK*, Art. 262 CO § 46; The extent to which the purpose of the sublease can differ from the principal lease is controversial.

Art. 262 CO is semi-mandatory for the benefit of the tenant; the landlord cannot exclude or restrict the tenant's right to sublet the dwelling by contract.[484]

The tenant who sublets his dwelling is responsible towards the landlord that the subtenant uses the dwelling only in a manner which would also be permitted to himself (Art. 262 s. 3 CO).

If the tenant does not inform the landlord of the sublease or if the landlord refuses to consent to the sublease, the contract between tenant and subtenant is still valid and the subtenant can claim damages from the tenant.[485] In this case, where the tenant refuses to inform the landlord of the conditions of the sublease on request, the landlord has the possibility to give ordinary or extraordinary[486] notice to the tenant, if reasons to refuse his consent existed (see above).[487] Whether an ordinary notice would also be justified if no reasons to refuse his consent existed, is controversial. [488]

The same provisions which are applicable to a normal lease are also applicable to a sublease.[489] The provisions about protection against termination of leases of residential and commercial premises (Art. 271-273c CO) however, are only applicable to the sublease if the principal lease has not been terminated. Also, an extension of the lease can only be granted within the duration of the principal lease (Art. 273b s. 1 CO). Despite this restriction, the subtenant can invoke the provisions of protection against termination without regard to the principal lease, if the sub-lease was made mainly to circumvent these provisions (Art. 273b s. 2 first sentence CO). If, in such a case, the principal lease is terminated, the landlord is subrogated to the position of the tenant in the contract with the subtenant (Art. 273b s. 2 second sentence CO).

- Is it possible, and if yes under what conditions, to conclude a contract with a multiplicity of tenants (e.g. group of students)?

Apart from concluding separate contracts with different people for certain parts of an apartment, the landlord can also conclude one contract with a multiplicity of tenants. In this case, the tenants are usually joint and severally liable (by contractual agreement, according to the circumstances or because the tenants form a simple partnership as is assumed for example in case of cohabitation or flat-sharing community).[490] If the landlord wants to for example terminate the lease or increase the rent, he has to submit the notice to all tenants separately. On the other hand, one tenant cannot terminate the lease alone.[491]

If a multiplicity of tenants or landlords exists, the relation between the tenant(s) on the one hand and landlord(s) on the other hand is (with some exceptions, for

[484] Weber, *BSK OR*, Art. 262 CO § 2; Honsell, *OR BT*, 228; BGE 134 III 300 E. 3.
[485] Heinrich, *CHK Miete*, Art. 262 CO § 4.
[486] According to Art. 257f s. 3 CO, see section 6.6 – Notice by the landlord.
[487] Heinrich, *CHK Miete*, Art. 262 CO § 5; Blumer, *Gebrauchsüberlassungsverträge*, N 595; Weber, *BSK OR*, Art. 262 CO § 4a.
[488] Negative: Weber, *BSK OR*, Art. 262 CO § 4; affirmative: Heinrich, *CHK Miete*, Art. 262 CO § 5; The 'SVIT-Kommentar' would even allow the landlord to terminate the contract extraordinarily according to Art. 257f s. 3 CO (Schweizerischer Verband der Immobilienwirtschaft SVIT, *Das schweizerische Mietrecht, Kommentar,* 3rd ed. [Zurich: Schulthess, 2008], Art. 262 CO § 32).
[489] Blumer, *Gebrauchsüberlassungsverträge*, N 590. This also includes for example the obligation to use a form for indicating the initial rent mandatory in certain cantons (see 6.3 – Formal requirements and BGE 124 III 62 E. 2a).
[490] Blumer, *Gebrauchsüberlassungsverträge*, N 305; Lachat et al., *Mietrecht für die Praxis*, 18; Honsell, Art. 253 CO § 12.
[491] Lachat et al., *Mietrecht für die Praxis*, 18.

example concerning the representation) the same as between two parties. The relation of the tenants among each other or the landlords among each other is ruled by the provisions of the specific form in which the multiplicity of tenants or landlords is organized (for example the rules which apply to a community of heirs).[492]

Spouses and registered partners who live in a dwelling with the tenant have certain rights, even without being party to the tenancy contract (where the premises are used as family dwelling).[493]

- Duration of contract
    - Open-ended vs. limited in time contracts
        - for limited in time contracts: is there a mandatory minimum or maximum duration?

The conclusion of tenancy contracts limited in time is generally not subject to restrictions. There is no minimum duration required and also tenancy contracts concluded for a very long duration are admissible (for example for the lifetime of one of the parties). If the duration however seems obviously excessive considering the circumstances, the parties can terminate the lease extraordinarily for good cause (Art. 266g CO; see also section 6.6 – Notice by the tenant and Notice by the landlord).[494]

Also, the general means of contract law concerning unlawful or immoral terms (Art. 20 CO), unfair advantage (Art. 21 CO) or protection of legal personality against excessive restriction (Art. 27 s. 2 CC) can be invoked. An eternal contract for example is unlawful and partly void. In this case, the court determines the duration of the contract at its discretion or declares the contract capable of termination.[495]

Where a holiday home is rented for a maximum period of three months, the provisions about the lease of residential premises are not applicable.

    - 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 options; contracts for life etc.

Whether chain contracts are generally admissible or not is controversial. However, where – as one extreme – they serve to circumvent mandatory provisions preventing abuse (for example renting out an apartment as a holiday home for a maximum period of three months, so that the provisions about the lease of residential and commercial premises are not applicable [Art. 253a s. 2 CO]), they are not admissible.[496] Where – as the other extreme – legitimate interests are pursued, chain

[492] Higi, *ZK*, Vorbemerkungen zum 8. Titel, § 107; Heinrich, *CHK Miete*, Art. 253 CO § 12. For further information, especially about joint and several liability, see Higi, *ZK*, Vorbemerkungen zum 8. Titel, § 113 ff.
[493] See section 6.6. – Mutual termination agreement, Notice by the tenant and Notice by the landlord).
[494] Lachat et al., *Mietrecht für die Praxis*, 30. When holiday homes are rented out, the provisions governing the leasing of residential and commercial premises are only applicable if the contract is concluded for more than three months (Art. 253a s. 2 CO, see also section 4.1).
[495] Lachat et al., *Mietrecht für die Praxis*, 30; Weber, *BSK OR*, Art. 255 CO § 8; Heinrich, *CHK Miete*, Art. 255 CO § 13.
[496] Higi, *ZK*, Art. 266 CO § 42.

contracts are admissible (for example if a tenant was repeatedly in arrears of payments).[497]

Prolongation options can be agreed on and are mainly used in contracts about commercial premises or single family homes.[498]

Concerning contracts for life see above.

- Rent payment
    - In general: freedom of contract vs. rent control

In general, according to the principle of freedom of contract, the parties are free to agree on any amount of rent. However, for residential (and commercial) premises, which are not rented out as holiday homes for a maximum period of three months and which are no luxury dwellings within the meaning of Art. 253b s. 2 CO,[499] provisions about protection against unfair rents (Art. 269 ff. CO) are applicable. These provisions are semi-mandatory to the benefit of the tenant.[500] Thus, the rents of these residential premises can be agreed freely but they are reviewable on initiative of the tenant under certain circumstances (see below).[501]

    - 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

Challenging the initial rent and rent increases, and request of rent reduction

The tenant may challenge (1) the initial rent or (2) rent increases during the tenancy. He has to do so within a certain period of time after taking possession of the property or the notice of rent increase, otherwise also an excessive rent is considered accepted.[502] The tenant may also (3) request a rent reduction during the tenancy, where he has good cause to suppose that the landlord makes excessive profit of the premises because of significant changes to the calculation basis.

(1) Challenge to initial rent

Contrary to the principle of 'pacta sunt servanda'[503], the tenant has the possibility to challenge the initial rent he and the landlord had agreed on as unfair within the meanings of Art. 269 and 269a CO (see below) and thus request a reduction of the rent, if one of the following two situations is given: (A) 'the tenant felt compelled to conclude the lease agreement on account of personal or family hardship or by reason of the conditions prevailing on the local market for residential and commercial premises' (Art. 270 s. 1 ss. a CO) or (B) 'the initial rent required by the landlord is significantly higher than the previous rent for the same property' (Art. 270 s. 1 ss. b

[497] BGer 4C.155/2003 of 3 November 2003 E. 3.2

[498] T. Kunz, 'Optionen im Mietrecht', in *Aktuelle Fragen zum Mietrecht,* ed. B. Rohrer (Zurich: Schulthess, 2012), 104.

[499] The rent for holiday homes hired for three months or less and for luxury apartments and single-occupancy residential units with six or more bedrooms and reception rooms can be agreed freely and are only revisable according to the general provisions of the Code of Obligations (Blumer, *Gebrauchsüberlassungsverträge*, N 405). Concerning the term of luxury dwellings, see section 4.1.

[500] Weber, *BSK OR*, Art. 269 CO § 3.

[501] Blumer, *Gebrauchsüberlassungsverträge*, N 407.

[502] These are forfeiture periods (Heinrich, *CHK Miete*, Art. 270 CO § 2 and 270b-270e CO § 1; BGE 131 III 566 E. 3.2).

[503] Schmid & Stöckli, *OR BT*, 158 N 1111; Honsell, *OR BT*, 245; contrast: Lachat et al., *Mietrecht für die Praxis*, 284, according to which the possibility to challenge the initial rent does not contradict the canon, since tenant and landlord are not contracting partners on an equal footing.

CO). The tenant has to challenge the rent before the conciliation authority within thirty days of taking possession of the property (Art. 270 s. 1 CO). Where the tenant does not act within these thirty days, he is considered to having accepted the rent.[504] The existence of the above mentioned conditions to challenge the rent have to be established by the tenant.[505]

(A) An emergency situation (*Notlage*) generally only exists where the tenant is compelled to conclude the specific contract in question and he had no reasonable alternative.[506] A *personal or family hardship* can for example compel the tenant to conclude a contract, where he needs a new apartment because his family grows or because the tenancy contract was terminated by the previous landlord.[507] Independently from personal or family hardship, *Conditions prevailing on the local market for residential (and commercial) premises* can also give reason for the tenant to feel compelled to conclude the lease: Such conditions are considered given where the vacancy rate of residential premises is less than 1.5% of the rental stock, regardless of search efforts of the tenant.[508]

(B) *Rent required is significantly higher than the previous rent*: According to estimations for 2010 to 2012, for almost half of all changes of tenants, the landlords raised the rent.[509] In those cantons where there is no obligation to inform the new tenant of the amount of rent of the previous lease (see section 6.3 – Requirements for a valid conclusion of the contract), the landlord has to give this information (only) on request of the tenant.[510] A rent increase is considered to be significant where it is at least ten percent higher than the previous rent, (independently from the calculation bases).[511]

Where one of these conditions – emergency situation or significantly higher rent – is given, the tenant is admitted to challenge the initial rent as unfair. Whether the rent actually is considered unfair and has to be reduced or not, has to be examined according to Art. 269 f. CO (see below).[512]

The relation of the provisions about challenging the initial rent to the general provisions of the code of obligations is controversial.[513] However, if the tenant challenged the initial rent, this can be considered as ratification of the contract, whereupon the tenant cannot invoke unfair advantage or fundamental error anymore.[514]

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[504] Lachat et al., *Mietrecht für die Praxis*, 282.
[505] BGer 4C.367/2001 of 12 March 2002, E. 3a.
[506] Koller, *OR BT*, § 10 N 37.
[507] Weber, *BSK OR,* Art. 270 CO § 3.
[508] BGer 4C.367/2001 of 12 March 2002, E. 3b/dd.
[509] E. Hauri, 'Wohnungspolitik des Bundes: Optimierung ohne sofortige Markteingriffe'. *Die Volkswirtschaft, Das Magazin für Wirtschaftspolitik* 6 (2013):14.
[510] Art. 256a s. 2 CO; The time limit for this request is thirty days of taking possession of the property, since this right is connected to the right to challenge the initial rent (Heinrich, *CHK Miete*, Art. 256a CO § 4).
[511] BGE 136 III 82 E. 3.3; Weber, *BSK OR*, Art. 270 CO § 5.
[512] BGE 136 III 82 E. 3.3.
[513] Weber, *BSK OR*, Art. 270 CO § 1c.: Even if the time-limit for challenging the rent has expired, the tenant can still invoke unfair advantage (Art. 21 CO) and fundamental error (Art. 24 s. 1 CO). As a result, the contract may be decided to be partly void and the rent reduced by the judge. Heinrich, *CHK Miete*, Art. 270 CO § 8: Art. 270 CO is lex specialis to Art. 21 and 24 s. 1 ss. 3 CO.
[514] Weber, *BSK OR*, Art. 270 CO § 1c; Heinrich, *CHK Miete*, Art. 270 CO § 8.

As mentioned above, most of the tenants in Switzerland judge their rent as adequate, whereby tenants in German-speaking Switzerland are generally more pleased with the rent-performance rate than tenants in other regions.[515] The statistics of the conciliation authorities show a similar result; in French-speaking Switzerland there are generally more challenges to the initial rent than in German-speaking Switzerland, where this occurs only in some few cases.[516]

(2) Challenge to rent increases

A tenant may challenge a rent increase before the conciliation authority as unfair within the meaning of Art. 269 and 269a CO (see below) within thirty days of receiving notice (Art. 270b s. 1 CO). The landlord has to comply with certain formal requirements (using a form approved by the canton and give notice at least ten days before the beginning of the notice period for termination) and give reasons for the rent increase, otherwise the rent increase is void and challenging it is superfluous (Art. 269d CO, see also 6.5 – Rent regulation, ordinary rent increases). Where the tenant does not challenge the rent increase within thirty days, the increase is considered accepted.

A rent increase which is unfair according to the 'relative method' cannot be justified by invoking that according to the 'absolute method' the new rent was not unfair. On the other hand, where a rent increase would not be unfair according to the relative method, the tenant can still invoke that the increased rent is unfair according to the absolute method.[517]

(3) Request for rent reduction during the lease:

As a counterpart to the possibility for the landlord to increase the rent during the tenancy, the tenant may request a rent reduction where he has good cause to believe that the return derived by the landlord from the leased property is excessive within the meaning of Art. 269 and 269a CO. This may be because of significant changes to the calculation basis and most notably a reduction in costs (Art. 270a s. 1 CO).

A change in the calculation basis within the meaning of Art. 270a s. 1 CO may in particular be the reduction in costs because of the mortgage rates. Independently from the actual level of debt financing and even for mortgage free premises, the rent is linked to the reference mortgage rate quarterly announced by the FOH.[518] Also, a reduction in costs can for example occur where maintenance or running costs are reduced or where the landlord reduces services.[519]

The tenant can demand the rent reduction only as of the next termination date; a rent reduction cannot be requested in a tenancy concluded for a limited period of time.[520]

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[515] See section 2.2.

[516] 'Berichte über die Tätigkeit der paritätischen Schlichtungsbehörden in Miet- und Pachtangelegenheiten' (http://www.bwo.admin.ch/themen/mietrecht/00161/index.html?lang=de [last retrieved 18 February 2014]). Further results of these statistics of the conciliation authorities are displayed in section 6.8 – Tenancy law and procedure 'in action'.

[517] BGE 121 III 163 E. 2c. Concerning the relative and the absolute method, see below – Unfair rent.

[518] Art. 12a s. 1 VMWG; Weber, *BSK OR*, Art. 269a CO § 7 and Art. 270a CO § 1b. See also below – Unfair rent.

[519] Blumer, *Gebrauchsüberlassungsverträge* N 561; Lachat et al., *Mietrecht für die Praxis*, 312.

[520] Art. 270a s. 2 CO; Blumer, *Gebrauchsüberlassungsverträge* N 321; Weber, *BSK OR*, Art. 255 CO § 2

In general, a request for rent reduction is assessed according to the relative method (see below); similar to the landlord when raising the rent, the tenant can only invoke changes which happened after the last time the rent was fixed.[521] An exception is however made for reductions of mortgage rates which were not considered upon the last fixation of the rent.[522]

Where, at the same time that costs were reduced, other costs increased which – also according to the relative method – would allow a rent increase, this can be held against a rent reduction (for example balance inflation on the risk capital).[523]

If a rent reduction according to the relative method would be justified, the landlord may counter that according to the absolute method, the existing rent is not unfair (the landlord can for example invoke that the income derived from the leased property is not excessive [Art. 269 CO] or that the rent falls within the range of rents customary in the locality or district [Art. 269a s. a CO]).[524] The burden of proof for these allegations rests on the landlord.[525]

Proceedings for rent reduction

The tenant has to present his request to reduce the rent (in writing) to the landlord. The landlord then has thirty days in which to respond. He can either accept the rent reduction or refuse the request in full or in part. Where the landlord does not accept the reduction or where he does not respond on time, the tenant may apply to the conciliation authority within another thirty days.[526]

Generally, presenting the request for rent reduction to the landlord before applying to the conciliation authority is a procedural requirement.[527] Where the tenant is simultaneously challenging a rent increase and requesting a rent reduction however, he does not have to do this preliminary proceeding (Art. 270a s. 2 CO). Also, where the landlord made it clear from the beginning that he is not willing to reduce the rent, the tenant can apply to the conciliation authority directly.[528]

Unfair rent

Notion of unfair rent in general

In general, where a rent allows the landlord to *derive excessive income (1)* from the lease or where the rent is *based on a clearly excessive sale price (2)*, the rent is considered unfair (Art. 269 CO). Art. 269a CO however states the *exceptions (3)* where rents are not generally held to be unfair.

(1) Excessive income

A rate of return is still considered reasonable (and not yet excessive) where the net return does not exceed the reference mortgage rate by more than 0.5%.[529]

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[521] BGE 133 III 61 E. 3.2.2.2.
[522] Art. 13 s. 4 VMWG; Heinrich, *CHK Miete*, Art. 270a CO § 2; Lachat et al., *Mietrecht für die Praxis*, 269.
[523] Art. 269a s. E CO; Blumer, *Gebrauchsüberlassungsverträge* N 563.
[524] BGE 121 III 163 E. 2; Weber, *BSK OR*, Art. 269 CO § 18 and Art. 270a CO § 3.
[525] Art. 8 CC; Weber, *BSK OR*, Art. 270a CO § 3.
[526] However, if he misses this deadline, he can make a new request with the same arguments as of the following next termination date (Blumer, *Gebrauchsüberlassungsverträge* N 569; Lachat et al., *Mietrecht für die Praxis*, 317).
[527] Nonetheless, the parties are not bound to their declarations in this preliminary proceeding (Heinrich, *CHK Miete*, Art. 270a CO § 8; Lachat et al., *Mietrecht für die Praxis*, 316).
[528] BGE 132 III 702 E. 4.3.
[529] Heinrich, *CHK Miete*, Art. 269-269a CO § 12.

The net return is calculated on the base of the net income (net rental income minus all real estate expenses that actually incurred, such as for example maintenance and running costs and mortgage interest rates) in relation to the invested equity (difference between the investment costs [such as for example sale price[530], construction costs and real estate transfer costs][531] and outside capital).[532]

(2) Clearly excessive sale price

Where the calculation of the net return of a property is based on a clearly excessive sale price, a rent not resulting in an excessive income can still be challenged as unfair. A sale price is considered clearly excessive, where it exceeds the earning value of a comparable property by more than about 10%[533]. The earning value of comparable properties is calculated according to the rents customary in the locality or district (Art. 10 VMWG). These rents are therefore capitalized with an interest rate according to the reference mortgage rate increased by 2-3%.[534]

(3) Exceptions

Art. 269a s. a-f CO state situations in which rents are not generally held to be unfair. These legal presumptions are rebuttable.[535]

s. a) Rents falling within the range of rents customary in the locality or district

For determining the range of rents admissible, dwellings in the same locality or districts, which are comparable in location, size, equipment, condition and construction period have to be taken into account (Art. 11 s. 1 VMWG).[536] Where there is no official statistic to base a claim on (see below), at least five apartments meeting these criteria have to be considered.[537]

- *Location:* The dwellings have to be comparable in terms of traffic and public transport access, infrastructure (such as schools, shopping facilities and leisure facilities), external nuisances, natural location (e.g. natural lighting and view), etc.[538]
- *Size:* Comparability for residential dwellings has to be given primarily concerning the number of rooms, but – especially when it comes to big dwellings – also the floor area has to be considered.[539]
- *Equipment and condition of the apartment:* Mainly the quality and the functionality have to be comparable. It has to be evaluated, whether for example the floor

[530] The sale price can be increased by value adding investments by the landlord (Blumer, *Gebrauchsüberlassungsverträge*, N 424).
[531] Inflation can be balanced out on up to 40% of the invested equity (see Weber, *BSK OR*, Art. 269 CO § 9).
[532] Weber, *BSK OR*, Art. 269 CO § 6; Heinrich, *CHK Miete*, Art. 269-269a CO § 12 ff.
[533] Heinrich, *CHK Miete*, Art. 269-269a CO § 14; Blumer, *Gebrauchsüberlassungsverträge*, N 430; Lachat et al., *Mietrecht für die Praxis*, 336 (with further references).
[534] Blumer, *Gebrauchsüberlassungsverträge*, N 429; Heinrich, *CHK Miete*, Art. 269-269a CO § 14.
[535] BGE 124 III 310 E. 2b.
[536] Differences of the dwellings concerning the criteria of comparison cannot be compensated by increases or reductions of the rent of the compared dwelling (Weber, *BSK OR*, Art. 269a CO § 2a; Lachat et al., *Mietrecht für die Praxis*, 359).
[537]. BGE 123 III 317 E. 4a. Dwellings on the same real estate which are owned by the same person are considered as only one comparable object (BGE 123 III 317 E. 4c/aa and 4c/bb; Lachat et al., *Mietrecht für die Praxis*, 356).
[538] Blumer, *Gebrauchsüberlassungsverträge*, N 439; Weber, *BSK OR*, Art. 269a CO § 2a.
[539] BGE 136 III 74 E. 3.2.2; Weber, *BSK OR*, Art. 269a CO § 2a.

covering, the kitchen furnishings and sound and thermal insulation are comparable in quality and whether installations as for example an elevator exist or not.[540]

- *Construction period:* The compared apartments have to be built in the same construction period. When it comes to buildings constructed around the turn of the nineteenth century, one construction period covers about twenty years; in more recent times (in the last about fifty years) a construction period covers about a decade.[541] This classification is however controversial in literature and poses problems in practice. Also, a completely renovated dwelling may possibly rather be compared with apartments constructed at the time of the renovation than with apartments of the same construction period.[542]

Official statistics shall be taken into account, where they are sufficiently detailed concerning the above mentioned criteria of Art. 11 s. 1 VMWG and where the localities or districts are distinguished.[543] The requirements concerning the level of detail are very high, which is why currently there is presumably no official statistic sufficiently detailed.[544] However – depending on the individual circumstances – official statistics which do not meet all required criteria may be considered as indicator whether a rent is unfair, where the rent in question differs considerably from comparable rents in the statistic.[545]

Since no sufficiently detailed official statistics exist, other – 'private' – statistics are not admissible and the information about five comparable apartments (which are owned and inhabited by people not party to the procedure) is not easy to be gathered, producing evidence of the range of rents customary in the locality or district is difficult. Also, where information about five apartments is produced and accepted in a procedure, this does not necessarily represent the actual rents customary in the locality or district adequately. The system therefore is criticized in literature.[546]

Interaction with the criteria of 'excessive income': The tenant can generally invoke that a rent, which falls within the range of rents customary in the locality or district, permits the landlord to derive excessive income from the property. As an exception to this, the tenant cannot invoke an excessive income where the rent of dwellings in old buildings fall within the range of comparable rents, since for buildings built or acquired several decades ago it is difficult to prove whether the income is excessive or not because documents are often missing or calculations based on them would lead to unrealistic results.[547] Where the landlord bases the rent on a non-excessive income, the tenant cannot invoke that the rent does not fall within the range of comparable rents.[548]

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[540] Blumer, *Gebrauchsüberlassungsverträge*, N 441; Lachat et al., *Mietrecht für die Praxis*, 358.
[541] Weber, *BSK OR*, Art. 269a CO § 2a ; Lachat et al., *Mietrecht für die Praxis*, 358 f.
[542] Lachat et al., *Mietrecht für die Praxis*, 358 f.; Blumer, *Gebrauchsüberlassungsverträge*, N 442.
[543] BGer 4C.176/2003 of 13 January 2004 E. 3.1; Lachat et al., *Mietrecht für die Praxis*, 360.
[544] Lachat et al., *Mietrecht für die Praxis*, 360.
[545] BGer 4C.176/2003 of 13 January 2004 E. 3.2.1 and 3.2.2 (concerning the Basel 'Mietpreisraster'). See also BGer 4A_612/2012 of 19 February 2013 E. 3.2.3 (concerning the cantonal statistics of Geneva, which are not specified enough to be taken into account; not even for confirming a general impression).
[546] Weber, *BSK OR*, Art. 269a CO § 5a; Blumer, *Gebrauchsüberlassungsverträge*, N 445 f.
[547] BGer 4C.176/2003 of 13 January 2014, E. 3.3; BGer 4C.323/2001 of 9 April 2002, E. 3a.
[548] Lachat et al., *Mietrecht für die Praxis*, 426 f.

s. b) Rents justified by increases in costs or by additional services provided by the landlord.[549]

- *Increases in costs* can in particular be increases in the reference mortgage rate (independently from the actual level of debt financing)[550] and other costs, such as fees, taxes, building right interests, insurance premiums and maintenance costs.[551]

  Where the reference mortgage rate increases, the rent can – independently from the actual percentage of outside capital[552] – be increased according to the rates fixed in Art. 13 s. 1 VMWG. A change in the reference mortgage rate of ¼ percent usually allows a rent increase[553] of:

  ss. a) 2% where the reference mortgage rate is higher than 6%;
  ss. b) 2.5% where the reference mortgage rate is between 5 and 6%;
  ss. c) 3% where the reference mortgage rate is lower than 5%.[554]

  By deviation from the relative method (see below), where the rent is adjusted because of changes in the reference mortgage rate, it has to be considered if and to what extent possible earlier changes have led to rent-adjustments (Art. 13 s. 4 VMWG). This is for example applicable where at the occasion of an earlier rent increase only higher maintenance costs or the costs for additional services provided by the landlord were adapted.[555]

  In general, concerning increases in costs other than mortgage rates, the landlord can only take the actual increase of lasting changes into account.[556] Lump sums are basically not admissible, however, where the calculation according to the actual billings do not reflect the average costs correctly (since they contain extraordinarily high or low items), lump sums based on experience value can be considered where it is made sure that their application does not lead to a cost increase exceeding the actual circumstances.[557]

- The term *'additional services of the landlord'* covers value-adding investments as well as enlargements of the rented property and additional accessory charges. Concerning additional services of the landlord, see section 6.5 – Rent increase after renovation measures.

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[549] Where, on the other hand, the costs decrease or the landlord reduces services, the tenant can demand a rent reduction (Art. 13 s. 1 VMWG; Blumer, *Gebrauchsüberlassungsverträge*, N 538).
[550] Linking the rent to mortgage rates is criticized by both, Tenants' and Landlords Associations (see section 5).
[551] Art. 12 s. 1 VMWG. Costs arising from a change of ownership (*Handänderungskosten*) are considered being part of the purchase costs and are not considered being increases in costs according to Art. 269a s. b CO (Art. 12 s. 2 VMWG).
[552] Weber, *BSK OR*, Art. 269a CO § 7.
[553] The rates for rent decrease are not stated in the VMWG and are not rounded. For examples of calculations, see Lachat et al., *Mietrecht für die Praxis*, 364 ff.
[554] These rates are based on a standardized financing model, in which the relation between own equity and outside capital is 40% to 60% and it is assumed that 70% of the rental income is used for capital financing and 30% for covering the remaining costs, such as maintenance costs, taxes and amortization (Lachat et al., *Mietrecht für die Praxis*, 363; Weber, *BSK OR*, Art. 269a CO § 6a).
[555] Concerning the calculation of the adequate rent increase in such cases, see Lachat et al., *Mietrecht für die Praxis*, 370 f.
[556] Weber, *BSK OR*, Art. 269a CO § 8; P. Higi. *Kommentar zum schweizerischen Zivilrecht (Zürcher Kommentar), Bd. V/2b, Die Miete, Art. 269-270e OR,* 4th ed. (Zurich: Schulthess, 1998), Art. 269a CO § 224 f. and 230 f.
[557] BGer 4C.157/2001 of 1 October 2001, E. 2a and 2b; BGE 111 II 378 E. 2; Higi, *ZK*, Art. 269a CO § 214 ff.; Lachat et al., *Mietrecht für die Praxis*, 372 f.

s. c) In the case of a recently constructed property, where rents do not exceed the range of gross pre-tax yield required to cover costs.

The cost covering gross pre-tax yield is determined by the net rental income in relation to the investment costs. A gross pre-tax yield of about two percentage points above the reference mortgage rate is still admissible.[558] A property is considered recently constructed where it is not older than ten to fifteen years.[559]

s. d) Payment plan: Where rents serve merely to balance out a rent decrease previously granted as part of a reallocation of funding costs at prevailing market rates and they are set out in a payment plan made known to the tenant in advance.[560]

A payment plan can be agreed on, where the rent in the beginning of the tenancy does not cover the costs of the landlord. The tenant has to know the payment plan from the beginning and the intended increases may not exceed the rent decrease previously granted.[561] It is comparable to a stepped rent (Art. 269c CO, see section 6.4 – Clauses on rent increase), however, where a payment plan is agreed on, the tenant can challenge every increase of the rent which is not possible where a stepped rent is stipulated.[562]

s. e) Where rents serve merely to balance out the inflation on the risk capital.

Independently from the actual percentage of the risk capital in the total investment costs, the landlord can increase the rent to the extent of up to 40% of the increase of the Swiss Consumer Price Index.[563]

s. f) Rents not exceeding the levels recommended in master agreements drawn up by landlords' and tenants' associations or organizations representing similar interests.

In frame lease agreements it can for example be agreed on referring to another interest rate than the reference mortgage rate.[564] Currently, neither of the two frame lease agreement declared generally binding contains provisions based on Art. 269a s. f CO.[565]

Relative and absolute calculation method

Whether a rent is unfair can be determined according to two different methods:

With the *absolute calculation method* (*absolute Berechnungsmethode*), a rent is assessed independently from previous contractual terms. It is applied to rents which are agreed on.[566] Criteria for the absolute method are the net return (Art. 269 CO and Art. 10 VMWG), gross return (Art. 269a s. c CO and Art. 15 VMWG) and the range of rents customary in the locality or district (Art. 269a s. a CO and Art. 11 VMWG).[567]

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[558] Blumer, *Gebrauchsüberlassungsverträge*, N 449.
[559] Heinrich, *CHK Miete*, Art. 269-269a CO § 21; see also Lachat et al., *Mietrecht für die Praxis*, 387 (with further references).
[560] The possibility of stipulation on a payment plan was intended to promote new financing models, see Weber, *BSK OR*, Art. 269a CO § 16 and Lachat et al., *Mietrecht für die Praxis*, 390 f.
[561] Heinrich, *CHK Miete*, Art. 269-269a CO § 22; Lachat et al., *Mietrecht für die Praxis*, 391.
[562] Lachat et al., *Mietrecht für die Praxis*, 391.
[563] Art. 16 VMWG; Blumer, *Gebrauchsüberlassungsverträge*, N 544.
[564] Lachat et al., *Mietrecht für die Praxis*, 397.
[565] Heinrich, *CHK Miete*, Art. 269-269a CO § 24. Concerning frame lease agreements, see also section 5.
[566] BGE 120 II 302 E. 6b; BGE 121 III 163 E. 2b; Schmid & Stöckli, *OR BT*, 157.
[567] Heinrich, *CHK Miete*, Art. 269-269a CO § 5.

According to the *relative calculation method* (*relative Berechnungsmethode*), the admissibility of changes in the interest rate is assessed. It is applied when it comes to unilateral amendments by the landlord or where circumstances have changed.[568] Criteria for the relative method are increased costs or additional services provided by the landlord (Art. 269a s. b CO and Art. 12-14 VMWG), balancing out of a rent decrease previously granted (Art. 269a s. d CO), balancing out the inflation on the risk capital (Art. 269a s. e CO; Art. 16 VMWG), levels recommended in master agreements (*Rahmenverträge*, Art. 269a s. f CO).[569] Once the landlord had raised the rent, the tenant may legitimately expect that this gives the landlord a sufficient income according to the new situation so that – apart from having agreed on reservations in Swiss francs or percent – the landlord cannot increase the rent again referring to a not completely exhausted previous rent increase. A further rent increase can therefore only be based on changes which have occurred after the previous one; the new rent increase will be assessed according to the relative method compared to the situation after the previous rent increase.[570] There is an exception however, where the new rent adjustment is based on a change in the reference mortgage rate.[571]

- Maturity (fixed payment date); consequences in case of delayed payment

If not otherwise agreed or required by local custom, the rent and accessory charges are considered due at the end of each month (Art. 257c CO). In most cases however, the parties agree on an obligation for advance performance of the tenant. If the rent is owed as a monetary payment,[572] such a date agreed on is a deadline for performance according to Art. 102 s. 2 CO, where on expiry of the deadline, the obligor is automatically in default. [573] If the tenant is in default on payment, he must pay default interests. If nothing else is agreed on, the rate is five percent per annum (Art. 104 s. 1 CO). The parties are however free to deviate from this rate.[574]

- May the tenant exercise set off and retention rights over the rent payment? (i.e. the tenant withholding the rent or parts of it when the landlord does not respect his contractual duties, e.g. does not repair a defect);

Set-off (Art. 265 CO)

Generally, the parties to a tenancy contract have the right to set off their claims arising from the lease under the general conditions of Art. 120 CO (two sums of money or performance of identical obligations between the same two persons and the claim to be set off has to be due and enforceable).[575]

[568] BGE 120 II 302 E. 6b; BGE 121 III 163 E. 2b; Schmid & Stöckli, *OR BT*, 157.
[569] Heinrich, *CHK Miete*, Art. 269-269a CO § 5; Weber, *BSK OR*, Art. 269 CO § 16.
[570] Weber, *BSK OR*, Art. 269d CO § 4; Lachat et al., *Mietrecht für die Praxis*, 428.
[571] See above.
[572] The parties could also agree on other forms of payment, such as performance in kind (*Sachleistung*) or provision of services, for example building maintenance.
[573] Heinrich, *CHK Miete*, Art. 257-257c CO § 5; Blumer, *Gebrauchsüberlassungsverträge*, N 656 f. (S. 199).
[574] A. Furrer & R. Wey, *Handkommentar zum Schweizer Privatrecht, Obligationenrecht Allgemeine Bestimmungen – Art. 1-183 (Art. 104 OR),* 2nd ed. ed. A. Furrer & A. K. Schnyder (Zurich: Schulthess, 2012), Art. 104 CO § 9; Lachat et al., *Mietrecht für die Praxis*, 219.
[575] L. Killias & M. Wiget, *CHK OR AT*, Art. 120 CO § 4 ff.

According to Art. 265 CO, neither landlord nor tenant may waive the right to set off claims arising from the lease in advance. A waiver of this right in advance is however possible where only one claim and not both arises from the lease.[576]

Where the tenant is in arrears of payment and the landlord started the proceedings for terminating the lease according to Art. 257d CO (see section 6.6 – Notice by the landlord), the tenant has to declare a possible set-off within the time limit for payment, set by the landlord. A set off-declaration after this time limit may not stop the termination proceedings anymore.[577]

Where the tenant has not reduced the rent during the time defects which entitle the tenant to reduce the rent still existed, he can set off his claims arising from the rent he paid in excess with rent payments which are due later.[578]

Concerning restrictions on set-off after opening of bankruptcy of one of the parties, see Art. 213 s. 2 ss. 1 and 2 DEBA[579].[580]

Retention rights

Concerning the possibility for the tenant to deposit the rent, see section 6.5 – Defects of the dwelling.

- May claims from rental agreements be assigned to third parties (i.e. may the landlord assign his rent claim to a bank?)

The landlord is allowed to assign rent claims to a third party, for example to the bank which is also his mortgage creditor.[581] Also the tenant who has claims from a sublease is entitled to assign these rent claims to a third party, which in this case can for example be the landlord, so that the subtenant pays his rent (or part of it) directly to the landlord.[582]

As soon as the tenant was informed about the assignment of the rent, he has to pay it directly to the assignee. If the tenant pays the rent to the wrong person, he risks getting into arrears of payments.[583] In order to prevent this or double payment, in the event of dispute as to entitlement, the tenant may be discharged from his obligation by depositing the payment with the court (Art. 168 s. 1 CO).[584]

- 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-contractor" create problems in that case? (a lien is a statutory right of a contractor to ensure his being paid for his performances, e.g. improvements to the house, e.g. § 648 BGB)

The parties can agree on performance in kind, for example on a 'Hauswartvertrag' (see section 6.3 – Tenancy contracts). Whether and under what conditions such an

[576] See J.-P. Tschudi, 'Verrechnungsverbot im Mietvertrag', *MRA* (1996): 29 (including historic foundation of the provision). A time-barred claim however may be set off anyways if it was not time-barred at the time it became eligible for set-off (Art. 120 s. 3 CO; Killias & Wiget, *CHK OR AT*, Art. 120 CO § 11 f.).
[577] Heinrich, *CHK Miete*, Art. 257d CO § 10; Lachat et al., *Mietrecht für die Praxis*, 223.
[578] Weber, *BSK OR*, Art. 265 CO § 3; Heinrich, *CHK Miete*, Art. 259d CO § 6.
[579] Federal Act of 11 April 1889 on Debt Enforcement and Bankruptcy (DEBA, SR 281.1).
[580] BGE 127 III 273 E. 2 ; Lachat et al., *Mietrecht für die Praxis*, 222.
[581] Art. 164 ff. CO; Lachat et al., *Mietrecht für die Praxis*, 215.
[582] Lachat et al., *Mietrecht für die Praxis*, 215.
[583] However, where payments were made in good faith by the tenant, before the assignment has been brought to his attention, he is validly released from his obligation (Art. 167 CO).
[584] Lachat et al., *Mietrecht für die Praxis*, 215.

agreement of the parties, to generally replace the rent payment with a performance in kind, changes the character of the contract (mixed contract), is controversial.[585]

The tenant has no statutory right to generally replace the rent by a performance in kind. However, where the landlord would be obliged to repair a defect and fails to do so, the tenant may arrange for the defect to be remedied at the landlord's expense (Art. 259b s. b CO, see also section 6.5 – Disruptions of performance after the handover of the dwelling, Self-help). Also, the tenant may set-off other claims he has towards the landlord with the rent he owes (see above).

Where the tenant ordered construction work in the dwelling on his account and a builder's lien (*Bauhandwerkerpfandrecht*) is recorded in the land register, because he fails to pay the tradesmen or building contractors, the landlord may request the tenant to redeem the builder's lien with the threat of giving notice of termination.[586] As a result of a statutory change in 2012, a builder's lien for debts the tenant is liable for is only valid if the property owner has consented to the work being done in the first place (Art. 837 s. 2 CC).

  - Does the landlord have a lien on the tenant's (movable) property in the house (Vermieterpfandrecht as in § 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?

Only the landlord of commercial premises has a special lien on chattels located on the leased premises (Art. 268 CO). The special lien of the landlord of residential premises was abolished with the new tenancy law of 1990.[587]

- Clauses on rent increase
  - Open-ended vs. limited in time contracts
  - Automatic increase clauses (e.g. 3% per year)
  - Index-oriented increase clauses

The requirements for landlord and tenant to agree on index-linked rent or stepped rent are prescribed in Art. 269b and Art. 269c CO respectively.[588]

Both, stepped rent clauses and index-linked rent clauses are only valid if the contract is concluded for a certain minimum amount of time (fixed term lease or where the landlord is only allowed to terminate an open-ended contract after this amount of time).[589]

Where a stepped rent or an index-linked rent was agreed on, the landlord is not allowed to increase the rent for other reasons unless it is because he provides additional services (see above) and this possibility is explicitly provided in the

[585] Koller, *OR BT*, § 9 N 6.
[586] Lachat et al., *Mietrecht für die Praxis*, 549. The builder's lien is regulated in Art. 837 s. 1 and 839 ff. CC. The claim of tradesmen or building contractors is only valid, if the property owner has consented to the work being done in the first place (Art. 837 s. 2 CC).
[587] See section 5.
[588] According to the principle of freedom of contract, other forms of adjustment clauses (without indexation character or similar) are admissible if they respect the mandatory provision of tenancy law concerning unfair rent (Weber, *BSK OR*, Art. 269b CO § 10).
[589] Art. 269b f. CO; Art. 17 s. 4 VMWG.

contract. A combination of automatic increase clauses with index-oriented increase clauses is therefore not admissible.[590]

If the requirements for a stepped rent or index-linked rent are not fulfilled, these clauses are void but the rest of the contract stays valid.[591]

Stepped rent

A stepped rent can be agreed on where the lease is contracted for at least three[592] years and the rent cannot be increased more than once a year. Additionally, the amount by which the rent is increased has to be fixed in francs[593] (Art. 269c CO).

The landlord has to notify the tenant about the rent increase with a form approved by the canton and give reason for it, i.e. relate to the stepped rent.[594]

The tenant is allowed to challenge the initial rent, but not the rent increases, even if only the rent after the increase is unfair; unreasonably high rent increase-steps therefore have to be challenged already at the beginning of the tenancy.[595]

Index-linked rent

An index-linked rent can be agreed on where the lease is contracted for at least five years and where the benchmark is the Swiss consumer price index (Art. 269b CO).

Where an index-oriented increase clause is agreed on, the tenant also has the right to a reduction of the rent in case of decrease in the index.[596]

A change in the index gives the landlord (or in case of a decrease the tenant) a right to alter the legal obligations between the parties by constitutive declaration (*Gestaltungsrecht*). This for the landlord (but not the tenant) has to use a form approved by the canton and give reason for the rent increase, i.e. relate to the index-clause.[597] The current status of the Swiss consumer price index is published monthly by the FSO. After that, the rent increase according to the new status has to be

[590] In BGE 124 III 57 E. 3a, the Federal Supreme Court had to decide on a contract concluded for a minimum period of five years, in which the parties agreed on index-oriented increase of the rent, with a prolongation option with a new starting rent which is higher than the index-oriented rent after these five years. The Court judged the agreement of a new starting rent after five years as an automatic increase clause which cannot be combined with an index-oriented increase clause and therefore is void.
[591] Art. 20 s. 2 CO; Heinrich, *CHK Miete*, Art. 269b CO § 1 and Art. 269c CO § 1. For example where an index-oriented increase was linked to another index than the Swiss consumer price index, the judge may decide that the latter index is applicable instead, if this corresponds the presumed intention of the parties (Weber, *BSK OR*, Art. 269b CO § 9).
[592] Please note: The English version of the CO published on the website of the Federal Authorities of the Swiss Confederation Art. 269c s. a CO erroneously states five instead of three years.
[593] Whether a clause determining the increase of the rent in percent instead of francs is partly void, is controversial (affirmative: Blumer, *Gebrauchsüberlassungsverträge* N 528, whereas a judge would simply express the percentages agreed on in francs; negative: Weber, *BSK OR*, Art. 269c CO § 2, relating to excessive formalism).
[594] Art. 19 s. 2 VMWG in conjunction with Art. 269d CO. If this formal requirement is not respected, the rent increase is void, which seems excessively formalistic when taking into account that the increase is already agreed on in advance and the tenant has no possibilities to challenge it anyway (Honsell, *OR BT*, 244; Blumer, *Gebrauchsüberlassungsverträge* N 529).
[595] Art. 270d CO; BGE 124 III 57 E. 3a; BGE 121 III 397 E. 2b/aa; Koller, *OR BT*, § 10 N 29.
[596] Art. 17 s. 2 VMWG; Honsell, *OR BT*, 243.
[597] Art. 19 s. 2 VMWG in conjunction with Art. 269d CO; Blumer, *Gebrauchsüberlassungsverträge* N 522.

notified to the tenant at least thirty days beforehand to the end of a month. A retrospective adjustment is not possible. [598]

The tenant is allowed to challenge the initial rent. An index-oriented rent increase (or reduction) can only be challenged if it is not justified by a corresponding change in the index.[599]

- Utilities
    - 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

Accessory charges are 'the actual outlays made by the landlord for services connected with the use of the property'.[600] The landlord must not make profit out of accessory charges.[601]

Accessory charges are for example heating, hot water and costs for stairwell cleaning, garden maintenance and common-area electricity.[602]

Also, public taxes arising from the use of the property are considered accessory charges. This notion covers for example basic fees for water, waste water and waste collection.[603] Not covered by this term are for example real estate taxes, mortgage interests or building insurance premiums and general maintenance costs.[604] Whether general administrative expenses can be accessory charges is controversial in literature; courts usually allow expenses of about three per cent of the whole accessory charges.[605]

The so called 'Verbraucherkosten', costs which arise exclusively from the consumption of the tenant, are usually not considered accessory charges. The tenant has to pay the costs for these services directly to the provider. Such services are for example electricity for inside of the apartment (but not for common areas, such as the lights in the stairwell) or telephone charges.[606]

Service contracts (e.g. for an elevator or a washing machine) can also be accessory charges and the costs can therefore be transferred to the tenant, as far as they cover only regular checks and minor maintenance work. The additional costs for a service contract which also covers replacement of spare parts, major maintenance work and repairs have to be borne by the landlord (see below – Repairs).[607]

    - Responsibility of and distribution among the parties
        - Does the landlord or the tenant have to conclude the contracts of supply?

[598] Art. 17 s. 3 VMWG; Blumer, *Gebrauchsüberlassungsverträge* N 522; Heinrich, *CHK Miete*, Art. 269b CO § 2.
[599] Art. 270c CO; BGE 124 III 57 E. 3a.
[600] Art. 257b s. 1 CO
[601] BGer 4C.82/2000 of 24 May 2000, E. 3b.
[602] Art. 257b s. 1 CO; Blumer, *Gebrauchsüberlassungsverträge*, N 338; Higi, *ZK*, Art. 257a-257b CO § 7 f.
[603] It does however not cover fees which are owed independently from the use of the dwelling. If the fees consist of a part owed independently from the use of the dwelling and a consumption-related part, the tenant only owes the latter part of the fee (Lachat et al., *Mietrecht für die Praxis*, 238).
[604] Weber, *BSK OR*, Art. 257b CO § 3 and Art.257a CO § 3.
[605] K. Spühler, 'Nebenkosten, Teil 2: Die Abrechnung', *Der Zürcher Hauseigentümer* 3/2012.
[606] Weber, *BSK OR*, Art. 257a CO § 1; Heinrich, *CHK Miete*, Art. 257-257c CO § 12
[607] Heinrich, *CHK Miete*, Art. 257-257c CO § 10; Blumer, *Gebrauchsüberlassungsverträge*, N 497 f.

Concerning the above mentioned 'accessory charges', the landlord has to specify all charges which are not included in the rent. Otherwise – or if nothing about such charges is stipulated in the contract – they are considered covered by the rent.[608] A reference to a list in the general terms and conditions or a clause referring to 'all accessory charges' is not sufficient to transfer the costs of services to the tenant; the items have to be designated individually and explicitly in the individual contract itself.[609] The above mentioned 'Verbraucherkosten' have to be paid to the provider by the tenant directly.

- Which utilities may be charged from the tenant?

See above, all services defined as 'accessory charges' can be charged from the tenant additionally to the rent.

The costs for keeping the dwelling fit for its designated use have to be borne by the landlord and are therefore covered by the rent. The parties can however agree to consider these costs as accessory charges if the rent is reduced accordingly (see also below, Repairs).

- What is the standing practice?

The parties are free in agreeing on the method of payment. If the accessory charges are not included in the rent[610], the parties can agree on payment on account, payment of a lump sum or direct payments to the provider[611]:

Usually the parties agree on *payment on account* (*Akontozahlungen*). If nothing about the payment method had been specified in the contract, an amount fixed as accessory charges is also deemed to be payment on account.[612] The landlord has to submit an overview of the actual charges to the tenant at the least annually.[613] The tenant cannot rely on the payments on account to approximately covering the actual accessory charges; he has to pay the difference between the actual costs and the payments on account, even if they are set significantly too low.[614]

The parties can also agree on a *lump sum* covering the accessory charges. Since the landlord must not make profit of the accessory charges, he has to base the calculation on the average amounts of the last three years.[615] The landlord is not

[608] Art. 257a s. 2 CO ; Heinrich, *CHK Miete*, Art. 257-257c CO § 7; Lachat et al., *Mietrecht für die Praxis*, 236. Most of the landlords, especially in the German-Speaking part of Switzerland, conclude tenancy contracts in which accessory charges are *not* included in the net rent (Lachat et al., *Mietrecht für die Praxis*, 236).

[609] BGE 121 III 460 E. 2a/aa ; Heinrich, *CHK Miete*, Art. 257-257c CO § 7. This however does not mean that the contract has to be in written form. Accessory charges can even be designated sufficiently according to the circumstances, for example if the washing machine only works with coin [Münuzautomat] ('Botschaft zur Revision des Miet- und Pachtrechts', 1426; BGer 4P.323/2006 of 21 March 2007, E. 2.1).

[610] Costs for utilities can also be included in the rent. This can for example be useful if only one room is sublet and calculating the costs would be difficult (Lachat et al., *Mietrecht für die Praxis*, 242).

[611] The parties can also combine the different methods of payment (Blumer, *Gebrauchsüberlassungsverträge*, N 481).

[612] Lachat et al., *Mietrecht für die Praxis*, 243.

[613] Art. 4 s. 1 VMWG; Blumer, *Gebrauchsüberlassungsverträge*, N 480.

[614] BGE 132 III 24; For criticism concerning this Federal Supreme Court ruling, see Weber, *BSK OR*, Art. 257b CO § 2a f.

[615] Art. 4 s. 2 VMWG; Weber, *BSK OR*, Art. 257b CO § 9. If the contract is limited in time, the lump sum remains the same throughout the tenancy. If the contract is unlimited in time, the landlord can demand a rent increase according to the average costs of the previous three years (Lachat et al., *Mietrecht für die Praxis*, 242 [Footnote 42]).

obliged to submit an overview of the actual charges to the tenant regularly; the tenant nevertheless has the right to review the documentation on request.[616]

The parties can agree that the tenant pays accessory charges *directly to the provider*. In practice this is for example applied if single family homes are rented out. The tenant then orders and pays for example the heating oil directly from the provider.[617]

- How may the increase of prices for utilities be carried out lawfully?

Where the parties have agreed on a lump sum covering the accessory charges or where these are included in the rent, the landlord can pass an increase of prices on the tenant by amending the contract unilaterally according to Art. 269d CO:

If the accessory charges are included in the rent, an increase of prices can justify a rent increase. On the other hand, a reduction of prices for accessory charges can justify a rent reduction (Art. 269a s. b CO, see section 6.5 – Rent regulation).[618]

If the accessory charges are compensated with a lump sum, this sum can be increased if for the last three years the average of the actual costs increased. The landlord has to follow the procedure of rent increase (Art. 269d s. 3 CO).[619] The increase of the lump sum can be made with effect from the next termination date and has to be notified to the tenant at least ten days before the beginning of the notice period for termination. The landlord has to use a form approved by the canton and state the reasons for the increase.[620]

The same procedure analogous to a rent increase has to be followed if the landlord introduces new charges for services or extracts payment for services which previously were covered by the rent.[621]

- Is a disruption of supply by the external provider or the landlord possible, in particular if the tenant does not pay the rent?

In general, disruption of supply is very rarely a problem in practice.[622] Where the tenant is in arrears of payments with accessory charges towards the landlord, the landlord has no right to disrupt the supply but he may give notice of termination as if the tenant were in arrears with payment of the rent (Art. 257d CO, see also section 6.6 – Notice by the landlord).

- 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)?

<u>Security for the dwelling in general</u>

There are different ways a landlord can get security for the dwelling. Next to joint and several liability of a third person (*Solidarschuldnerschaft*, Art. 143 ff. CO) and other

[616] Art. 257b s. 2 CO ; Lachat et al., *Mietrecht für die Praxis*, 242; Blumer, *Gebrauchsüberlassungsverträge*, N 479.
[617] Heinrich, *CHK Miete*, Art. 257-257c CO § 13 ; Blumer, *Gebrauchsüberlassungsverträge*, N 478.
[618] Lachat et al., *Mietrecht für die Praxis*, 242 (Footnote 39).
[619] Art. 4 s. 2 VMWG; Lachat et al., *Mietrecht für die Praxis*, 244.
[620] Art. 269d s. 1 CO ; for further information about the procedure of rent increase, see section 6.5 – Rent regulation.
[621] Lachat et al., *Mietrecht für die Praxis*, 244.
[622] Information provided by T. Herren, Zurich tenants' association, in telephone interview from 7 April 2014.

liability of a third person (for example contract of surety, Art. 492 ff. CO or guarantee of performance by third party, Art. 111 CO) the parties can agree on paying a deposit in form of cash or negotiable securities. On federal level, only this deposit is regulated and restricted by the Code of Obligations.[623] The cantons are free to enact further provisions, for example additional provisions about the deposit, subject other forms of security to restrictions or exclude some forms of securities (some cantons have for example excluded the guarantee of performance by third party from the means of security).[624]

The security deposit

The deposit is a guarantee to cover future claims of the landlord. In the following paragraphs only the deposit in the sense of Art. 257e CO is explained.

If it was stipulated that the tenant would pay the deposit before the beginning of the tenancy and he does not do so, the landlord can refuse to deliver the rental property to the tenant (Art. 82 CO: *Erfüllung Zug um Zug*) or act according to Art. 107/109 CO (withdraw from the contract, compel performance or claim damages for non-performance. See also section 6.5 – Disruptions of performance prior to the handover of the dwelling, in the sphere of the landlord). If the rental property is already handed over to the tenant, the landlord can legally enforce the payment based on the contract or terminate the contract.[625]

Security deposit insurance ('Mietkautionsversicherung')

Instead of paying a deposit as security for the dwelling, recently the possibility to conclude a security deposit insurance grows in popularity: Instead of paying a large sum at once, the tenant pays regular contributions to the guarantor, who, in return, guarantees payment to the landlord in amount of the security deposit (max. three months' rent). Despite the name, the security deposit insurance is not an actual insurance but rather a guarantee. Once the guarantor had to pay the landlord, he may reclaim the amount from the tenant. There are various offers of security deposit insurances, also in combination with a liability insurance, which is the kind of insurance actually covering damages.[626]

- What is the usual and lawful amount of a deposit?

The maximum amount the landlord is allowed to ask from the future tenant is three month´s rent, which includes the net rent and accessory charges.[627]

According to a study in 1999, every third tenant has to pay a deposit and the average amount of the deposit is 2.2 monthly rents. However, there were significant differences according to the cantons. In the cantons Vaud, Fribourg and Zug for

[623] Lachat et al., *Mietrecht für die Praxis*, 260 f.
[624] Art. 257e CO; Lachat et al., *Mietrecht für die Praxis*, 269 f. (with further examples).
[625] Maag, 'Die Bundesgerichtspraxis zur ausserordentlichen Kündigung nach Art. 257f OR bei Vertragsverletzungen', 134 f. It is controversial whether the contract can be terminated extraordinarily by analogy with Art. 257f s. 3 CO (Blumer, *Gebrauchsüberlassungsverträge*, N 347) or according to Art. 266g CO (Higi, *ZK*, Art. 257e CO § 13).
[626] The Tenants' Association advises to only conclude a security deposit insurance if it is not otherwise possible to provide the amount of the deposit. Additionally, where during the tenancy, the tenant can save the money for the deposit, he shall terminate the security deposit insurance and pay the deposit (leaflet of the Tenants' Association 'Was Mietzinsgarantien und Mietkautionsversicherungen wirklich leisten und was sie kosten', available at http://www.mieterverband.ch/fileadmin/alle/Dokumente/Mieterinnentipps/MT_Merkblatt_Mietzinsdepot_aktuell.pdf [last retrieved 12 March 2014]).
[627] Heinrich, *CHK Miete*, Art. 257e CO § 8.

example, more than 70% of the tenants had to provide a deposit, while in Solothurn and Bern less than 10% of the tenants were concerned.[628]

- How does the landlord have to manage the deposit (e.g. special account; interests owed to the tenant?)

The landlord must deposit the security in a bank savings or deposit account in the tenant´s name. The landlord then has a lien on these assets.[629] The interests of the deposit are owed to the tenant.[630] Whether the tenant has the right to claim the interests already during the time of the tenancy or whether they also become part of the security and the bank therefore is not allowed to distribute them, is controversial.[631]

If, within one year following the end of the lease, no claim has been brought against the tenant by the landlord, the tenant may request that the security be returned to him. Before the expiry of this time period, the bank may release the security (to the tenant or to the landlord) only with the consent of both parties or in compliance with a final payment order[632] or final decision of the court (Art. 257e s. 3 CO).

- What are the allowed uses of the deposit by the landlord?

If nothing else is agreed on, the security deposit covers all claims of the landlord towards the tenant arising from the tenancy. This includes especially arrears in rent and accessory charges and possible claims for damages when the rented property is returned.[633]

However, neither landlord nor tenant is allowed to unilaterally set off the deposit against his debt/claim:

- The tenant cannot prevent an extraordinary termination by the landlord because of arrears of payments by setting off the deposit against the outstanding rental payments.[634]
- If the landlord duly deposited the security in a bank account in the tenant's name, a set off of the deposit by the landlord is not possible, since the assets are not in the power of disposal of the landlord anyways. If, however, the landlord did not duly deposit the security in the tenant's name, he shall not be in a better position than a landlord who meets his obligations. Therefore a set off in such cases is also not possible.[635]

[628] Blöchliger, Staehelin & Partner, *Mietzinsdepots, Aktuelle Handhabung und mögliche Alternativen* (Berne: FOH, 1999) p. 21.
[629] Heinrich, *CHK Miete*, Art. 257e CO § 4; Weber, *BSK OR*, Art. 257e CO § 4.
[630] Lachat et al., *Mietrecht für die Praxis*, 264.
[631] Lachat et al., *Mietrecht für die Praxis*, 264; Heinrich, *CHK Miete*, Art. 257e CO § 9.
[632] Concerning the notion of "final payment order", see Weber, *BSK OR*, Art. 257e CO § 10; Blumer, *Gebrauchsüberlassungsverträge*, N 677.
[633] Lachat et al., *Mietrecht für die Praxis*, 262.
[634] Lachat et al., *Mietrecht für die Praxis*, 266 f.; Blumer, *Gebrauchsüberlassungsverträge*, N 676 f.
[635] Lachat et al., *Mietrecht für die Praxis*, 266 f.; Blumer, *Gebrauchsüberlassungsverträge*, N 676 f.

- 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)

The tenant is responsible for repairs of defects which are either attributable to him and or for minor defects (see section 6.5 – Disruptions of performance after the handover of the dwelling, defects of the dwelling).

The landlord has to maintain the dwelling in a condition fit for its designated use (Art. 256 s. 1 CO).[636] In leases for residential premises, the parties cannot deviate from this to the detriment of the tenant (Art. 256 s. 2 ss. b CO). If the maintenance costs enter into the calculation of the rent however, they can be transferred to the tenant.[637]

- Connections of the contract to third parties
    - Rights of tenants in relation to a mortgagee (before and after foreclosure)

Where the landlord has been declared bankrupt or where rent payments or the rental premises are seized or in forced liquidation, the tenant will be notified by the competent enforcement office or by publication of the bankruptcy that he has to pay the rent and accessory charges to them instead of the landlord.[638]

Where the landlord is bankrupt, the tenant cannot set off rent payments which arose after the opening of the bankruptcy with claims he has towards the landlord. Also, he cannot set off any rent payments (also the ones which arose before the opening of the bankruptcy) with claims of the landlord against him which arose after the opening of the bankruptcy.[639]
The provisions about change of ownership according to Art. 261 ff. CO also apply to cases of dispossession in debt collection or bankruptcy proceedings. The contract is transferred to the new owner, who has a right to terminate the lease extraordinarily (see section 6.6 – Notice by the landlord).

6.5 Implementation of tenancy contracts

Summary Table 12: Implementation of tenancy contracts

Breaches prior to handover	<u>In the sphere of the landlord</u>: - Where there are serious defects, the tenant may: - Compel performance in addition to suing for damages in connection with the delay - Forego subsequent performance and claim damages for non-performance - Forego subsequent performance and withdraw from the contract altogether - In case of *double lease*, both contracts are valid, but the landlord can only perform one of them. The performance of the other contract is subjectively impossible, since the first tenant is protected

[636] This does not cover the normal wear and tear and aging, which the tenant has to accept (Higi, *ZK*, Art. 256 CO § 50).
[637] Heinrich, *CHK Miete*, Art. 256 CO § 7; Blumer, *Gebrauchsüberlassungsverträge*, N 642 f.
[638] If he still pays the rent to the landlord even after notification, the tenant risks to pay the rent double (Lachat et al., *Mietrecht für die Praxis*, 217.
[639] Art. 213 s. 2 ss. 1 and 2 DEBA ; BGE 127 III 273 E. 2 ; Lachat et al., *Mietrecht für die Praxis*, 222.

	in his possession of the dwelling - If the *performance* of the contract is made *objectively impossible* after the conclusion of the contract by circumstances not attributable to the landlord, the obligation is deemed extinguished - Where there are only major or minor defects, the tenant cannot refuse the handover of the dwelling but may request the remedy of the defect In the sphere of the tenant: - The tenant has no obligation to make use of the dwelling
Breaches after handover	- Minor defects and defects attributable to the tenant have to be remedied by the tenant - Depending on whether a major or a serious defect occurs, the tenant has several options: - Rectification of the object - Self-help (only where major defects are concerned) - Extraordinary termination of the contract (only where serious defects are concerned) - Rent-reduction - Damages - Assumption of litigation - Deposition of the rent - Other (e.g. protection of possession, protection against unlawful entry, neighbour law, liability of property owners)
Rent increases	- The landlord is generally free to increase the rent as of the next possible date for giving notice, using a form approved by the canton - The tenant may challenge the rent-increase as unfair within thirty days Concerning the notion of unfair rents, see section 6.4 – Rent payment
Changes to the dwelling	By the tenant - Interventions into the substance of the building may only be made with written consent of the landlord - Where the landlord consented to the alterations, the tenant does not have to restore the original state of the dwelling and he may claim appropriate compensation where the value of the object increased significantly By the landlord - The tenant has to tolerate works intended to remedy defects or to repair or prevent damage Works other than maintenance measures (renovations and modifications) can only be made where conscionable for the tenant and where the lease has not been terminated
Use of the dwelling	In general, the tenant is allowed to use the dwelling according to the contract and he is obliged to use the object with all due care and show due consideration for others who live in the building and for neighbours

- Disruptions of performance (in particular “breach of contract”) prior to the handover of the dwelling
    - In the sphere of the landlord:
        - Delayed completion of dwelling
        - 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)
        - Refusal of clearing and handover by previous tenant
        - Public law impediments to handover to the tenant

The landlord has to hand over the dwelling in a ‘condition fit for its designated use’ (Art. 256 s. 1 CO). If the dwelling is not handed over on the agreed date or is handed over with ‘defects rendering it wholly or partly unfit for its designated use’ (serious defects, see below), the tenant has three options according to Art. 258 in conjunction with 107-109 CO. In general, before exercising this option right, the tenant has to set an appropriate time limit for subsequent performance for the landlord (Art. 107 s. 1 CO). If a specific date for the handover has been agreed on however, it is controversial if the tenant still has to set the landlord such a time limit. No time limit is needed if it is evident from the conduct of the landlord, that it would serve no purpose. This applies for example in case of ‘double lease’.[640]

- *(Option 1)* The tenant may compel performance in addition to suing for damages in connection with the delay. This for, the tenant has the same means at his disposal as if the defect had arisen during the lease (Art. 258 s. 2 CO; see the means of Art. 259a-259i CO below).

Instead of compelling performance, the tenant may immediately after expiration of the additional time period declare to:

- *(Option 2)* Forego subsequent performance and claim damages for non-performance, which gives him right to damages in the extent of the positive interest in the performance of the contract,[641] or
- *(Option 3)* Forego subsequent performance and withdraw from the contract altogether, which gives him right to damages in the extent of the negative interest in the performance of the contract.[642]

In case of *double lease*, both contracts are valid, but the landlord can only perform one of them. The performance of the other contract is subjectively impossible, since the first tenant is protected in his possession of the dwelling (Art. 926 ff. CC). The second tenant can demand damages according to the above mentioned procedure.[643]

If the *performance* of the contract is made *objectively impossible* after the conclusion of the contract by circumstances not attributable to the landlord, (for example because the dwelling is destroyed and cannot be replaced or repaired within

[640] Art. 108 s. 1 and 3; Blumer, *Gebrauchsüberlassungsverträge*, N 507; Heinrich, *CHK Miete*, Art. 258 CO § 9.
[641] The ‘positive interest’ being the difference to the financial situation which would exist if the contract had been fulfilled properly.
[642] Blumer, *Gebrauchsüberlassungsverträge*, N 506. The ‘negative interest’ being the difference to the financial situation which would exist if the contract had not been concluded at all.
[643] Blumer, *Gebrauchsüberlassungsverträge*, N 1084; Lachat et al., *Mietrecht für die Praxis*, 126.

reasonable time), the obligation is deemed extinguished (Art. 119 CO). The landlord does in this case not owe damages to the tenant.[644] If this subsequent impossibility is attributable to the landlord, the tenant can proceed according to Art. 258 CO (see above).[645] If performance was already impossible at the time of the conclusion of the contract, the contract is void (see section 6.3 – Limitations on freedom of contract through regulation).

If only major or minor defects[646] exist, the tenant may bring the claims pursuant to Art. 259a-259i CO (see below), but not refuse the handover of the dwelling. Other than during an existing contract, the tenant can also demand that the landlord remedies minor defects, which includes for example the cleaning of the dwelling before the handover.[647]

According to general contract law, the parties are free to agree on a contractual penalty in case the landlord fails to hand over the dwelling within the stipulated time.[648]

- In the sphere of the tenant:
  - refusal of the new tenant to take possession of the house

The tenant has no obligation to make use of the dwelling.[649] If the tenant refuses to take possession of the dwelling without justification or if the handover generally fails by circumstances attributable to the tenant, he still owes the rent payments.[650]

- Disruptions of performance (in particular “breach of contract”) after the handover of the dwelling
  - Defects of the dwelling
    - Notion of defects: is there a general definition?

A dwelling has a defect if characteristics are lacking which are contractually agreed or result from the contractual purpose.[651] However, independently from whether the tenant knows about defects before the handover, he can always demand of the landlord that all parts of the apartment which assure a certain minimum standard are functioning and not hazardous for the health. For example, even if the tenant rents an old house without central heating and old windows, he can expect that the heatable rooms can be kept warm enough to be used without warm clothing.[652]

Not only material damages are considered defects, but also ideological nuisances (*ideelle Immissionen*) can be qualified as a defect of the dwelling.[653]

[644] Heinrich, *CHK Miete*, Art. 258 CO § 4; Blumer, *Gebrauchsüberlassungsverträge*, N 510.
[645] Heinrich, *CHK Miete*, Art. 258 CO § 4.
[646] Concerning the notion of minor, major and serious defects, see below.
[647] Art. 258 s. 3 CO; Weber, *BSK OR*, Art. 258 CO § 8.
[648] Art. 160 CO. An excessive amount may be lowered by the court.
[649] Koller, *OR BT*, § 9 N 34.
[650] Blumer, *Gebrauchsüberlassungsverträge*, N 511.
[651] BGer 4C.384/2005 of 22 March 2006 E. 2.1; Higi, *ZK*, Art. 258 OR § 27 ff.
[652] Weber, *BSK OR*, Art. 256 CO § 5. For further information about the minimum standard that a tenant can expect, see Higi, *ZK*, Art. 256 CO § 33 ff.
[653] Lachat et al., *Mietrecht für die Praxis*, 144.

There are three categories of defects which lead to different consequences:

Serious defects

A defect is serious if it 'renders the leased property unfit or significantly less fit for its designated use' (Art. 259b s. a CO; similar: Art. 258 s. 1 CO). It is objectively unreasonable for the tenant to use the rented premises.[654] Also, a serious defect occurs if the health of the tenant or his family is endangered.[655]

A defect is for example considered serious where it is not possible for the tenant to use important rooms of the dwelling (kitchen, bathroom, etc.) for more than just a short period of time,[656] where the heating is constantly insufficient[657] or in the event of dampness and standing water.[658]

Apart from material damages, also for example the following situations were qualified as serious defects: A tenant and his children had psychological problems after there was an arson attack (*Brandanschlag*) on the neighbour dwelling and neither the offender nor the motive for the crime (and even if the neighbour dwelling was the actual target) was known[659]; Where a massage parlour was operated in the same building[660]; Where another tenant in the same building regularly attacked his neighbours[661].

Where a defect can be remedied easily and without high expenses, it is generally not considered a serious defect.[662]

Major defects

A defect is qualified as a major defect if it is neither serious nor minor.[663]

A major defect could for example be defective household appliances such as the washing machine or the refrigerator[664]; if the heating system fails for a short period of time or if the tenant cannot use important rooms of the dwelling for a short period of time[665].

Minor defects

Minor defects can and have to be remedied by the tenant himself by minor cleaning and repairs as part of regular maintenance (Art. 259 CO). If either of the following two conditions is fulfilled, a defect is in practice not considered to be minor: (1) Expertise (*Fachwissen*) or tools which are usually not present in an average household are

[654] Higi, *ZK* Art. 258 CO § 43; Heinrich, *CHK Miete*, Art. 258 CO § 7.
[655] BGer 4C.168/2001 of 17 August 2001, E. 4a.
[656] Higi, *ZK*, Art. 258 CO § 45; Lachat et al., *Mietrecht für die Praxis*, 146.
[657] Cantonal Court Geneva, 29 February 1988 ('Mangelhafte Raumtemperatur'), in: *mp* (1988): 110 f., where a room temperature of 17-18 degrees was considered insufficient; SVIT-Kommentar, Art. 258-259i CO § 53; Weber, *BSK OR*, Art. 258 § 2.
[658] President of the District Court Rorschach (St. Gallen), 4 December 1987 ('Anspruch auf Mietzinsherabsetzung und Schadenersatz bei Mängeln'), in: *mp* (1988): 106; SVIT-Kommentar, Art. 258-259i CO § 53; Weber, *BSK OR*, Art. 258 § 2.
[659] Cantonal Court Solothurn, 7 July 2000 ('Fristlose Kündigung bei Mängeln'), in: *mp* (2003): 67-70.
[660] Rental Court District of Zurich, 23 December 1987 ('Mängel aus Verhalten der Mieter. Massagesalon'), in: *mp* (1988): 112 f.; SVIT-Kommentar, Art. 258-259i CO § 53.
[661] Lachat et al., *Mietrecht für die Praxis*, 147; Weber, *BSK OR*, Art. 258 CO § 2.
[662] BGer 4C.168/2001 of 17 August 2001, E. 4a; Weber, *BSK OR*, Art. 258 CO § 2.
[663] Art. 258 s. 3 ss. a CO; C. Huguenin, *Obligationenrecht, Allgemeiner und Besonderer Teil* (Zurich: Schulthess, 2012), N 2921; Higi, *ZK*, Art. 258 CO § 40.
[664] Higi, *ZK* Art. 258 CO § 41.
[665] Higi, *ZK* Art. 258 CO § 41.

required to remedy the defect. (2) Repairing a defect would cost more than approximately CHF 150 (according to local custom).[666]

A minor defect could for example be a light bulb or a fuse that needs to be changed[667] or a siphon or a drain which is clogged[668].

- 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?

Whether noise emissions result in a defect of the dwelling depends on the intensity of the emissions. For example construction sites and strongly increased aircraft noise can constitute defects of the dwelling and entitle the tenant to a reduction of the rent although the landlord has no possibility to remedy the defect.[669] Noise and disturbances of neighbours and third persons exceeding a reasonable level also constitute a defect of the dwelling.[670]

Where a defect is attributable to the tenant or persons he is responsible for, he has no claims against the landlord. Where other third persons (such as craftsmen acting on behalf of the landlord) cause defects, the tenant can act according to the different options mentioned below (rent reduction, rectification, etc.).[671]

If the dwelling is occupied by squatters before the handover to the tenant, see section 6.5 – Disruptions of performance prior to the handover of the dwelling, in the sphere of the landlord. After handover to the tenant, the tenant has the rights according to Art. 926 ff. CC (Protection of possession) and can take action against squatters himself. Where a third party claims a right to the dwelling, the landlord is obliged to assume responsibility for litigation (see below).

- 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

Generally, if a defect is attributable to the tenant, he has no claims towards the landlord (Art. 259a s. 1 CO e contrario). If a defect is not attributable to the tenant, he has different options, depending on the type of defect (minor, major or serious). A fault of the landlord is (apart from the right to damages) not necessary.[672] However, if the defect is not attributable to the landlord and it is objectively impossible or unreasonable for the landlord to perform the contract (e.g. because the dwelling is destroyed), the tenant has no defect rights towards the landlord since his obligation is deemed extinguished (Art. 119 CO, see also above – defects before handover of the dwelling).[673]

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666 Heinrich, *CHK Miete*, Art. 259 CO § 3 f.
667 Lachat et al., *Mietrecht für die Praxis*, 159.
668 Higi, *ZK* Art. 258 CO § 39.
669 Lachat et al., *Mietrecht für die Praxis*, 171 ff.; District Court Bülach (Zurich), 24 September 2000 (Mietrecht), in: *SJZ* (2002): 108 ff.
670 BGer 4C.164/1999 of 22 July 1999, in: *mp* (2000): 45-49.
671 Art. 259a s. 1 CO e contrario; Art. 259a ff. CO.
672 Schmid & Stöckli, *OR BT*, 139.
673 Heinrich, *CHK Miete*, Art. 259a CO § 2.

If a *minor defect* occurs during the tenancy, the tenant has to remedy it himself and cannot claim compensation from the landlord (Art. 259 CO).

For *major and serious defects* generally the landlord is obliged to do the remedy. The tenant has to inform the landlord about defects (already existing ones as well as defects that are only about to occur) which he does not have to remedy himself. If the tenant fails to do so, he is liable towards the landlord for any loss or damage incurred as a result of the failure or delay of notification (Art. 257g CO), but he does not lose his defect rights towards the landlord.[674]

In Art. 259a ff. CO the possibilities of the tenant are listed. The defect rights can be applied cumulatively.

Rectification of the object (Art. 259a s. 1 ss. a CO)

The tenant can demand that the landlord remedies the defect within reasonable time.[675] If he fails to do so, the tenant has different options which are displayed below, depending on whether a major or a serious defect is involved. If the landlord however provides full compensation for the defective object (e.g. another [equivalent] dwelling for the same rent and also covering for example removal expenses[676]) the tenant is not entitled to rectification of the defect (Art. 259c CO).

Self-help (*Ersatzvornahme*, Art. 259b s. b and 98 CO)

If a *major defect* occurs and the landlord is aware of it but fails to remedy it within reasonable time, the tenant may arrange for the defect to be remedied at the landlord's expense (Art. 259b s. b CO).

In case of a *serious defect*, the tenant is not entitled to self-help. According to general contract law however, he can obtain judicial authority to perform the remedy at the landlord's expense (Art. 98 s. 1 CO).[677]

Right to terminate the contract (Art. 259b s. a CO)

If the landlord is aware of a *serious defect* and fails to remedy it within a reasonable time, the tenant has the right to terminate the lease with immediate effect (Art. 259b s. a CO) and claim damages (see below).

If only a *major defect* is involved, the tenant has no right to terminate the contract with immediate effect. However, he still has the possibility to terminate the contract ordinarily or – depending on the specific case – extraordinarily (see section 6.6 – Notice by the tenant).

Proportionate reduction of the rent (Art. 259a s. 1 ss. b and 259d CO)

If there is a major or serious defect, the tenant may require the landlord to reduce the rent proportionately. The rent-reduction is not primarily a means to motivate the landlord to remedy a defect but it serves to remedying the imbalance caused by the reduced performance of the landlord by reducing the performance of the tenant accordingly. A rent reduction can therefore also be demanded if the landlord has no possibility to eliminate the disturbance, for example where emissions from construction sites are concerned.[678]

[674] Lachat et al., *Mietrecht für die Praxis*, 151 f.
[675] Concerning the term 'reasonable time', see Weber, *BSK OR*, Art.259b CO § 6 f.
[676] Weber, *BSK OR*, Art. 259c § 1; Higi, *ZK*, Art. 259c § 21 ff.
[677] Weber, *BSK OR*, Art. 259b CO § 3; Heinrich, *CHK Miete*, Art. 259b CO § 8.
[678] Lachat et al., *Mietrecht für die Praxis*, 172.

The tenant can demand the reduction for the time from the moment the landlord has knowledge of the damage until the conditions for the reduction are not given anymore (which is usually the remedy of the damage).[679] The exercise of the right to reduce the rent is not generally subject to a time limit, it is however controversial if it is still possible to exercise this claim after the remedy of the defect and even after termination of the tenancy contract.[680]

The tenant has to inform the landlord of his intention to reduce the rent and of the extent of the demanded reduction.[681]

The amount of the reduction is calculated according to the difference of the dwelling with and without the defect, taking into account objective criteria. In extreme cases of serious defects, also a reduction to zero is possible. [682] A reduction of the rent cannot be demanded for only very small impairments of the dwelling, namely if the use of the dwelling is restricted for less than 5% (or less than 2% if the restriction is permanent).[683]

If the tenant stops paying the full rent without consent of the landlord or court he risks termination of the contract because of arrears of payment (Art. 257d CO, see below) if he reduced the rent without justification or if the extent of the reduction was not justified. Where the tenant keeps paying the full rent until a rent reduction is acknowledged by the landlord or granted by the court, the tenant can reclaim the amount of rent he paid too much, since it is a contractual claim. The claim becomes time-barred only after five years (Art. 128 s. 1 CO) and can be set-off with further rent-payments (Art. 265 CO).[684]

Damages (Art. 259a s. 1 ss. c and 259e CO)

The landlord is liable for damages the defect has caused to the tenant, unless he can prove that he was not at fault. This contractual claim does not exclude other claims for damages, as for example the liability of property owners (Art. 58 CO).[685]

Apart from cases in which damages occurred as a result of the defect (for example if furniture is damaged because of a leaking roof or if the tenant has to temporarily stay in a hotel), also in cases of termination with immediate effect according to Art. 259b s. a CO, compensation can be claimed.[686]

Generally, the tenant can only demand the damage he actually suffered; the expenses he saved must be taken into account.[687] Also, according to general provisions, the tenant has an obligation to mitigate damages.[688]

[679] BGE 130 III 504 E. 5.1; Weber, *BSK OR*, Art. 259d CO § 4.
[680] Affirmative: Weber, *BSK OR*, Art. 259d CO § 4; negative: Higi, *ZK*, Art. 259d CO § 21 f.
[681] BGer 4C.248/2002 of 13 December 2001, E. 4.2.
[682] Heinrich, *CHK Miete*, Art. 259d CO § 5, 7; For examples of case law, see Lachat et al., *Mietrecht für die Praxis*, 175 f. or leaflet of the Tenants' Association 'Mietzinsreduktion bei Mängeln', available at http://www.mieterverband.ch/smv_mubrief_maengel.0.html (last retrieved 3 December 2013).
[683] BGE 135 III 345 E. 3.2.
[684] Heinrich, *CHK Miete*, Art. 259d CO § 6; Lachat et al., *Mietrecht für die Praxis*, 178.
[685] Weber, *BSK OR*, Art. 259e CO § 3.
[686] Higi, *ZK*, Art. 259e CO § 4, 13; Huguenin, N 2940; Weber, *BSK OR* , Art. 259e CO § 2.
[687] Heinrich, *CHK Miete*, Art. 259e CO § 3; for example the amount the tenant saved because he reduced the rent has to be taken into account (Weber, *BSK OR*, Art. 259e CO § 1).
[688] Art. 44 CO ; Lachat et al., *Mietrecht für die Praxis*, 180.

Assumption of litigation (Art. 259a s. 1 ss. d and 259f CO)

On notification by the tenant, the landlord is obliged to assume responsibility for litigation if a third party claims a right over the object that is incompatible with the rights of the tenant. This statutory provision is of little practical significance.[689]

The provision is applicable if third parties claim rights in rem (dingliche Rechte), limited rights in rem (beschränkte dingliche Rechte) and claims under neighbour law[690]. If the third party only claims obligatory rights, Art. 259f CO is not applicable (for example in case of 'double lease').[691]

The tenant has to notify the landlord within good time (as long as the landlord is still allowed to put forward all claims and defences) otherwise the landlord is not obliged to assume responsibility for the litigation.[692]

Deposition of the rent (Art. 259a s. 2 and 259g CO)

If the landlord does not remedy a defect of the dwelling after request of the tenant, the tenant can use the deposition of the rent as leverage. The rent has to be deposited with an office designated by the canton ('depository'). Since rent paid on deposit is deemed duly paid, the landlord cannot terminate the lease for arrears of payments (Art. 259g s. 2 CO).

The rent paid on deposit is only deemed duly paid if all material and formal preconditions are fulfilled:

Material preconditions: There has to be a defect and the tenant has to have the right to demand its remedy from the landlord. Because of its character as leverage, the deposition of the rent is not possible if for example the landlord has already started to remedy the defect or if a remedy is not possible or would be unreasonable.[693]

If the tenant is in good faith about the existence of a defect and his right to deposit the rent, when in fact he isn't entitled to do so, the tenant is nonetheless protected against termination of the lease for arrears of payment.[694]

Formal preconditions: The tenant has to set the landlord an appropriate time limit to remedy the defect in writing and warn him about the deposition of the rent. If the landlord considers the time limit as too short, he has to inform the tenant and request a longer delay, otherwise the tenant is allowed to assume that the landlord considers it as appropriate.[695]

Additionally to the warning of deposition of the rent, the tenant also has to notify the landlord in writing about the payment of the rent on deposit. Doctrine and jurisprudence however consider this to be a pure aspirational guideline, which has no influence on the validity of the deposition.[696]

Only future rent payments (including accessory charges) can be paid on deposit. It is possible to pay the whole rent (independently from the severity of the defect and the

[689] Huguenin, N 2943; Weber, *BSK OR*, Art. 259f CI §1.
[690] Whether claims under neighbor law are also covered by this provision is controversial (negative: Weber, BSK OR, Art. 259f CO § 3).
[691] Heinrich, *CHK Miete*, Art. 259f CO § 2.
[692] Heinrich, *CHK Miete*, Art. 259f CO § 3; Higi, *ZK*, Art. 259f CO § 18.
[693] Heinrich, *CHK Miete*, Art. 259g-i § 3 ; Lachat et al., *Mietrecht für die Praxis*, 188 ff.
[694] BGE 125 III 120 E. 2.
[695] Weber, *BSK OR*, Art. 259g § 6.
[696] Lachat et al., *Mietrecht für die Praxis*, 191; L. Polivka. 'Zahlungsverzug bei Mietzinshinterlegung', *mp* (2004): 12.

amount of an eventual reduction of the rent) on deposit or only parts of it.[697] The depository does not control whether the formal or material requirements of the deposition of the rent are fulfilled or not.[698]

Once the tenant paid the rent or parts of it to the depository, he has to bring claims against the landlord (i.e. the remedy of the defect)[699] before the conciliation authority within thirty days of the due date for the first rent payment paid into deposit (Art. 259h s. 1 CO). If the tenant does act within this time-limit, the landlord becomes entitled to the rent paid on deposit and the depository has to hand it out to him.[700] If the landlord does not want to wait the thirty days, he also has the possibility to apply to the conciliation authority for release of the rent already when he is notified by the tenant about the deposit.[701]

Concerning the procedure before the conciliation authority, see section 6.1 – Court structure in tenancy law.

Other claims of the tenant

Apart from the means of tenancy law, the tenant has claims arising from his right of quiet enjoyment (*Besitzesschutz*, Art. 926-929 CC) and is entitled to assert unlawful entry (Art. 186 SCC) against the landlord, other tenants and third persons. Also, the tenant has claims directly against neighbours because of emissions of their premises out of neighbour law (Art. 679 and 684 CC).[702] The tenant additionally has the possibility to claim rights against the owner of the premises according to Art. 58 CO (liability of property owners).[703]

- Entering the premises and related issues
  - Under what conditions may the landlord enter the premises?
  - Is the landlord allowed to keep a set of keys to the rented apartment?

In general, the tenant has an exclusive right of use of the dwelling and the landlord is not allowed to enter the premises or keep a set of keys without consent of the tenant. If the landlord enters the premises without consent of the tenant, this can be a criminal offence (unlawful entry, Art. 186 SCC).[704]

The tenant must however tolerate works intended to remedy defects or to repair or prevent damage (Art. 257h s. 1 CO) and permit the landlord to inspect the object for maintenance, sale or future leasing (Art. 257h s. 2 CO):

- The tenant must tolerate maintenance work which is usually considered as necessary to prevent deterioration of the condition of the property. The maintenance work does not have to be urgent.[705]
- The landlord is allowed to inspect the dwelling for maintenance periodically but restrainedly.[706] The tenant normally does not have to accept inspections serving

[697] Art. 259g s. 1 CO ; BGE 124 III 201 E. 2d; Weber, *BSK OR*, Art. 259g CO § 10 f.
[698] Heinrich, *CHK Miete*, Art. 259g-259i CO § 14; Weber, *BSK OR*, Art. 259g CO § 12.
[699] Heinrich, *CHK Miete*, Art. 259g-259i CO § 9; Lachat et al., *Mietrecht für die Praxis*, 194; The tenant can also demand a reduction of the rent or damages in the same procedure (ibidem).
[700] Art. 259h s. 1 CO; Lachat et al., *Mietrecht für die Praxis*, 194.
[701] Art. 259h s. 2 CO ; Weber, *BSK OR*, Art. 259h-259i CO § 1.
[702] Lachat et al., *Mietrecht für die Praxis*, 20 and 162 f.
[703] Weber, *BSK OR*, Art. 259a CO § 1a; Lachat et al., *Mietrecht für die Praxis*, 162.
[704] Weber, *BSK OR*, Art. 258 CO § 6a; Lachat et al., *Mietrecht für die Praxis*, 20 f. and 714 ff.
[705] Heinrich, *CHK Miete*, Art. 257h CO § 3.

for future leasing of the dwellings before the notice of termination was given and inspection of the dwelling for sale can only be made in case of ongoing serious negotiations.[707]

The landlord must inform the tenant of works and inspections in good time. In general, the more urgent the maintenance work – the shorter the notification period and the more considerable the maintenance work – the longer the notification period should be. The landlord also has to take all due account of the tenant's interests when carrying out the works and inspections.[708]

If the tenant refuses without justification to accept works and inspections the landlord is entitled to do, the landlord has to take legal action. The landlord is only entitled to protect his rights without assistance of the authorities in emergency situations, when such could not have been obtained in good time and if self-help was the only means of preventing the loss of his rights or a significant impairment of his ability to exercise them (for example in case of a broken water pipe).[709]

The tenant is liable in case of damages because of unjustified refusal of tolerating works or inspections. According to circumstances the landlord is also entitled to terminate the lease extraordinarily because of lack of care and consideration (Art. 257f CO, see section 6.6 – Notice by the landlord).[710]

- Can the landlord legally lock a tenant out of the rented premises, e.g. for not paying rent?

As mentioned above, the tenant has an exclusive right of use of the dwelling. This domiciliary right does not end with the termination of the contract but only with the vacation of the property by the tenant. The landlord is therefore not allowed to lock a tenant out of the rented premises.[711] If the tenant will not leave the apartment after termination of the lease, the landlord needs to take legal proceedings to achieve an eviction (see section 6.7 – Eviction procedure).

- Rent regulation (in particular implementation of rent increases by the landlord)
  - Ordinary rent increases to compensate inflation/ increase gains

The landlord is generally free to increase the rent at the next possible date for giving notice.[712] This for, the landlord has to state the reasons for the rent increase and give notice at least ten days[713] before the beginning of the notice period for termination (Art. 269d s. 1 CO). The rent increase is void where it is not communicated using a form approved by the canton (Art. 269d s. 2 ss. a) or where no reasons[714] for the rent increase are given (Art. 269d s. 2 ss. b). These reasons need to be sufficiently precise and have to be stated on the form required.[715] The rent increase is also void

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[706] According to Higi, twice a year maximum (Higi, *ZK*, Art. 257h CO § 36).
[707] Higi, *ZK*, Art. 257h CO § 37 f.; Weber, *BSK OR*, Art. 257h CO §3.
[708] Art. 257h s. 3 CO; Heinrich, *CHK Miete*, Art. 257h CO § 4.
[709] Art. 52 s. 3 CO; Weber, *BSK OR*, Art. 257h CO § 5; Lachat et al., *Mietrecht für die Praxis*, 156 f.
[710] Weber, *BSK OR*, Art. 257h CO § 5 ; Lachat et al., *Mietrecht für die Praxis*, 154 and 156.
[711] Lachat et al., *Mietrecht für die Praxis*, 715.
[712] The tenant has the possibility to challenge the rent increase, if he does not do so, the rent increase is considered accepted (see section 6.4 – Rent payment).
[713] This time period of ten days is supposed to give the tenant time to consider whether he wants to terminate the lease rather than accepting the higher rent (Weber, *BSK OR*, Art. 269d CO § 6).
[714] In case of dispute, the landlord is bound to these reasons he stated on the form (Weber, *BSK OR*, Art. 269d CO § 3).
[715] BGE 121 III 6 E. 3a and 3b.

where the notification of the increase is accompanied by notice to terminate or a threat of termination (Art. 269d s. 2 ss. c). The rent increase can be challenged by the tenant as unfair within the meaning of Art. 269 and 269a CO within thirty days of receiving notice of it (Art. 270b s. 1 CO).[716]

A rent increase is not possible for tenancy contracts which are limited in time, since there is no 'next possible date for giving notice' other than the end of the contract itself.[717]

The landlord can for example increase the rent, where the reference mortgage rate or for example fees or insurance rates increase. The tenant on the other hand, has a right to request a rent reduction where the costs decreased, especially because of a decrease of the reference mortgage rate (see section 6.4 – Rent payment). In practice however, landlords react more frequently to changes in the reference mortgage rate than tenants.[718]

- 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?

Since the landlord is generally free to increase the rent, he can also do so after renovation measures.[719] The tenant however has the possibility to challenge the rent increase as unfair.[720]

Rent increases are not considered unfair where they are justified by additional services provided by the landlord (Art. 269a s. b CO). According to Art. 14 s. 1 VMWG value adding investments, enlargement of the rented property and additional utilities are considered additional services which justify a rent increase. Most of the measures upgrading the energy performance of the house are also considered additional services within the meaning of Art. 269a s. b CO and therefore justify a rent increase.[721]

Where additional services produce periodical costs, as for example where a landlord decides to employ a caretaker, the calculation of the rent increase is not problematic. When calculating the rent increase after value adding investments, an adequate rate for applying interest, amortization and maintenance can be taken into account (Art. 14 s. 4 VMWG).[722] Where installations already exist but they are improved, only the part of the costs which would exceed the costs of restoration or maintenance

[716] Concerning the term of 'unfair rent', see section 6.4 – Rent payment.
[717] BGE 128 III 419 E. 2.4.1; Weber, *BSK OR*, Art. 255 CO § 2.
[718] A. Barandun, 'Immobilienfirmen kümmern sich kaum um sinkende Zinsen', *Tages-Anzeiger*, 3 December 2013.
[719] The Cantonal law can require planning permission for demolition, renovation measures or change in purpose of a dwelling and also link this permission to a rent control for a limited period of time (for example ten years). The Canton of Geneva has such provisions (BGer 1C_496/2012 of 12 February 2013, E. 2.1; Lachat et al., *Mietrecht für die Praxis*, 280; BGE 116 Ia 401).
[720] See section 6.4 – Rent payment.
[721] Art. 14 s. 2 VMWG; 'Botschaft zur Änderung des Obligationenrechts (Schutz vor missbräuchlichen Mietzinsen)' of 12 December 2008 (BBl 2009 347), 359.
[722] The reference mortgage rate increased by 0.5% and divided by two is considered adequate (Weber, *BSK OR*, Art. 269a CO § 10). The amortization taken into account is calculated according to the likely life-span according to the 'paritätische Lebensdauertabelle' of the Swiss Tenants' Association and the Swiss Landlords Association (available at: http://www.mietrecht.ch/32.0.html [3 December 2013]; Blumer, *Gebrauchsüberlassungsverträge* N 541); maintenance costs are adequate to the extent of 1% of the investment per year (Blumer, *Gebrauchsüberlassungsverträge* N 541).

work for keeping the object in the original state can be used as basis for calculating the rent increase (Art. 14 s. 3 VMWG).[723] This makes sure that the tenant cannot be burdened with maintenance costs which have to be borne by the landlord.[724]

In case of a complete renovation (*umfassende Sanierung*) there is a rebuttable presumption that 50-70% of the costs are value adding investments (Art. 14 s. 1 VMWG). This presumption was introduced to motivate (or at least not prevent) landlords to renovate older buildings and applies where investments for maintenance measures and improvements cannot easily be separated.[725]

- Rent increases in 'housing with public task'

Residential premises made available with public sector support for which rent levels are set by a public authority are not subject to the provisions governing challenges to unfair rents (Art. 253b s. 3 CO).[726] The public authority will authorize the rent admissible for a certain apartment according to the actual costs.[727]

Cooperative housing organisations charge cost rents and the contracts are subject to the provisions governing challenges to unfair rents.[728]

- Procedure to be followed for rent increases

See section 6.5 – Rent regulation.

  - 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])?

When assessing whether a rent is unfair, the rents customary in the locality or district are taken into consideration. Also, rent increases and reductions can be requested following the reference mortgage rate (see section 6.4 – Rent payment, Unfair rents – exceptions).

- Possible objections of the tenant against the rent increase

The tenant can challenge the rent increase as unfair (see section 6.4 – Rent payment).

- Alterations and improvements by the tenant
  - Is the tenant allowed to make (objective) improvements on the dwelling (e.g. putting in new tiles)?

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[723] The Federal Supreme Court has for example decided that the value-adding part of replacing old windows with new ones which are double-glazed is 40% of the investment costs of the new windows (BGer 4C.287/2001 of 26 March 2002, E. 3.3).

[724] Report of the Committee for the Environment, Spatial Planning and Energy of 22 May 2007 06.3015 n Motion Nationalrat (UREK-NR 02.473). 'Verbesserte Überwälzung energetisch wirksamer Massnahmen im Gebäudebereich', 2 (available at http://www.parlament.ch/sites/kb/2006/Kommissionsbericht_UREK-N_06.3015_2007-05-22.pdf [last retrieved 3 December 2013]).

[725] BGer 4A_495/2010 and 4A_505/2010 of 20 January 2011, E. 4.1; It is controversial when exactly the presumption applies (see P. M. Schiess Rütimann, 'Mietzinserhöhung wegen wertvermehrender Verbesserungen. Ein Vergleich von Art. 269a lit. b OR und Art .14 VMWG mit dem deutschen und österreichischen Recht', *mp* (2002): 81 f.

[726] See section 4.1.

[727] Blumer, *Gebrauchsüberlassungsverträge*, N 406; Lachat et al., *Mietrecht für die Praxis*, 277. For further information about rent control for subsidized housing, see Lachat et al., *Mietrecht für die Praxis*, 276 ff.

[728] BGE 134 III 159 E. 5.2.1 and 5.2.2.; see also section 4.1.

- Must, and if yes under what conditions, improvements of the dwelling by the tenant be compensated by the landlord?

If the tenant wants to renovate or modify the object in a way in which he intervenes in the substance of the building, he needs the written consent of the landlord.[729] Once this consent is given and unless the parties stipulate otherwise, the landlord may not require the restoration of the object to its previous condition (Art. 260a s. 2 CO).

Art. 260a CO is only applicable if the alterations to the substance of the building are *not* necessary for making the dwelling fit for its designated use.[730]

If the landlord has consented to renovations made by the tenant that increased the value of the object significantly[731] by the end of the lease, the tenant may claim appropriate compensation for the renovations or modifications (Art. 260a s. 3 CO). The parties can stipulate a compensation also for smaller increases in value. On the other hand, it is also possible to exclude in advance any compensation in case of a significant increase of value.[732]

If the landlord did not consent to alterations, he has, apart from demanding damages, the following options:

- The landlord can demand that the court prohibits the tenant to go on with the alterations if they are not finished at that time.[733]
- The landlord can demand the restoration of the previous condition. If the alterations are not conducted in a professional manner (*fachmännisch ausgeführt*), the landlord can demand the restoration of the previous condition immediately. Whether the landlord has the right to demand the restoration of the previous condition immediately also if the alterations are made professionally or only at the end of the lease is controversial.[734]
- Depending on the specific circumstances, the landlord may also have the right to terminate the contract, according to Art. 257f s. 3 or 4 CO for lack of care and consideration.[735] Additionally, an ordinary termination of the contract would not be considered as contravening the principle of good faith (see section 6.6 – Notice by the landlord).[736]

    - 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)?

For changes needed to accommodate a handicap, the same rules as for other changes made by the tenant apply (see above).

[729] Art. 260a s. 1 CO; Heinrich, *CHK Miete*, Art. 260a CO § 2.
[730] Weber, *BSK OR*, Art. 260a CO § 2; Blumer, *Gebrauchsüberlassungsverträge*, N 582.
[731] The question, when an increase of value is significant, is controversial. For a list of opinions, see Lachat et al., *Mietrecht für die Praxis*, 702 Footnote 53.
[732] BGE 124 III 149 E. 4b and E. 5.
[733] Heinrich, *CHK Miete*, Art. 260a CO § 5; Lachat et al., *Mietrecht für die Praxis*, 697.
[734] Restoration can be demanded at the end of the lease: Heinrich, *CHK Miete*, Art. 260a CO § 5; Lachat et al., *Mietrecht für die Praxis*, 697 f.; Restoration can be demanded immediately: SVIT-Kommentar, Art. 260-260a CO § 59.
[735] Lachat et al., *Mietrecht für die Praxis*, 698; Weber, *BSK OR*, Art. 260a CO § 1.
[736] Weber, *BSK OR*, Art. 260a CO § 1.

- fixing antennas, including parabolic antennas

Where for fixing parabolic antennas constructions intervening in the substance of the building are necessary, they are subject to approval by the landlord (see above).[737] Fixing an antenna at the house front is generally considered an intervention in the substance of the building.[738] Whether a building permission for the parabolic antenna is required depends on the municipality and mostly on the size and placement of the antenna.

Where the parabolic antenna can be installed on a balcony without towering above the balcony railing, no consent of the landlord is needed.[739] Where a parabolic antenna may be installed without intervening in the substance of the building, but cannot be hidden inside the balcony, it is controversial whether the approval of the landlord is necessary or not and whether it can be forbidden in the tenancy contract. The information interest of a tenant from a foreign country for receiving programs of their home countries has to be weighed against the interests of the landlord.[740]

- 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?
    - 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 tenant has to tolerate works intended to remedy defects or to repair or prevent damage (Art. 257h CO, see section 6.5 – Disruptions of performance after the handover of the dwelling, Entering the premises). Works other than maintenance measures (renovations and modifications) can only be made where conscionable for the tenant and where the lease has not been terminated (Art. 260 s. 1 CO).

Whether works are conscionable for the tenant or not, depends on the circumstances of the individual case, for example the duration of the tenancy, usefulness of the renovations or modifications for the tenant, possible rent-increase and inconvenience caused to the tenant by the construction works.[741]

Carrying out such works, the landlord must give due consideration to the tenant's interests (Art. 260 s. 2 CO). The landlord has to inform the tenant in due time and the works have to be carried out quickly and without unnecessary emissions. Additionally

[737] A. Maag, 'Erneuerungen und Änderungen durch den Mieter: Art. 260a OR', *MRA* (2005): 81; BGer 4A_541/2011 of 28 March 2012, E. 4.3, where a concrete base buried into the ground of a garden seating area as a mount for the parabolic antenna was considered as intervening in the substance of the building within the meaning of Art. 260a CO.
[738] Maag, 'Erneuerungen und Änderungen durch den Mieter: Art. 260a OR', 81.
[739] Lachat et al., *Mietrecht für die Praxis*, 25; D. Fischer, 'Änderungen an der Mietsache durch den Mieter – Satellitenschüssel im Garten', *Der Zürcher Hauseigentümer* (2013).
[740] M. Jaun, 'Diskriminierungsschutz durch Privatrecht – Die Schweiz im Schatten der europäischen Rechtsentwicklung', *ZBJV* (2007): 483. Considering the possibility to get information via internet, it is controversial whether a parabolic antenna is still necessary to comply with the information interest (A. Wermelinger, *Kommentar zum schweizerischen Zivilrecht (Zürcher Kommentar), Vol. IV/1c, Das Stockwerkeigentum, Art. 712a-712t ZGB*, ed. J. Schmid (Zurich: Schulthess, 2010), Art. 712b CC § 60).
[741] Blumer, *Gebrauchsüberlassungsverträge*, N 576; Weber, *BSK OR*, Art. 260 CO § 2.

the works have to be reasonably scheduled; the tenant does for example not have to accept the replacement of a heating or windows in winter.[742]

The tenant can demand a rent reduction according to Art. 259d CO and damages according to Art. 259e CO if the respective requirements are met (Art. 260 s. 2 CO; see section 6.5 – Disruptions of performance after the handover of the dwelling, Legal consequences). He has no other means as long as the works are still conscionable.[743]

If the renovations or modifications lead to additional services within the meaning of Art. 269a s. b in conjunction with Art. 14 s. 1 and 2 VMWG (for example installation of an elevator or replacement of household appliances with such of much better quality), the landlord can increase the rent in the extent of the added value.[744]

If major works are planned, the landlord can terminate the lease ordinarily. If the tenant however offers to stay in the apartment during the works, the notice of termination contravenes the principle of good faith and may be challenged if the tenant staying would not at all or only insignificantly delay or complicate the works (Art. 271 CO, see below).[745]

If the landlord plans non-marginal renovations or modifications that limit the use of the dwelling permanently (for example if attic space is developed for habitation), Art. 260 CO is not applicable. Instead, the landlord is considered modifying the content of the contract unilaterally and therefore, if the tenant does not agree, has to proceed in accordance with Art. 269d s. 3 CO (see section 6.5 – Rent regulation).[746]

- 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.

In general, the tenant is allowed to use the dwelling according to the contract and he is obliged to use the object with all due care and show due consideration for others who share the building and for neighbours (Art. 257f CO, see section 6.6 – Notice by the landlord). On the other hand, Art. 256 s. 2 CO limits contractual restrictions in the use of the dwelling to the detriment of the tenant.

Keeping animals

If nothing is stipulated in the tenancy contract, the tenant is generally allowed to keep animals in the dwelling.[747] Whether a landlord is allowed to prohibit keeping animals in the contract, without significant reasons, is controversial.[748] Small animals however such as for example guinea pigs, hamsters, budgerigars and canary birds, which are

[742] Blumer, *Gebrauchsüberlassungsverträge*, N 579; Weber, *BSK OR*, Art. 260 CO § 6.
[743] Art. 260 s. 2 CO; Weber, *BSK OR*, Art., 260 CO § 7; Heinrich, *CHK Miete*, Art. 260 CO § 6. If however, the works are not conscionable anymore (for example because of not preannounced extra work), the tenant also has the possibility to invoke the other defect rights (Heinrich, *CHK Miete*, Art. 260 CO § 6).
[744] Heinrich, *CHK Miete*, Art. 260 CO §7 and Art. 269-269a CO § 20; Weber, *BSK OR*, Art. 269a CO § 11. See also section 6.4 – Rent payment, Unfair rent, Exceptions.
[745] BGE 135 III 112 E. 4.2.
[746] Heinrich, *CHK Miete*, Art. 260 CO § 8; Weber, *BSK OR*, Art. 260 CO § 5.
[747] Heinrich, *CHK Miete*, Art. 256 CO § 3; A. Hensch, 'Streitigkeiten zwischen Mietern', *AJP* (2013): 986.
[748] Blumer, *Gebrauchsüberlassungsverträge*, N 351.

held in cages, are considered allowed and not possible to prohibit, as long as they are not held in large numbers and give no reason to complaints.[749]

Producing smells

The tenant is expected to avoid unnecessary emissions, depending on the specific circumstances. See also section 6.6 – Notice by the landlord, Care and consideration.

Receiving guests

The landlord cannot prohibit the tenant to receiving guests.[750]

Prostitution and commercial uses

If the dwelling is rented out as residential premises and the tenant changes the use of the dwelling, this constitutes a breach of contract which allows the landlord to terminate the tenancy extraordinarily according to Art. 257f CO.[751] However, under certain circumstances it is possible that a person living in an apartment uses for example one room as an office: where no changes of the apartment have to be made, where there are no additional emissions such as additional noise or customers frequenting the dwelling and where the apartment is not used excessively. Using part of the dwelling as a medical clinic would not be allowed without consent of the landlord. The same applies for using the dwelling for prostitution.[752]

Concerning the removal of an internal wall, see above – Alterations and improvements by the tenant.

Fixing pamphlets outside

As part of the freedom of expression, a tenant may fix pamphlets outside on the dwelling.[753] The content and the form however have to comply with the building regulations and other rules of public law (such as for example the protection of peace and order).[754]

Smoking inside of the dwelling

The landlord cannot generally prohibit smoking inside of the dwelling, however, it is inadmissible to the intensity where the smoke changes the colour of the walls or where other tenants are affected by the smell.[755]

- Is there an obligation of the tenant to live in the dwelling? Are there specificities for holiday homes?

If not otherwise stipulated, there is no obligation for the tenant to live in the dwelling himself.[756] Concerning the subletting of the dwelling, see section 6.4 – Parties to a tenancy contract.

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[749] Weber, *BSK OR*, Art. 256 CO § 10; Schweizerischer Mieterinnen- und Mieterverband / Deutschschweiz, 'Merkblatt für Mieterinnen und Mieter, Die Rechte der Mieterinnen und Mieter: Heimtiere in der Mietwohnung' (available at http://www.mieterverband.ch/fileadmin/alle/Dokumente/Merkblaetter/weitere_Merkblaetter/mb_tierhaltung.pdf [last retrieved 12 March 2014]).

[750] Weber, *BSK OR*, Art. 256 CO § 9.

[751] BGE 123 III 124 E. 2a; BGer 4A_429/2010 of 6 October 2010, E. 2.2.

[752] P. Strub, *Mietrecht, Umzug, Kosten, Kündigung – alles, was Mieter wissen müssen*, 7th ed. (Zurich: Der Schweizerische Beobachter, 2010), 81 f.

[753] Art. 16 s. 2 Const.

[754] BGer 1C_440/2007 of 25 March 2008.

[755] Art. 257f s. 2 CO; Weber, *BSK OR*, Art. 256 § 8; Lachat et al., *Mietrecht für die Praxis*, 25.

- Video surveillance of the building
    - Is the surveillance of certain parts (e.g. corridors) of the building lawful and usual?

The use of closed-circuit television cameras by private individuals where people appearing on the recorded images can be recognized is – irrespective of whether the recordings are saved or not – governed by the Federal Act on Data Protection and must therefore comply with the general principles of data protection. Video surveillance of certain parts of a building is used more and more often and is lawful if the following criteria, listed on the website of the Federal Data Protection and Information Commissioner, are fulfilled:[757]

- An infringement of personal privacy may be justified either by consent of the persons being filmed, an overriding public or private interest in surveillance (primarily for security purposes) or by specific legal provisions (principle of legality).
- The video surveillance must be suitable for achieving the intended purpose of security and protection of persons and property, other measures that are less of an intrusion on privacy (for example alarm systems) must prove insufficient or impractical, and the intrusion on privacy must be in reasonable proportion to the intended purpose (principle of proportionality).

  The camera must be positioned so that only the absolutely essential images are recorded. In an apartment building for example it would be unlawful to monitor which persons are entering which apartment or opening which mail box.
- Everyone within range of the cameras must be informed of the recording and, if the data is stored in some form, people must additionally know who to contact for more information.
- The use of the data must be limited to the specific purpose, which justifies its gathering. Also, 'the personal data recorded must not be disclosed unless the images are handed over to the prosecution authorities to assist in criminal proceedings, or in cases provided for or permitted by law, for example in response to a request from a court'.
- Data security must be granted by appropriate technical and organizational measures (for example storage in a locked room), so that unauthorized persons cannot process the data.
- The access to the data should be limited to as few people as possible. Also, if it is sufficient, stored data should only be viewed if an incident occurs (for example after an act of vandalism) and – if there was no incident – be deleted after a reasonable time without being viewed.

[756] BGE 136 III 186 E. 3.1.2. An obligation to actually use the rented object can be agreed on, for example for commercial leases, if the non-use of the object can result in a financial loss for the landlord (Koller, *OR BT*, § 9 N 34).

[757] http://www.edoeb.admin.ch/datenschutz/00628/00653/00654/index.html?lang=en (last retrieved 3 December 2013); see also the German and French version for clarity reasons.

6.6 Termination of tenancy contracts

Summary Table 13: Termination of tenancy contracts

Mutual termination	yes
Notice by tenant	- Ordinary termination - Extraordinary termination - Good cause - Death of tenant - Landlord fails to remedy a defect within reasonable time Termination without respecting notice periods and termination dates is possible by proposing another tenant
Notice by landlord	- Ordinary termination (without specific reason, but not contravening the principle of good faith) - Extraordinary termination - Good cause - Bankruptcy of the tenant (and tenant fails to furnish security in time) - Tenant in arrears - Breach of contract, in particular lack of care and consideration - Change of ownership
Other reasons for termination	Destruction of the object (*Untergang des Mietobjekts*)

A rental contract can be concluded either for a limited or an indefinite duration (Art. 255 s. 1 CO). Contracts concluded for a limited duration expire at the end of this duration without any further notice (Art. 266 s. 1 CO).[758] A rental contract of limited duration may be terminated extraordinarily; a contract of indefinite duration may be terminated ordinarily or extraordinarily. Under certain circumstances, the tenant has the possibility to request an extension of the tenancy. This applies to open-ended as well as to fixed-term leases.

The provisions about the protection against termination of rental contracts of residential and commercial premises (Art. 271 ff. CO) apply to leases of all residential premises except for holiday homes that are rented for a maximum period of up to three months.[759]

In general, where time-periods and dates are not respected, the notice of termination (by the tenant or the landlord) is valid for the next legally possible termination date.[760]

- Mutual termination agreements

Open-ended and time-limited rental contracts alike can be terminated by agreement of the parties. There are no formal requirements to the termination agreement, even if the parties should have agreed on a certain form for the conclusion of the contract.[761] Also the fact that the notice of termination by the landlord must be given in a certain form (see below) does not affect the possibility to mutually agree on the

[758] If the parties continue the lease tacitly however, the lease becomes of indefinite duration (Art. 266 s. 2 CO).
[759] Art. 253a s. 2 CO; Koller, *OR BT*, § 10 N 7.
[760] By analogy with Art. 266a s. 2 CO; Blumer, *Gebrauchsüberlassungsverträge*, N 824.
[761] By analogy with Art. 115 CO.

termination orally or even by implication. However, it cannot be assumed easily that the parties waive their rights to notice periods and termination dates. If the landlord initiates the termination agreement, the agreement is only valid if the tenant knew his rights to proceed against a termination of the contract and consciously waived these rights.[762] The tenant cannot waive his rights in advance (Art. 273c CO), but only if the waiver and the termination agreement take place simultaneously. If the tenant initiates the termination, it must mostly be assumed that Art. 264 is applicable, according to which the current tenant has to propose a new tenant if he wants to leave the apartment prematurely (see below). If the landlord waives this right however, the arrangement has the same effect as a mutual termination agreement.[763] If a family residence is concerned, both, the tenant and his spouse or registered partner, must agree to the termination.[764]

- Notice by the tenant
    - Periods and deadlines to be respected

Ordinary notice of termination of a lease of indefinite duration

The tenant may terminate a rental contract of indefinite duration by observing formal requirements and the notice periods and termination dates. The tenant does not have to give reason for the termination.

Formal requirements: The tenant must give notice of termination in writing (Art. 266l s. 1 CO). Where the leased property serves as the family residence, one spouse (or registered partner) may only terminate the lease with the express consent of the other (Art. 266m s. 1 and s. 3 CO), even if the spouse (or registered partner) is not a party to the contract.[765] If the formal requirements are not met, the notice of termination is void (Art. 266o CO).

Notice periods and termination dates: The legally prescribed notice period for residential premises is three months. This provision may only be derogated towards a longer notice period (Art. 266a s. 1 CO). Even if the tenant wishes it, he cannot waive his right to a minimum notice period of three months in advance.[766] The termination dates can be chosen by the parties to the contract (Art. 266a s. 1 CO). If no dates are fixed in the contract, they are either determined by local custom or in absence of local custom they are always at the end of a three-month period of the lease (Art. 266c CO). Termination dates according to local custom are quite different within Switzerland: In some cantons and municipalities, only few dates are customary (e.g. in Zurich end of March and end of September, in the city of Berne end of April and end of October), in some cantons no customary dates exist (e.g. in the canton Geneva) and in some cantons customary dates of termination exist for example at the end of every month except end of December.[767] The notice period starts from the

[762] The landlord shall not circumvent his/her obligation to terminate the contract by using a form approved by the canton (see below) easily, since disregarding this formal requirement leads to the notice being void (Art. 266o CO).
[763] Blumer, *Gebrauchsüberlassungsverträge*, N 1015; Lachat et al., *Mietrecht für die Praxis*, 497.
[764] Lachat et al., *Mietrecht für die Praxis*, 497; Blumer, *Gebrauchsüberlassungsverträge*, N 1015.
[765] Koller, *OR BT*, § 9 N 299. This provision was introduced to protect the non-contracting spouse/registered partner from having to leave the apartment against his/her will and since it was possible to use the threat of terminating the lease as a leverage in the course of divorce proceedings (Koller, *OR BT*, § 9 N 295).
[766] Honsell, *OR BT*, 234.
[767] Termination dates of different localities are available at: http://www.mieterverband.ch/be_schlicht_behoerde.0.html (last retrieved 3 December 2013).

moment the landlord receives the notice of termination.[768] Where a notice period or termination date is not observed, the termination will be effective as of the next termination date. (Art. 266a s. 2 CO).

For furnished rooms the lease can be terminated with a two week notice period at the end of a one-month period of the lease (Art. 266e CO).

- 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)?

The tenant may terminate the lease extraordinarily, if the requirements therefore are fulfilled. If there are no reasons to terminate the contract extraordinarily, the tenant also has the possibility to being released from his obligations by proposing a suitable new tenant to the landlord (see below).

Extraordinary notice of termination

Also for the extraordinary notice of termination, the formal requirements stated above have to be respected.

Art. 266g CO – good cause

In general (notice given by tenant or landlord):

The lease can be terminated at any time with observance of the legally prescribed notice period 'where performance of the contract becomes unconscionable for the parties for good cause' (Art. 266g s. 1 CO).

A party to the contract can only give extraordinary notice for good cause if, on objective assessment, the performance of the contract is unconscionable for the time it would take until the contract could be terminated ordinarily. Whether this criterion is fulfilled, needs to be evaluated on a case-by-case basis, considering all circumstances.[769] The notice of termination has to be given immediately after receiving knowledge of the good cause; otherwise the performance of the contract during the notice period of an ordinary termination would not be considered 'unconscionable'.[770]

Facts already known or foreseeable at the time the contract was concluded cannot be invoked as good reasons to terminate the contract extraordinarily. Also, a party cannot invoke such reasons when they were caused by himself.[771]

The court determines if and to which extent the party terminating the contract for good cause has to pay compensation (Art. 266g s. 2 CO). Hereby the financial situations of the parties are taken into account and the compensation determined under the principle of equity.[772]

The possibility of termination of the contract for good cause is subsidiary to other extraordinary reasons of termination.[773] The provision is mandatory; the parties cannot waive their right to it or extend the period of notice in advance. Whether the

[768] Koller, *OR BT*, § 9 N 286.
[769] BGer 4C.345/2005 of 9 January 2006, E. 2.1; Koller, *OR BT*, § 9 N 275.
[770] BGer 4A_536/2009 of 2 February 2010, E. 2.4; Koller, *OR BT*, § 9 N 275.
[771] BGE 122 III 262 E. 2a/aa; Müller-Chen, Girsberger & Furrer, *OR BT*, 144; Koller, *OR BT*, § 9 N 275; Honsell, *OR BT*, 235.
[772] BGE 122 III 262 E. 2a/aa; Koller, *OR BT*, § 9 N 277.
[773] Blumer, *Gebrauchsüberlassungsverträge*, N 946.

periods of notice can be reduced, additional reasons can be agreed on or liability for compensation can be excluded is controversial.[774]

The notice of termination for good cause can theoretically be challenged but if a good reason exists, there is little space for a breach of good faith. If however no good cause exists, the termination is void.[775]

Termination for good cause by the tenant in particular:

The practical significance of this possibility of extraordinary termination of the contract for the tenant is small in times of housing shortage, because of the possibility to being released from the contractual obligations prematurely by providing a new tenant.[776] Legitimate reasons for a tenant to terminate the contract for good cause would for example be a lack of money through no fault of the tenant because of non-payment of alimonies by the ex-husband, a medical condition like anxiety after a burglary or personal differences between the parties. A change of residence on the other hand is usually not considered unforeseeable.[777]

Art. 266i CO – Death of the tenant

'On the death of the deceased, the estate in its entirety vests by operation of law in the heirs.' (Art. 560 s. 1 CO). This also applies to the lease of the deceased tenant; the contract is not automatically terminated, but transferred to his heirs.[778] The heirs of the deceased have the possibility to terminate the contract regardless of possible longer contractual termination dates and a possible time-limitation of the contract, on the next statutory termination date (the time running from the day of death), respecting the statutory notice period (Art. 266i CO).

The termination of the contract is possible only on the first admissible termination date after the death of the tenant. However, according to the circumstances – especially if the tenant dies shortly before the beginning of the notice expiring on the next admissible termination date – this period can be longer, since the community of heirs may claim a reasonable reflection period to make their decision.[779]

The provision is semi-mandatory; the notice period can be shortened but not extended.[780]

The surviving spouse or registered partner has no right to demand the transfer of the contract to himself. However, where the family residence is concerned, the heirs cannot terminate the contract against the will of the non-contracting surviving spouse or registered partner.[781]

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[774] Blumer, *Gebrauchsüberlassungsverträge*, N 910; Müller-Chen, Girsberger & Furrer, *OR BT*, 145; Heinrich, *CHK Miete*, Art. 266g CO § 1.
[775] Blumer, *Gebrauchsüberlassungsverträge*, N 915; Lachat et al., *Mietrecht für die Praxis*, 569.
[776] Koller, *OR BT*, § 9 N 277 f.
[777] Honsell, *OR BT*, 235 (with further references).
[778] This also applies if more than one tenant is party to the contract. An automatic termination of the contract could also be agreed on, except if a family residence is concerned (Lachat et al., *Mietrecht für die Praxis*, 580; Blumer, *Gebrauchsüberlassungsverträge*, N 928).
[779] Blumer, *Gebrauchsüberlassungsverträge*, N 932; Lachat et al., *Mietrecht für die Praxis*, 582.
[780] Heinrich, *CHK Miete*, Art. 266i CO § 1; Müller-Chen, Girsberger & Furrer, *OR BT*, 146.
[781] Blumer, *Gebrauchsüberlassungsverträge*, N 930; Lachat et al., *Mietrecht für die Praxis*, 580.

Art. 259a f. CO – Landlord fails to remedy a defect within reasonable time

If the landlord is aware of a defect which renders the leased property unfit or significantly less fit for its designated use[782] and fails to remedy it within a reasonable time, the tenant may terminate the contract with immediate effect (Art. 259b s. a CO). This provision applies if the tenant is already in possession of the property.[783] Termination of the contract with immediate effect is admitted in case of serious defects, where the health of the tenant and his family are endangered or where major parts of the dwelling cannot be used for a certain amount of time.[784]

If the tenant gives the notice of termination of the contract based on this provision and in fact the defect does not meet its criteria, the notice is void and the provisions about the premature return of the object are applied (Art. 264 CO). The same applies if the landlord was not informed of the defect or was not given an appropriate period of time to remedy the defect.[785]

The notice of termination has to be given in writing and, if a family residence is concerned, with the consent of the spouse/registered partner. There is no obligation to set a deadline for the landlord to remedy the defect, it suffices that the landlord knew the defect and the tenant waited a reasonable time with the notice of termination.[786] The tenant does not have to respect termination dates or notice periods, but is not obliged to terminate the contract and leave the apartment immediately; the tenant may especially stay during the search for a new apartment. However, a long waiting period may be a sign of waiver of the right to terminate the contract, especially if the tenant accepts a delayed remedy of the defect.[787]

- Are there preconditions such as proposing another tenant to the landlord?

If no extraordinary reason to terminate the lease is given but the tenant still wants to leave the apartment without observing the notice periods and termination dates or if the tenant wants to terminate a time-limited lease prematurely, he can do so without negative consequences by proposing to the landlord a new tenant who is (1) willing to take on the lease under the same terms and conditions, (2) solvent and (3) acceptable to the landlord (Art. 264 s. 1 CO):

- (1) The landlord only has to release the current tenant from the contractual obligations if the proposed new tenant is willing to take on the lease exactly to the same conditions. If the new tenants demands a rent reduction or repairs which the current tenant would not be entitled to, the landlord can refuse him as a suitable tenant.[788]

[782] Concerning the different types of defects and other means of the tenant, see section 6.5 – Disruptions of performance after the handover of the dwelling, Defects of the dwelling.
[783] If the defect exists already at the beginning of the lease, the tenant can refuse to accept the property and step back from the contract (see section 6.5 – Disruptions of performance prior to the handover of the dwelling, In the sphere of the landlord). If the tenant accepts the object despite the defects and insists that the contract be duly performed, he has the same possibilities as if the defect had arisen during the lease (Art. 258 s. 2 CO).
[784] BGer 4C.384/2005 of 22 March 2006, E. 3.1.
[785] Blumer, *Gebrauchsüberlassungsverträge*, N 923; Lachat et al., *Mietrecht für die Praxis*, 184.
[786] Blumer, *Gebrauchsüberlassungsverträge*, N 921, 924; Lachat et al., *Mietrecht für die Praxis*, 182 and 184; Heinrich, *CHK Miete*, Art. 259c CO § 5 f.
[787] Lachat et al., *Mietrecht für die Praxis*, 183; Heinrich, *CHK Miete*, Art. 259c CO § 7; Blumer, *Gebrauchsüberlassungsverträge*, N 925.
[788] Blumer, *Gebrauchsüberlassungsverträge*, N 1033.

- (2) The landlord does not have to accept a new tenant whose solvency is not at all comparable to that of the current tenant. The income-rent ratio alone however is not an adequate instrument to imply insolvency. The new tenant's sufficient solvency has to be examined on a case to case basis.[789]
- (3) If a proposed tenant is solvent and willing to take on the lease to the same conditions, there are only few reasons why the landlord can refuse to release the current tenant from his obligations. In particular the landlord can refuse the tenant if there were major disadvantages for the landlord or if he has a good cause to do so.[790] No sufficient reasons are vague apprehensions, antipathy and discriminative reasons such as race, religion or sex, membership of an organization or sexual orientation. As long as the neighbours are not disturbed, having a pet – although the current tenant did not – is not generally a sufficient reason to refuse a proposed tenant either.[791] A sufficient reason would for example exist if there is animosity between the new tenant and the landlord or if they are in economic competition; if the new tenant had a considerably larger family or if the behaviour of the new tenant would cause inconveniences for the other tenants because of his habits or character defects (for example insulting employees of the property administration company).[792]

There are no deadlines and dates to consider but the tenant must give the landlord enough time to check on the new tenant, especially concerning his solvency.[793] The frame lease agreement 'Contrat Cadre Romand' for the French-Speaking part of Switzerland however specifies the modalities for presenting a new tenant to the landlord.[794] Where the above mentioned conditions are fulfilled, the landlord has to release the current tenant from his contractual obligations (Art. 264 s. 1 CO). In contrast to the rental of commercial premises, the landlord of residential premises is however not obligated to conclude a contract with the proposed tenant.[795]

According to Art. 264 s. 1 CO the tenant needs to propose only one suitable new tenant. This provision is semi-mandatory: The parties may agree that the tenant does not have to propose any new tenant but they may not agree that the tenant hast to propose more than one suitable tenant.[796]
If the tenant proposes no or no suitable new tenant, he must continue to pay the rent until the contract ends otherwise. The landlord must allow the deduction of expenses saved and earnings obtained (or intentionally failed to obtain) from putting the object to some other use (Art. 264 s. 3 CO).[797]

[789] BGE 119 II 36 E. 2d; Honsell, *OR BT*, 230.
[790] Koller, *OR BT*, § 9 N 223.
[791] BGE 119 II 36 E. 3d; Blumer, *Gebrauchsüberlassungsverträge*, N 1036; Lachat et al., *Mietrecht für die Praxis*, 585 f.
[792] Blumer, *Gebrauchsüberlassungsverträge*, N 1035; Lachat et al., *Mietrecht für die Praxis*, 586; Honsell, *OR BT*, 230 f; BGer of 6 April 1998, in: *SJ* (1998): 733.
[793] Müller-Chen, Girsberger & Furrer, *OR BT*, 149.
[794] Blumer, *Gebrauchsüberlassungsverträge*, N 1023.
[795] Müller-Chen, Girsberger & Furrer, *OR BT*, 149; See also Art. 263 CO applicable on leases of commercial premises.
[796] Honsell, *OR BT*, 231; Müller-Chen, Girsberger & Furrer, *OR BT*, 149.
[797] Earnings 'intentionally failed to obtain' are only taken into account if not putting the object to other use presents itself as a breach of good faith by the landlord. He may wait and see if the tenant makes an effort to find a new tenant (Honsell, *OR BT*, 231).

- 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)

Ordinary notice of termination

The landlord can terminate the lease of indefinite duration by observing formal requirements and the notice periods and termination dates. On request, the landlord has to state the reasons for giving notice and the tenant has the possibility to challenge a wrongful termination.

Formal requirements: The landlord must give notice of termination using a form approved by the canton which informs the tenant on his right to request from the landlord to state the reasons for the termination and gives information on how the tenant must proceed if he wishes to challenge the termination or apply for an extension of the lease (Art. 266l s. 2 CO and Art. 9 s. 1 VMWG). The notice of termination has to be sent to the tenant as well as his spouse or registered partner (Art. 266n CO) where the premises serve as family residence.[798] The landlord hereby has to serve the notice of termination separately on the tenant and on his spouse or registered partner, even if the latter is not a party to the contract[799], since the non-contracting spouse or registered partner also has the right to proceed against the termination of the contract (Art. 273a CO). If these formal requirements are not met, the notice of termination is void (Art. 266o CO).

Notice periods and termination dates: See above – Notice by the tenant, Periods and deadlines to be respected.

Stating reasons for giving notice: In principle, the landlord can terminate the lease without explanation. If the formal requirements are met (see above), the termination of the lease comes into effect, unless the tenant challenges it within thirty days. The notice is open to challenge if it contravenes the principle of good faith (see below). In order to being able to judge whether he should challenge the notice or not, the tenant can request the landlord to state the reasons for giving notice (Art. 271 s. 2 CO). Unchallenged, the termination of the lease even comes into effect if it would constitute an abuse of right (*Rechtsmissbrauch*), since the provisions about challenging the notice of termination in tenancy law (Art. 271 ff. CO) are lex specialis to the general principle of non-protection of a manifest abuse of rights (Art. 2 s. 2 CC).[800]

Extraordinary notice of termination

Also for the extraordinary notice the formal requirements stated above have to be respected. Additionally to these requirements, already when giving notice the landlord has to make clear that he gives *extraordinary* notice and has to indicate which circumstances led to this.[801] Where an extraordinary notice of termination is

[798] Koller, *OR BT*, § 9 N 296.
[799] Koller, *OR BT*, § 9 N 304: If the spouses or registered partners still live in the same household however, one spouse/registered partner is generally authorized to accept notice by post for the other. Therefore, one spouse/registered partner could accept both notices of termination.
[800] BGE 133 III 175; Koller, *OR BT*, §10 N 70; Honsell, *OR BT*, 247; Schmid & Stöckli, *OR BT*, 159.
[801] Weber, *BSK OR*, Art. 266l CO § 5; Lachat et al., *Mietrecht für die Praxis*, 538.

given where, in fact, the requirements therefore are not fulfilled; the notice is ineffective (and not only challengeable).[802]

Art. 266g CO – Good cause

For general information about the termination of the contract for good cause, see above – Notice by the tenant, Good cause, In general.

The landlord is entitled to terminate the contract for good cause because of external factors, such as a war or a severe economic crisis or because of internal factors in the sphere of (but not caused by) the landlord, such as sickness, invalidity, economic ruin or changes in family circumstances.[803] Also, reasons in the sphere of the tenant can be considered as good cause to give notice of termination (e.g. death threats of the tenant towards the landlord or repeatedly reprimanded breaches of contract which each by itself does not justify an extraordinary termination of the contract).[804]

It is theoretically possible that the tenant demands an extension of the lease. In practice, where the performance of the contract is unreasonable for the landlord, an extension would be unreasonable too.[805]

Art. 266h CO – Bankruptcy of the tenant

Where the tenant becomes bankrupt the landlord may call for security for future rent payments. The landlord has to grant the tenant and the bankruptcy administrators an appropriate time limit in which to furnish this security (Art. 266h s. 1 CO). The law does not define a minimum 'appropriate time limit', the opinions in legal literature rage from one to three weeks.[806] If it is set too short the notice is not void, but the time limit is converted into a sufficient one.[807] If the tenant does not furnish security in time, the landlord may terminate the contract with immediate effect (Art. 266h s. 2 CO), no further legal periods or deadlines must be respected.[808]

The amount of the security is calculated according to the rent and accessory charges until the next possible date of termination of the contract by the landlord in open-ended contracts and until the originally agreed end in time-limited contracts.[809]

The time limit for security and later the notice of termination have to be sent to the tenant and his spouse or registered partner (in case a family residence is concerned) as well as to the bankruptcy administration.[810]

Art. 257d CO – Tenant in arrears

If the tenant is in arrears with payments of rent or accessory charges[811], the landlord has the right to terminate the contract extraordinarily. To do so, the landlord must

[802] BGE 121 III 156 E. 1c/aa.
[803] Blumer, Gebrauchsüberlassungsverträge, N 911.
[804] U. Hulliger, 'Kündigung aus wichtigen Gründen, Überblick über Lehre und Rechtsprechung', *MRA* (2011): 3 f.
[805] Blumer, *Gebrauchsüberlassungsverträge*, N 916; Lachat et al., *Mietrecht für die Praxis*, 638.
[806] Only the SVIT-Kommentar states one to two weeks minimum, the other commentaries state two or three weeks. See the references in Lachat et al., *Mietrecht für die Praxis*, 572 Footnote 226.
[807] Heinrich, *CHK Miete*, Art. 266h OR § 7.
[808] Blumer, *Gebrauchsüberlassungsverträge*, N 821.
[809] Koller, *OR BT*, § 9 N 268; Müller-Chen, Girsberger & Furrer, *OR BT*, 145; Blumer, *Gebrauchsüberlassungsverträge*, N 903; Heinrich, *CHK Miete*, Art. 266h OR § 5.
[810] Blumer, *Gebrauchsüberlassungsverträge*, N 901.
[811] The tenant is usually already 'in arrears' when the rent is not paid at the date agreed on in the contract. No formal reminder is necessary. The tenant is not considered 'in arrears' if he deposits the

take the following two steps: First, he has to set the tenant a time limit for payment of at least thirty days and notify the tenant that in case of non-payment he will terminate the lease on expiry of that time limit (Art. 257d s. 1 CO).[812] Second, if the tenant does not pay within the time limit, the landlord may terminate the contract with a notice period of at least thirty days on the last day of a calendar month (Art. 257d s. 2 CO).

Concerning the consequences of a time limit set too short by the landlord it is controversial if the payment notification is void or if it is extended automatically to the statutory minimum.[813]

The termination of the contract is possible for arrears of rent and accessory charges as well as the default interest charged on them. If the arrears are only marginal, a termination can be disproportionate and entitle the tenant to challenge the notice (*Bagatellbeträge*). If the tenant pays the arrears only just after the deadline (one or two days too late), the notice may also be open to challenge, especially if until then the tenant used to pay the rent on time.[814]

Where the tenant repeatedly pays the rent with delay or even only after warning, but always before expiry of the time limit set by the landlord, a termination according to Art. 257d CO is not possible. In these situations the landlord has to terminate the lease ordinarily or, where an ordinary termination is not possible in due time (in case of contracts limited in time or contracts unlimited in time with a minimum term), the landlord can give extraordinary notice according to Art. 266g CO (good cause).[815]

The tenant is liable for damages caused by the breach of contract by non-payment of the rent. The landlord can ask the agreed rent until the apartment could objectively be rented out again, but not longer than until the next contractually agreed ordinary termination date.[816]

If the landlord terminates the lease because of arrears of payments, the tenant cannot demand an extension of the lease (Art. 272a s. 1 ss. a CO).[817]

In case of the lease of a *furnished room*, the landlord preferably declares ordinary termination of the contract instead of extraordinary termination, since in these cases the ordinary notice period is only two weeks on the end of a one-month period of the lease.[818]

Art. 257f CO – Care and consideration

According to Art. 257f s. 1 and 2 CO the tenant must use the object with all due care and he must show due consideration for others who share the building and for neighbours.

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rent according to Art. 259g CO (Blumer, *Gebrauchsüberlassungsverträge*, N 847 f.). See also section 6.5 – Disruptions of performance after the handover of the dwelling, legal consequences.

[812] If a family residence is concerned, the landlord has to notify the spouse/registered partner separately (Art. 266n CO).

[813] Blumer, *Gebrauchsüberlassungsverträge*, N 856.

[814] Blumer, *Gebrauchsüberlassungsverträge*, N 850; Lachat et al., *Mietrecht für die Praxis*, 546.

[815] Weber, *BSK OR*, Art. 266g CO §4; Higi, *ZK*, Art. 257d CO § 30. This is however controversial: According to SVIT-Kommentar, also extraordinary termination for lack of care and consideration (Art. 257f CO) is possible (Art. 257d CO § 12); See also Maag, 'Die Bundesgerichtspraxis zur ausserordentlichen Kündigung nach Art. 257f OR bei Vertragsverletzungen', 127 ff.

[816] BGE 127 III 548 E. 5; Heinrich, *CHK Miete,* Art. 257d CO § 16.

[817] Art. 272a s. 1 ss. a CO; for further information about the extension of the lease, see below – Extension of the contract.

[818] Lachat et al., *Mietrecht für die Praxis*, 541.

If the tenant does not act according to these principles and the breach of duty reaches a certain degree of seriousness[819], the landlord may send him a written warning.[820] If the tenant then 'continues to act in breach of his duty of care and consideration such that continuation of the lease becomes unconscionable for the landlord' or other persons sharing the building, he may terminate the contract with a notice of at least thirty days ending on the last day of a calendar month (Art. 257f s. 3 CO). The continuation of the lease would be unreasonable for the landlord for example if the tenant creates a condition with dirt and vermin in the apartment and on the balcony which is hazardous to health and where the neighbours are affected by unpleasant odours;[821] where the apartment is overcrowded,[822] if the tenant sublets the apartment although the landlord did not consent and had the right to refuse his consent,[823] where a tenant threatens other tenants,[824] in case of repeated night disturbances[825] or where the tenant refuses to tolerate works and renovations the landlord is entitled to do.[826]

The obligation to use the object with all due care also includes the use in accordance with the contract in general. Residential premises for example cannot be converted into business premises without the consent of the landlord. This would legitimate the extraordinary termination of the contract even if it doesn't result in a breach of the duty of care and consideration in the strict sense of the legal provision.[827]

The breach of duties does not have to emerge from the tenant himself, he is also responsible for ancillary staff, subtenants, family members and other occupants.[828]

A termination without warning and with immediate effect is possible if the tenant intentionally (incl. conditional intent[829]) causes serious damage to the property (Art. 257f s. 4 CO). For example if the tenant destroys or renders a room unusable, but not if he only for example destroys a door.[830] This provision also applies where the tenant intentionally causes serious damage to the property of neighbours and also where the tenant intentionally causes serious physical harm to the landlord or neighbours.[831]

The landlord can demand compensation from the tenant for the damages he caused on the apartment and also for the rent until the apartment could be rented out again. Since the landlord is responsible to mitigate the damage, he has to make an effort to find a new tenant as soon as possible.

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[819] For further information about the degree of seriousness, see Heinrich, *CHK Miete* Art. 257f CO § 8.
[820] Where a family residence is concerned, the warning does not have to be sent to the tenant and the spouse/registered partner separately (Art. 266n CO e contrario; Blumer, *Gebrauchsüberlassungsverträge*, N 874).
[821] Schmid & Stöckli, *OR BT*, 144.
[822] Weber, *BSK OR*, Art. 257f CO §1.
[823] BGE 134 III 300 E. 3.1; see also section 6.4 – Parties to a tenancy contract, Subletting.
[824] Heinrich, *CHK Miete*, Art. 257f CO § 12.
[825] For example by producing unbearable noise by vacuum-cleaning, moving furnishings or walking around in wooden shoes during night-time in a house with poor acoustic isolations ('Fristlose Kündigung wegen Lärm', BGer of 4 June 1998 in: *mp* [1998]: 131).
[826] BGer 4C.306/2003 of 20 February 2004; A. Maag, 'Ausserordentliche Kündigung gemäss Art. 257f Abs. 3 OR', *MRA* (2004): 180 f. See also Art. 257h and 260 CO.
[827] BGE 123 III 124 E. 2; Blumer, *Gebrauchsüberlassungsverträge*, N 870.
[828] Lachat et al., *Mietrecht für die Praxis*, 550.
[829] Heinrich, *CHK Miete,* Art. 257f CO § 9; Lachat et al., *Mietrecht für die Praxis*, 554.
[830] Higi, *ZK*, Art. 257f CO § 75.
[831] SVIT-Kommentar, Art. 257f CO § 40; Lachat et al., *Mietrecht für die Praxis*, 554.

If the reason given by the landlord is not sufficient to terminate the contract, the notice is void and cannot be converted into an ordinary termination by extending the notice period.[832]

Where the conditions of Art. 257f CO are fulfilled, challenging the notice would theoretically still be possible,[833] but practically it would be difficult.[834] The tenant cannot demand an extension of the lease (Art. 272a s. 1 ss. b CO).

Art. 261 – 261b CO – Change of ownership

Where the ownership of a property changes, 'the lease passes to the acquirer together with ownership of the object' (Art. 261 s. 1 CO).[835] A change of ownership in the sense of the law includes purchase, exchange, donation, etc. as well as dispossession in debt collection or bankruptcy proceedings. Also, where a limited right in rem tantamount to a change of ownership is granted to a third party the same provisions are applicable (Art. 261a CO). [836] On the other hand, the provisions are not applicable in case of inheritance[837] and compulsory purchase, which has its own rules (Art. 261 s. 4 CO).[838]

The new owner of the property has the possibility to terminate the contract extraordinarily if he claims an urgent need of the premises for himself, close relatives or in-laws.[839] He can terminate the lease as of the next legally admissible termination date with the legal notice period (Art. 261 s. 2 ss. a CO). If the new landlord does not make use of this next legally admissible termination date, he loses the right to extraordinary termination.[840] An urgent need is given if it is not reasonable for economic or other reasons to renounce the use of the dwelling.[841]

Where the landlord is a legal entity, it cannot claim urgent need for a shareholder, since the shareholder is a person independent from the company.[842]

The old landlord is liable toward the tenant if the new landlord terminates the lease sooner than was permitted under the old contract (Art. 261 s. 3 CO). He only has to compensate the economic consequences of the premature termination of the contract and is not jointly and severally liable for any behaviour of the new landlord

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[832] Heinrich, *CHK Miete*, Art. 257f CO § 10; Blumer, *Gebrauchsüberlassungsverträge*, N 879.
[833] Although with restrictions, cf. Art. 271a s. 3 ss. c CO.
[834] Blumer, *Gebrauchsüberlassungsverträge*, N 880 ; Lachat et al., *Mietrecht für die Praxis*, 555.
[835] The principle that sale does not break the lease was introduced only with the 1990 rent law reform (see also section 5).
[836] Schmid & Stöckli, *OR BT*, 168; such a right in rem might be a right of usufruct of the property (*Nutzniessungsrecht am Grundstück*) or a building right (*Baurecht*) (Blumer, *Gebrauchsüberlassungsverträge*, N 883).
[837] Blumer, *Gebrauchsüberlassungsverträge*, N 885.
[838] In case of compulsory purchase, the landlord is released from his obligations. If the tenant's rights are affected, the dispossessor has to provide compensation (Koller, *OR BT*, § 9 N 166).
[839] If the premises are sold in debt collection or bankruptcy proceedings after a second-attempt auction (*Doppelaufruf*) however, the lease can be terminated as of the next legally admissible termination date without showing urgent familial need for the dwelling (BGE 125 III 123 E. 1e).
[840] Koller, *OR BT*, § 9 N 175; Blumer, *Gebrauchsüberlassungsverträge*, N 890: The new landlord has no right to a period of reflection (like for example the heirs of the tenant have, see section 6.6 – Notice by the landlord, Death of the tenant), since he has time to make the decision about the extraordinary termination already before buying the premises and before the entry in the land register (which is precondition for the new landlord to give notice of termination. For further information about the precondition of the entry in the land register, see Blumer, *Gebrauchsüberlassungsverträge*, N 890; Lachat et al., *Mietrecht für die Praxis*, 560; Koller, *OR BT*, § 9 N 179 f.).
[841] BGE 132 III 737 E. 3.4.3; Koller, *OR BT*, § 9 N 175.
[842] BGE 132 III 737 E. 3.4.3.

contrary to contract. The damage can for example consist of the rent-difference for an equivalent alternative to the previously rented apartment until the end (or possible end) of the previous lease, as well as removal expenses.[843] The old and the new landlord can agree to exclude the possibility for the new landlord to terminate the contract extraordinarily. This would spare the old landlord from eventual demands for compensation from the tenant.[844] The same effect has the entry of the lease under priority notice in the land register (Art. 261b CO, see also section 6.1 – Is the position of the tenant also considered as a real property right).

A notice of termination given without sufficient urgent need is void and cannot be converted into an ordinary termination by extending the notice period.[845]

The notice of termination can be challenged by the tenant.[846] An extension of the lease is possible but only granted with restraint, since the landlord has a strong interest in the termination of the contract (see also below – Challenging the notice before court).[847]

- Statutory restrictions on notice:
  - for specific types of dwellings, e.g. public dwellings; rental dwellings recently converted into condominiums (if there exists a special form of protection in this case as in German law) etc.

For subsidized dwellings and cooperative dwellings the same provisions about termination of the contract apply as for other dwellings. Where cooperative dwellings are concerned, the tenant additionally needs to be excluded from the cooperative.[848]

According to Art. 271a s. 1 ss. c CO a notice of termination served by the landlord may be challenged as unfair, where it is given for the sole purpose of inducing the tenant to purchase the leased premises.

  - in favour of certain tenants (old, ill, in risk of homelessness)

Old age, illness and the chances of finding a new apartment are considered when deciding about an extension of the lease (see below – Extension of the contract).

  - for certain periods

See below – Challenging the notice before court.

  - after sale including public auction ('emptio non tollit locatum'), or inheritance of the dwelling

Where the property is sold or transferred in public auction, the tenancy contract is also transferred to the new owner, who has an extraordinary termination right (see also above – Change of ownership).

[843] Removal expenses have to be compensated although the tenant would have had to move later anyways (BGer of 9 May 1989, in: *mp* (1989): 171).
[844] Heinrich, *CHK Miete*, Art. 261-261b CO § 9; Lachat et al., *Mietrecht für die Praxis*, 564; Koller, *OR BT*, § 9 N 177 f.
[845] BGE 135 III 441 E. 3.3; Heinrich, *CHK Miete*, Art. 261-261b CO § 7a; Koller, *OR BT*, § 9 N 178.
[846] Although with restrictions, cf. Art. 271a s. 3 ss. a CO. See also below.
[847] Lachat et al., *Mietrecht für die Praxis*, 560 and 638.
[848] Lachat et al., *Mietrecht für die Praxis*, 515 f.

- Requirement of giving valid reasons for notice: admissible reasons
- Objections by the tenant

On request of the tenant, the landlord has to state the reasons for giving notice. Where the notice of termination contravenes the principle of good faith, the tenant may challenge it (see below – Challenging the notice before court).

- Does the tenancy have 'prolongation rights', i.e. the statutory right to stay for an additional period of time (outside the execution procedure)?

Where a termination of the lease is valid, the tenant may demand an extension of the lease (see below – Extension of the contract).

- Challenging the notice before court (or similar bodies)

Principle of good faith

The notice of termination by the landlord is open to challenge if it contravenes the principle of good faith (Art. 271 s. 1 CO). The abuse of rights within the meaning of Art. 271 s. 1 CO does not have to reach a similar level of seriousness as the general principle of good faith of Art. 2 s. 2 CC.[849] On the other hand – since Art. 271 CO is lex specialis – where the tenant fails to challenge the notice of termination within the time-limit of thirty days, he cannot claim violation of Art. 2 s. 2 CC (see below).

The termination of a tenancy contract by the landlord is considered contravening the principle of good faith and therefore wrongful where there is no objective, serious and legitimate interest and the reasons stated are an obvious pretext, where the termination is purely vexatious or where it is contrary to the former conduct of the landlord (for example termination because the tenant practices prostitution in the apartment, where the landlord initially agreed to that).[850] Wrongful termination can also be claimed where purpose and effect of the termination are in clear disproportion, for example in case of a termination because of construction works planned by the landlord, which are anyways not possible because of public law. Or where tenancy contracts were terminated because of renovation works which would not be considerably complicated or delayed with the tenant staying in the dwelling.[851]

The law states exemplary reasons of wrongful termination in Art. 271a s. 1 CO:

- ss. a: Termination because the tenant is asserting claims arising under the lease in good faith, such as the right to sublet the apartment (under certain conditions, see section 6.4 – Parties to a tenancy contract, Subletting) or claims arising from defects of the dwelling.[852]
- ss. b: Termination because the landlord wishes to impose a unilateral amendment of the lease to the tenant's detriment or to change the rent.[853] This should give the tenant the possibility to negotiate with the landlord without pressure.[854] Nevertheless, the landlord is allowed to terminate a tenancy contract for the purpose to rent the apartment out to a new tenant for a higher rent, provided that a higher rent would not be unfair according to the absolute rent calculation method,

[849] BGE 136 III 190 E. 2; Weber, *BSK OR*, Art. 271/271a CO § 3.
[850] BGE 135 III 112 E. 4.1; BGE 136 III 190 E. 2; Weber, *BSK OR*, Art. 271/271a CO § 3.
[851] BGE 136 III 190 E. 4; BGE 135 III 112 E. 4.2; Weber, *BSK OR*, Art. 271/271a CO § 6.
[852] Weber, *BSK OR*, Art. 271/271a CO § 10.
[853] See also Art. 269d s. 2 ss. c and s. 3 CO about unilateral amendments by the landlord.
[854] Heinrich, *CHK Miete*, Art. 271-271a CO § 8.

but could not (or not to the same extent) be achieved by rent increases in the existing tenancy (see section 6.4 – Rent payment, Unfair rent).[855]

- ss. c: Termination for the sole purpose of inducing the tenant to purchase the leased premises. A termination of the contract in order to sell the property to a third person is not covered by this provision.[856]
- ss. f: Termination because of changes in the tenant's family circumstances, such as death, marriage, divorce or separation (also of registered partnerships), adding children, etc.[857], which do not give rise to any significant disadvantage to the landlord, such as for example overcrowding.[858]

Statutory restrictions on notice for certain periods

The termination of the lease can be challenged, if it is given during the following periods of time:

During conciliation or court proceedings in connection with the lease, unless the tenant initiated such proceedings in bad faith (Art. 271a s. 1 ss. d CO) or within three years of the conclusion of conciliation or court proceedings in connection with the lease in which the landlord was either largely unsuccessful, or withdrew or considerably reduced his claim or action, or declined to bring the matter before the court, or reached a settlement or some other compromise with the tenant (ss. e). This time-barrier is not applicable where the notice of termination is given in the following situations: because the landlord urgently needs the property for his own use or that of family members or in-laws (Art. 271a s. 3 ss. a CO), because the tenant is in default on his payments (ss. b), because the tenant is in serious breach of his duty of care and consideration (ss. c), as a result of alienation of the leased premises (ss. d), for good cause (ss. e; see also Art. 266g) or because the tenant is bankrupt (ss. f).[859]

Failure of the landlord to comply with formal requirements

The landlord has to comply with certain formal requirements for the termination to be valid:[860] He has to give notice on a form approved by the canton with information for the tenant on how to proceed to contest the termination or apply for an extension of the lease (Art. 266l CO). Where a family residence is concerned, the landlord has to serve the notice separately on the tenant and his spouse or registered partner (Art. 266n CO).

[855] BGE 120 II 105; BGer 4A_472/2007 of 11 March 2008, E. 2.1; T. Koller & M. Bühler, 'Ertragsoptimierung als Motiv einer Mietvertragskündigung – Gedanken zu einer Inkohärenz in der mietrechtlichen Rechtsprechung des Bundesgerichts: BGE 120 II 105 ff.', *ZBJV* (1995): 415. However, the tenant has good chances when challenging the termination by the landlord, since in this particular case the requirements for the landlord to contribute to the establishment of the non-abusiveness of the new rent are quite high (BGer 4A_448/2009 of 1 February 2009 E. 2.2 and M. Sommer, 'Kündigung zur Erzielung eines höheren Mietzinses', *MRA* [2011]: 85).

[856] Heinrich, *CHK Miete*, Art. 271-271a CO § 9.

[857] Weber, *BSK OR*, Art. 271/271a CO § 22; Heinrich, *CHK Miete*, Art. 271-271a CO § 13. Not covered by this provision are cohabitation and only temporary changes such as for example holiday visits. In these cases however, the termination may be wrongful within the meaning of Art. 271 s. 1 CO (Weber, *BSK OR*, Art. 271/271a CO § 22).

[858] Weber, *BSK OR*, Art. 271/271a CO § 23.

[859] See also section 6.6 – Notice by the landlord, Extraordinary notice of termination.

[860] Art. 266o CO.

Time-limit for challenging the notice

Where the tenant or the landlord wishes to challenge the termination, he must bring the matter before the conciliation authority within thirty days of receiving the notice of termination (Art. 273 s. 1 CO).[861] Where an ordinary notice of termination was given by the landlord and the tenant did not challenge it within this time-limit, the notice is valid, even if it contravenes the principle of good faith fundamentally (Art. 271 CO is lex specialis to Art. 2 s. 2 CC).[862] Where an extraordinary termination of the lease was made by the landlord, where actually no reason was given, the notice is ineffective and not only challengeable.[863]

Conversion of a certain type of termination into another

An extraordinary termination whose requirements are not fulfilled cannot be converted into an ordinary termination, which is important considering the blocking period after conciliation or court proceedings (Art. 271a s. 1 ss. e CO, see above). However, it is possible to give subsidiary ordinary notice together with an extraordinary notice.[864]

The conversion of an extraordinary notice of termination (for example for good cause, Art. 266g CO) into another kind of extraordinary notice (for example for lack of care and consideration, Art. 257f CO) is possible.[865]

- In particular claims for extension of the contract or for granting of a period of grace under substantive or procedural law

Extension of the lease in general

Where the termination of the lease would cause a degree of hardship for the tenant or his family[866] that cannot be justified by the interests of the landlord, he may request an extension of the lease. An extension can also be requested for fixed-term leases (Art. 272 s. 1 CO).[867]

The courts have a wide margin of discretion deciding about the duration of the extension. In 1996, in practice usually one to two years of extension were granted to tenants in urban areas.[868] The purpose of the extension of the lease is to give the tenant more time to find a new dwelling.[869]

The tenant must submit his request for an extension of the lease to the conciliation authority within thirty days of receiving the notice of termination.[870] However, where

[861] Concerning the procedure before the conciliation authority, see section 6.1 – Court structure in tenancy law.
[862] BGE 133 III 175 (The qualifying requirements for 271 CO are lower than the requirements for Art. 2 s. 2 CC, but – on the other hand – the breach of good faith has to be claimed within the time-limit of Art. 273 s. 1 CO).
[863] BGE 121 III 156 E. 1c (for example where a notice for arrears of payments was given and, in fact, there were no arrears).
[864] BGE 137 III 389 E. 8.4.2.
[865] BGer 4C.223/2006 of 7 September 2006, E. 2.1.
[866] A hardship for a possible subtenant is not relevant (Weber, *BSK OR*, Art. 272 CO § 4a).
[867] The conclusion of tenancy contracts limited in time is not subject to any restrictions in Switzerland.
[868] Heinrich, *CHK Miete*, Art. 272b CO § 1; T. Koller, 'Wohn- und Gewerberaummietrecht in der Schweiz', *Zeitschrift für Miet- und Raumrecht* (1996): 167. For more recent data about the duration of extensions, see the list of decisions about extension of leases by Richard Püntener, published in I. Spirig, 'Grundsätze im Erstreckungsrecht', *mp* (2008).
[869] Heinrich, *CHK Miete*, Art. 272 CO § 3.
[870] Art. 273 s. 2 ss. a CO. Where a lease of limited duration is concerned, the tenant must act not later than sixty days before expiry of the lease (Art. 273 s. 2 ss. b CO).

the tenant challenged the termination and the competent authority rejects this request, an extension of the lease is examined ex officio (Art. 273 s. 5 CO).

Up to two extensions can be granted, whereas the overall extension limit is four years (Art. 272b s. 1 CO).[871] The judge may not grant extension for an indefinite period of time until a certain condition is fulfilled (for example until a building permit for the landlord is given) but only for a clearly specified period of time.[872] The parties are free to set an extension period by mutual agreement, whereby they are not bound by this maximum duration and the tenant may waive his right to request a second extension (Art. 272b s. 2 CO). The tenant may also waive his right to extension of the lease in general once the notice of termination has been given (The restriction of Art. 273c CO is only applicable before a notice was given).[873]

During the extension period the original lease remains in force, still subject to means of variation envisaged by law (for example rent increases/reductions[874]), unless the court modified the lease in line with changed circumstances on request of one of the parties (Art. 272c CO). The tenant may terminate the lease by giving one month's notice at the end of a calendar month or, where the extension exceeds one year, by giving three months notice on a statutorily valid termination date (Art. 272d CO).

Exclusion of extension

According to Art. 272a s. 1 CO, no extension is granted, where (ordinary or extraordinary[875]) notice of termination is given because the tenant is in default on his payments,[876] because the tenant is in serious breach of his duty of care and consideration,[877] because the tenant is bankrupt and fails to furnish security[878] and where the lease is expressly concluded for a limited period until refurbishment or demolition works begin or the requisite planning permission is obtained.

Generally, also no extension is granted where the landlord offers the tenant equivalent premises (Art. 272a s. 2 CO).

Weighing of interests

When weighing the interests of landlord and tenant, according to Art. 272 s. 2 CO especially the following aspects have to be considered:

- ss. a: Circumstances in which the lease was contracted and the terms of the lease. For example where the apartment is used by the caretaker of the building, it has to be considered that the apartment is needed for the new caretaker.[879] The information of the tenant at the time of the conclusion of the contract (for example

[871] Where the tenant requests a second extension of the lease, his efforts to mitigate the hardship caused by the notice of termination are taken into consideration (Art. 272 s. 3 CO): He has to search for a new apartment intensely during the whole time of the first extension. An opportunity to accept a reasonable substitute dwelling excludes a second extension of the lease (Weber, *BSK OR*, Art. 272 CO § 16).
[872] BGE 135 III 121 E. 4.
[873] BGer 4A.467/2009 of 19 November 2009, E. 4.
[874] Heinrich, *CHK Miete*, Art. 272c-d CO § 4.
[875] Where the conditions for one of the extraordinary notices of termination stated in Art. 272a s. 1 ss. a-c are fulfilled, but the landlord gives ordinary notice instead, an extension of the lease is also not possible (Heinrich, *CHK Miete*, Art. 272a CO § 2).
[876] Art. 257d CO.
[877] Art. 257f s. 3 and 4 CO.
[878] Art. 266h CO.
[879] Weber, *BSK OR*, Art. 272 CO § 7.

about a possible need of the landlord to use the dwelling for himself or about a possible renovation of the building) also have to be taken into account.[880]

- ss. b: Duration of the lease. A very long, but also a very short duration of the lease can lead to hardship for the tenant.[881]
- ss. c: Personal, family and financial circumstances of the parties and their conduct. A low income family is likely to have more difficulties in finding a new dwelling which is affordable to them than a single person with high income.[882] Also the age, health, situations such as forthcoming birth or divorce, the professional situation and also the nationality of the tenant have to be considered.[883] Also breaches of contracts by the tenant (e.g. repeatedly delayed rent payments) have to be taken into account.[884]
- ss. d: Possible need of the landlord (and its urgency) to use the dwelling for himself, his family members or his in-laws.
- ss. e: Conditions prevailing on the local market for residential premises. A low vacancy rate of dwellings is an indication for hardship. Only the dwellings in the same price range have to be considered.[885]

An important aspect that has to be considered is the effort of the tenant to find a new dwelling, since the purpose of the extension of the lease is to give the tenant more time to find a new apartment.[886]

Where the tenant challenges the termination of the lease and this claim is not manifestly without cause, he is (at least until the decision of the conciliation authority) not obliged to search for a new apartment.[887] The requirements in regard to the search efforts are different depending on the tenant; a young and well educated tenant is expected to make bigger efforts than an old tenant who is not familiar with using the internet.[888]

Also, upcoming renovation projects are to be taken into account on the side of the landlord.[889] Only little weight is however given to purely economic interests of the landlord.[890]

- Termination for other reasons
    - Termination as a result of execution proceedings against the landlord (in particular: repossession for default of mortgage payment)

Dispossession of the dwelling in debt collection or bankruptcy proceedings are considered changes of ownership within the meaning of Article 261 ff. CO. The lease is transferred to the new owner who has an extraordinary right to terminate it as of

[880] Lachat et al., *Mietrecht für die Praxis*, 644.
[881] Weber, *BSK OR*, Art. 272 CO § 8. Where the landlord terminates the contract after a very short duration, the financial efforts for two relocations have to be taken into account (Lachat et al., *Mietrecht für die Praxis*, 645).
[882] Lachat et al., *Mietrecht für die Praxis*, 645.
[883] Weber, *BSK OR*, Art. 272 CO § 9; Lachat et al., *Mietrecht für die Praxis*, 645.
[884] Heinrich, *CHK Miete*, Art. 272 CO § 5.
[885] Lachat et al., *Mietrecht für die Praxis*, 647.
[886] Heinrich, *CHK Miete*, Art. 272 CO § 2 f.
[887] Spirig, 'Grundsätze im Erstreckungsrecht', 211.
[888] Spirig, 'Grundsätze im Erstreckungsrecht', 211.
[889] Heinrich, *CHK Miete*, Art. 272 CO § 5.
[890] Spirig, 'Grundsätze im Erstreckungsrecht', 208.

the next legally admissible termination date in case of urgent need for himself, close relatives or in-laws (see above, section 6.6 – Notice by the landlord).

- 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 rehousing in case of demolition of rental dwellings? Are tenants interested parties in public decision-making on real estate in case of urban renewal?

Expropriation

Where the landlord is expropriated of a dwelling, the provision about change of ownership (Art. 261 CO) is not applicable and the tenancy contract is not transferred to the new owner. The expropriation is governed by the Federal Expropriation Act[891] or the respective cantonal provisions. The rights of the tenant can also be part of the expropriation. The tenant who concluded the tenancy contract before initiation of the expropriation procedure then has the possibility to request compensation from the authority for damages he suffered from the premature termination of the tenancy contract.[892] The tenant cannot request damages from the landlord, since the performance of his obligation has become objectively impossible by circumstances not attributable to him and the obligation is therefore extinguished.[893]

Public decision-making on real estate

A tenant is entitled to appeal against building permissions of third persons and land use plans, where the conditions which also have to be fulfilled by the owner of a dwelling concerned are fulfilled.[894] The tenant is however not entitled to appeal against a building permit-application of his own landlord in order to prevent eviction.[895]

6.7 Enforcing tenancy contracts

Summary Table 14: Enforcing tenancy contracts

Eviction procedure	- Ordinary or simplified proceedings (with attempt at conciliation) - Summary procedure (without attempt at conciliation)
Protection from eviction	- Challenging the notice of termination - Request for extension of the lease
Effects of bankruptcy	Bankruptcy of the tenant constitutes a reason for extraordinary termination, if no security is furnished.

- Eviction procedure: conditions, competent courts, main procedural steps and objections

There are two different procedures for a landlord to evict a tenant: the regular procedure, as described above (ordinary or simplified proceedings, see section 6.1 –

[891] Bundesgesetz über die Enteignung, SR 711.
[892] Art. 23 s. 2 EntG.
[893] Art. 119 CO.
[894] BGE 132 II 209 E. 2.3; H. Aemisegger & S. Haag, *Praxiskommentar zum Rechtsschutz in der Raumplanung* (Zurich: Schulthess, 2010), Art. 33 RPG § 6.
[895] President of the Administrative Court of the Canton St. Gallen, 24 August 2006 [B 2006/88] E. 2b.

Court structure in tenancy law) where an attempt at conciliation is necessary and the summary procedure, where the landlord can address the court directly.

The summary procedure can be applied where the facts are undisputed or immediately provable and the legal situation is clear (Art. 257 s. 1 CPC). Such ability for summary decision (*Anspruchsliquidität*) arises for example where the occupant of the apartment has no contract (squatters) or where the tenant did not challenge an ordinary notice nor demand an extension of the lease within the time limit (see above).[896] Also, where an extraordinary termination because of arrears of payments or because of bankruptcy of the tenant is concerned, the landlord can choose summary procedure, since the facts are immediately provable (by producing documents of the call for security or notification and time limit for payment and notice) and an extension of the lease is not possible (Art. 272a s. 1 CO).[897]

Where a tenant challenged the notice of termination before the conciliation authority (simplified proceedings), in clear cases the landlord may still start an eviction procedure in summary proceedings before the court.[898] The summary proceeding is either judged applicable because there are no open questions of law or fact, in which case the challenge of the notice is assessed as a preliminary question, or the judge rejects the request for summary proceeding and the proceedings concerning the challenging of the notice of termination continue in simplified proceedings.[899]

Where a tenant challenged the notice of termination and the landlord starts an eviction procedure in the same type of proceedings (simplified proceedings, see Art. 243 s. 2 ss. c CPC), the separately filed actions may be joined.[900]

The enforcement of the eviction can already be applied for in the proceedings concerning the legitimacy of the eviction. The landlord can for example request that if the eviction is legitimate, the same court also sets a deadline to the tenant for clearing the apartment and in case he does not do so, order the police to perform the eviction and issue a threat of criminal penalty for contempt of official orders.[901]

The enforcement can also be applied for in a separate enforcement proceeding. Once the enforcement is granted, the landlord may also request the assistance of the police.[902]

- Rules on protection ('social defences') from eviction

Apart from the above mentioned possibilities to challenge the notice of termination and to request an extension of the lease, there are no further social defences from eviction.

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[896] Lachat, *Procédure civile en matière de baux et loyers,* 167 ; T. Sutter-Somm & C. Lötscher, *Kommentar zur Schweizerischen Zivilprozessordnung (ZPO)*, 2nd ed. (Zurich: Schulthess, 2013), Art. 257 CPC § 38.

[897] 'Botschaft zur Schweizerischen Zivilprozessordnung (ZPO)', 7352

[898] The pendency of one of these actions does not affect the other according to Art. 64 s. 1 ss. a CPC, since the subject matters of the disputes (challenging the notice and eviction) are not identical (U. Hulliger, 'Urteil des Obergerichts des Kantons Zürich PF110018-O vom 1. Juli 2011 (rechtskräftig publiziert in ZR 110 (2011) Nr. 54 S. 166 ff.)', *MRA* (2012): 34 ff.).

[899] Hulliger, 'Urteil des Obergerichts des Kantons Zürich PF110018-O vom 1. Juli 2011', 34 ff.

[900] Art. 125 s. c CPC; Hulliger, 'Urteil des Obergerichts des Kantons Zürich PF110018-O vom 1. Juli 2011', 34 ff.

[901] D. Gasser, 'Die Vollstreckung nach der Schweizerischen ZPO', *Anwaltsrevue* (2008): 343.

[902] Art. 343 s. 3 CPC; Sutter-Somm & Lötscher, *Kommentar ZPO*, Art. 343 CPC § 25.

- May rules on the bankruptcy of consumers influence the enforcement of tenancy contracts?

Bankruptcy of the tenant constitutes a reason for extraordinary termination of the lease by the landlord, where no security for future payments is furnished (Art. 266h CO; see also section 6.6 – Notice by the landlord).

Where the tenant has become insolvent, in particular by virtue of bankruptcy proceedings or execution without satisfaction, before takeover of the apartment, the landlord may refuse to hand the apartment over to the tenant and withdraw from the contract.[903]

6.8 Tenancy law and procedure 'in action'

Preliminary notice: To the extent that scientific sources are lacking, reporters are welcome to use any evidence (also newspaper articles, online sources, private interviews or even their own experience and opinion) in this section.

The practical role of private rented housing can only be realistically assessed when the practical functioning of the legal system in this field ('tenancy law in action') is taken into account:

- What is the legal status and what are the roles, tasks and responsibilities of associations of landlords and tenants?

The Swiss Tenants' Association and the Swiss Homeowner's Association with their cantonal and regional associations are representing the interests of tenants and landlords respectively on a political level and offer services to their members, such as legal advice. For further information, see section 1.5.

- What is the role of standard contracts prepared by associations or other actors?

In a large part of the tenancy contracts concluded in Switzerland general terms and conditions are used.[904] Often used is the set of model general terms and conditions jointly published and offered for sale by the Swiss Landlords Association, the Zurich section of the Swiss Real Estate Association and the Association of Zurich Real Estate Companies.

- 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?

The conciliation authorities keep a statistic about the number of cases brought before them, what they are about and how they are dealt with. These statistics are published on the website of the Federal Office for Housing on a half-yearly basis and are particularly interesting since the beginning of 2011 when the Federal Civil Procedure Code entered into force and the procedure was unified throughout Switzerland. From then on, between around 12,400 and 16,000 new requests were made at the conciliation authorities every semester. Of all cases the conciliation authority deals with, the percentage of cases in which an agreement was reached (settlement, acknowledgement of the claim or withdrawal of the claim) was between 45-51%. In 13-15% of the cases, the conciliation authority granted authorisation to proceed. In 5-8% of the cases the conciliation authority proposed a judgment (which was accepted by the parties in 54-63% of these cases). A decision – which is possible in financial

[903] Art. 83 CO; Blumer, *Gebrauchsüberlassungsverträge*, N 1019.
[904] Wetzel, Grimm & Mosimann, 4.

disputes with a value in dispute not exceeding CHF 2,000 – was made by the conciliation authority only in 0.4-1.2% of all cases. In the rest of the cases, which make 26-34% of all cases, the parties either withdrew the application, the conciliation authority did not admit the application or the proceedings were dismissed as groundless or transferred to an arbitral tribunal.[905] For this last category there is no detailed statistic on what these cases were about. All other cases brought before the conciliation authority by tenants or landlords are further detailed in the statistic as follows:[906] 'Challenging the initial rent', 'Rent raise', 'Rent reduction', 'Accessory charges', 'Ordinary notice of termination', 'Extraordinary notice of termination'[907], 'Extension of the lease', 'Claim for payment'[908], 'Defects' and 'other reasons'. With each about one fifth of the cases, 'ordinary notice of termination' and 'claims for payment' are the most common problems brought before the conciliation authority. With regularly only around three percent of the cases, 'challenges to the initial rent' are not often brought before the conciliation authority. The rate of agreements reached before the conciliation authority was in all of the above mentioned cases always between fifty and eighty percent. In cases of rent raise and reduction as well as cases about accessory charges and extension of the lease, the rate of reaching an agreement was typically above average while in disputes concerning claims for payment an agreement can typically be reached less often.[909]

- Do procedures work well and without unreasonable delays? What is the average length of procedures? Are there peculiarities for the execution of tenancy law judgments (e.g. suspensions of, or delays for, eviction)?

The hearing before the conciliation authority must take place within two months of reception of the application or the end of the exchange of written submissions (Art. 203 s. 1 CPC). The total duration of the proceedings before the conciliation authority must not exceed twelve months (Art. 203 s. 4 CPC).

Before the entry into force of the Federal Civil Procedure Code, when the tenant challenged an extraordinary termination before the conciliation authority, the request was transferred to the court competent for the eviction procedure (Art. 274g s. 3 old CO). This provision was not introduced into the CPC. Therefore, eviction proceedings could take longer than under the previous legislation.[910]

- 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?

In conciliation proceedings, no court costs are charged and no party costs are awarded. In court proceedings, legal aid is granted and a legal agent can be

[905] 'Berichte über die Tätigkeit der paritätischen Schlichtungsbehörden in Miet- und Pachtangelegenheiten' (http://www.bwo.admin.ch/themen/mietrecht/00161/index.html?lang=de [last retrieved 18 February 2014]). The reports are published every half year, show data per semester and contain more detailed information about in what way (for example agreement reached or proposed judgment accepted) what kind of cases (for example challenging of rent increase or extension of the lease) are dealt with.

[906] The statistic does not show applications made by landlords and by tenants separately.

[907] This category comprises also termination by the landlord because of arrears of payments; however, it does not comprise cases in which the landlord opted for summary procedure (see section 6.7), since in these cases no attempt at conciliation is needed.

[908] This category includes among others disputes about the return of the deposit.

[909] 'Berichte über die Tätigkeit der paritätischen Schlichtungsbehörden in Miet- und Pachtangelegenheiten', first semester 2011 to first semester of 2013.

[910] The CPC was introduced only in 2011.

appointed to persons who do not have sufficient financial resources, where certain requirements are fulfilled. Also, the tenants' association may cover parts of the legal expenses to its members. Furthermore, the conciliation authority provides legal advice to the parties and in court proceedings the facts are established ex officio (see section 6.1 – Court structure in tenancy law).

- How about legal certainty in tenancy law? (e.g.: are there contradicting statutes, is there secondary literature usually accessible to lawyers etc?)

Problems concerning legal certainty arise mainly from the federal structure of Switzerland. Many questions concerning accessory charges and minor problems are adjudicated only on regional levels and never pursued to the Federal Court, resulting in an inconsistent case law. Also, the tension between the market rent principle and the cost rent principle in Swiss tenancy law leads to uncertainties in case law.[911]

- 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)?

In the last few years, swindlers used real estate advertising websites for posting ads for rental dwellings which do not actually exist. The 'landlord', saying that he is abroad, demands a deposit for the handover of the key to be paid via payment service (e.g. Western Union).[912]

Also, swindlers may send e-mails to landlords who advertise rental dwellings on real estate advertising websites, saying to be interested in renting. The swindlers send a link in this e-mail, leading to a fake login-page which appears to be from the real estate advertising website. With the data the landlord inserts into this fake login-page, the swindlers have access to his profile and to the e-mails of potential tenants of whom they then ask to pay a deposit for the dwelling.[913]

- Are the areas of 'non-enforcement' of tenancy law (such as legal provisions having become obsolete in practice)?

The tenancy law was revised in 1990. So far no areas of non-enforcement are striking.

- What are the 10-20 most serious problems in tenancy law and its enforcement?[914]

- Notice of termination by the landlord, challenging the notice and request for extension of the lease, especially in relation to renovation work.
- Rent increases and how to proceed for reaching a rent reduction because of decrease of the reference mortgage rate.
- Accessory charges: The payment on account requested by the landlord is often much lower than the actual costs and the additional charges are therefore high. This problem occurs mainly in the German-speaking parts of Switzerland.

[911] Information provided by T. Herren, Zurich tenants' association, in telephone interview from 7 April 2014.
[912] Schweizer Radio und Fernsehen (O. Fueter & M. Renggli), 'Betrug bei der Wohnungssuche', 17 April 2012.
[913] Schweizer Radio und Fernsehen, ‚Phishing, Betrüger attackieren Immobilienplattform', 26 October 2012.
[914] Information partly provided by T.Herren, Zurich tenants' association, in electronic correspondence from 7 January 2013 and telephone interview from 7 April 2014.

- Large property administration companies may offer their own building maintenance services without regard to normal market prices.
- Demarcation between normal wear (to be paid by the landlord) and excessive wear (to be paid by the tenant) at the return of the apartment.
- Correct deposition of the rent and (delayed) reimbursement.
- The threshold of reparation costs for which a defect is still considered as 'minor' being contractually coupled to the yearly net rent (e.g. one percent) and as such being higher than the admissible amount of about CHF 150.-
- Fixed fee (of up to one percent of the yearly net rent) charged by the landlord for general cost increase, to cover increasing costs of for example rubbish, water and waste water, independently from actual cost increases (*allgemeine Kostensteigerungspauschale*).
- Contractual obligation of the tenant to make a service subscription which exceeds the maintenance obligation of the tenant. Without reducing the rent adequately, this obligation of the landlord cannot be transferred to the tenant.
- Key service on account of the tenant at the end of the tenancy.

• What kind of tenancy-related issues are currently debated in public and/or in politics?[915]

- Before the acceptance of the popular initiative against mass immigration in February 2014, the Federal Council announced accompanying measures to the free movement of persons. One of these measures would have been to make the use of a form indicating the amount of rent under the old tenancy mandatory throughout Switzerland at the conclusion of a new tenancy. However, after acceptance of the initiative, the future of these accompanying measures is uncertain.
- Promotion of cooperatives and other non-profit housing organizations and affordable housing in general is debated on cantonal and municipal level.
- For further issues currently debated in politics, see section 5 – Former and still ongoing reform efforts of the current tenancy law.

7 Effects of EU law and policies on national tenancy policies and law

As Switzerland is not an EU member state, Directives and Regulations do not have to be implemented into Swiss law. The relations of Switzerland with the European Union are governed by bilateral agreements. Among these agreements are two packages, the Bilaterals I and the Bilaterals II, in which the agreements are legally linked with one another.[916]

The bilateral agreements of 1990 (Bilaterals I) relate, among others, to technical barriers to trade, public procurement and the free movement of persons.

[915] Information partly provided by T. Herren, Zurich tenants' association, in telephone interview from 7 April 2014.
[916] Federal Department of Foreign Affairs – Directorate for European Affairs (http://www.europa.admin.ch/themen/00500/00507/index.html?lang=en [last retrieved 10 March 2014]). For a list of all current bilateral agreements between Switzerland and the EU see http://www.europa.admin.ch/themen/00500/index.html?lang=en (last retrieved 10 March 2014).

The bilateral agreements of 2004 (Bilaterals II) relate, among others, to retirement pensions, taxation of savings income, the environment, statistics, fight against fraud and also include the Schengen/Dublin agreement.

As mentioned above (section 1.2 – Immigration and Emigration), after accepting the popular initiative against mass immigration in 2014, the future of the Bilaterals I is uncertain, since the initiative contradicts the agreement of free movement of persons.

In the following, some aspects concerning the relations between Switzerland and the EU are explained in more detail:

Fundamental freedoms

e.g. the Austrian restrictions on the purchase of secondary homes and its compatibility with the fundamental freedoms

The construction of secondary homes is to be restricted by the cantons as of 2014, following a popular initiative 'Schluss mit uferlosem Bau von Zweitwohnungen!' which was accepted on 11 March 2012.[917] The restrictions count the same for Swiss nationals as for foreigners.

Cases in which a licence to buy house is needed – is this compatible with the fundamental freedoms?

The acquisition of real estate for residential purposes in Switzerland by foreigners is restricted by the Federal Law on the Acquisition of Real Estate by Persons Abroad.[918] The appropriate cantonal authority may grant or refuses the authorization for the acquisition.[919]

No authorization to purchase real estate in Switzerland is required for nationals of a member state of the EU or EFTA who are domiciled in Switzerland (in general resident foreign nationals, holding a B EC/EFTA permit or settled foreign nationals, holding a C EC/EFTA permit). Other foreigners also do not need permission if they are entitled to settle in Switzerland (holding a C settlement permit) [920] and domiciled in Switzerland.

Apart from natural persons, legal entities which have their registered office abroad (even if they are Swiss-owned) and legal entities which have their registered office in Switzerland but are controlled by persons abroad (where more than one third of a company's capital or voting rights are in the hands of these persons abroad or where substantial loans were granted by them) are considered as foreigners.[921]
An exemption from the requirement of an authorization is made for everyone where owner occupied principal residences are concerned[922] or for dwellings that may be

[917] Swiss Statistics (http://www.bfs.admin.ch/bfs/portal/de/index/themen/17/03/blank/key/2012/011.html [last retrieved 24 February 2014]).
[918] Bundesgesetz über den Erwerb von Grundstücken durch Personen im Ausland (BewG), SR 211.412.41 (also known as Lex Koller)
[919] For more detailed information about the federal law on the acquisition of real estate by persons abroad, see Federal Office of Jusitice 'Acquisition of real estate by persons abroad, Guidelines'. (Berne: FOJ, 2009).
[920] An overview of the different residence permits is available on the webpage of the Federal Office for Migration: https://www.bfm.admin.ch/content/bfm/en/home/themen/aufenthalt.html (last retrieved 3 December 2013).
[921] Art. 5 s. 1 ss. b and c and Art. 6 BewG; Federal Office of Jusitice,'Acquisition of real estate by persons abroad, Guidelines', 3.
[922] Art. 2 s. 2 ss. b BewG; The buyer needs to have the intention of living in that home permanently. If he changes his place of domicile subsequently however, he need not sell it. This rule also applies on

purchased in exceptional circumstances in conjunction with commercial real estate.[923] For cross-border commuters from EC or EFTA Member States an exemption is made where owner occupied secondary residences are concerned.[924]

Agreement on dismantling technical barriers to trade (Mutual Recognition Agreement)

Conformity tests for most industrial products in order to determine whether a product meets current standards or not, shall be mutually recognized by Switzerland and the EU ('EC'-Label).[925] The Swiss law on technical barriers to the trade (THG)[926] entered into force in 1995 and sets the basis for the Confederation to avoid technical barriers to trade. The specific standards are regulated in the numerous specific regulations. For example concerning lifts, the European standards of Directive 95/16/EC of 29 June 1995 were adapted in Switzerland in the ordinance on the safety of lifts[927] and the law on product safety[928]. Regulations about construction products can be found in the law on construction products[929], the ordinance on construction products[930] and in the Inter-cantonal agreement on the elimination of technical barriers to trade[931] and regulations about boilers are set in the Ordinance on Air Pollution Control.

In developing energy efficiency rules, Switzerland mainly orients their regulations towards their most important partner in trade, the EU. There is, however, no obligation to adapt similar rules; the Federal Council may also imply higher efficiency requirements than the EU. [932] In 2013 the Swiss Federal Office for Energy submitted a partial revision of the Energy Ordinance (EnV)[933] to public consultation, intending to further tighten the efficiency rules for electrical equipment. The revision is planned to enter into force as of 1 August 2014 and mainly includes measures to keep pace with or exceed EU energy efficiency levels.[934]

For various electrical household appliances the same energy labelling as in the EU is mandatory (refrigerators, washing machines, tumble driers, household lamps, dishwashers, washer-driers, ovens, air conditioners and televisions).[935]

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second residences of cross-border commuters from EC or EFTA Member States (Federal Office of Justice, 'Acquisition of real estate by persons abroad, Guidelines', 4).

[923] Real estate for commercial purposes is not subject to authorisation (Art. 2 s. 2 ss. a BewG). Exceptional circumstances exist for example where living accommodation is necessary for a business (such as the dwelling of a caretaker or technician where permanent on-site presence is essential) or where a dwelling is situated in the middle of a factory site (Federal Office of Justice, 'Acquisition of real estate by persons abroad, Guidelines', 5).

[924] Art. 7 s. j BewG; See also above, footnote 921.

[925] Federal Department of Foreign Affairs – Directorate for European Affairs (http://www.europa.admin.ch/themen/00500/00506/00520/index.html?lang=en [last retrieved 10 March 2014]).

[926] Bundesgesetz über die technischen Handelshemmnisse (SR 946.51).

[927] Verordnung über die Sicherheit von Aufzügen (SR 819.13).

[928] Bundesgesetz über die Produktesicherheit (SR 930.11).

[929] Bundesgesetz über Bauprodukte (SR 933.0).

[930] Verordnung über Bauprodukte (SR 933.01).

[931] Interkantonale Vereinbarung zum Abbau technischer Handelshemmnisse of 23 October 1998.

[932] Swiss Federal Office of Energy, 'Erläuternder Bericht zur Revision der Energieverordnung: Vorschriften Elektrogeräte (EnV; SR 730.01)' (Berne: SFOE, 2013), 5.

[933] Energieverordnung (SR 730.01).

[934] Federal Chancellery (https://www.news.admin.ch/message/index.html?lang=de&msg-id=50791 [last retrieved 11 March 2014]).

[935] 'Erläuternder Bericht zur Revision der Energieverordnung: Vorschriften Elektrogeräte (EnV; SR 730.01)', 4.

Award of public works contracts, public supply and public service contracts

Concerning the award of public work contracts, public supply and public service contracts, there are agreements on international level, laws and ordinances on federal level and an intercantonal agreement as well as laws and ordinances on cantonal level:

Switzerland is part of the Government Procurement Agreement of the World Trade Organization,[936] which determines criteria for procurements of goods, services and construction services of certain procuring entities for contracts worth more than specified threshold values. Exceeding the scope of the WTO-Agreement, as part of the Bilaterals I, Switzerland concluded an agreement with the European Union on certain aspects of government procurement,[937] determining criteria for the putting out to international public tender for certain procurements.[938]

On federal level the procurement of goods and services is governed by the Federal Act- and the Ordinance on Government Procurement[939] and on cantonal level by the inter-cantonal agreement on public procurements sets procurement directives[940] and cantonal laws and ordinances. According to the volume of orders there are different allocation procedures.

Anti-discrimination legislation

See section 6.3 – Restrictions on choice of tenant – antidiscrimination issues.

Energy efficiency in buildings

There are currently no obligations for Switzerland to align to energy efficiency rules of the European Union. However, it is planned to negotiate a comprehensive energy agreement with the EU in the long term.[941] For further information about energy efficiency in buildings, see section 3.5 Energy policies.

General Terms and Conditions

As mentioned above, the wording of the clause concerning general terms and conditions in the Swiss Unfair Competition Act is similar to Art. 3 s. 1 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. It is however not clear whether leases of residential premises are considered consumer contracts and whether the provision is applicable also to consumer-to-consumer contracts (see also section 6.3 – Control of contractual terms).

Jurisdiction and applicable law

The jurisdiction and applicable law are governed by the Lugano Convention[942] which regulates the jurisdiction and the recognition and enforcement of judgments in civil

[936] Übereinkommen über das öffentliche Beschaffungswesen (SR 0.632.231.422).
[937] Abkommen zwischen der Schweizerischen Eidgenossenschaft und der Europäischen Gemeinschaft über bestimmte Aspekte des öffentlichen Beschaffungswesens (SR 0.172.052.68).
[938] For more information about these international agreements, see Information sheet 'Öffentliches Beschaffungswesen' (Berne: DEA, 2013).
[939] Bundesgesetz über das öffentliche Beschaffungswesen (SR 172.056.1) and Verordnung über das öffentliche Beschaffungswesen (SR 172.056.11).
[940] Interkantonale Vereinbarung über das öffentliche Beschaffungswesen of 15 March 2001.
[941] Directorate for European Affairs (http://www.europa.admin.ch/themen/00499/00503/00563/index.html?lang=en [last retrieved 21 March 2014]).
[942] Übereinkommen über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen (SR 0.275.12).

and commercial matters and by the Federal Act on Private International Law[943] which regulates the jurisdiction, the applicable law and the recognition and enforcement of foreign judgments in international matters.

8 Typical national cases (with short solutions)

Tenant leaving the dwelling before the expiry of the notice period

A tenant wants to leave the dwelling before the expiry of the notice period. Does the tenant have to pay the rent until the end of the notice period, or is it possible for him to be released from the contract earlier?

> If the tenant can present at least one suitable and solvent new tenant, who is willing to accept a contract with the same conditions as the current tenant has, the landlord must release him from the contract.

Payments on account

A landlord demands from the tenant a monthly payment of CHF 150.- on account for accessory charges. The annual accounting showed that the actual costs are more than twice as high as the accounted costs. The landlord demands the tenant to pay the difference.

> According to the freedom of contract, the landlord is free to set the amount of the payments on account as he wishes. The tenant cannot refuse to pay the difference to the actual costs. He would only stand a chance before court, if he could prove that the landlord made an explicit warranty that the accounted costs approximately cover the expected actual expenses (BGE 132 III 24).

Challenging the initial rent

A tenant concludes a contract for a new apartment. He finds out that he pays much more than the previous tenant. Can he do something about that?

> Art. 270 s. 1 CO: The initial rent may be challenged as unfair and the tenant can request a reduction of the rent within thirty days of taking possession of the property:
>
> - if the tenant felt compelled to conclude the lease agreement on account of personal or family hardship or by reason of the conditions prevailing on the local market for residential and commercial premises; or
> - if the initial rent required by the landlord is significantly higher than the previous rent for the same property. In practice this means at least ten percent, if there was no renovation work on the property.
>
> If one of these two conditions is fulfilled, the rent is considered unfair:
>
> - the rent permits the landlord to derive excessive income from the leased property; or
> - the rent does not fall within the range of rents customary in the locality or district. This proof is not easy to accomplish.

Chain contracts

A landlord concludes a contract with a tenant for one year. At the end of this year, they conclude another contract for another year and so forth. After some years, the

[943] Bundesgesetz über das Internationale Privatrecht (SR 291).

landlord does not conclude another contract and intends to let the contract expire. Does the tenant have to leave the apartment or can he challenge the non-prolongation of the contract?

> Whether successive contracts ('Kettenverträge') are generally admissible is controversial. They are however always admissible, where there is a legitimate interest for the limitation. A legitimate interest would exist, for example, if the tenant was repeatedly in default of payment. By avoiding the conclusion of permanent rental contracts, the tenants' protection against termination of leases could be diminished. If there is no legitimate interest, the contract must be treated as if it was open-ended contract (BGer 4C.155/2003 E. 3.2).

Defects of the dwelling

A tenant discovers a defect in the dwelling, which is not caused by excessive wear. Who has to pay for the repairs?

- If it is a broken shower hose?
- If a complicated repair of the dishwasher is required?

> The landlord is required to maintain the object in a condition fit for its designated use. Exception: Defects attributable to the tenant and Art. 259 CO: 'Obligation of tenant to carry out minor cleaning and repairs'. In practice, minor repairs do not require specialized knowledge and are less expensive than approximately CHF 150.- (according to local custom). If one of the two criteria is not fulfilled, the defect is not considered 'minor'. The shower hose has to be replaced by the tenant; the technician who repairs the dishwasher has to be paid by the landlord.

Minor repairs

A landlord defined in the general terms and conditions that the maximum cost of a defect to be repaired and still be considered as 'minor' is coupled to the tenant's annual net rent (for example one percent of the annual net rent). A repair/replacement of a particular defect costs CHF 300, which is still less than one percent of the annual net rent but more than the limit for minor defects of about CHF 150 which is applied in practice. Who has to pay?

> The limit set by the landlord is not legally enforceable, since Art. 259 CO is a semi-mandatory legal provision, which could only be altered for the benefit of the tenant.

Service subscription

The landlord obliges the tenant in the rental contract to make a service subscription for the dishwasher and the washing machine. The tenant refuses to do so. The landlord then requests the tenant to pay CHF 180.- for the inspection of the dishwasher and CHF 290.- for the maintenance of the washing machine. The tenant refuses to pay.

> Since repairs which have to be made by experts must be paid for by the landlord, the tenant cannot be obliged to make a service subscription to the extent that the landlord transfers his maintenance obligations by contract to the tenant. The tenant can refuse to pay (Cantonal Court Berne, Decision ZK 12 157 of 27 June 2012).

Excessive wear

At the handover of the apartment, the landlord notices burn holes in the carpet caused by the tenant. He wants the tenant to pay for a new carpet. How much does the tenant have to pay if the carpet was either six or fifteen years old?

> According to Art. 256 CO, the landlord is required to maintain the object in a condition fit for its designated use. If the objects are worn excessively, however, the tenant has to pay the fair value of the object, which is usually calculated after the 'Paritätische Lebensdauertabelle' jointly elaborated by the tenants' association and the landlords' association. Burn holes are considered to be excessive wear. The life of an average carpet is defined as ten years. If the carpet is six years old (no matter how long the tenant lived in the apartment), the tenant has to pay the fair value, thus forty percent of the original price of the carpet. If the carpet was fifteen years old however, the tenant does not have to pay for the carpet. (Paritätische Lebensdauertabelle: http://www.mieterverband.ch/smv_lebensdauertab.0.html [3 December 2013])

Rent reduction

A tenant lives on the fourth floor of a multi dwelling building. The elevator breaks. The landlord intends to repair the elevator, but it takes two months before the repair is completed. Can the tenant reduce the rent?

> Yes, but he needs to be careful to avoid the risk that the landlord could then terminate the lease for getting into rent arrears. The tenant has the right to a reduced rent from the first notification of the defect until its remedy. The tenant must notify the defect to the landlord and request a reduction of the rent. If the landlord and tenant do not agree on a reduction, the tenant must submit a request to the conciliation authority. In a decision regarding such a defect, a reduction of ten percent was granted (Summary of court decisions: http://www.mieterverband.ch/fileadmin/alle/Dokumente/Merkblaetter/maengel/mb_mangel_senkungsentscheide.pdf [3 December 2013])

Deposition of the rent

A tenant claims that his rental apartment suffers from a defect and requests the landlord to remedy it. The tenant deposits the rent correctly with an office designated by the canton, but the landlord terminates the lease because of arrears with payments, claiming that there was no defect in the first place. Can the tenant challenge the termination?

> Rent paid on deposit is deemed duly paid (Art. 259g s. 2 CO). However, this is valid only for the legitimate deposition of the rent. The tenant fulfilled all formal requirements, but the landlord contests its legitimacy by denying the existence of a defect. If there is no defect, the deposition would not be legitimate, and the tenant would be in arrears with payments, which would justify the termination of the lease. If, however, the tenant deposited the rent in good faith concerning the existence of a defect, the rent would still be deemed duly paid. (BGE 125 III 120)

9 Tables

9.1 Literature

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http://www.europa.admin.ch/themen/00500/index.html?lang=en	Overview of the Bilateral Agreements Switzerland – EU
http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc_mded01&lang=de	Percentage of the disposable household income used as housing costs (Eurostat SILC)
http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do	Share of housing costs in disposable household income, above and below 60% of median equivalised income (Eurostat SILC)
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http://www.bsv.admin.ch/themen/gesellschaft/00072/index.html?lang=en http://www.skos.ch/	Swiss Conference for Social Welfare (SKOS) and Guidelines
http://www.news.admin.ch/message/index.html?lang=en&msg-id=43142	Special housing policies targeted at travelers

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http://www.bfu.ch/PDFLib/812_105.pdf	Structural safety
http://www.bfe.admin.ch/energie/00588/00589/00644/?lang=de&msg-id=42237 www.dasgebaeudeprogramm.ch	Buildings programm ('Das Gebäudeprogramm')
http://www.wohnbaugenossenschaft-gruenden.ch/wie_fuehren/weitere_gemeinnuetzige_bautraeger.html	Types of non-profit housing organizations
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http://www.mietrecht.ch/32.0.html	Paritätische Lebensdauertabelle
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http://www.mieterverband.ch/be_schlicht_behoerde.0	Termination dates of different

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http://www.bwo.admin.ch/themen/mietrecht/00161/index.html?lang=de	Berichte über die Tätigkeit der paritätischen Schlichtungsbehörden in Miet- und Pachtangelegenheiten
https://www.bfm.admin.ch/content/bfm/en/home/themen/aufenthalt.html	Overview of the different residence permits
http://www.bfs.admin.ch/bfs/portal/de/index/themen/17/03/blank/key/2012/011.html	Results of the vote on the popular initiative 'Schluss mit uferlosem Bau von Zweitwohnungen!'.
http://www.europa.admin.ch/themen/00500/00507/index.html?lang=en http://www.europa.admin.ch/themen/00500/index.html?lang=en	Bilateral Agreements Switzerland – EU
http://www.europa.admin.ch/themen/00500/00506/00520/index.html?lang=en	Technical barriers to trade
http://www.europa.admin.ch/themen/00499/00503/00563/index.html?lang=en	Energy Agreement Switzerland-EU
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Federal Laws and International Agreements

Federal Laws and international agreements are available in different languages on the website of the Federal Authorities of the Swiss Confederation at http://www.admin.ch/bundesrecht/00566/index.html?lang=de (in German, French, Italian and some also in Rumantsch and/or English).

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151.3	Federal Law on Equal Rights 166ort he Disabled of 13 December 2002 (Bundesgesetz über die Beseititung von Benachteiligungen von Menschen mit Behinderungen).
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220	Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code, Part Five: The Code of Obligations (Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches, Fünfter Teil: Obligationenrecht), CO.
221.213.11	Ordinance of 9 May 1990 on the Lease and the Usufructuary Lease of Residential and Business Premises (Verordnung über die Miete und Pacht von Wohn- und Geschäftsräumen), VMWG.
221.213.15	Law on Frame Lease Agreements of 23 June 1995 (Bundesgesetz über Rahmenmietverträge und deren Allgemeinverbindlicherklärung).
235.1	Federal Act of 19 June 1992 on Data Protection (Bundesgesetz über den Datenschutz).
241	Federal Act of 19 December 1986 against Unfair Competition (Unfair Competition Act, Bundesgesetz gegen den unlauteren Wettbewerb), UWG.
272	Swiss Civil Procedure Code of 19 December 2008 (Schweizerische Zivilprozessordnung), CPC.
281.1	Federal Act of 11 April 1889 on Debt Enforcement and Bankruptcy (Bundesgesetz über Schuldbetreibung und Konkurs), DEBA.
291	Federal Act on Private International Law of 18 December 1987 (Bundesgesetz über das Internationale Privatrecht).
311.0	Swiss Criminal Code of 21 December 1937 (Schweizerisches Strafgesetzbuch), SCC.

641.71	Federal Act of 23 December 2011 on the Reduction of CO_2 Emissions (Bundesgesetz über die Reduktion der CO_2-Emissionen), CO_2-Gesetz.
642.11	Federal Act of 14 December 1990 on Direct Federal Taxation (Bundesgesetz über die direkte Bundessteuer), DBG.
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730.0	Energy Act of 26 June 1998 (Energiegesetz), EnG.
730.01	Energy Ordinance of 7 December 1998 (Energieverordnung), EnV.
814.318.142.1	Ordinance on Air Pollution Control of 16 December 1985 (Luftreinhalte-Verordnung).
819.13	Ordinance on the safety of lifts of 23 June 1999 (Verordnung über die Sicherheit von Aufzügen).
831.40	Federal Law of 25 June 1982 on Occupational Old Age, Survivors' and Invalidity Pensions (Bundesgesetz über die berufliche Alters-, Hinterlassenen- und Invalidenvorsorge), BVG.
831.411	Ordinance of 3 October 1994 on the use of occupational pension fund assets to promote home ownership (Verordnung über die Wohneigentumsförderung mit Mitteln der beruflichen Vorsorge), WEFV.
831.441.1	Ordinance of 18 April 1984 on Occupational Old Age, Survivors' and Invalidity Pensions (Verordnung über die berufliche Alters-, Hinterlassenen- und Invalidenvorsorge) BVV 2.
831.461.3	Ordinance on the tax deductibility of contributions to recognized forms of benefit schemes (Verordnung über die steuerliche Abzugsberechtigung für Beiträge an anerkannte Vorsorgeformen), BVV 3.
842	Federal Act for the promotion of Affordable Housing of 21 March 2003 (Federal Housing Act; Bundesgesetz über die Förderung von preisgünstigem Wohnraum), WFG.
842.1	Ordinance of 26 November 2003 on the Federal Act for the promotion of Affordable Housing (Verordnung über die Förderung von preisgünstigem Wohnraum), WFV.
843	Housing construction and Housing Ownership Promotion Act of 4 October 1974 (Wohnbau- und Eigentumsförderungsgesetz), WEG.
843.1	Ordinance of 30. November 1981 on the Housing construction and

	Housing Ownership Promotion Act (Verordnung zum Wohnbau- und Eigentumsförderungsgesetz), VWEG.
930.11	Law on product safety of 12 June 2009 (Bundesgesetz über die Produktesicherheit).
933.0	Law on construction products of 8 October 1999 (Bundesgesetz über Bauprodukte).
933.11	Ordinance on construction products of 27 November 2000 (Verordnung über Bauprodukte).
946.51	Law on technical barriers to the trade of 6 October 1995 (Bundesgesetz über die technischen Handelshemmnisse), THG.
951.31	Federal Act on Collective Investment Schemes of 23 June 2006 (Bundesgesetz über die kollektiven Kapitalanlagen).

Cantonal Laws

Basel Stadt	SG Systematische Gesetzessammlung Basel-Stadt, available at http://www.gesetzessammlung.bs.ch/
SG 730.100	- Bau- und Planungsgesetz Basel Stadt of 17 November 1999.
Berne	BSG Bernische Systematische Rechtssammlung BELEX, available at http://www.sta.be.ch/belex/d/bsg_search.asp
BSG 721.1	- Bauverordnung of 6 March 1985.
Geneva	RSG Recueil systématique genevois, available at http://www.geneve.ch/legislation/
RSG L 5 05	- Loi sur les constructions et les installations diverses of 14 April 1988.
RSG L 5 05.01	- Règlement d'application de la loi sur les constructions et les installations diverses of 27 February 1978.
Zurich	LS (Loseblattsammlung) Zürcher Gesetzessammlung (ZH-Lex), available at http://www.zh.ch/internet/de/rechtliche_grundlagen/gesetze.html
LS 230	- Einführungsgesetz zum Schweizerischen Zivilgesetzbuch of 2 April 1911.
LS 846.100	- Verordnung der Stadt Zürich über die Grundsätze der Vermietung, Gemeinderatsbeschluss of 6 September 1995.
LS 700.1	- Planungs- und Baugesetz of 7 September 1975.
LS 700.21	- Besondere Bauverordnung I of 6 May 1981.

9.2 List of Cases

Federal Court

BGE 124 I 127	Housing shortage.
BGer 4C.121/2005 of 5 July 2005	Fees of real estate agents.
BGer 4C.128/2006 of 12 June 2006	Areas to stay and for transiting for traveller communities; Provisions on protection of residential premises.
BGE 124 III 149	Possibility to renounce in advance to claim compensation for renovation or modification measures by the tenant.

BGer 4A_387/2013 of 17 February 2014	Conciliation proceedings; Parties in default, Obligation to appear in person.
BGE 133 III 493	Appeal with the Federal Supreme Court; Questions involving a fundamental question of law.
BGE 136 III 257	Definition of 'family residence'.
BGE 124 III 62	Obligation to use a form for contracting a new lease; Legal consequences in case of non-compliance.
BGE 119 II 347	Court can set the amount of rent only retroactively, not for the future.
BGer 4A_173/2010 of 22 June 2010	Impossibility of a tenancy contract at the time of the conclusion.
BGer 4C.161/2001 of 26 September 2001	Validity of tie-in transactions.
BGE 135 III 537	Fundamental error; Habitable surface as a necessary basis of a contract, especially in contracts about commercial premises.
BGer 4A.465/2010 of 30 November 2010	Wrong indication of habitable surface of a dwelling; Requirements for rent reduction.
BGer 4A.465/2010 of 30 November 2010	Legal consequences of wrong data indicated erroneously by the landlord before conclusion of the contract.
BGer 4C.43/2001 of 20 June 2001	Art. 253a s. 1 CO; The term 'object' also covers premises for residential use.
BGE 125 III 231	Art. 253a s. 1 CO; Sufficient connection between two premises.
BGE 136 III 186	Persons allowed moving in with the tenant.
BGE 138 III 59	Right of the tenant to sublet the dwelling: Restrictions.
BGE 134 III 300	Right of the tenant to sublet the dwelling.
BGE 124 III 62	Rules applicable on sublease contracts.
BGer 4C.155/2003 of 3 November 2003	Admissibility of chain contracts.
BGE 131 III 566	Challenging the initial rent; Excessive rent is considered accepted where the tenant does not challenge it within a certain period of time.
BGer 4C.367/2001 of 12 March 2002	Challenging the initial rent; The existence of the conditions required has to be established by the tenant.
BGE 136 III 82	Challenging the initial rent; Conditions.
BGE 121 III 163	Challenging a rent increase; Relative and absolute method of

	calculation: Request for rent reduction. The landlord may invoke that the existing rent is not unfair according to the absolute method.
BGE 133 III 61	Request for rent reduction; Assessment according to the relative method.
BGE 132 III 702	Challenging the initial rent and rent increases and request for rent reduction; Proceedings.
BGE 124 III 310	Legal presumptions of Art. 269a s. a-f CO are rebuttable.
BGE 123 III 317	Rents falling within the range of rents customary in the locality or district; Proof (official statistics or at least 5 comparable apartments).
BGE 136 III 74	Rents falling within the range of rents customary in the locality or district; Proof (Requirements of the comparable apartments).
BGer 4C.176/2003 of 13 January 2004	Rents falling within the range of rents customary in the locality or district; Proof (‘Mietpreisraster’ Base]).
BGer 4A_612/2012 of 19 February 2013	Rents falling within the range of rents customary in the locality or district; Proof (cantonal statistics of Geneva).
BGer 4C.176/2003 of 13 January 2014	Rents falling within the range of rents customary in the locality or district; Relation to rent allowing the landlord to derive excessive income from the property.
BGer 4C.323/2001 of 9 April 2002	Rent falling within the range of rents customary in the locality or district; Relation to rent allowing the landlord to derive excessive income from the property.
BGer 4C.157/2001 of 1 October 2001	Increases in costs other than mortgage rates; Lump-sums.
BGE 111 II 378	Increases in costs other than mortgage rates; Lump-sums.
BGE 120 II 302	Assessing rents according to the absolute and relative calculation method.
BGE 127 III 273	Restrictions on set-off after opening of bankruptcy.
BGE 124 III 57	Clauses on rent increase; Index-oriented rent and automatic increase clause.
BGE 121 III 397	Stepped rent; Tenant may challenge the initial rent but not rent increases.
BGer 4C.82/2000 of 24 May 2000	Accessory charges; The landlord must not make profit out of accessory charges.
BGE 121 III 460	Accessory charges: Conditions for passing on accessory charges to the tenant.
BGer 4P.323/2006 of 21 March 2007	Accessory charges; Conditions for passing on accessory charges to the tenant.
BGE 132 III 24	Accessory charges; Payments on account.

BGer 4C.384/2005 of 22 March 2006	Defects; Definition.
BGer 4C.168/2001 of 17 August 2001	Defects; Serious defects.
BGer 4C.164/1999 of 22 July 1999	Defects; Noise and disturbances of neighbours and third persons.
BGE 130 III 504	Defects; Rent reduction.
BGer 4C.248/2002 of 13 December 2001	Defects; Rent reduction (procedure).
BGE 135 III 345	Defects; Rent reduction (small impairments of the dwelling).
BGE 125 III 120	Defects; Deposition of the rent in good faith.
BGE 124 III 201	Defects; Deposition of the rent.
BGE 121 III 6	Rent increase; Stating of reasons for rent increase by the landlord.
BGE 128 III 419	Rent increase; Tenancy contracts limited in time.
BGer 1C_496/2012 of 12 February 2013	Rent increase after renovation measures; Permission for demolition, renovation measures or change in purpose of a dwelling may be linked to rent control by cantonal law.
BGE 116 Ia 401	Rent increase after renovation measures; Permission for demolition, renovation measures or change in purpose of a dwelling may be linked to rent control by cantonal law.
BGer 4C.287/2001 of 26 March 2002	Rent increase after renovation measures; Value-adding part of investment costs (new windows).
BGer 4A_495/2010 and 4A_505/2010 of 20 January 2011	Rent increase after renovation measures; Value-adding part of complete renovations.
BGE 134 III 159	Cooperative housing organisations; Cost rents and applicability of the provisions governing challenges to unfair rents.
BGE 124 III 149	Improvements of the dwelling by the tenant; Compensation.
BGer 4A_541/2011 of 28. March 2012	Parabolic antennas; Approval of the landlord.
BGE 135 III 112	Notice of termination by the landlord; Renovation works.
BGE 123 III 124	Notice of termination by the landlord; Breach of contract (change of use of a dwelling).
BGer 4A_429/2010 of 6 October 2010	Notice of termination by the landlord; Breach of contract (change of use of a dwelling).
BGer 1C_440/2007 of 25 March 2008	Fixing pamphlets outside; Freedom of expression.
BGE 136 III 186	Obligations of the tenant; Living in the dwelling.

BGer 4C.345/2005 of 9 January 2006	Notice of termination by the landlord; Good cause.
BGer 4A_536/2009 of 2 February 2010	Notice of termination by the landlord; Good cause.
BGE 122 III 262	Notice of termination by the landlord; Good cause.
BGer 4C.384/2005 of 22 March 2006	Notice of termination by the landlord; Termination with immediate effect in case of serious defects.
BGE 119 II 36	Notice of termination by the tenant; Leaving the dwelling prematurely (requirements for a proposed new tenant).
BGer of 6 April 1998, in: *SJ* (1998): 732-734	Notice of termination by the tenant; Leaving the dwelling prematurely (requirements for a proposed new tenant).
BGE 133 III 175	Ordinary notice of termination by the landlord. Without challenging, even a termination contravening the principle prohibiting the abuse of right comes into effect.
BGE 121 III 156	Extraordinary notice of termination by the landlord: Legal consequences in case of non-existence of the indicated reasons for giving notice.
BGE 127 III 548	Tenant in arrears; Liability of the tenant for damages resulting of the non-payment of the rent.
BGE 134 III 300	Notice of termination by the landlord; Care and consideration (subletting the apartment without consent of the landlord).
BGer of 4 June 1998 in: *mp* (1998): 130-132	Notice of termination by the landlord; Care and consideration (repeated night disturbances).
BGer 4C.306/2003 of 20 February 2004	Notice of termination by the landlord; Care and consideration (tenant refuses to tolerate works and renovations).
BGE 123 III 124	Notice of termination by the landlord; Care and consideration (use of the dwelling in accordance with the contract in general).
BGE 125 III 123	Notice of termination by the landlord; Change of ownership through debt collection or bankruptcy proceedings.
BGE 132 III 737	Notice of termination by the landlord; Change of ownership (Liability of the old landlord towards the tenant).
BGer of 9 May 1989, in: *mp* (1989): 171-173	Notice of termination by the landlord; Change of ownership (removal expenses).
BGE 135 III 441	Notice of termination by the landlord; Change of ownership (urgent need).
BGE 136 III 190	Challenging the notice of termination before court; Abuse of rights within the meaning of Art. 271 s. 1 CO.
BGE 135 III 112	Challenging the notice of termination before court; Examples of

	wrongful termination.
BGE 136 III 190	Challenging the notice of termination before court. Examples of wrongful termination.
BGE 120 II 105	Challenging the notice of termination before court; Examples of wrongful termination.
BGer 4A_472/2007 of 11 March 2008	Challenging the notice of termination before court. Examples of wrongful termination.
BGer 4A_448/2009 of 1 February 2009	Challenging the notice of termination before court; Obligation of the landlord to cooperate in establishing the facts.
BGE 121 III 156	Extraordinary notice of termination; Nullity of a notice of termination, where actually no reason was given.
BGE 137 III 389	Extraordinary notice of termination; Conversion of an extraordinary termination into an ordinary termination and giving subsidiary ordinary notice together with an extraordinary notice.
BGer 4C.223/2006 of 7 September 2006	Extraordinary notice of termination; Conversion into another kind of extraordinary termination.
BGE 135 III 121	Extension of the lease; Extension only possible for a clearly specified period of time.
BGer 4A.467/2009 of 19 November 2009	Extension of the lease; Waiver of the tenant's right to extension of the lease after the notice of termination was given.
BGE 132 II 209	Building permissions of third persons and land use plans; The tenant's right to appeal.

Cantonal and regional courts

Cantonal Court Geneva	Decision of 29 February 1988 'Mangelhafte Raumtemperatur', in: *mp* (1988): 110-111.
President of the District Court Rorschach (St. Gallen)	Decision of 4 December 1987 'Anspruch auf Mietzinsherabsetzung und Schadenersatz bei Mängeln', in: *mp* (1988): 106-109.
Cantonal Court Solothurn	Decision of 7 July 2000 'Fristlose Kündigung bei Mängeln', in: *mp* (2003): 67-70.
Rental Court District of Zurich	Decision of 23 December 1987 'Mängel aus Verhalten der Mieter. Massagesalon', in: *mp* (1988): 112-114.
President of the Administrative Court of the canton St. Gallen,	Decision of 24 August 2006 (B 2006/88).
District Court	Decision of 24 September 2000 'Mietrecht', in: *SJZ* (2002):

Bülach (Zurich)	108-113.
Cantonal Court Berne	Decision ZK 12 157 of 27 June 2012

9.3 List of Abbreviations

Art.	Article
AJP	Aktuelle juristische Praxis
ARE	Federal Office for Spatial Development
ASLOCA	Association Suisse des Locataires
BDS	Buildings and Dwellings statistic
BGE	Published decisions of the Swiss Federal Court
BGer	Non-published decisions of the Swiss Federal Court
BGG	Federal Supreme Court Act
BVG	Federal Law on Occupational Old Age, Survivors' and Invalidity Pensions.
BVV 3	Ordinance on the tax deductibility of contributions to recognized forms of benefit schemes.
CC	Swiss Civil Code.
CO	Code of Obligations.
CO_2-Gesetz	Federal Act on the Reduction of CO_2 Emissions.
Const.	Federal Constitution of the Swiss Confederation.
CPC	Swiss Civil Procedure Code.
DBG	Federal Act on Direct Federal Taxation.
DEA	Directorate for European Affairs
DEBA	Federal Act on Debt Enforcement and Bankruptcy
EAER	Federal Department of Economic Affairs, Education and Research
EFTA	European Free Trade Association
e.g.	exempli gratia (for example)
EnG	Energy Act
et al.	et alii (and others)
EU	European Union
f. / ff.	and the following
FDF	Federal Department of Finance
FDHA	Federal Department of Home Affairs
FINMA	Swiss Financial Market Supervisory Authority
FOH	Federal Office for Housing
FOJ	Federal Office of Justice

FOM	Federal Office for Migration
FSIO	Federal Social Insurance Office
FSO	Federal Statistical Office
FTA	Federal Tax Administration
HEV	Swiss Landlords Association
i.e.	id est (that is)
MRA	Mietrecht Aktuell
RPG	Federal Law on Spatial Planning
SCC	Swiss Criminal Code
SFOE	Swiss Federal Office of Energy
SILC	Statistics on Income and Living Conditions
SJ	La Semaine Judiciaire (1965-1998)
SJZ	Schweizerische Juristen-Zeitung
SKOS	Swiss Conference for Social Welfare
SNB	Swiss National Bank
SR	Systematic order, Classified Compilation of Federal Law
SSK	Schweizerische Steuerkonferenz, Vereinigung der schweizerischen Steuerbehörden
StHG	Law on the harmonization of the direct taxation of cantons and municipalities
SVIT	Swiss Real Estate Association
UWG	Unfair Competition Act
VWEG	Ordinance on the Housing construction and Housing Ownership Promotion Act
VMWG	Ordinance on the Lease and the Usufructuary Lease of Residential and Business Premises
WEFV	Ordinance on the use of occupational pension fund assets to promote home ownership.
WEG	Housing construction and Housing Ownership Promotion Act.
WFG	Federal Act for the promotion of Affordable Housing (Federal Housing Act)
WFV	Ordinance on the Federal Act for the promotion of Affordable Housing
ZBJV	Zeitschrift des Bernischen Juristenvereins