

Legal Update

Rental Cap on Berlin Residences

The Berlin Senate, on 22 October 2019 decided to introduce legislation to stop the rental price development for residential properties (**"Properties"**) in Berlin for a period of five years. The Act on the limitation of rents (*"Gesetz zur Neuordnung gesetzlicher Vorschriften zur Mietenbegrenzung"*, the **"Act"**) is supposed to come in force in January 2020 and shall have a duration of five years. After certain restrictions on increases of residential property rents (*"Mietpreisbremse"*) introduced by the federal legislator in 2015, the Act, which affects approx. 1.5 million Properties in Berlin, goes far beyond federal legislation. It intends to freeze rents on the level effective 18 June 2019 (the **"Reference Date"**) and is estimated to allow up to 300,000 tenants to reduce their rents.



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The Act though has to pass the Berlin parliament and be considered constitutional by the local and federal courts – something that is at least doubtful given the massive effect of the Act to property owners and investors. The belowsaid information is provided based on information available up and until 31 October 2019. It is still possible that the Berlin parliament changes part of the Act or that after a court defeat part or the entirety of the Act will be redrafted. In addition to the overview given in advance, please read the Q&A catalogue for more details.

Scope of Application

The Act calls on a rent freeze on Properties for a period of five years starting on the date of its publication in the Official Gazette (*"Gesetz- und Verordnungsblatt"*). However, from 1 January 2022 onwards, property owners may increase rents in line with the inflation rate to a maximum of 1.3% per year limited by the upper rent limits (see details below). The Ministry for Urban Development and Housing shall determine the admissible increase amounts.

The Act covers all residential properties (be it unfurnished or furnished property) with exemptions of

- Properties that were ready for occupancy for the first time ever from 1 January 2014 onwards;
- Publicly subsidised Properties;
- Properties for which funds from public budgets have been granted for modernization and repair measures and subject to a fixed rent (*"Mietpreisbindung"*);
- Housing in a dormitory and
- Property, which is rented or leased by a legal person under public law or a recognised private welfare organizations to persons with urgent housing or nursing needs.

Rent Increases

The Act provides a rent table with upper rent limits (see details below). The applicable upper rent limit for a specific property needs to be calculated on a case-by-case basis taking into account further *factors*, especially the location and the existence of modern equipment (see details below).

In existing tenancies, rents must not be increased beyond the level they had on the Reference Date (Pre-Rent). If the Pre-Rent exceeds the upper rent limit (see table below), it must be capped to the applicable upper rent limit.

For re-lettings, the rent must not exceed the applicable upper rent limit.

Rents for new lettings after the reference date have to comply with the applicable upper rent limits and shall be calculated based on the rent tables (see below). If the rent for a property with modern equipment is particularly low (less than 5.02 Euro/sqm), it may be raised by a maximum of 1.00 Euro/sqm to a maximum of 5.02 Euro/sqm.

Property owners can apply for approval for rents in excess of the upper rent limits if the applicable upper rent limit results in losses for the property owner or threatens the substance of the Property.

Applications for approval must be filed with the Investitionsbank Berlin, shall be resolved within three months after submission and notified to property owners and tenants.

Modernization

Costs of certain modernization measures (“**Eligible Modernization Measures**”, see details below) may be allocated to tenants in accordance with the regulations in the German Civil Code. Even if the allocation does not exceed the amount of 1.00 Euro/sqm and the upper rent limit by more than 1.00 Euro/sqm the modernization costs need to be notified to the Investitionsbank Berlin. The purpose of the notification is not quite clear since there are no consequences attached to the notification. The Act states, however, that subsidy schemes will be created to cover additional costs of up to a further 1.00 Euro. Costs for other modernization measures than Eligible Modernization Measures must not be allocated to tenants in Berlin. This creates a conflict with the German Civil Code. It remains to be seen, if this last provision will stay in the Act and withstand legal review.

Cases of Hardship

In cases of hardship on the part of property owners, the Investitionsbank Berlin can approve rent increases exceeding the upper rent limit if this is necessary to avoid endangering the substance of the Property or to avoid sustainable losses on the part of the property owner.

Consequences: Caps, Information Obligations and Fines

Property owners are not allowed to increase the rent in excess of the respective upper rent limit. If they do, the Ministry of Urban Development and Housing on application of the tenant is entitled to cap the rent accordingly. Applications for caps will be admissible if the agreed rent exceeds the upper rent limit by more than 20%. The capped rent will be effective the month following the application. Cap decisions may not be made before nine months after the Act enters into force.

Property owners are obliged to inform tenants about the applicable Pre-Rent before a new lease agreement is concluded, and anytime if the tenant so requests. In addition, property owners have to inform tenants without solicitation about all factors required for calculating the applicable upper rent limit within two months after the Act enters into force.

Violations of the requirements of the Act will be regarded as an administrative offence with a fine of up to 500,000 Euro per violation.

Questions and Answers:

Q: What does „rent“ mean for the purpose of the rental cap?

A: „Rent“ for the purpose of the Act always refers to the net cold rent (Netto-Kaltmiete), including all surcharges, e.g. for furniture or equipment. The conclusion of separate lease agreements for furniture (e.g. in case of a furnished apartment) may be regarded as circumvention of the Act. With regard to the obvious unfairness of such clause, this rule may be subject to scrutiny in the legislative process.

Q: How do I calculate the applicable upper rent limit?

A: The applicable upper rent limit is determined based on the Pre-Rent on the Reference Date for existing tenancies or based on the rent table below for new and re-lettings.

First-time occupancy of the Property and equipment	Rental price per square metre
until 1918 with collective heating and with bathroom	6.45 Euro
up to 1918 with collective heating or with bathroom	5.00 Euro
until 1918 without collective heating and without bathroom	3.92 Euro
1919 to 1949 with collective heating and bathroom	6.27 Euro
1919 to 1949 with collective heating or with bathroom	5.22 Euro
1919 to 1949 without collective heating and without bathroom	4.59 Euro
1950 to 1964 with collective heating and bathroom	6.08 Euro
1950 to 1964 with collective heating or with bathroom	5.62 Euro
1965 to 1972 with collective heating and bathroom	5.95 Euro
1973 to 1990 with collective heating and bathroom	6.04 Euro
1991 to 2002 with collective heating and bathroom	8.13 Euro
2003 to 2013 with collective heating and bathroom	9.80 Euro

Depending on the location, the following adjustments shall be made: For simple locations, the upper rent limit reduces by 0.28 Euro/sqm, medium locations shall be considered with a reduction of 0.09 Euro/sqm while good locations allow for a surcharge of 0.74 Euro/sqm. Locations will be classified by the Berlin Ministry of Urban Development and Housing in a separate regulation.

For **spaces in Properties with no more than two apartments**, the upper rent limits increase by 10%.

For Properties with modern equipment, the upper rent limits increase by 1.00 Euro/sqm.

Q: What is considered as “modern equipment”?

A: A modern equipment is deemed to be given with the existence of at least three of the following characteristics:

- Elevator accessible without thresholds,
- fitted kitchen,
- high-quality sanitary equipment,
- high-quality floor covering in the majority of living spaces,
- energy consumption parameter of less than 120 kWh/sqm.

Q: What about rent increases before the Act is entering into force?

A: The opinion of the Ministry for Urban Development and Housing is that, as the Act will be applied retroactively back from the Reference Date, rent increases after that date but before the Act enters into force, need to comply with the applicable upper rent limits.

Q: What are Eligible Modernization Measures?

A: Eligible Modernization Measures are those:

- to which property owners are legally obliged,
- for thermal insulation of the building envelope, the basement ceiling, the top floor ceiling or the roof,
- for the use of renewable energies,
- for window renewal,
- to replace the heating system,
- for elevator extension or
- to dismantle barriers by removing thresholds, widening doors or converting bathrooms.

Q: What can property owners do against rent cap decisions by the Ministry of Urban Development and Housing?

A: Rent cap decision can be fought by filing a formal objection (“*Widerspruch*”) with the Ministry of Urban Development and Housing. If the objection is turned down a lawsuit against the Land Berlin before the administrative court of Berlin can be filed. The legal remedies do not have suspensive effect. If suspension of the rent cap decision is required, a separate claim needs to be submitted to the administrative court.

Q: What steps do property owners have to take?

A: We recommend the following measures to property owners:

1. Check, if you have eligible Properties in your portfolio and if they are compliant with applicable upper rent limit.
2. If action with regard to tenants and/or lease agreements appear to be necessary, check with your in-house or external legal team.
3. Prepare for providing tenants with the information to be provided regarding construction, energy consumption, etc., if not already provided. All factors influencing the calculation of the applicable upper rent limits for a Property in the scope of the Act need to be communicated to tenants within two months after the Act enters into force.
4. Discuss balance sheet and valuation implications with your advisors.

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