

## Law passed to regulate rental housing market in Berlin

Dr. Benjamin Schirmer and Dr. Julius Städele, LL.M. (Cambridge)

Following months of political wrangling, on 30 January 2020 the Berlin House of Representatives passed the “Law on the Revision of Statutory Provisions for Rent Limitation” for the Federal State of Berlin. The new statute constitutes rent-control legislation under public law. Its purpose is to influence market developments with the aim of ensuring that housing remains affordable until the situation in the Berlin housing market eases. In addition to a rent freeze, i.e. a freezing of the rents as agreed at a certain reference date, the legislation also provides for absolute rent ceilings covering new and existing rents, thereby implementing a rent cap.

The law incorporates the key provisions approved by the Berlin Senate on 18 June 2019. The draft bill, which was initially introduced on 28 November 2019 after lengthy discussions, was substantially amended in the course of the subsequent legislative process. For the most part, the law will enter into force the day after its promulgation in the Berlin Law and Ordinance Gazette, which is expected to happen in February 2020. The rent cap for existing rents comes into force nine months after promulgation of the law.

### I. Key provisions

The main provisions of the law, which is limited to five years, can be summarised as follows:

The law applies to all housing, with the exception of publicly funded housing and new construction, i.e. housing ready for first-time occupation on or after 1 January 2014. A total of around 1.5 million rented apartments will be covered by the law.

The law provides for a rent freeze (section 3 of the law) which is conceived as a statutory prohibition within the meaning of section 134 of the German Civil Code (BGB). Accordingly, the law imposes a ban on any rent (i.e. net rent excluding heating but including all additional charges) that exceeds the rent agreed with legally binding effect as at 18 June 2019 (the “reference date”). If a stepped or index-linked rent was agreed, the amount of rent due at the reference date applies. If this permitted rent is less than EUR 5.02 per square metre of living space, the rent may increase by EUR 1 when the apartment is re-let, provided it has two modern features (such as a fitted kitchen or high-quality sanitary fixtures). The increase must not lead to a rent that exceeds EUR 5.02 per square metre.

The maximum limits resulting from the rent freeze will increase annually from 1 January 2022 by the rate of inflation, but by no more than 1.3%. The rent ceilings likewise stipulated by the new legislation (see below) may not be exceeded.

The rent freeze is buttressed by rent ceilings which may not be exceeded when housing is re-let or let for the first time (section 4 of the law). This represents a rent cap on new lettings. The ceilings are detailed in the rent table set out in the law. This table stipulates the permissible rent, based on the date on which the apartment was ready for first-time occupation and on its fittings (section 6 of the law). The maximum permissible rent ranges from EUR 3.92 for first-time occupation up to 1918 without central heating and without a bathroom to EUR 9.80 for first-time occupation from 2003 to 2013 with central heating and bathroom. For housing with modern fittings (see above), an additional EUR 1 on the maximum rent is permitted. A rent increase due to modernisation is permissible if the rent-freeze compliant rent does not increase by more than EUR 1 per square metre and at the same time the relevant rent ceiling is not exceeded by more than EUR 1 (section 7 of the law).

The law does not provide for any distinction to be made depending on the location of the housing. An apartment on downtown Kurfürstendamm is subject to the same criteria as an apartment on the outer fringes of the city.

During the legislative process, substantial amendments were made to the provision relating to excessive rents, i.e. the rent cap for existing rents (section 5 of the law). Rent is excessive if it exceeds the maximum permissible rent by more than 20%, taking the area into account, and has not been approved. The area (poor/average/good) is only a factor with regard to the rent cap for existing rents: in poor and average areas, the rent ceiling is reduced by EUR 0.28 or EUR 0.09, respectively, while EUR 0.74 is added for good areas. It was originally envisaged that the relevant Senate Department would reduce the rent at the tenant's request. The law now merely states that excessive rent is prohibited. Here again, this can be regarded as a statutory prohibition within the meaning of section 134 of the German Civil Code (BGB). As a result, it is necessary for the tenant to challenge excessive rent demands made by the landlord and to recover any excessive rent payments from the landlord. The disputes arising in this context are a matter for the civil courts. The competent Senate Department will monitor compliance with the ban on excessive rent and may, ex officio, take any measures necessary for enforcing the prohibition. The rent cap in relation to existing rents does not come into force until nine months after promulgation of the law.

A hardship clause provides that a higher rent may be approved to avoid undue hardship (section 8 of the law). Investitionsbank Berlin is responsible for this aspect. The law stipulates that undue hardship exists if maintaining the level of rent permitted by the law would result in long-term losses for the landlord or materially erode the value of the asset. The possibility that a higher rent may be charged in individual cases is cushioned by the possibility of a rent subsidy for the tenant concerned (section 9 of the law).

Lastly, the law provides for administrative offences, in particular for demanding undue rent. These offences are punishable with a fine of up to EUR 500,000 (section 11 of the law).

## II. Concerns about the constitutionality of the law

As expected, political disputes have continued after publication of the draft bill and the amendments made during the legislative process have failed to dispel concerns around the constitutionality of the law.

In addition, the authority of the Federal State of Berlin to enact such legislation has been widely questioned. It is argued that the German federal government has already enacted definitive provisions by way of the rent regulations laid down in the German Civil Code. It is certainly the case that as a result of the new law landlords can no longer make use of the option of increasing the rent within the constraints of the “rent brake”. There is also a view that the law interferes disproportionately with landlords’ fundamental right of ownership. Linking the rent freeze to the reference date of 18 June 2019, meanwhile, has led to a discussion about retroactive effect, which the German constitution only permits within narrow limits.

The opposition in the Berlin House of Representatives has announced that it will ask the Berlin Constitutional Court to conduct an abstract judicial review of the law. An application to this effect is expected to be submitted before the summer break. Regardless of this move, it is possible that the Federal Constitutional Court will also be confronted with the new law in the context of civil court proceedings between tenants and landlords or through separate applications. Only a ruling at the highest level will deliver legal clarity.

## III. Consequences in practice

Until the constitutionality of the law has been definitively assessed, landlords should comply with its provisions.

Even at this stage, the initial effects of the law on the Berlin housing market are already evident – although not the effects intended by the law. Many landlords have reduced their investment in new builds and in modernisation and refurbishment. There are also cases of landlords agreeing two rents simultaneously: a “rent-cap rent” which meets the requirements of the law, and a “normal” rent in the event that the law fails to meet the constitutionality test. Lastly, there are already signs of a more cautious valuation of Berlin real estate.

The law now has to demonstrate that it can work in practice. It remains to be seen how many tenants will actually take civil court action against rents that are illegal under the law and what role the Berlin administration will play in enforcing the law. The Berlin administration will have to find workable answers to many unresolved issues. That includes dealing with unsettled rent claims in the event that the law is not upheld.

## Dr. Benjamin Schirmer

Tel: +49 30 20360 2606

E-Mail: [benjamin.schirmer@cms-hs.com](mailto:benjamin.schirmer@cms-hs.com)

Benjamin Schirmer's practice focuses on environmental, planning and construction law and specifically on infrastructure and energy sector projects. In case of large transactions, he coordinates teams across CMS offices and practice areas and acts as a personal contact for all regulatory issues. His clients include public bodies as well as private companies across all industries.



## Dr. Julius Städele, LL.M. (Cambridge)

Tel: +49 30 20360 2606

E-Mail: [julius.staedele@cms-hs.com](mailto:julius.staedele@cms-hs.com)

Julius Städele specialises in public commercial law and procurement, advising public authorities as well as German and international companies on all aspects of public and procurement law. He also represents clients in administrative proceedings and legal disputes and advises them in transactions.

