



Rent Cap (Mietendeckel)

Berlin Capped

On October 22, 2019 the Senate of Berlin approved a rent cap (*Mietendeckel*) in the form of the compromise negotiated on October 17/18

The background of the rent cap is that the Berlin coalition partners are striving to cool down what is perceived as an overpriced rental market and provide relief to renters.

According to information from the Senate, the law is expected to affect approximately 1.5 million households on the renter side.

The so-called "Act for the Reformation of Rent Control Laws"

The Act will introduce three tools for managing the rental market:

1. **Rent freeze**
Rents will be frozen at the levels of June 18, 2019
2. **Rent cap**
Upper rent limits will be introduced for all apartments in the city.
3. **Rent reduction**
Rents will be reduced to a newly defined usury limit.

Regulatory law trumps civil law

Previously uncontrolled, rental prices will be subject to central regulation by the government from now on. The market economy, including the social free market economy, will be suspended across the board.

The rent cap law is prohibitive in nature. Anyone who violates the prohibition or fails to perform legal obligations will commit a regulatory offense that may result in a fine of up to €500,000.

Objections filed against a regulatory measure will have no suspensive effect; the suspensive effect of an objection must be established by an administrative court to avoid regulatory enforcement of the measure.

The Senate Department for Urban Development and Housing will be responsible for capping rental prices, and the IBB Investment Bank Berlin will be responsible for receiving reports of or approving upgrades and for reviewing cases of undue hardship. The district offices will continue to be responsible for all so-called general responsibilities.

Rent cap not in effect yet

The provisions of the Act as they are currently known, including the white paper of June 18, 2019, are not binding yet. The rent cap has not gone into effect yet. The Act is expected to take effect at the end of February 2020. Until then, apartments may be rented out "freely" within the limits of the so-called "rent brake" (*Mietbremse*) provisions of §§ 556d of the German Civil Code (*BGB*), if applicable. The Act will remain in effect for a period of five years from its effective date. It cannot be ruled out that the effective period of the Act will be extended in the future.

When the Act takes effect, rental prices would, in the opinion of the Senate of Berlin, ideally revert to the level of June 18, 2019.

The potential unconstitutionality of the Act, a topic of much debate, does not render the law invalid as long as a court has not determined that the law is in fact unconstitutional. Like all practitioners, we hope for a swift settlement of all open legal issues by the courts. Until the Act is published in the Gazette of New Laws and Regulations (*Gesetz- und Verordnungsblatt*) of the State of Berlin, no complaint can be filed with the Federal Constitutional Court and no legal review can begin.

Penalties will aim at "demands" for excessive rent

Landlords who violate upper rent limits, in particular a (newly defined) usury limit, may commit a regulatory offense. Rent agreed upon before the rent cap takes effect will not satisfy the elements of a regulatory offense, even if the agreed rent exceeds the rent in effect on June 18, 2019 and is not covered by rent increases for upgrades, which are permitted within certain limits, or by hardship provisions.

Once the Act has taken effect, no rent exceeding the legal limits may be demanded as long as it is still uncertain whether the Act is unconstitutional. Even using a direct debit authorization from a tenant may be considered a demand for excessive rent and as such may result in a fine. While a lease agreement may provide for higher rent, the agreement will not be valid with respect to the excess amount.

Taking precautions

If the Federal Constitutional Court were to decide that the Act is unconstitutional, payment of any (suspended) amount of the difference payment of which has not yet been demanded could be demanded later on only if agreed upon in the lease agreement. For such agreements the known rent increase provisions of the Civil Code are available, where applicable as limited by the "rent brake" provisions. Tenants will have to face potential claims for additional rent payments and, if possible, set aside savings.

Absent such an agreement, lost rent cannot be recouped later on. The State of Berlin is not liable for any rent lost as a result of complying with the potentially unconstitutional Act.

To take appropriate precautions, we recommend a careful review on a case-by-case basis.

Apples, pears, and bananas all for the same price

Upper rent limits will be independent of the location of an apartment in the city, its outfitting (except for rough categories), and any other value-relevant features.

Apartments leased on a long-term basis will be treated the same as apartments rented on a short-term basis. The same is true for living space within landlord's apartments and living space in large apartment buildings, and for furnished and unfurnished apartments. Only apartments in buildings with no more than two units will be subject to rent limits that are raised by 10%. Rent for apartments with so-called non-standard outfitting may exceed the upper limit by €1.00.

Irrespective of the above, an apartment on *Kollwitzplatz* or on *Fasanenstrasse* will cost the same as an apartment at *Bahnhof Lichtenberg*. Only the age category of the building and the availability of a central heater, bathroom and/or indoor restroom will still make a difference.

For (new) leases signed after the Act takes effect, at most the previous rent, capped by the upper rent limit, may be collected. The upper rent limit is goes up to €1.00 per m² if there are rent-relevant upgrades. In all other cases the previous rent may be exceeded only for apartments that feature so-called modern outfitting and in cases of especially low previous rent up to a limit of €5.02 per m².

For existing lease agreements (leases signed before the Act takes effect) the rent will be reduced if the upper rent limits – which may be higher or lower depending on the location of the apartment – are exceeded by more than 20% (cap).

Upper rent limits

Due the assumption of the Senate of Berlin that the rental market in Berlin was still balanced until the end of 2013, rents charged after that date are viewed skeptically. The rental market in Berlin will therefore be blanketed with upper limits based on the (the second to last) rent index from the year 2013, regardless of location. The 2013 rent index, created on the cutoff date of September 1, 2012 (i.e., seven years ago), supposedly was adjusted according to the development of real wages until 2019. The upper permitted rent limits will be as follows:

Readiness of apartment (outfitting) for first occupancy	Rent for apartment per m ² in €		
	with central heater and bathroom	with central heater or bathroom	without central heater, without bathroom
2003 through 2013	9,80		
1991 through 2002	8,13		
1973 through 1990	6,04		
1965 through 1972	5,95		
1950 through 1964	6,08	5,62	
1919 through 1949	6,27	5,22	4,59
Until 1918	6,45	5,00	3,92

In each case

- plus 10% for apartments in buildings with not more than two units;
- plus €1.00 for living space with so-called modern outfitting (if at least three of five criteria are satisfied: barrier-free access to elevator, built-in kitchen, high-quality sanitary equipment, mostly high-quality flooring, energy consumption of less than 120 kW/(m²a);
- for the determination of the usury limit with deductions of €0.28 per m² for standard locations or €0.09 per m² for midrange locations and increases in the amount of €0.74 per m² for upscale locations (usury limit plus 20% above the applicable upper rent limit)

Not all new construction is the same, revitalization is not new construction

For newly constructed apartments to avoid the constraints of the rent cap "readiness for first occupancy" must have been reached by January 1, 2014. Apartments that were completed between January 1, 2014 and September 30, 2014 are excepted from the rent cap, but are subject to the "rent brake." For purposes of the "rent brake" apartments are considered new construction only if they were completed on or after October 1, 2014. Apartments that were completed later are not subject to either set of regulations.

There are no plans to treat fully restored apartments as new apartments in order to reintroduce to the rental market living space that has become uninhabitable.

Rent reduction and rent cap-defined usury

The newly introduced usury limit differs slightly from the tabulated values of the upper rent limits.

Rents will be reduced to the newly defined usury limit regardless of the financial strength (household income) of tenants. This should substantially reduce the administrative burden for the authorities, but – as has already happened in the case of the "rent brake" – will also and to the same extent benefit affluent tenants renting at upscale locations.

In any event, the associated shifting of the financial burden from tenants to landlords will not provide the urgently needed boost for new apartment construction nor will it alleviate the shortage of apartments, one cause of the overpriced housing market.

Only the new usury rent limit differentiates by location to a certain degree (deductions from the upper rent limit in the amount of €0.28 per m² for standard locations or €0.09 per m² for midrange locations and increases in the amount of €0.74 per m² for upscale locations). If the rent charged exceeds the upper rent limit so calculated by more than 20%, the rent is considered usurious. Rent may be reduced for the first time after nine months (from the effective date) (not before the end of October 2020).

Rent will be reduced by the authorities and only if requested by tenants. However, landlords will have a legal obligation to provoke such requests as follows:

Notification obligation of the landlord

Under penalty of monetary fines landlords must proactively notify not only prospective tenants before a lease agreement is signed, but also existing tenants – within two months from the effective date of the Act – of the "material factors" that figure into the calculation of the upper rent limit.

Unlike for original or new leases of apartments, notification to existing tenants does not have to be in written form (but must be demonstrable, if possible). The expense associated with this notification should be immense because it must include the date the apartment was ready for first occupancy (which may require a review of the building files), the outfitting of the apartment (central heater/bathroom and restroom), the location of the apartment in buildings with two or more units, and the euro amount of any upgrading costs for specific upgrades made in the last 15 (!) years before the effective date of the Act that will be allocated to tenants, and any valid exceptions (undue hardship). If upgrades or modifications are made after the effective date, or if requested by a tenant, the above information must be updated.

Multiple restrictions for upgrades

Upgrades may impact rent only up to an amount of €1.00 per m² in any given five-year period (authorities must be notified) and may not exceed the upper rent limit by more than €1.00 per m². More costly upgrades may be permitted by the authorities and supported by subsidies, so that the limit for rent increases will remain at €1.00 per m² for tenants.

The Act provides that the following circumstances are generally grounds for permitting more costly upgrades:

- The landlord has a legal obligation to make certain upgrades.
- The upgrades advance climate protection goals of the State of Berlin.
- The upgrades make the apartment disabled-accessible.

Any other measures having an impact on rent are excluded.

Undue hardship for landlord

In cases of so-called undue hardship, a landlord may apply for assistance, which, if approved, results in higher rent. The tenant impacted by the rent increase will be able to receive rent subsidies if the tenant is eligible for subsidized housing. Undue hardship generally includes permanent losses for the landlord and deterioration of the premises.

Protection against inflation

For the first time in the year 2022 rents will increase by 1.3% to compensate for inflation, in conformity with the provisions of §§ 558 et seq. of the German Civil Code (*BGB*). Rent increases should occur on an annual basis, but in connection with a demand for a rent increase in accordance with § 558a of the Civil Code will be permitted only every 15 months. Rent increases to compensate for inflation may however not exceed the strict upper rent limits.

Conclusion

The Act will take Berlin into uncharted territory.

Should the Act be passed as outlined above, its constitutionality will be contested, a contest with an uncertain outcome. We will advise our clients with this uncertainty in mind and will make recommendations for action on a case-by-case basis.

For more information check out our website at www.fps-law.de

Contact

Israel Desk

Dr. Nina Cohen, L.L.M. (UCLA)

Attorney, Partner
Head of Israel Desk



Frankfurt am Main

Eschersheimer Landstr. 25-27
60322 Frankfurt am Main

T +49 69 95 957-215
cohen@fps-law.de

Stefanie Kalke

Certified Attorney for Commercial
and Corporate Law, Partner



Berlin

Kurfürstendamm 220
10719 Berlin

T +49 30 88 59 27-704
kalke@fps-law.de

Tenancy and Residential Property Law

Dietrich Sammer

Certified Attorney for Tenancy and
Residential Property, Partner



Frankfurt am Main

Eschersheimer Landstr. 25-27
60322 Frankfurt am Main

T +49 69 95 957-339
sammer@fps-law.de

Urte Wienckowski

Certified Attorney for Tenancy and
Residential Property, Senior Associate



Berlin

Kurfürstendamm 220
10719 Berlin

T +49 30 88 59 27-250
wienckowski@fps-law.de

BERLIN

Kurfürstendamm 220
10719 Berlin
T +49 30 88 59 27-0
T +49 30 88 59 27-100
berlin@fps-law.de

DUSSELDORF

Königsallee 60 C (KÖ-Höfe)
40212 Dusseldorf
T +49 211 30 20 15-0
F +49 211 30 20 15-90
duesseldorf@fps-law.de

FRANKFURT/MAIN

Eschersheimer Landstr. 25-27
60322 Frankfurt am Main
T +49 69 95 957
F +49 69 95 957-455
frankfurt@fps-law.de

HAMBURG

Große Theaterstr. 31
20354 Hamburg
T +49 40 37 89 01-0
F +49 40 36 62 98
hamburg@fps-law.de