

Part II

Countries' Reports

Chapter 3

Report on the property situation in Belgium

Property law in Belgium is governed by the Civil Code.

The main principle for leases, particularly those on offices, workshops, garages and secondary residences, is freedom of contract.

3.1 The different types of lease

3.1.1 Leases on a main residence

The new laws of 20.02.1991 and 13.04.1997 determine the leases for main residences:

1. the dwelling must conform to basic norms of security, sanitation and habitability.
2. a lease will be for a nine-year period, except in the case of a shorthold tenancy (which is for a maximum period of three years and can be issued twice, as long as the intervening period does not exceed three years).
3. the tenant can end the agreement at any moment (three months notice must be given and during the first three years no penalties are incurred) except in the case of a shorthold tenancy where the lease must be respected.
4. the landlord must have justification for terminating a lease, which he can do:
 - (a) at any time after the first three-year period, if he needs the property for personal occupation (or for family members

up to the third degree) for two years, within that year. A penalty of 18 months rent could be due;

- (b) at the end of the first or second three-year period for improvements (conditions to be respected);
 - (c) at the end of the first or second three-year period without reason (compensation equal to nine or six months rent);
 - (d) the tenant can give a counter-notice one month in advance without being penalised.
5. the rent cannot be raised before the end of the nine-year period (a review upwards or downwards is possible at each three-year period. If no agreement can be reached, the case is submitted to the magistrate's court).
 6. if there are successive shorthold leases with different tenants, the rent cannot be increased unless there are 'new circumstances' or 'improvements'.
 7. transfers and subletting must be specially authorised by the landlord (except in the case of specific non-profit organisations - AS-BLs).
 8. the property tax cannot be charged to the tenant.
 9. index-linking is not permitted unless the lease has been agreed in writing.
 10. service charges: each of the parties may request a review of the price from the magistrate.
 11. in the case of sale of the property: the new owner can give the tenant notice to quit for personal occupation after the first three-year period. Six months notice must be given if the lease was registered, three months if not.
 12. tenancy deposits: in a special account. Penalties: interest at average market rates or legal interest to be calculated from when the payment is due.

3.1.2 Commercial leases

Commercial leases tend to protect the tenant with a set nine-year lease period, in addition to the right to renew three times for nine years. The possibilities of termination are limited by the law to reasons of:

1. personal occupation;
2. improvements, demolition.

3.1.3 Farm leases

Farm leases give great protection to the tenant. They are set for an obligatory nine years with the right to two automatic renewals.

Privileged transfer to descendants is provided for. Farm leases are fixed by law, the tenant has a right of pre-emption and this right is transferable. Slight tax reductions are accorded to the landlord if the lease is for 18 years.

3.2 Pre-emption rights

3.2.1 Pre-emption rights in Brussels

In order to stop a proposition on pre-emption tabled by an alternative majority in Brussels, the local government has adopted a pre-emption law that is clearly more advantageous to property owners and safer for solicitors.

In contrast to the bill tabled by Parliament, the Brussels ordinance respects the rights of the seller in that *the sale price cannot be contested*. The alternative majority had aimed to make it possible to contest the sale price, which would then have to be set by an expert, in order to fight what it called “property speculation”.

Only property situated in *areas where every owner has been notified by recorded delivery* can be subject to the pre-emption law.

In addition, a *certified copy of this notification must be given to the Mortgage Services Authority*.

In these areas, the pre-emption right only applies to transfers, against payment, of the full ownership of a property or part of a property, either with buildings or without.

It does not apply in the following cases:

- Joint tenancies and transfers of undivided rights;
- Sale within a family to the third degree;
- Sale of new properties under the VAT regime;
- Exchanges with or without compensation;
- Sales related to a lease concluded before the establishment of the boundary;

- Sale of property falling within a compulsory purchase boundary;
- Mergers, divisions or winding up of companies;
- Sale to a company in which the seller or their spouse or their family to the third degree has a minimum 50% interest;
- Transfers of property within three years of the issue of a certificate or permit for development;
- Sale for a lifetime annuity;
- Sale to a public authority that has the power of pre-emption;
- Sale of property belonging to the State, the Regions, or the Communities.

Payment must be made within four months and the pre-emptive authority must accept the other conditions of sale, such as the establishment of an easement, a business contract or the repurchase of a business alongside the sale of the property.

Moreover, the site submitted to pre-emption rights can only be established for a *seven-year period*, which can be renewed once only for an additional five years.

It is the *solicitor's* responsibility to notify of a pre-emption offer. If he fails to do so, he will be liable to a €10,000 fine, while the public authorities will be entitled to demand the cancellation of a sale made disregarding their rights.

3.2.2 The application of the right of pre-emption in Brussels

The debate in committee on planning in the Brussels Parliament has shed some light on the subject of pre-emption laws in Brussels:

1. It is *not necessary to sign an agreement* in order to submit a property to pre-emption. A draft contract drawn up by a solicitor is sufficient, as Article 9 of the ordinance stipulates that the solicitor must provide a copy of the agreement or draft contract for the property transfer at the latest two months before the final contract is drawn up. However, a problem can arise if the public authority pre-empts after a solicitor has issued a draft contract, where the seller has not entered into a written agreement. The Committee has not provided an adequate answer to this possibility. As Article 9 speaks explicitly of a verbal agreement, the solicitor could use this to explain the lack of a written contract.

2. *Notification must be given to the Land Administration* established by a specific ordinance, which must then pass on the file to other administrations that may have pre-emption rights.
3. If the right of pre-emption is exercised, the pre-empting authority must indicate *why this is in the public interest*. The mere fact that the building lies within a government-allocated site is not sufficient to justify the exercise of pre-emption.
4. The right of pre-emption is applied to all transfers, against payment, of the full ownership of a property or parts of a property. However, this does not include ground or emphyteutis rights, nor the sale of usufruct, unless such agreements were shown to be *fraudulent*; for example if within a short space of time from placing the property on the market a right of emphyteutis were established that would make pre-emption impossible.
5. A building sold under the VAT regime cannot be subjected to pre-emption. This includes an existing building which has been *re-classified* as new, either because of improvements worth more than 60% of the value of the property or because of a declaration stating that such works are to be carried out.
6. Payment must be made within *four months* of the property transfer. The Commission has not specified which date should be used for the transfer. Is it the date of the first agreement or the date on which the right of pre-emption is exercised? Usually payment is made upon signing the final full agreement, which allows the seller to refuse to agree if the money is not available at this date. Only once the full contract has been signed will the transfer of property be confirmed.
7. The right of pre-emption *does not cover the sale of shares belonging to a legal entity*, even if that company's only asset consists of a piece of property within the pre-emption perimeter. However, if a company sells a property that lies within the site, this sale will be subject to the right of pre-emption.
8. Following the stubborn refusal of one of the political parties to give way on this, *the solicitor will be notified eight days after the seller* that the right of pre-emption has been exercised. This double delay gives rise to a legal insecurity that the Committee cannot agree on how to deal with. The solicitor will be notified eight days after the two-month period, but it is not clear whether

he can finalise the contract before the additional eight-day period has ended, for instance under instruction from the seller.

9. At a public meeting, a new question arose regarding properties owned by companies. More precisely, it was confirmed that the sale of shares in a real estate company is not subject to pre-emption, independently of the tax position. Indeed, the Financial Services Authority has already decreed that the transfer of part of a company is subject to registration taxes for the sale of property (12.5% in Brussels) in the event that the property has been made into a company after a sale has been agreed.

3.2.3 Buying one's own home will be cheaper in Brussels

The special law of July 12, 2001 on institutional reforms (the “Lambermont agreements”) has confirmed the authority of the Regions in matters of registration and inheritance taxes.

The government of the Brussels Capital Region has adopted an bill, as yet to be voted on by the Brussels parliament, that would make Brussels a more attractive location for those who wish to purchase their own home.

Since France reduced its registration tax, Belgium has had the highest rate of registration tax in the world.

While Flanders, in a hurry to exercise its new powers, has decided to lower the general rate of registration tax from 12.5% to 10% (-20%), Brussels has been more sensible in wanting to encourage the purchase of first homes within the Capital Region.

Registration tax rates

Brussels Proposition: first-time home purchase:

- exemption for the first €45,000 (throughout the Region)
- exemption for the first €60,000 within ‘Areas of reinforced housing development’ (EDLRs)

Conditions:

- purchase is as a main residence 100% by an individual
 - not owning other dwellings as an individual in Belgium
 - resident in Brussels Capital Region for at least five years
- the rate for estate agents goes from 5% to 8%.

Article 212 (resale within two years): the restoration rate goes from 60% to 36%.

Example Purchase of a main residence in Brussels for €150,000.

registration taxes before the reform	€18,750
registration taxes after the reform	€13,125 (throughout Brussels)
	€11,250 (in EDLRs)

Wallonia (UNCHANGED)

Rate of 12.5% or 6%

Estate agents 5%

Article 212: 60% refund if resold within two years.

Flanders As of 01.01.2002:

- reduction of the 12.5% rate to 10% and the 6% rate to 5%;
- tax reduced by €1.250 for first-time purchase;
- tax credit limited to €12,500 (where sale and purchase are within two years of each other).

The system used in Flanders is particularly unhelpful to Brussels, as the tax credit only works in favour of those who sell their dwelling in Flanders and on the condition that they buy in the same region. They cannot purchase in Brussels.

Because of this, the Brussels Government has decided to offer a tax reduction to anyone who meets the conditions, without distinguishing between people from Flanders, Wallonia or Brussels.

It will now be possible to sell one's dwelling in the Wallonia or Flanders Regions and to benefit from the lower registration tax rate in Brussels.

Gift tax rates

Brussels Proposition: reduction of the gift tax rates for a dwelling in Brussels.

Conditions:

- direct-line descent, between spouses, or between cohabitants
- the beneficiary does not own another dwelling in Brussels
- must keep main residence in the Brussels Region for a period of five years

Table of the relative preferential rates for the bequest of dwellings (after the reform) (*)

Gift bracket	A	B
From - up to and including		
€0.01 – €50,000	2%	
€50,000 – €100,000	5.3%	€ 1,000
€100,000 – €175,000	6%	€3,650
€175,000 – €250,000	12%	€8,150
€250,000 – €500,000	24%	€17,150
Over €500,000	30%	€77,150

(*) direct-line descent, between spouses or between cohabitants

Example Bequest of a main residence worth €150,000

— gift tax before the reform: €10,625

— gift tax after the reform: €6,650

Flanders – Wallonia No proposition known of.

Inheritance tax rates

Brussels Reduction of the inheritance tax for a main residence inherited through direct-line descent, or from a spouse or cohabitant:

The rate is set at 2% on the first bracket of €50,000; 5.3% on the second bracket of €50,000; 6% on the third bracket of €75,000; and 12% on the fourth bracket of €75,000.

Example Inheritance of a €150,000 dwelling through direct-line descent, from a spouse or cohabitant:

— inheritance tax before the reform: €10,625

— inheritance tax after the reform: €6,650

It should be noted that the other assets of the inheritance will be taxed starting at the higher rate, following immediately on from the valuation of the dwelling, meaning that the reform directly benefits all heirs.

Propositions Regarding inheritance taxes:

After a year of negotiations between liberals and socialists, the DONNEA administration intends to reform the inheritance and registration taxes in the Brussels Capital region.

In order to finance this substantial reduction in taxation on a first-time home purchase, the government aims to unify collaterally inherited assets, which means a major increase for small bequests from uncles to nephews and between persons who are not related or who are more distantly related.

Reaching an agreement between the Reformist Movement (MR) and the Socialist Party (PS) has been difficult. If the socialist negotiators had been listened to, the tax reduction would in fact have benefited those who do not pay.

Taken as a whole, the tax reform is positive for housing in Brussels. The MR unconditionally supports the Finance Minister's bill.

Within the context of an upcoming tax reform, Senator Olivier de Clippele will propose the following amendments:

- 1. Index-linking the taxation brackets.** The brackets have not been changed since 1977, which has led to a substantial increase in taxes on all inheritances. Between 1977 and 2002, the retail price index has increased by around 113%. This means that an inheritance is clearly taxed more in 2002, although it has the same value as 25 years ago.

The absence of index linking in this case will be followed up after the reform. Adapting tax brackets to the development of prices will undoubtedly be the main political demand in terms of taxation.

- 2. Tax exemption for forests.** Although the environmentalists are joining forces with the socialists, the Finance Minister's proposition to exempt woods and forests from taxes has been rejected by the socialist side, apparently at the request of the Walloon socialist contingent. This episode proves once again that the Left places more importance on taxation than on safeguarding the Belgian forests. The party has not yet realised that taxation on trees means their death, certainly broad-leaved trees such as the oak, which are inherited many times before they reach maturity.
- 3. The elimination of the 70% and 80% rates.** When Flanders eliminated the old rates of 70% and 80%, the socialists demanded that they be kept, probably for the pleasure of penalising those guilty of having saved €150,000. This rate is more a confiscation than a contribution.

The elimination of these 70% and 80% rates could have balanced the normalisation of inheritable assets that is the aim of the government bill.

4. The introduction of the ‘residence’ rate for inheritances between brothers and sisters. There are many siblings who have maintained close family ties; there is nothing immoral about three sisters living in the same house. It is a shame that this kind of cohabitation has not been supported by the new tax reform, despite the amendments that were tabled at the same time as the reduction of inheritance taxes between legal cohabitants.

If two sisters live together, they can declare legal cohabitation before the community administration and may therefore benefit from the direct-line descent rate, but they cannot benefit from the preferential rate for a residence. The MR demands equal treatment for such cases.

5. The introduction of a preferential rate on the bequests to charitable non-profit organisations (ASBLs). The rates on bequests to ASBLs will go up to 25%. This sharp rise in the rate for testamentary gifts to non-profit organisations must be made more flexible for ASBLs working in the social sector, such as charities for the homeless. Without financial support, all these citizen-led initiatives risk being absorbed into the public sector, whereas our society needs private associations working within the social sector, particularly helping the homeless.

Belgium-specific: tenant files

On the initiative of the National Property Owners Union, a file on tenants has been created in Belgium.

Tenant files: transparency creating confidence The Commission for the Protection of Privacy has let it be known in an initial statement that merely opening a file on defaulting tenants is not enough to show a breach of the law of December 8, 1992 on the protection of privacy. It remains to be how it works to ensure it remains within the law.

The creation of a file on defaulting tenants at the beginning of this year has led to negative reactions from certain socialist leaders for two reasons: firstly on the basis that such a file could breach the privacy law, and secondly because there is no comparable file of defaulting property owners that would allow for a balanced relationship between tenants and landlords.

Clearly, the arguments supporting the first of these reasons are unconvincing and remain to be proved. The second reason is erroneous, not to say ignorant.

Multiple files on property owners There are seven different files on property owners, five of which can already be accessed by the public.

The oldest of these files is that belonging to the Mortgage Services Authority, which dates from 1851. It can be accessed by anyone and it provides information on whether an owner has mortgage debts or if he has been the object of a distraint order. It is also possible to determine the sale price of all properties in Belgium.

Next is the Land Registry administration, in existence since 1877, which includes around 6,000,000 individuals or organisations which together own more than 10,000,000 registered plots of land. This administration keeps information on all land owners and can also be accessed by the public.

In addition, property owners are systematically noted and filed in all regional and communal urban administrations. Anyone can examine construction or renovation plans on properties, and so find out where their neighbour's bedroom, living room or kitchen is.

Flanders has established a register of empty buildings, which will soon be accessible to the public through an Internet site. Also in Flanders, there are "stedebouwachten" who are charged with checking planning laws are applied, and reporting any infringements.

Again in Flanders, a file was established on October 1, 1996 comprising all properties that have a soil pollution risk. This file is open to the public.

Finally, the law of August 4, 1992 has established a file on credits which have not been repaid for at least three months. This file is managed by the Belgian National Bank and is available only to credit companies and institutions.

The last file on landowners is fairly inaccessible. It is the one held by the Finance Ministry within the framework of Article 433 of the Income Tax Code. It allows the recovery of back taxes through solicitors when an owner sells a property or mortgages it. This file is in any case very restrictive because the mere disclosure of the debtor means the sale price is frozen.

Transparency This list is long enough for it to be obvious that the law is happy to create files on landowners. Most of these files are easily accessed by the general public. In all these files on property owners, legislation has shown repeatedly that transparency of personal data is vital to upholding the law and creating confidence in contracts.

The first objection of the opponents of files on tenants regards privacy. Is there a breach of the December 8, 1992 protection of privacy act? This is, in fact, a matter which might need to undergo some

changes in order to conform with the law.

It is always interesting to know that there are already other files organised by the private sector that target dishonest or defaulting people. The most important is the one held by insurance companies, which lists people deemed to be high risk, primarily in the automobile sector, but which also aims to improve the detection of insurance fraud.

This file, entitled DATASSUR, was not questioned during the vote on the Monfils Act of August 2, 2002 on car insurance. However, the Commission for the Protection of Privacy issued it with a negative notice on June 28, 2000.

Insurance/credit companies also have a file and know more or less all the credits issued to all Belgian citizens, including those in arrears and defaulting on payments. This file can be accessed by their clients, such as banks and credit companies.

Social housing tenants already on file Something also worth noting, which the opponents of tenant files fail to mention, is the existence of files on undesirable tenants held by various social housing associations. These files also list tenants who are deemed ‘difficult’ because of their behaviour towards other tenants (violence, excessive noise, damage to property, convictions, etc.).

Even if ‘difficult’ tenants have always paid their rent on time, they may be evicted for anti-social behaviour and refused housing by other social security associations which, as though by chance, know of these ‘difficult’ tenants’ wrongdoing. Such ‘lists’ do not conform in any way to the December 8, 1992 Act because those on the list are not informed of this fact and cannot therefore present their comments. In the Walonia Region alone there are 24,000 defaulting social housing tenants, almost a quarter of all such tenants.

In addition, the bill of December 24, 2002 has improved tenants’ position by imposing a double legal procedure before the magistrate’s court for all problems regarding payment of rent.

It is therefore not surprising that an association for the protection of landlords should suggest a service that lets its members know the risks involved in renting to someone whose honesty or solvency are questionable.

This file has a time limit, in accordance with the Commission for Privacy guidelines, and a tenant who pays off his debts will be erased from the list so that his past is not used against him. The tenant must be given notice of any future inclusion in such a file to allow him to put forward his comments. Moreover, even though the law does not impose this, the landlord can demand that the tenant himself provide evidence

of non-inclusion in the file. In this case, the tenant will himself have approved the consultation of the file.

This practice is widespread in France, where it is impossible to rent housing without showing the landlord the right credentials. The law has attempted to protect landlords against a constantly increasing number of defaulting tenants.

Nowadays in France a landlord can no longer afford the risk of renting to a tenant with financial difficulties or who does not have steady employment.

In Belgium, the latest report from the High Council of Finance has confirmed that most common socio-professional category among landlords is pensioners, who often have low incomes. These landlords need to find tenants who can pay their rent regularly. Also, they do not have the means to pursue bad tenants or to undertake legal proceedings.

A file of defaulting tenants is designed to give landlords confidence, leading to more investment in rental housing. In order to re-house defaulting tenants who find themselves blacklisted, Senator Olivier de Clippele has tabled a proposition in conjunction with Mrs Marion Lemesre, president of the MR party within the Brussels parliament, which aims to establish a housing benefit in order to guarantee payment of rent. In this way the right to housing can be better assured.

3.3 Banning winter evictions

Senators Santkin, Mahoux and Laloy (PS) have put a proposition to the Senate Justice Committee that aims to ban winter evictions by extending the period of delay from one to six months.

The three Socialist senators have tabled a bill aiming to set a six-month period of delay for tenants who were due to be evicted after a court decision requiring them to leave the premises.

In addition, the proposition wants to ban evictions in winter – between November 1 and February 28.

To recap: the law of November 30, 1998 already gives the occupants of any dwelling a period of one month between the passing of a judgement obliging them to leave the premises and the execution of such a judgement. This law affects tenants facing court orders as well as landlords subject to a court distraint order.

The authors of this bill would like the period of delay to be extended from one to six months, regardless of the damage this would cause a landlord deprived of income from rent during this entire period.

An amendment was tabled to reduce the period from six to four months, but this was not upheld.

Senator Olivier de Clippele has tabled a series of amendments to this proposition by way of opposition. In the end the bill was rejected by the Justice Committee (MR and VLD voted against PS-SP-Ecolo-Agalev).

Those against the motion feared a rise in situations of non-payment of rent should Santkin et al's bill be accepted. A property owner/landlord who has done no wrong and who has fulfilled all his obligations as landlord should not have to suffer for his tenant's impecuniousness.

An arbitration procedure will already increase the period of delay sufficiently:

Senator de Clippele recalled that the bill of December 24, 2002 established a new Article 1344 section in the Judicial Code that aims to impose legal arbitration on every case relating to the eviction of a tenant. This compulsory arbitration was set up as a response to the problem of evictions. Adding a fixed period of non-intervention to the period allowed for legal arbitration is superfluous and lengthens the delays unnecessarily.

Such arbitration divides legal opinion and, as a consequence, gives defaulting tenants an additional breathing space, despite the fact that a study produced by the Antwerp magistrates showed that tenants are responsible in 90% of all rent-related cases.

For his part, Senator Mahoux believes that the arbitration procedure and the bill are two separate issues, as the arbitration procedure does not place a ban on winter evictions.

These arguments have nonetheless failed to convince the other commissioners, who rejected the bill with voting equal.

The bill will not remain at this stage, however, as, at a plenary session, the senators sent the bill to the Justice Commission by 24 votes to 22.

At a plenary assembly, Senator de Clippele recalled that the right to housing is a collective responsibility which cannot be borne by any landlord chosen at random. It is up to the public authorities to assist the weaker members of society.

This debate is not yet over and it will no doubt be taken up again after the elections of May 18, 2003.

Conclusion:

Belgian law protects both tenants and landlords in a relatively balanced fashion. Some regional differences are noteworthy for creating distortion and inequality between citizens regarding taxes or public authorities.

The file on tenants will allow contractual security that will benefit all within the rental sector. The protection of people on low incomes

or in financial difficulties should be a matter of concern for everyone, starting with the public authorities. A real social housing policy should be designed for Belgium, and also for the entire European Union. The private sector can collaborate and provide its experience of housing, working with the public authorities and other agents in social housing matters.

THANKS TO SENATOR OLIVIER DE CLIPPELE FOR HIS CONTRIBUTION.

Chapter 4

Property Law in France

4.1 Introduction: General Characteristics and Principles

In much the same way as the majority of European legislations, French legislation staunchly protects the right to private property. Nonetheless, it does establish the possibility for a person to be partially or completely deprived of their right to property, as long as justified grounds of public use or social interest exist or concur. The law establishes the pertinent compensations for owners affected by such limitations or deprivations of their right to property.

French law, a descendant of Roman law, recognises a basic, inviolable right in property, and describes it as:

- AN ABSOLUTE RIGHT:

The “absolute” nature of property rights is manifested in the fact that a natural or legal person who owns property has “absolute” rights to use this asset, with the only limitations and/or prohibitions being those established by the laws in force.

- AN EXCLUSIVE RIGHT:

The right to property is exclusive; in principle, it belongs to or is reserved for a single person. Nonetheless, in some cases, this right can be shared or distributed among several persons, a clear case of co-ownership.

- A PERPETUAL RIGHT:

The right to property is considered perpetual as it can neither be annulled nor extinguished with the passage of time. Nonetheless, there are certain exceptions to this general principle, such as copyrights.

4.2 Limits and restrictions to property rights

As opposed to property rights' condition as individual and absolute, there is the concept of public use as one of the limits to the exercise of property rights by property owners.

Along these lines, Article 545 of the French Civil Code states that “No one may be obliged to give up their property unless it is on the grounds of public use and following fair compensation.”

There are certain restrictions imposed by law or by the regulations applicable to the exercise of property rights. These restrictions specifically refer to the relations among several property owners (easements) or those between owners and the state. This way, a distinction can be established between:

Legal easements : rights of way, maintenance of common parts or areas of buildings in co-property, and the so-called “troubles of voisinage” (neighbourhood nuisances).

Restrictions of general interest: those imposed by town planning law, expropriation on grounds of public interest and nationalisation.

Regarding the so-called “troubles of voisinage” it is often said in France that “a person has the right to make noise until 10 pm”. In fact, this is not so. The idea of a “nuisance” or “noise” is open to interpretation. In reality, a person bothering the neighbours can be made to halt the activities causing the nuisance at any time. It should be underscored that this legal easement has a highly significant area and scope of application.

4.3 Property Law: Means of Acquisition

French law provides for the following means of acquiring property:

- Inheritance: if there is not a last will and testament, the law determines the distribution of property in the estate of the deceased.
- Last will and testament
- Donation
- Contract
- Possession

This article deals exclusively with bargain and sale transactions as a means to purchasing ownership rights to a property.

4.4 Bargain and Sale of Buildings

It is mandatory for all real estate bargain and sale transactions to be authorised and supervised by the commissioner for oaths. Therefore, the relevant public bargain and sale deed must be executed.

In France, a Notary Public, is actually a real estate expert. The Notary Public regularly intervenes in bargain and sale operations to appraise the property and also tends to play a key role in the negotiations between the parties. The Notary Public drafts the bargain and sale commitment, and is responsible for attaining and preparing all of the administrative and town planning documents essential for the formalization of the bargain and sale transaction.

Once the bargain and sale transaction has been formalised and, consequently, the public deed executed, the Notary Public presents, together with the deed, their bill of fees, which features the following items:

- Their fees, the amount of which is determined by an obligatory scale (generally, 1% of the building sales price).
- The overheads and outlays incurred as a consequence of performing the preliminary procedures: cadastral information, plans, topographers, etc.
- Fees and taxes paid to the state: registry expenses, municipal fees, etc. These overheads come to a maximum of 4.89% of the sales price for a home.

4.4.1 Means of acquisition

Co-ownership

A building can be purchased by two or more persons in equal shares or according to any other ownership coefficient.

La tontine ou l'acte tontinier

This figure is unique to French law. It consists of a couple's purchase of their first home. What makes this purchasing method special is a clause included in the public bargain and sale deed (called "clause de tontine") by virtue of which, upon the death of one of the members of the couple, the supérite (survivor) automatically becomes the sole owner of the property, regardless of the payment made at the time of purchase.

The private property company (SCI)

Before the purchase of a property, the future buyers may wish to establish a private property company. The private property company becomes the owner of the property. It is a very widespread, commonly used figure in France, especially for purchases in the business or professional realm.

4.4.2 Purchase of a new home

- Purchase under development
- Purchase of property under construction
- Purchase of built property less than one year old.

When the bargain and sale contract for purchase of a home under development can not be formalized (which is what happens in most cases), the parties sign a reservation contract legally called a “precontract”. Any other type of contract (sales promise or commitment) is expressly prohibited by law in such cases. The reservation contract represents a commitment on the seller’s part to reserve a home for the buyer, who must deposit a certain amount as a guarantee in return. Once the reservation commitment has been signed by the seller, the buyer has seven days to withdraw from the transaction. If the buyer withdraws within seven days, the entire deposit must be returned without any penalization. The reservation commitment must be sent by the seller to the buyer by certified mail with acknowledgement of receipt, and in such cases, the buyer must notify the seller of his withdrawal by the same means.

If the construction works on the property have concluded, the buyer may:

- Sign a document accepting the sales commitment and handover at that time of a down payment to the seller (generally, 10% of the price of the home).
- Sign a reservation commitment for the property. This preliminary contract or pre-contract necessarily includes a clause for withdrawal from the operation in the event that the buyer does not attain the financing necessary to purchase the property.
- If the construction works on the property are unfinished or underway the buyer:

signs a reservation contract for the property and makes a deposit in a current account. This operates as a guarantee deposit, and is inaccessible to the seller. The deposit made by the buyer must not exceed 5% of the foreseeable sales price. If the time frame for performance and completion of the works is from one to two years, the deposit made by the buyer will stand for 2% of the initially foreseeable sales price.

Therefore, the public deed that the parties execute before a Notary Public will either be a fixed-term bargain and sale contract by virtue of which the buyer acquires the ownership of the property upon completion of the construction works, or a sale contract for property under construction by virtue of which the buyer acquires a coefficient of ownership over the plot and acquires ownership of the home as the construction works progress and conclude.

It must be underscored that the buyer has a seven-day timeframe, called the reflection period, in which to withdraw from the bargain and sale transaction.

Financing

Financing can reach up to 90% of the sales price. There are different types of financing that depend on certain conditions, such as the future buyer's minimal income, the place and location of the property to be acquired, the characteristics of the building, etc.:

- 0% interest loan: The amount of the loan and terms for its repayment are established depending on the conditions and characteristics of the purchasing family, the income of the family unit and the location of the property.
- PAS Loan: a type of loan that consists of personalised aid for purchase of one's first home.
- Loan bound by agreement (prêt conventionné): there are no requirements for minimal income, but the total amount of the transaction can not exceed the maximum per-square meter amount in euros set for the area where the property is located.
- Home Savings Loan
- Loans from private companies
- Paris home 0% loan: only for people residing in Paris who meet certain qualifications.

- “1% logement” loan: This type of loan dates back to the 1940’s. It was implemented by businessmen’s groups as a financial aid system for their employees to have access to home rental or purchases in more favourable conditions through flexible financing adjusted to their income. The beneficiary of the financing had to be the first occupant of the home.

4.4.3 Purchase of used property

In any case, the buyer must first sign a precontract (avant-contrat) which establishes a sales commitment and that can be formalized as a private contract or public deed. Later, the parties are obliged to execute a public bargain and sale deed.

Pursuant to the legislation (Loi SRU, Solidarité et Renouvellement Urbain) as of 1 July 2001, a non-professional buyer of a used home enjoys a seven-day reflection period during which time he may withdraw from the bargain and sale transaction.

In the purchase of a used home or property, one must bear in mind a series of precautions, which are expressly laid down in French legislation: the condition of the property and easement status, etc.

Expenses

Purchase expenses stand for approximately 8% of the sales price, and are to be covered by the buyer. The Notary Public receives the entire amount of the expenses included in their bills (the registry expenses, municipal fees, etc.) to later make and apply any necessary payments.

Financing

The financing can be for up to 80% of the sales price. In some cases (such as loans with higher interest rates), financing can reach 90% of the sales price.

These loans are the same ones discussed for the purchase of homes that are newly-built or under development.

4.5 Real Estate Tax Regulations

4.5.1 Occupation tax

Anyone occupying a home –be they owners, tenants or even those living there for free– must pay the occupation tax. The tax is payable as of January 1st each year.

4.5.2 Real estate tax, charged to owner

Homeowners must pay an annual tax regardless of whether they occupy the property in question. This is a territorial tax.

4.5.3 Tax levied on vacant homes

In an effort to stimulate rental of vacant homes, in 1999 the French government levied an annual tax on their owners. This tax is not in force throughout all France at present. It is being gradually introduced in several of the country's provinces or regions (Paris, Lyon, Lille and Bordeaux, among others).

4.5.4 Real estate income tax

This tax is levied on the income obtained by the owner of a building or home derived from its rental.

4.5.5 Capital gains tax

The capital surplus or gain is calculated by the difference between the property's sales price—which may be diminished depending on the nature and characteristics of the expenses incurred by the seller—and the sales price which could may be augmented with the cost of certain expenses that the owner has covered. In some cases the law stipulates the application of certain deductions (such as those that depend on the time that the property has formed part of the seller's assets). In other specifically defined cases, there is a total exemption from the tax (some cases of conveyance of the seller's usual residence; sale in France of a property to a non-resident; a sale made by a retired natural person; sales made within an expropriation context, etc.).

4.6 Construction in France

Owners who plan to construct a building or home on a plot of their property can directly hire the services of a builder, who will be responsible for sub-contracting the services of the various professionals or specialists who will intervene in the execution of the works. If not, the owners of the plot can directly hire the various professionals, obviously chosen depending on their specialties (electricity, masonry, plumbing, etc.).

French legislation establishes the maximum percentage that the builder can charge upon beginning or completion of each of the phases, as a percentage of the total price.

The builder is obliged to set up the appropriate guarantees against any possible risks, incidents and/or defects that could emerge during the construction works. The law obliges the builder to establish the legally required guarantees, with periods of validity of 1, 2 or 10 years, depending on the type and scope of the possible damages: guarantee of perfect finishing, decennial guarantee, etc. These guarantees are supported and backed by the appropriate insurance policies. The application and execution of these guarantees does not require any instance of breach or liability by the professionals intervening. All that is required is to cite grounds of force majeure.

The intervention of an architect is mandatory for the approval of the plans, which must be attached to the works permit application whenever the net floor space of the building or home is greater than 170 m². The architect is the professional responsible for the management and supervision of the works.

In cases in which the useful floor space is less than 170 m², architects are not required to intervene. In these cases, the necessary authorisations or inspections of the so-called “Architecture, Urbanism and Environment Council” must be obtained.

4.7 Remodelling or Renovation Works

There are different types of aid and subsidies for home renovation, improvement or customization in France. The conditions required to qualify for this type of aid are determined by the rules and regulations in force.

There are several administrative bodies and organisations that offer subsidies for the works planned. This type of subsidy makes for real, significant savings for renovation or improvement works.

The possibility to qualify for these subsidies depends on the type of works to carry out and the location of the home. The administrative authorities offering the subsidies, who work independently, sometimes receive financial aid from the state. The authorities are the ANAH, ADEME, EDF, DRAC and the DDE.

Depending on the case, the amount of the subsidies can range from 1/5 to 3/5 of the total cost of the renovation or improvement works.

On another note, in the case of maintenance or renovation works carried out and billed by professionals for buildings or homes over two years old, the applicable VAT rate was reduced to 5.5% in 1999. This is a temporary measure, planned to be applied until December 31st, 2005.

4.8 The Rental Situation in France

There are different types of rentals in France, and the applicable rules differ in each case.

- Leasings subject to the 1948 Law
- Leasings subject to the Law of 6 July 1948
- These are the more “expensive” and numerous, leasings. To find a home subject to this leasing system, anyone interested can refer to real estate ads, real estate agencies, or Notaries Public.
- So-called “social” leasings
- The HLM: This is a type leasing for homes in so-called HLM buildings. The rent to be paid must be lower than the monthly incomes listed in the Law of 6 July 1989. These leasings are specifically reserved for persons or families with limited economic resources. The demand is very high, and the built stock is insufficient to meet it.
- Leasings of homes built or remodelled with state subsidies In this type of leasing, the owner must respect the maximum rent limits established by the state. These remain in force throughout the period in which the state loan is repaid.
- Leasings of vacant homes managed by the HLM’s
- “Free” leasings

These leases include furnished homes, seasonal lets, etc. The leasing arrangement is governed by contractual conditions, or, in their absence, the Civil Code.

The estate agent is the most common of the professionals to intervene in the realm of leases. The professions of “estate agent” and “land agents” are both regulated by French legislation. Estate agents must possess a “licence and have an insurance policy to cover their professional civil liability.” Additionally, estate agents can intervene in real estate dealings.

Notaries can also be middlemen in leasing operations for any type of building.

The sale of lists or files of the leased built stock of homes or business premises is common in France. The seller or conveyer of the list or files must be a licensed professional. Further, they are obliged to sign a contract with the customer.

4.9 Conclusion

A brief summary of the area and scope of property law in France would indicate that French legislation aims to leave no situation of probable concurrence in real estate transactions to chance. In reality, French legislation works through laws, ordinances and municipal decisions to regulate and delimit any situation or circumstances that could arise, either in a bargain and sale transaction, the leasing of a home or business premises, or the remodelling or maintenance works that people conduct in their homes.

On another note, it should be underscored that although many restrictions apply to them, in France there is a wide array of loans, aid and subsidies for the purchase of property as well as the performance of renovation or remodelling works.

In all, the right to property under French law benefits from a much broader, protective legislation for purchasers than it does under the legal systems of other nearby countries.

These other national systems would do well to take note of certain aspects in French property law to provide greater protection for purchasers in situations that commonly come about in the real estate sector, which in some cases (fortunately, not the majority) infringe the basic rights of home buyers.

Legal security in real estate transactions formalized in France is reinforced by the Notary Public's key role. He is the maximum commissioner for oaths, who may be present from the outset of negotiations to the final formalization of the transaction.

On a final note, this article has omitted any mention of real estate prices, (quite high in France), as it is a purely legal study of this topic.

Chapter 5

Real Estate Property Rights in Germany

Prof. Dr. Heinz Rehkugler & Dipl.-Vw. Stefan Bechtold

Albert-Ludwigs-Universität Freiburg im Breisgau
Betriebswirtschaftliches Seminar I
Lehrstuhl für Finanzwirtschaft und Banken
Alte Universität
Bertoldstraße 17
79085 Freiburg

Directory. List of abbreviations. *Introduction.* *Tenancy Agreement Legislation.* Demission protection. Asymmetrical notice periods and demission reasons. Temporal tenancy agreement. Further regulations. Rental fee regulation. Rent increase cap. The system of comparable rents. Preliminary conclusion. *Taxation on property.* Different taxational selling periods. Property acquisition tax. Inheritance and donation tax. Depreciation rules. Commercial real estate trading. Building deduction tax. Tax dependency on the legal form of the underlying assets. Preliminary conclusion. *Public zoning and building law.* Building law. Misappropriation. Protection of historic buildings. Separation of assembly sections / trade regularity. Preliminary conclusion. *Environmental policy.* Energy saving regulation. Energy certificates. Ecological tax reform. Environmental survey. Preliminary conclusion. *Real estate and retirement provision.* *Special problems in Eastern Germany.* Expropriation. Rejection by subsidy laws. Restitution. Investment commitments. Stuck compensation. Preliminary conclusion. *Conclusion.*

List of abbreviations. BauGB = Baugesetzbuch (Federal Building Law). BGB = Bürgerliches Gesetzbuch (Civil Code of FRG). BGBL = Bundesgesetzblatt (Federal Law Gazette). BFH = Bundesfinanzhof (Supreme Tax Court). BVerfG = Bundesverfassungsgericht (Federal Constitutional Court). EinigungsV = Einigungsvertrag (Unification Treaty). EntschG = Entschädigungsgesetz (Compensation Law concerning the New States). ErbStG = Erbschaftssteuergesetz (Inheritance Tax Law). EStG = Einkommensteuergesetz (Income Tax Law). FRG = Federal Republic of Germany. GDR = German Democratic Republic. GG = Grundgesetz (Basic Constitutional Law of FRG). HeizkostenV = Heizkostenverordnung (Heating Cost Prescription). VermG = Vermögensgesetz (Property Law concerning the New States)

5.1 Introduction

The key for growth and prosperity of economies is an efficient economic organization. Essential institutions¹ of organizing economies are well-defined property rights which assign authority to decide about properties and the provision of an executable civil law organization². In addition looking at real estate property rights, the factual utilization possibilities such as the preparation of land for building³ and a stable monetary system⁴ are indispensable.

Basically the property rights in Germany are defined in Art. 14 I of German “Grundgesetz”⁵. In certain cases the German government constrains or in extreme cases completely eliminates property rights based on social precept⁶. The social dysfunction⁷ of property serves

¹In the sense of constitutional configuration requirements pertaining ownership protection.

²Without legal infrastructure the property term is only a dummy instruction. See Deppenheuer (2002), p. 149.

³The connection of land on the public road and supply network is infrastructural condition for residential or commercial use of the property and therefore intrinsic element of real estate property at all.

⁴Marketability which means to provide an exit opportunity requires a functioning monetary system.

⁵See Art.14 I GG (Basic Law of the Federal Republic of Germany). Furthermore according to § 903 Bürgerliches Gesetzbuch (Civil Code) the proprietor of a matter is permitted to proceed discretionarily and to count other people out on acting upon it.

⁶Limitations and eliminations of property rights are above all the assignment of rights of proposal to the state (e.g. public property such as dikes), the delimitative primary allocation (temporary monopoly like patents or terrestrial frequencies), public appropriation (expropriation), the compulsorily transference on other subjects (e.g. land consolidation) or the dilution of property rights (e.g. hire legislation).

⁷In the main the antagonists of property rights are arguing with social effects.

as a justification for the limitation of property rights. The assessment between individual interest of owners and common welfare⁸, administrated by the authorities occurs as problem each time in a new way. Therefore the property rights regulation has to be adapted for each situation of the community⁹. On the one hand the legislator has to acknowledge private ownership and on the other hand the legislator has to allow for the social percept of Art. 14 II GG in the manner that the interests of all parties have to be condignly protected and brought in a levelling offset and a balanced proportion¹⁰.

The accomplishment is focused on economic interest, to a smaller degree on political, social and therefore normative concerns. This appears appropriate due to the fact that most restrictions lead to economic losses. Albeit further limitations of property rights exist and different organizations claime their annulment we limit the depiction on facts which handicap the market in the authors view the most and which can be more or less portrayed free of value judgement. Limitations of property rights subsequently embodied are:

- Tenancy Agreement Legislation
- Taxation
- Public Zoning and Building Law
- Environmental Policy
- Regulation of Retirement Provision

We furthermore display some special problems in the New German States which are still not completely secluded after the reunification.

The market economy with defined property rights doesn't cope with the "social question", property rights cement the social differences. Another objection is the preference for institutions because of the market being an uncomfortable steering mechanism. Market measures everything in money, even the gentlest emotion and the highest aims. See Engel (2002), p. 71 et seq.

⁸Strictly speaking the point is the distribution of competences and decision-making authority, which assure the tangible wealth, the social peace and legal certainty as well as preserve the modernity and accommodativeness of the community in times of flexibility and globalization too. See Depenheuer (2002), p. 113.

⁹Accordingly the property rights regulation will always be subject to changes. See Depenheuer (2002), p. 112.

¹⁰See Depenheuer (2002), p. 191.

5.2 Tenancy Agreement Legislation

In Germany we observe different phases of more or less severe tenancy agreement legislation¹¹. At the moment the reduction of the disposal rights by regulation of contracts concerning living space in Germany is considered as significant¹². This is said to be shifting the property rights from the initial owner to the tenant. Below we present the most important¹³ issues of the legal situation after the last reform of lease legislation related to residential lease, in power since 1st of September 2001. Tenant's protection primarily takes place in demission (section 2.1) and lease price (section 2.2) protection.

5.2.1 Demission protection

Asymmetrical notice periods and demission reasons

Residential lease contracts show different notice periods determined by law¹⁴. Whilst the tenant is able to cancel a lease contract within a period of three months without giving a reason, the landlord is not allowed to cancel unless he has a legitimate interest. Firstly, in case the tenant does not fulfil his obligations (especially not paying the rent). Secondly, the landlord requires the dwelling for himself or a relative and thirdly, if the landlord is impeded from an appropriate economic utilization of the property¹⁵. Additionally the landlords' notice period extends by 3 months after a five and eight years lease period respectively.

Often multi-family-buildings are converted from lettings into individually owned condominiums due to the fact that a higher market prize is realizable in sale¹⁶. Since 1974 the buyer has to notice the

¹¹It must be pointed out that after World War II a significant part of housing stock was destroyed and the residential market was a state controlled economy. After some years of post-war time we differentiate three phases: 1st phase: 1950-1970 cutback of the protection of tenants; 2nd phase: switchback to severe protection of tenants; 3rd phase: carrot and stick. See Lutz (1998). Within the three phases there also can be seen fluctuating legal situations according to the respective majorities in parliament or party political tactic and also the temporal economic situation.

¹²Compared to living space contracts the freeness of agreement of commercial lease is much more distinctive and from the authors view not relevant in this matter.

¹³Correspondent to the perception of "Haus & Grund – Deutschland" which is a German organization of real estate property owners. See Haus & Grund (2002), p. 13 f

¹⁴See § 573 c BGB (Civil Code).

¹⁵A possibility of raising rents isn't a cause of cancellation in this relation so as a planned sale after having established apartment ownership.

¹⁶Already in the seventies speculative investors have bought large multi-family-buildings with the predetermination to set up residential ownership at each dwelling.

extended cancellation period of three years in such circumstances (sale doesn't break lease)¹⁷. If there are prescripts of changing nature of utilization in the regarding community it even can take up to 10 years¹⁸.

Temporal tenancy agreement

Another modification brought by the 2001 reformation is the abolishment of temporal tenancy contracts for dwellings not including one of the two legal reasons which are personal requirement and extensive modernization. The right to draw up a contract acceptable to all parties like temporal tenancy contracts with fixed expiring date are necessary for the tenant forming her inhabitation and for the landlord to manage his property well e.g. modernization.

Further regulations

Other legal limitations affecting rent conditions are the period of grace due to default of payment¹⁹, entry and continuation rights in cause of dead of the tenant²⁰, agreement concerning transfer of operating costs²¹ and the heating cost prescription²². Complementary the courts continuously rule over disputes of landlords and tenants to necessarily interpret the complex hire legislation for example the so-called esthetical repairs²³.

After selling the property the new owner quitted the contract for own requirement. The reason was that many especially older properties could have only been managed with covered expenses as owner occupied.

¹⁷See § 577 a (1) BGB.

¹⁸See § 577 a (2) BGB.

¹⁹In 2001 it has been extended up to two months. In combination with the previously necessary demission reason from two months arrear the total time amount to four months until an eviction of the dwelling is legal possible which additionally harms the landlord. See § 544 (2) No 3 BGB in combination with § 569 (3) No 2 BGB.

²⁰After hire legislation reform in 2001 there are legally entitled: husband, wife, family members, registered life partner and persons who join housekeeping. See § 563 (1) and (2) BGB.

²¹Only the mentioned cost can be transferred to tenants. See § 556 I BGB in connection with "Betriebskostenverordnung" (running cost prescription). A contractual expansion of this catalogue to burden the tenant is not permissible.

²²See HeizkostenV.

²³Many contractual agreements concerning esthetical repairs are legal inoperative with the consequence of the landlord always have to pay the cost unessential which arrangement the parties initially wanted.

5.2.2 Rental fee regulation

Rent increase cap

The cap when increasing rents for residential lease is one of the worst interventions in the formation of lease prices and therefore in freedom of contracts²⁴. Raising rents is capped by an amount of 20 percent within a period of three years²⁵. The rules' background is to smooth price expansion in situations with lack of housing space to protect especially the poorer tenants.

In reverse, the abrogation of the scarcity function of market prices causes serious harm to efficient capital allocation. The steering mechanism of prices is indispensable for allocating scarce goods to their most profitable utilization. The most important right and economic exigency for investors is the ability to increase rents and therewith keep up profitability and the value of the property. Mainly inflation, rising cost of capital or increasing cost of managing which couldn't be passed through otherwise diminish the property value and result in a less attractive of real estate investment. In the past, invested money devaluates and therefore the owners' capital losses observed cause less supply of dwellings respectively less new development and lower maintenance which is directly opposed to the effect initially desired.

The system of comparable rents

Since 1983 residential lease contracts are subject to the system of comparable rents²⁶ which means firstly, that rent increases have to be founded on legal means if there is no contractual grading or indexation of rents²⁷. Without referring to one of the legal means a rent increase is futile. Secondly, even if there is a stipulation of raising rents the owner is engaged by § 5 WiStG to compare actually paid or contractually increasable rents with the rents customary in a place²⁸. If the rent is 20

²⁴Decisions of investing in residential property are based on long-term return expectations. In this respect it is an important aspect to what extent rent increase is enforceable in the future.

²⁵Introduced in 1982 with 30 percent and reduced to 20 percent within the 2001 reformation. See § 558 III BGB. The rule is essential for rent increasing based on the rents customary paid in a place which is the only legal possibility for raising rents without arranging indexation or gradation in contracts. Correspondingly excepted are rent increases founded by indexation or grading according to the hire contract.

²⁶Comparable rents are lease prices concerted or changed in the last 4 years for comparable living space at corresponding locations.

²⁷A lease rate index, especially a qualified one, a lease rate database, an appraisal report or rents of at least three comparable dwellings are means for founding rent increases. See § 558 a BGB.

²⁸See § 5 Wirtschaftsstrafgesetz (German Economic Penal Law).

percent higher than average level customary in a place the tenant is allowed to cut rents to the level of comparable dwellings²⁹. The problem is that heterogeneous goods like real estate property are just not comparable. In this respect it is not astonishing that tenants occasionally exploit this regulation for their favour. It can be observed that they offer the owner of especially well located old buildings high rents above the rents customary in a place. If the owner non-distrustfully signs the rent contract the tenant afterwards appoints on § 5 WiStG for cutting lease³⁰. Further it must be pointed out that additionally the tenant is adequately protected through the terms of exorbitant rents³¹.

5.2.3 Preliminary conclusion

Flexible prices are well-known as the key for solving allocation problems. The question is who should own a scarce good? The answer is that limited goods are moving to the best host³². By means of that they are used in their most productive utilization which increases prosperity of the entire society. The prices result from balance of supply and demand which under perfect competition is the famous “invisible hand”³³. Interference in the price mechanism leads to an inferior solution of the scarcity problem and inefficiencies, e.g. peaks in prices through lack of dwelling offers aren’t generating important signals for investors to develop and offer new housing space. If prices could freely adjust new buildings would be developed and through the acceding supply rents came down to the long-run level which (after tax) is the risk-adjusted rate of return of the corresponding real estate sub-segment³⁴.

²⁹ Additionally there has to be a low supply of comparable (type, size, equipment, condition and location) living space.

³⁰ It was as well easy due to the fact that § 5 WiStG has always been applied when there was an order of misappropriation (see section 4.2) in the corresponding community. The consequence was a kind of automatism by the application of § 5 WiStG because such applications are very common. Recently this mechanism has been stopped by the Bundesgerichtshof (German Federal Supreme Court).

³¹ See § 138 (2) BGB respective § 302 a Strafgesetzbuch (Penal Law). If rents are more than 50 percent over rents contemporary in a place the landlord will be punished.

³² Thereby realizing “The Gains from Trade”, see Walras, L. (1874): “Elements of Pure Economics or the Theory of social wealth”.

³³ See Smith, A.: „The Wealth of Nations”.

³⁴ It is the matter of arbitrage pricing theory where yields are all on the same (risk-adjusted) level. Attention should be paid to the numerous propositions of such theories which are not satisfied on real estate markets with frictions occurring in succession. Despite this there can be stated that basiliary investment hindrances will be reduced through simplification of tenancy legislation. Finally exaggerated tenant protection induces less supply whereas sufficient dwelling offer is supposed to be the best protection. Certainly for specific groups like the less privileged families

However it must be considered that removing control on rents does not necessarily lead to more investment in residential real estate: After the introduction of scaled rents in lease contracts the rents rose about 20 percent from 1982-1993 measured in percent of income. A growth in house building regarding reformation of hire legislation couldn't be observed³⁵.

By different rules of BGB the freedom of contracts is limited, distinctively strong concerning residential lease. The policy reduces rents by subsidies and makes tenancy more attractive by strong tenant protection and therefore enables consumption of other goods³⁶. Tenant protection as intervention in property rights of the landlord is justified with the social obligation of property. Roellecke (1992) however figured out that this kind of property intervention isn't suitable because it is no independent legal position which of itself could be protected by § 14 GG rather a strengthening of contractual rights of the tenant³⁷. An elementary basic law, the freedom under the law of property turns to be slightly effective³⁸.

The presented settlement of hire legislation which is leading to a splitting of rights of disposal between landlord and tenant tends to result in rising transaction costs of real estate reallocation. If the law is too restrictive it can be even prohibitive as it is the case in Portugal³⁹. The tenancy legislation concerning tenancy protection will always comprise social questions and will continue to be the most important task of courts⁴⁰.

The double nature of the good "dwelling" (economic and social good) requires now and in future a special political framework. The measure for the development of tenancy legislation in the future has

protection is necessary.

³⁵See Lutz (1998), p. 108. Qualitative aspects of the dwellings were not considered.

³⁶Of course dwellings are economic goods of a special type. However in contrast to other economic goods it is discussed that not the user that is beneficiary shall afford the abandonment of consumption but rather the taxpayer. See Roellecke (1992), p. 1649.

³⁷See Roellecke (1992), p. 1651.

³⁸The failure is the immediate reach-through on property rights which is only legitimate in the case of housing shortage. Art. 14 II GG refers namely to the benefit of the general public and not to the welfare of one tenant. See Roellecke (1992), p. 1652 et seq. The governmental control of housing after World War II hence was from present legal point of view principally justified. Today the intervention in property isn't suitable any more because overall housing shortage doesn't exist.

³⁹In Lisbon more than 20.000 dwellings are usually vacant mainly due to the historical but still existing apartment hire legislation. See the "Portugal Report".

⁴⁰Attention should be paid to the fact that the German Federal Supreme court never declared a hire rule as unconstitutional. See Lutz (1998), p. 112.

to be a fair balance of interests between tenant and landlord and has to recognize economic principals which are also indispensable for the social element of living⁴¹.

5.3 Taxation of Property

Real estate is subject to income tax as well as tax on transaction and substance. The taxation and subsidisation of real estate property is highly complex and subject to frequent changes. Lately on 1st of January 2004 there have been several changes in the following issues (in extracts⁴²):

- cutbacks of the state-run home owner grant
- changes of the gradually declining depreciation
- deficit offsetting between different income groups (abolition of the minimum taxation terms)
- constraints on losses carried forward or backward.

Most of them have recently been changed before and some of them are again in the ongoing political discussion. Below the taxational limitations are depicted, but the list is not exhaustive.

5.3.1 Different taxation selling periods

One important point of all types of investments since significantly affecting earnings is the taxation when selling an asset. Since 1930 to the tax reform in 1999 the binding regulation for private owned real estate provided a two-years selling period. At the moment realized gains from property sales are exempted from tax if the holding period of the property exceeds ten years⁴³. The sale of owner occupied residential real estate is non-assessable⁴⁴.

In contrast the minimum holding period for tax-free sale of shares and funds (equity, fixed income and even open real estate funds) is one

⁴¹See Hannig (2001), p. 318.

⁴²Further debt financing, reformation of the trade tax, depreciation of buildings in special refurbishment respective development areas among other things have been changed.

⁴³See § 23 I S. 1 EStG, modified by Steuerentlastungsgesetz 1999/2000/2002 (tax relief law) from 24th March 1999.

⁴⁴If the property is held less than five years it is non-assessable only if the alienator proves a private use on continuing basis.

year which is a significant difference especially concerning exit possibilities. Further this regulation was established without continuation permit which means a retroactive introduction. In the case of real estate disinvestment this results in the taxation of the whole capital gain from transfer which includes the so far perceived depreciation (also increased or special depreciation) and therefore attains full progression effect of taxation. Because of the serious impact on rate of return sales typically are omitted during that period.

5.3.2 Property acquisition tax

In Germany a 3.5 % property acquisition tax has to be paid. The level was increased in 1998 from beforehand 2 % and is due for all purchases regardless of the use of property (own or external). Regarding average house prices in Germany this tax cannot be neglected⁴⁵. As described above the acquisition tax confines economic efficient transactions through higher transaction costs thus hindering allocation processes especially concerning the mobility of workers and active portfolio management⁴⁶. In contrast other assets like shares or funds are not subject to acquisition tax and therefore have an advantage in this respect.

5.3.3 Inheritance and donation tax

Testators and donators equally can rely on Art. 14 II GG⁴⁷. So the right of inheritance serves as a function of inheritance law to guarantee the time independence of property⁴⁸. Law of succession is notable as an essential element of a property and social order founded on private autonomy⁴⁹. Taxation of such transference thus reduces property rights.

Currently the discussion arises again whether to increase taxes on heritages and donations. At the moment, like other assets, real estate property is taxed when donated or inherited whereas the height of tax depends on the legal form. Securitized real estate investment is taxed with its market value. In principle direct investment, too, but valuation uses a simplified capitalized income method which typically leads

⁴⁵Tax revenue 2002: ca 4.8 milliard €. See <http://www.bundesfinanzministerium.de/Steuern/Lexikon-Steuern-A-Z-.701.1283/Lexikon/Grunderwerbsteuer.htm>.

⁴⁶The property acquisition tax is also payable when whole property companies are transferred.

⁴⁷Beneath disposal rights are also to understand such rights of devolving or donating properties. See Pabst (2001), p. 1149.

⁴⁸See Pabst (2001), p. 1151.

⁴⁹See Pabst (2001), p. 1154.

to values below market values. Inheritance, in combination with leveraging real estate investment, is often tax-free. Therefore the testator of real estate property is favoured compared to testators of financial assets. This is one of the reasons for the frequent discussions to change that.

5.3.4 Depreciation rules

For externally utilized real estate property the after tax rate of return is the important figure. This depends on how investment costs for the acquisition are asserted according to the tax laws which are depreciation allowances. Illustration 1 (page 10) shows the alternating situation of the bygone two decades. In times of strained budget situation governments often cut back depreciation rates to increase tax revenue which on the other hand reduces after tax income. Despite this fact in many cases the taxational depreciation is rather higher than the economic one particularly considering that buildings are maintained⁵⁰ regularly and so have a much longer lifespan than the according depreciation rules take as basis.

5.3.5 Commercial real estate trading

For private investors it is important whether the investment is assigned to privacy or to commercial activity. The BFH ascertains in permanent adjudication the principle of law that the limit of private asset management is overstepped if the imposition of substantial property holdings through shifting assets comes to the front of the utilization of assets⁵¹. This principle is hardly conformable with adjudication in respect to the boundary of privacy and commercial stock broking as thereafter frequent shifting of such assets is not a characteristic criterion of a business establishment⁵². Hence Lüdicke and Naujok righteously ascertain that the so-called “Three-Object-Border⁵³” for real estate property and the denial of commercial trade for other asset types which has been developed from adjudication is inconsistent according to tax law⁵⁴. The

⁵⁰Maintaining costs are also fiscal relevant expenditures.

⁵¹See Lüdicke/Naujok (2004), p. 1796.

⁵²The same is true for assets which are unsuitable for drawing fruits like gold, currencies, and valuables.

⁵³Thenceforth the sale of three objects in a five year period is qualified as commercial real estate trading.

⁵⁴The deciding factor for defining commercial trading or private asset management therefore is the nature of activity and not the type of an asset. See Lüdicke/Naujok (2004), p. 1797.

serious consequences and disadvantages in relation to other asset classes have to be considered.

5.3.6 Building deduction tax

In order to confine illegal employment, the legislator introduced the so-called “Bauabzugsteuer”. Since January 2002 everybody who orders a construction work is obliged to retain 15 percent of the amount invoiced and has to transfer it to the tax department⁵⁵.

It is assumed that the costs of this bureaucratic act are not covered by the tax receipts. The administrative effort mainly affects enterprises and households.

5.3.7 Tax dependency on the legal form of the underlying assets

Real estate investment can be done directly or indirectly⁵⁶. Taxation and therefore return of investment rely on the legal form. Open and closed real estate funds are taxationally very close to the direct investment if some regulations were taken into account (taxational transparency). The closed fund is a community where every owner participating in returns determined similar to direct investment⁵⁷. The income and the sale period in which sales are tax-free are about the same on the asset level which is in case of closed funds also the personal one (the community has no taxational personality). This holds also for open investment funds which additionally benefit from classification of returns on personal level as capital income with the result of a shorter one-year sale period and a (small) tax allowance. The fungibility therefore is much higher⁵⁸. This is the same on the personal level when investing in a real estate property company. But on asset level the company is subject to taxation with corporation and trade tax which leads to a doubled taxation on the private level.

Real estate property held as a business asset is also subject to full taxation of profit⁵⁹ if sold⁶⁰. An interesting aspect is that property

⁵⁵An exception only applies if the building company has received a certificate of exemption or if legally defined trifle cases exist. See Beck/Girra (2002), p. 1079.

⁵⁶Indirect forms are basically open or closed real estate investment funds and real estate investment companies which are special vehicles between the investor and the properties dealt with.

⁵⁷Differences occur only if the community is not only managing the property but pursuing a commercial business in addition e. g. office or caretaker services.

⁵⁸The investment companies are obliged to pay back invested money on demand. The heavy issue surcharges are excepted having a similar effect.

⁵⁹The profit is calculated as the difference between book value and selling price.

⁶⁰Alternatively the profit can be parked in a tax-free reserve (not affecting net

Gradually decreasing depreciation by § 7 EStG			
Date (after the law is in force)	Non-residential use		Residential use
	Business asset	Private Asset	Business or private asset
31.03.1985	4 x 10% 3 x 5% 18 x 2,5%	8 x 5% 6 x 2,5% 36 x 1,25%	8 x 5% 6 x 2,5% 36 x 1,25%
28.02.1989			4 x 7% 6 x 5% 6 x 2% 24 x 1,25%
31.12.1993	Only linear depreciation according to § 7 Par.4 EStG		
31.12.1994			
31.12.1995	25 x 4%	Only linear depreciation according to § 7 Par. 4 EStG	8 x 5% 6 x 2,5% 36 x 1,25%
31.12.2000	33 x 3%	50 x 2% oder 40 x 2,5%	10 x 4% 8 x 2,5% 32 x 1,25%
31.12.2003			

Figure 5.1: Modification of depreciation law (§ 7 EStG)

companies selling shares of another (real estate property) company are charged with a compensation tax of only 5 percent in this matter⁶¹. Taxation neutrality of the legal form therefore can't be ascertained which is leading to different attractiveness depending on marginal rate of tax and the investment horizon of investors.

5.3.8 Preliminary conclusion

In respect of taxation of real estate property the concept of dilution of property rights is suitable as well. If the income flowing from real estate is taxed, it becomes less attractive to invest in these assets⁶². The fungibility of assets and therefore the exit option is one of the most relevant characteristics of investments because reacting to different market situations is indispensable for an active asset management. Higher transaction costs by transfer and income taxes on disinvestment therefore seriously hinder fungibility.

Another point which has to be considered is the changeability and retroactive influence of taxation which entails a higher risk in real estate investment along with a restriction of property rights through planning uncertainty⁶³. Especially in case of long-term investment with a high level of debt as given with real estate this is not appropriate.

These tax issues paint an ambiguous picture. The redistributive welfare state is reliant on engaging taxes from its citizens. In principle this could be normatively exculpated. As long as new tax rules are decided to cutback tax privileges it is of economic sense due to higher market efficiency. The federal tax code generally treats real estate favourably in several ways which had been founded by the government's duty of making housing available for all citizens. Interest payments on real estate debt are fully tax deductible for both firms and households. Home-owners also are effectively exempt from the taxation of housing capital gains realized with the sale of their homes⁶⁴. For investors, generous depreciation deductions are allowed each year far in excess of actual economic obsolescence. But it has to be considered too that there is a balance between the strong tenancy legislation

income) which has to be transferred on other legal assets or dissolved affecting net income within four years. See § 6 b EStG.

⁶¹Sale profits from real estate investments held in such vehicles (Property Company) are therefore accumulated nearly tax-free without having to account for a sale period.

⁶²The taxation sees the bough on which it is sitting. See Engel (2002), p. 71.

⁶³This can be measured by the amount of clarifications (so-called BMF-Schreiben) of the financial administration which are commonly required to determine after tax results.

⁶⁴This also rules for investors after a period of ten years.

and tax privileges. An unbalanced worsening of either hire legislation or tax privileges would lead to significant deterioration of the general framework. This is also valid for cutbacks or changes in subsidies like the home owner grant⁶⁵.

5.4 Public Zoning and Building Law

Art. 14 I GG also protects the right to cover the property with buildings within the framework of existent building law. Hence the owner has a claim on state permission of development according to planning law⁶⁶. Insofar the regulations under public law in Germany do not constitute the range of protection of property but have to be understood as limitations of the basic law building license⁶⁷.

5.4.1 Building law

The use respectively the possibilities of development of real estate property in Germany are widely determined by the “Baugesetzbuch” (federal building law) of the federation which ascertains the legal procedure of town planning and land law, the “Baunutzungsverordnung” (building usage regulation) which perceps the type and dimension of constructional usage, the “Landesbauordnung” (state building enactment) of the states and the “Bebauungsplan” (development plan) of the municipality which finally assigns the right to develop a particular area. In addition there are the “Handwerksordnung” (trade regularity), the “Gewerbeaufsicht” (trade control), the “Umweltämter” (environmental agencies), the “Gesundheitsämter” (health authorities) and the emission control rules (for air pollution and noisiness) which have to be considered.

As can be seen easily, there is a flood of regulations concerning the development of privately owned land which have to be observed by investors, architects and construction firms. Such regulations often are in public interest, but do impose three additional types of costs on private development. Firstly, they frequently extend the time necessary for completion of a project, since local governments require developers

⁶⁵Owners are not at all one-sided privileged with the home grant because of high amounts of tax benefits for residential real estate which lowers rents for tenants. See Empirica (2004).

⁶⁶Development is the most intensive form of utilization and of elementary continuance for the owner. Due to the economic importance of development for the freeholder the authority in this respect hasn't a discretionary power.

⁶⁷See Depenheuer (2002), p. 172.

to apply for various permits in order to proceed. Secondly, they sometimes act to create scarcity of sites. This can drive up land prices and add to site-acquisition costs. Thirdly, they are blamed for increasing the costs of construction.

The more binding or restrictive such regulations are, the more they increase development costs⁶⁸. Hence a frequent check of all prescriptions whether they are still necessary or already dispensable, whether they are compatible among each other and whether savings and exemption clauses are feasible would be essential⁶⁹.

5.4.2 Misappropriation

The accreditation of provincial government to decreed misuse appointments for specified communities is similar to public zoning (and a regulation unknown in other countries). Misuse of living space, e.g. the use of living space for commercial purposes, in such areas is only allowed with permission of the competent authority (district office or lower building supervision). This restriction of the best use of the property without any compensation for the owner is substantiated by the social binding of ownership. But in times of balanced housing markets the misuse regulations are dispensable.

5.4.3 Protection of historic buildings

The protection of historic buildings is tied to the indefinite legal term “Kulturdenkmal” (cultural monument) whose conditions are concretized by the monument protection laws of the states. Buildings are protected if they are kept in the so-called “Denkmalliste” (monument list)⁷⁰. It is subject to judicial control in its entirety because of its far reaching consequences for the owner. Legal consequences are sustainment and maintenance duty, licence requirement of substance changing actions and alteration of surroundings and often a preemptive right for the community which leads to diminishing property rights respective lower income or value⁷¹. Monument protection is also a result of the social binding of property related to Art. 14 II GG⁷².

⁶⁸See DiPasquale/Wheaton, p. 19.

⁶⁹See Conradi (2003), p. 2.

⁷⁰The conditions for keeping buildings in the monument list are openly verbalised using indefinite legal expressions. More exactly see Moench/Otting (2000), p. 146 et seq.

⁷¹See Mönch/Otting (2000a), p.516 et seq.

⁷²Monument protection regulates the contents and the boundaries of the property rights. See Mönch/Otting (2000), p. 521.

Still the negative economic consequences are compensated through tax benefits⁷³, which have been cutback recently⁷⁴. Whether the encumbrance of protection or the tax benefit predominates depends on the particular case. Anyhow the dilution of property rights has to be commensurate with public interest. Preservation and utilization of property have to be brought into counterbalance⁷⁵.

5.4.4 Separations of assembly sections / trade regularity

Initially invisible but particularly interesting for builder-owners is the strict separation of assembly sections in connection with poor pre-arrangement and insufficient coordination which leads to increasing construction costs. This is caused by the different trade regularities leading to a more difficult market entry and an arrogance of the various experts impeding a better coordination of building activities⁷⁶. Therefore it is demanded that the market entry should be relieved and that a better coordination of building activities should take place. Easement of market entry might cause noticeable price cuts for single sections and therefore lower costs in construction can be expected⁷⁷. A study on basis of EUROSTAT/OECD data concludes that the price levels in residential development from the mid-eighties to the mid-nineties in Central European Countries are not significantly different. Merely in France (25 percent) and in Great Britain (30 percent) residential building is constructed at lower costs compared to Germany⁷⁸.

5.4.5 Preliminary conclusion

The legislator mostly does not cut property rights straightforward. A classical example is the development of properties. Pertaining to civil

⁷³Tax benefits are regulated in §§ 7i, 10f, 10g and 11b EStG and are mainly designed as raised depreciation rates. Further exception is § 13 I No 2 ErbStG which defines a reduction by valuation of monuments concerning inheritance tax.

⁷⁴To the 1st January 2004 the depreciation rules have been declined for §§ 7i, 10f and 10g. Already 1983 the setting free of property acquisition tax had been abolished.

⁷⁵See Mönch/Otting (2000a), p.521.

⁷⁶Available knowledge isn't implemented in practice which is considered as the main problem. See Gluch (2002), p. 25 et seq.

⁷⁷See Gluch (2002), p. 26.

⁷⁸Countries with the lowest building costs (France and Great Britain) permit free market entry except for electric and gas or heating installations. See Gluch (2002), p.22. Gluch limits this statement because the EUROSTAT/OECD study didn't take care of extreme outliers and the voluminous transformations of the price data. Furthermore the price data base simply adds up individual prices for assembly sections not considering the relevance of the consolidation process with its efficiency differences.

law the proprietor is allowed to proceed freely with the property within the limits of neighbourhood legislation. But even after the reformation of the German BauGB the civil law building licence is superimposed by plenty of public law constraints. This is necessary because the urban land use planning is supposed to ensure an ordered urban planning and a humane environment⁷⁹.

The land market is not a free and untrammelled market but rather determined by the supply politics of the public authorities⁸⁰ and regulated by the (democratically legitimized) exclusive planning of the public authorities⁸¹. An allocation of usage competence solely by the rules of the market couldn't sufficiently consider public interests and social aspects⁸².

Investments are firstly depending on rent income but secondly the total performance is of particular interest. The classification of new construction sites has relevant influence⁸³. Therefore town planners have the important task to classify the economically correct size of construction sites to guarantee the steadiness of performance. As a counterargument it can be stated that the values do not arise by the owners' commitment but by the public town planning process and hence could be skimmed by the community.

5.5 Environmental Policy

5.5.1 Energy saving regulation

Since 1st February of 2002 the energy saving regulation is in force and leads to stricter energy consumption requirements for new buildings⁸⁴ (reduction of energy consumption by 30 percent) and a stronger inclusion of existing buildings, more precisely replacement of heating installations and modernization⁸⁵. Moreover since the regulation is taking

⁷⁹ See § 1 VI BauGB.

⁸⁰ See Güttler (1997), p. 82.

⁸¹ See Güttler (1997), p. 82.

⁸² See Dieterich (2001), p. 519.

⁸³ International comparisons show that not the objective conditions like habitant density and income level determine the prices of building land but rather the behaviour of the community by the disposition of development areas. See Braun/Pfeiffer (1997), p. 80.

⁸⁴ Houses have to be build according to the so-called "Low Energy House Standard".

⁸⁵ Heating boilers which have been installed before 1st October 1978 have to be put out of operation until the end of 2006. Furthermore water and heating pipes in non-heated rooms as well as the highest storey ceiling have to be insulated until end of 2005. However for these measures legal rent increment for modernization is possible so that the burden for the owner depends on elasticity of offer and demand,

effect energy certificates for all new buildings which show all details regarding energy consumption have to be issued and consigned to the building owner. Due to this enactment higher cost can be expected in house building.

5.5.2 Energy certificates

In addition to the energy saving regulation and according to the EU-Building-Directive⁸⁶ from 2006 on at any tenant or owner alternation in existent buildings an energy certificate has to be presented which creates transparency for the heating and hot water costs and the condition of the building cover. It has to be updated every five years. With this instrument enquiring tenants or potential owners shall be able to opt for energy saving houses (cost transparency) and will create an incentive to modernize energy relevant facilities⁸⁷. In first place the demand-oriented form of data collection is criticized where specialists have to visit the buildings considered giving rise to additional costs. A consumption-oriented energy certificate by contrast would be contrivable out of the cost of operation accounting causing much lower costs.

5.5.3 Ecological tax reform

The introduction of the ecological tax reform in 1999 led to a gradual increase of heating oil, current and natural gas tax which affected cost incidental to living⁸⁸. Even if operating expenses are initially shifted to tenants the so-called “second rent” defines the total encumbrance which at least in the mid-range will be divided between owner and tenant equal to their price elasticity.

5.5.4 Environmental survey

With the guideline for strategic environmental audit the European Environmental Law has been broadened so that the impact of plans and

e. g. if higher rents are enforceable at the market.

⁸⁶EU-Directive 2002/91/EG in force since 4th January 2003. It contains amongst other things regulations of requirements to define maximum values for energy demand of buildings at constancy, the creation of energy passes and the regular surveying of heating and air conditioning.

⁸⁷Experts estimate from 2006 on a demand of 1.5 million passes with prices about 650 Euro each. Therefore owners or landlords have to cover the expenses of about 1 milliard Euro a year. See unknown author (2004d), p. 19.

⁸⁸Tax on heating oil rose 50 percent, nearly doubled on natural gas and was first released for current. See Art. 2 of the law to the introduction of the ecological tax reform from 24th March 1999. BGBl I p. 378.

programs on the environment will be detected and evaluated still before the concrete project planning⁸⁹. Hence the concerns of environmental protection have to be detected, described, appraised, and documented in an environmental report.

In practice administration problems are seen for land development plans since an additional verification requires additional staff respectively financial means which in the end would be carried by the developer.

5.5.5 Preliminary conclusion

All the environmental policies displayed here entail at the bottom line higher costs for building, maintaining and running real estate. Therefore it can also be seen as a dilution of property rights by means of restrained economic utilization feasibilities. On the other hand the society wants to reduce pollution of our environment. For that reason the decisions made are not objectionable as long as they are decided consensually and represent the common mind.

5.6 Real Estate and Retirement Provision

In Germany the retirement provisions have to be changed due to the demographic development. A growing importance comes forward to asset covered insurance pension. Therefore the German government has passed a law (“Alterseinkünftegesetz”) which indicates: in the future pensions will be taxed but retirement provision expenditures will be tax-free.

Tax free retirement provisions are only payments for special products called “Riester- or Rürup-Renten”⁹⁰. Expenditures for owner occupied real estate are only supported by the so-called “modifiziertes Entnahmemodell”⁹¹. Savings at a buildings bank, repayment of mortgages or the acquisition of shares of cooperative inhabitation are not eligible. Again the government intervenes in relative prices respectively returns of different forms of saving. A freedom of choice between

⁸⁹On 20th of July the “Gesetz zur Anpassung des Baugesetzbuches an EU-Richtlinien“ has been come into force in BauGB 2004 which mainly altered the rules concerning environmental friendliness audit.

⁹⁰The names go back to Walter Riester (former Minister of Labour and Social Affairs) and Bert Rürup (leader of the commission which formed the product requirements).

⁹¹This means that between 10.000 and 50.000 Euro can be withdrawn from of the above mentioned products to buy or produce owner occupied inland real estate. The amount has to be paid back before reaching the age of 65th. It is considered to be expensive, bureaucratic an inflexible. See BFW (2004), p. 142.

different forms of investment is not given which is distorting capital allocation and discriminates one of the most popular forms of retirement provisions in Germany: the self-occupied real estate. An incorporation of real estate and possibly cooperative inhabitation in this model is desirable as real estate property is the most important form of retirement provision.

5.7 Special Problems in Eastern Germany

The unification of both the German Nations in 1989 suddenly confronted the legislation, the administration, the economy and the population with numerous tasks which had to be solved. The clarification of ownership structures in the New States was the main problem⁹². Despite many successful transformations of legal norms and economic institutions there is still some work leftover.

5.7.1 Expropriation

In the West German States dispossession is not a serious matter. In Eastern German States however it is. The German Parliament decided that the people who lost their real estate property during “Industrie- und Bodenreform⁹³” 1945-1949 under the control of the Soviet Union have no claim on returning the properties. Furthermore no compensation for confiscated areas which today mainly belong to the eastern states was intended with the argument that otherwise the Soviets would not have agreed to the German Unification⁹⁴. Many properties which are in ownership of the New States are currently put up for auction. After the BVerfG rejected complaints of victims twice the matter is pending with the European Court in Strasbourg since it is argued that the expropriation offends human rights.

⁹²In the GDR there had been no real estate market. Property transfers weren't taken on private law foundation but through decisions of state organs.

⁹³Industrie- und Bodenreform” is non-compensated expropriation of 13699 firms and farms with 3.3 million hectare agrarian and industrial usable area, from factories, workshops and trading houses along with inventory in value of about 200 milliard Euro through the soviet military administration and authorities of soviet occupied zone.

⁹⁴Today this argument is commonly impeached although the BGH has declared it as lawful two times. Schweisfurth (2000) proved that the constitutional conformity of the restitution exclusion for “Bodenreform”-victims is not tenable under national law.

5.7.2 Rejections by subsidy laws

The government ran massive support programs namely the “Fördergebietsgesetz⁹⁵”, the “Eigenheimzulagengesetz⁹⁶” and today the “Investitionszulagengesetz⁹⁷” which evoked an almost spatially uncontrolled investment push⁹⁸. Since demand couldn’t follow the additional offer the dwelling vacancy amounted to one million in 2000⁹⁹. Unoccupied dwellings (often financed by mortgages) conducted to high losses for investors. Hence property right is not only worthless but rather becomes a burden.

Today the real estate property and lease market in Eastern Germany collapsed¹⁰⁰. Hence it is estimated that about 50 percent of investors in Eastern Germany are in the debt fix¹⁰¹. That means they have to serve credits without getting rent income and this often ends with forced sale of real estate property. In addition to the renewal of city centers and sized settlements it came to a wave of suburbanization through home building in the city surroundings and also to an excessive building activity on the basis of subsidized bad investment.

5.7.3 Restitution

During the existence of the GDR with its socialistic regime many citizens have been expropriated or forced to sell their properties under market value. The Restitution of the victims is enforced by the “Vermö-

⁹⁵The “Fördergebietsgesetz“ contains all regulations of additional capital allowance and drawback amounts in the New German States which was effective until end of 1998. Aim was to lead the New States to the level of Western Germany as quick as possible.

⁹⁶The purchase or development of owner-occupied property is supported by the home owner grant which today is the only subsidy instrument apart from operational support.

⁹⁷The continuation of “Fördergebietsgesetz” was the “Investitionszulagengesetz“ which changed the subsidization from taxational depreciation rules to tax independent extra payments. It is valid until the end of 2006. Since 2004 extra pay is only intended for business-owned real estate.

⁹⁸Certainly it was well-meant by the politicians because of the large quantitative and qualitative housing shortage after the breakdown of the GDR.

⁹⁹See Expertenkommission (2000), p. 2; further reason are the migration to the Western States because of better income possibilities and the birth recession which led to a negative population balance of 1.2 million between 1989 and 1999. See DV (2002), p. 5.

¹⁰⁰2003 only in the state Mecklenburg-Vorpommern the loss of rent amounted to 297 mill. Euro of which 115 mill. fall to private owners. See unknown author (2004a). The loss of rent of residential property companies in all Eastern States 2001 amounted 1.000 mill. Euro. Hence 460 of 1200 companies closed the financial year with losses. See unknown author (2004c).

¹⁰¹See unknown author (2004a).

gensgesetz (VermG)¹⁰²" and the "Entschädigungsgesetz (EntschG)¹⁰³". Frequently criticized are the amounts of remuneration and (until 2004) the non-interest-bearing bonds which the expropriated got as compensation.

Related to the "Grundstücksverkehrsordnung¹⁰⁴" before selling, renting, dividing or mortgaging of the property it has to be ensured that there are no restitution claims remaining¹⁰⁵ which cumpers the legal relations enormously even if already 97 percent¹⁰⁶ of restitution requests are processed.

5.7.4 Investment commitments

Investors who acquired former GDR-properties from the privatization agency¹⁰⁷ in the 1990s often have committed per contract of sale to carry out specified investments¹⁰⁸. If they won't be carried out buyers are threatened with contractual penalty. Serious liquidity problems up to insolvency of companies – especially for smaller developers – are very concrete dangers¹⁰⁹. Economic reasons such as low rent, unprofitableness or financial problems of the investor which often occur in the New States do not prevent from penalty. Merely reasons not lying in the sphere of the investor for example changing of the public zoning plan are accepted as valid apologies¹¹⁰. Thereby it is often overlooked that the lack of execution is caused by poor economic conditions wherefore politicians have to take the responsibility.

5.7.5 Stuck compensations

The GDR also provided compensations for property withdrawing legal acts which often had been not fulfilled¹¹¹. Normally these compensations haven't been paid after German Reunion because afterwards they

¹⁰²"Gesetz zur Regelung offener Vermögensfragen" (Property Law concerning the New States).

¹⁰³"Gesetz über die Entschädigung nach dem Gesetz zur Regelung offener Vermögensfragen" (Law for Compensations after the Property Law concerning the New States).

¹⁰⁴Real Estate Market Order.

¹⁰⁵See Nölkel (1993), p. 1918.

¹⁰⁶See <http://www.barov.de>.

¹⁰⁷Today "Bundesanstalt für vereinigungsbedingte Vermögensfragen".

¹⁰⁸By privatization of former state-owned companies in the New German States under supervision of privatization agency and its successor organization property had been sold under market value. As compensation therefore the buyer was obligated to invest a determined amount in a certain period of time.

¹⁰⁹See Werp (2004).

¹¹⁰See Werp (2004).

¹¹¹So-called "stuck" compensations.

were not enforceable any more¹¹². Background of this constitutionally untenable situation is that federal government and the states couldn't settle whether the beneficiaries of expropriation or the "Erblastentilgungsfonds"¹¹³ has to pay the compensations¹¹⁴. Therewith the existing constitutional deficits shall be compensated through the "DDR-Entschädigungserfüllungsgesetz" which is oriented on the level of the GDR owed compensation amount. The decision reached is not only unsatisfactory since the law first decreed 13 years after reunion but also the compensation level is significantly disproportioned to market values¹¹⁵.

5.7.6 Preliminary conclusion

The unquestionably most important precondition for the success of economic-political measures in the New German States are unambiguous clarified property rights. The comments show only details of the past and current problems concerning property rights in the New German States. Unsolved conditions on property rights are blamed to be a serious obstacle for investments concerning real estate property in the five New States. A prompt clarifying of outstanding questions related to the enormous procedure of property rights assignment and the restitution of the victims of "Bodenreform" are the urgent tasks which German Unification imposes on us.

5.8 Conclusion

Property can be seen as a bundle of rights which defines what can be done with property: possession, use, alteration, transfer or retaining of third party access. The value of the bundle and hence the value of the property depends on the comprehensiveness of the bundle. Therefore real estate property has different values depending on the rights defined, e.g. rent cap, monument protection or restrictions of use according to the building law decreasing in value. May each regulation be meaningful and necessary for itself and have insignificant influence; in

¹¹²Claims on compensation were repealed related to Art. 9 I EinigungsV or to the demise of GDR as the claim objector. See Wasmuth (2004), p 201.

¹¹³The "Erblastentilgungsfonds" has been created in 1995 and summarizes the debts of the former GDR. Its purpose is the payment of interest and repayment of financial burden of the past. See "Gesetz über die Errichtung eines Erblastentilgungsfonds" from 23rd June 1993.

¹¹⁴See Wasmuth (2004), p. 202.

¹¹⁵Further problems are the legal definition of expropriation such as the not understandable disparate handling depending on whether the claim has deserved in time of expropriation or rather later. See Wasmuth (2004), p. 202.

total they represent a slight erosion of property rights. The legislator has to provide a bundle of legal positions and a civil law which on the one hand provides a privately benefiting use of properties and on the other hand at the same time accommodates the interests of the public. The legality, the proportionality and the protection of confidence are principles which have to be followed.

In Germany real estate property rights as an essential element of the social market economy and therefore economic prosperity and freedom are not endangered in general. But policy tries to breed the economic good “dwelling” by subsidies like tax advantages for landlords or housing subsidies for tenants and affect it at the same time by commandments and prohibitions like rent control and tenant protection. The continuous alteration of the general tax set-up, abrupt changes in subsidies, and announcements of new taxes on assets or altering inheritance tax are the main reasons for investors being bemused. Return on investment in real estate property therefore is generally dependent on facts over which investors have no control. The success of such real estate administration policy is not ascribable to market laws. Real estate properties are economic goods with a long lifetime as well as a low capital turnover frequency and therefore are poorly suitable for alternating and short-term oriented policies. A stable long-term and hence a calculable general set-up is necessary in order to achieve also ex post proper outcomes by correct anticipation of the future. The trust in reliability of the property regulation and the connected general set-up is of great significance (constitutionally advisable calculability and predictability) and has to be demanded.

References

Beck, H.-J.; Girra, H. (Girra/ Beck 2002)

Bauabzugsteuer, in: *Neu Juristische Wochenschrift*, 15/2002, p. 1079-1081

Braun, R.; Pfeiffer, U. (Braun/Pfeiffer 1997):

Auswirkungen der geplanten Einkommensteuerreform auf den Wohnungsmarkt, in: *Der langfristige Kredit*, Vol. 48, No 9, p. 286-294

Bundesverband freier Wohnungsunternehmen (BFW 2004):

Die Immobilienwirtschaft – Ein Spielball der Politik?, in: *Die freie Wohnungswirtschaft*, 04/2004, p. 142-143

Conradi, P. (Conradi 2003):

Baupolitik – Planungspolitik – Architekturpolitik, 11th March 2003, <http://www.bundesarchitektenkammer.de>

Depenheuer, Otto (Depenheuer 2002):

Entwicklungslinien des verfassungsrechtlichen Eigentumsschutzes

- Deutscher Verband für Wohnungswesen, Städtebau und Raumordnung e.V. (DV 2002):
Wohnungswirtschaftlicher Strukturwandel in Ostdeutschland, Berlin, Juni 2002
- Dieterich, H. (Dieterich 2001):
Bodenordnung und Bodenpolitik, in: H. W. Jenkis (Hrsg.), Kompendium der Wohnungswirtschaft, 4. Aufl., München/Wien, p. 516-542
- DiPasquale, D.; Wheaton, W. (DiPasquale/Wheaton 1996):
Urban Economics and Real Estate Markets, Prentice-Hall, Englewood Cliffs, New Jersey 07632
- Empirica (Empirica 2004):
Mieter oder Eigentümer, wer wird stärker gefördert?, cited from: Frankfurter Allgemeine Zeitung, 03rd of September 2004
- Expertenkommission der Bundesregierung (Expertenkommission 2000):
Wohnungswirtschaftlicher Strukturwandel in den neuen Bundesländern, Bericht der Kommission, Berlin
- Gluch, E. (Gluch 2002):
Baukosten und Bauhandwerk im internationalen Vergleich, in: IFO-Schnelldienst 6/2002, p. 22-29
- Güttler, H. (Güttler 1997):
Marktverhalten, Bodenpreisbildung, Planung, qualitative Faktoren, Instrumente der Bodenpolitik, in: Dieterich-Buchwald, B., Dieterich, H. (Hrsg.), Neue Perspektiven des Bodenrechts, Braunschweig/Wiesbaden, p. 78-91
- Hannig, U. (Hannig 2001):
GdW zur Mietrechtsreform im Rechtsausschuss, in: Neue Zeitschrift für Wohnungs- und Mietrecht, 07/2001, p. 318-323
- Kobler, M. (Kobler 2000):
Der Staat und die Eigentumsrechte, Institutionelle Qualität und wirtschaftliche Entwicklung, Mohr/Siebeck, Basel 2000
- Lutz, H.-J. (Lutz 1998):
Der Mieterschutz der Nachkriegszeit: Einfluss des Mietrechts auf den Wohnungsbau, Frankfurt am Main, Lang 1998
- Lüdicke, J.; Naujok, J.-P. (Lüdicke/Naujok 2004):
Abgrenzung zwischen privater Vermögensverwaltung und gewerblichem Grundstückshandel, in: Der Betrieb, 34/2004, p. 1796-1803
- Mönch, C.; Otting, O. (Mönch/Otting 2000):
Die Entwicklung des Denkmalschutzrechts – Voraussetzung der Denkmaleigenschaft, in: Neue Zeitschrift für Verwaltungsrecht, Heft 02/2000, p. 146-154
- Mönch, C.; Otting, O. (Mönch/Otting 2000a):
Die Entwicklung des Denkmalschutzrechts – Rechtsfolgen und Konsequenzen der Denkmaleigenschaft, in: Neue Zeitschrift für Verwaltungsrecht, Heft 05/2000, p. 515-525

- Nölkel, D. (Nölkel 1993):
 Die Umkehrung des Grundsatzes „Restitution vor Entschädigung“ als Instrument zur Förderung von Investitionen in den neuen Bundesländern, in: Deutsches Steuerrecht, Heft 51-52 1993, p. 1912-1918
- Pabst, H.J. (Pabst 2001):
 Vererben und verschenken aus grundrechtlicher Sicht, in: Juristische Schulung, Heft 12/2001, S. 1145-1151
- Roellecke, G. (Roellecke 1992):
 Das Mietrecht des BGB – Kritik einer Argumentationsfigur, in: Neue juristische Wochenschrift, Heft 27, p. 1649-1654
- Schweisfurth, T. (Schweisfurth 2000):
 Von der Völkerrechtswidrigkeit der SBZ-Konfiskationen 1945-1949 zur Verfassungswidrigkeit des Restitutionsausschlusses 1990, in: Zeitschrift für Vermögens- und Immobilienrecht, 9/2000, p. 505-520
- Unknown author (unknown author 2004a):
 Immobilienmarkt im Osten eingebrochen, in: Frankfurter Allgemeine Zeitung of 23rd August 2004
- Unknown author (unknown author 2004b):
 Wer trägt die Kosten?, <http://www.stern.de>, report of 23rd January 2004
- Unknown author (unknown author 2004c):
 Auch im Westen stehen immer mehr Wohnungen leer, <http://www.ftd.de>, report of 3rd July 2002
- Unknown author (unknown author 2004d):
 Energiepass – Nur Bürokratie und Kosten?, in: Immobilien Zeitung of 15th July 2004
- Wasmuth, J. (Wasmuth 2004):
 Nachträgliche Erfüllung „stecken gebliebener“ Entschädigungen, in: Zeitschrift für Vermögens- und Immobilienrecht, 5/2004, p. 201-207
- Werp, S. (Werp 2004):
 Investitionspflicht bei Ost-Immobilien, in Immobilien Zeitung, of 29th of July 2004

