

As in many other capitals and larger cities in the world, Berlin's population has faced significantly increasing asking prices for rent over the last 10 years. At the same time, fluctuation and flexibility of tenants with their German live-time contracts has remained on a very low level (the average actual rent is still far below the levels in London, Paris, Rome and New York, to name a few). New housing developments and construction are needed in Berlin. They are still moving forward too slowly to cover the current demand and shortfall in affordable apartments.

In 2019, Berlin implemented a state law to cap rents at a certain maximum level. This law was held to be invalid by the Federal Constitutional Court in 2021. In addition, Berlin's districts used pre-emption rights to discourage selling and upgrading of apartments and subsequent rent acceleration. This practice ended following a recent ruling of the Federal Administrative Court. With Berlin needing to stop its illegal approaches towards private investors, it chose to invest itself in 2021 and bought a considerable amount of Berlin units in the context of the Vonovia-Deutsche Wohnen takeover. However, the political idea to expropriate private housing business was back and is still on the table. In June 2022, Berlin's government and its state-owned housing companies agreed a pact with large private owners in Berlin, in particular Vonovia, now also controlling Deutsche Wohnen. "Social responsibility" is the headline, but will it serve the purpose? While the government will need to deliver on affordable rents, the private owners hope for more opportunities to develop and build on a faster track in the city.

The pact faces a number of new or accelerating economic challenges: general inflation, rising energy prices and possible gas shortages due to the Russia/Ukraine conflict, climate change with ever-increasing costs for new buildings and refurbishments, lack of building resources and, finally, rising interest rates, as well as a capital repricing, with public companies now trading at about 50% of NAV.

However, this is a legal alert so the comment here concerns the legal aspects of this pact. The pact between the state-owned and privately held undertakings on rent, allocations of apartments to tenants and investment is a cartel within the meaning of Art. 101 TFEU and Section 1 of the German Federal Cartel Law (GWB). These antitrust laws prohibit the direct or indirect fixing of prices, trading conditions and investments. Researching the history of the pact, it might well be that the participants did not even look at this aspect, given that antitrust issues rarely occur in the housing industry. Nevertheless, cartel law applies to rents and buildings as well and neither EU law nor German law makes a specific exemption with a view to create a favourable environment for social housing. The aim of the pact is to control the development of rents in Berlin. Private owners might say that applying social terms for their tenants under current market conditions is the right thing to do also from a long-term commercial perspective.

In addition, for them it is kind of an act of self-defence against any new Berlin ideas for unlawful state action powered by advocates of expropriation. However, all these arguments do not provide a legal justification for an agreement – or concerted action – of undertakings being competitors in the Berlin housing market.

From a legal point of view, the participants may claim that the Berlin pact does not fall within the scope of Art. 101 TFEU, since it only governs the Berlin housing market. In addition, they may further claim that the pact is exempt from the German prohibition of cartels under Section 2 GWB by virtue of its envisaged benefits for housing supply to Berlin's low- and middle-income population as consumers. The participants may be able to elaborate on this. However, from an external point of view, both arguments will not be easy to make in court. Germany's capital sees a lot of foreign – European – investment in real estate. And the core commercial content of the pact is a trade by the Berlin government to sell fairly, properly and quickly administered planning and licensing procedures to private businesses in exchange for a social rent policy and a political promise that Berlin will hold back on – lawful or unlawful – expropriation, if the deal works in its social aspects.

Chances are good, though, that the Berlin housing pact will never be reviewed by any antitrust authority or court. The German Federal Cartel Office has not published any approach to investigate the situation and may not be particularly keen to impose fines against Berlin. Private investors are very likely to hold back on challenging the cartel as well, since the alternative might be an even stronger price control and destroying the pact might push forward the expropriation discussion. The managers of the participating undertakings may have secured legal opinions on Section 2 GWB or they may even have approached the Federal Cartel Office for its informal assessment (though such assessment is not published) to discharge their managerial duties. In any case, there is neither administrative or civil antitrust action nor board or shareholder criticism on the Berlin pact today.

## Contact



**Dr. Kai Mertens**

Partner, Berlin

T +49 30 72616 8223

E kai.mertens@squirepb.com