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Germany
REAL ESTATE

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This country-specific Q&A provides an overview of real estate laws and regulations applicable in Germany.

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GERMANY
REAL ESTATE

1. Overview

The Federal Republic of Germany consist of sixteen states (*Laender*), each of which is subject to individual state legislation – in addition to the laws set by the federal legislator which is applicable in all states. Consequently, real estate-related laws in Germany result from various sources and may differ from state to state:

- Civil law: Regulations regarding the ownership and transfer of real estate, mortgages, encumbrances etc. and the contractual aspects of construction, leases, purchase and sale can be found mainly in the German Civil Code (*Buergerliches Gesetzbuch*, BGB). The Civil Code is the centre piece of federal civil law legislation and applicable in all of Germany. It has come into effect as of 01 January 1900 and has seen just one major reform. Especially with respect to title to real estate. German law is strongly influenced by Roman law.
- Federal public law: The federal legislator also has the legislative authority for zoning and planning law. Hence, while the actual local zoning is under the authority of local municipalities, the overarching principles of zoning and planning to be observed in all of Germany result from federal legislation (in particular the Federal Building Code; *Baugesetzbuch*).
- Public law of the states: While zoning law is federal law, the actual building law (e.g. permit procedures and building requirements) is under state authority. All sixteen states have more or less different building codes (*Landesbauordnung*). The applicable building code is the one of the State in which the respective real property is located.
- Public law of the European Union: The legislation of the EU has impact on the German real estate law, albeit in a narrow ambit (safety of buildings, planning and environment are the most prominent examples). Typically, EU legislation is transferred into federal or state legislation or technical norms and therefore not necessarily directly applicable.
- Last, but not least there are various taxes relevant to German real estate or to owners of real estate which are based on either federal or state tax laws.

While written law is the main source of German real estate law, court decisions may have (partially heavy) influence on the interpretation of those sources. Nevertheless, a court decision is not binding outside the specific case that was decided, since the concept of *stare decisis* is not enshrined in the German law system.

2. What is the main legislation relating to real estate ownership?

Question answered above.

3. Have any significant new laws which materially impact real estate investors and lenders come into force since December 2022 or are there any major anticipated new laws which are expected to materially impact them in the near future?

Since December 2022, several laws which materially impact investing in real estate and real estate-secured lending were enacted or amended to achieve Germany's goal of climate neutrality by 2045.

A first amendment to the Building Energy Act (*Gebäudeenergiegesetz*, GEG), which applies to residential and non-residential buildings, came into force on 1 January 2023. Among other things, the GEG sets a cap on the energy demand of new buildings for heating, hot water supply and air-conditioning. To receive the subsidies, any building erected post 1 January 2023 may not exceed 55% of the energy demand of a reference building, with identical extents (dimensions), usable floor

area etc. Should this requirement not be met, a fine of up to 50,000 € can be charged.

To initiate a comprehensive modernization of the heat supply, a further amendment to the GEG was passed on 8 September 2023, which will come into force on 1 January 2024. In areas consisting mainly of new buildings, every newly installed heating system must use at least 65% renewable energy as of 1 January 2024; for existing buildings and new buildings erected in areas of existing buildings, this requirement will apply as of 30 June 2026 resp. 30 June 2028, depending on the size of the municipality.

The CO2 Cost Allocation Act (*CO2-Kostenaufteilungsgesetz*) came into force on 1 January 2023 as well. According to this statue, a landlord is obliged to bear some of the costs related to carbon dioxide and may no longer pass it entirely to the tenants. More precisely speaking, the carbon dioxide costs are allocated to the parties of the lease agreement by means of a graduated model based on the CO2 emissions of the rented building or apartment in kg/sqm, whereas the party may only partially deviate from the statutory allocation. These costs must be shared between the landlord and the tenant, whereas the share itself depends on whether the leased premise is a residential or non-residential building. Therefore, it is forbidden to allocate all additional costs on to tenants through the carbon price, the cost burden for landlords may increase in the future.

The “Federal Subsidy for Efficient Buildings” (*Bundesförderung für effiziente Gebäude, BEG*, NB this a legal directive only, issued by the Federal Ministry of Trade) came into force on 1 January 2023 as part of broad legislative changes regarding energy-efficient construction of buildings. It provides a legal framework for subsidies re. the construction of residential and non-residential energy-efficient buildings, as well as building measures to improve energy-efficiency. It has been implemented that all investors, not only owners, landlords and tenants (as it was the case under the previously applicable statues) are eligible to apply for corresponding subsidies. Additionally, should an investor carry out such measures by himself, i.e. by employees, he may apply for subsidies to partially refund costs incurred for building materials. To receive subsidies for heat pumps, biomass systems and other heating systems, the conditions precedent for such subsidies have been enhanced (e.g. reducing the cap for dust and noise emissions), making the application for subsidies more difficult. However, the individual subsidies granted for particular measures to promote efficient buildings have been increased significantly. Kindly note that, in general, the subsidies do not need to be repaid and additional subsidies have been put in place to substitute costs incurred for modernization measures implemented to all residential and non-residential buildings. In this case, landlords are entitled pass on up to 10% of the modernisation costs to the tenant through a rent increase, but the subsidies received must be deducted from the modernisation costs, whereas statutory law generally provides for a cap of 8 % of the modernization costs.

4. How is ownership of real estate proved?

The ownership of real estate is generally proved by an excerpt from the land register (*Grundbuch*) which should be up to date and taken from a reliable source or be certified.

The land register is kept at the local court (*Amtsgericht*) in whose premises the real property is located. It can be accessed physically or online but is not a public source of information. It may only be accessed if a justified interest can be demonstrated. While the property owner always has a justified interest, the mere wish of a third party (e.g. an interested buyer) to get to know the owner of a property is not sufficient.

The land register is divided into the index (*Bestandsverzeichnis*) and three sections (*Abteilung*). The index lists the relevant cadastral plots of a land or the condominium. Section I shows the owner of the property and , in case of co-ownership, also the shares of the co-owners. Section II lists the existing encumbrances of the real estate which are subject to registration, for example, easements, rights of pre-emption, priority notices and heritable building rights. In section III mortgages and land charges are registered.

A change of ownership in real estate needs to be registered in section I of the land register to be valid. However, in a few cases changes of the ownership, such as succession due to inheritance, can be valid without registration or a wrong register entry could have been made by the registrar. It is therefore possible that there is a difference between the formal land registry entry and the legal ownership. Nevertheless, despite the land register not being a 100% proof of title, a person acting *bona fidae* can rely on the register entries in section I (with limited exceptions).

5. Are there any restrictions on who can own real estate?

There are no specific restrictions – i.e. everybody can own real estate, persons, legal entities, closed-end and open-end property funds, public law bodies and foreign

individuals and companies. Also minors and incapacitated persons are eligible to own real estate, however, they are not granted the power of disposition.

6. What types of proprietary interests in real estate can be created?

In general, under German law, ownership of land cannot be separated from ownership of the buildings on it. Yet, there are a few exceptions as outlined below.

There is no full equivalent to the common law concept of "proprietary interest" in German law. German real estate law rather differentiates between the following forms of ownership:

- Absolute or full ownership (*Volleigentum*): An absolute owner of a plot of land has generally unlimited ownership rights regarding the surface and the space above and below as well as any buildings erected on it. The absolute ownership can be held by several people together in co-ownership where each of the owners then owns a certain percentage (not a physical piece) of the property.
- Condominium ownership (*Wohnungseigentum*): For a condominium ownership it is necessary that an apartment or another definable unit of a building has been declared as a condominium under the Condominium Act (*Wohnungseigentumsgesetz*, WEG). In that case an absolute ownership upon the condominium can be awarded. The owners of the condominiums in a building are sharing the ownership of common used areas and the underlying land pro rata.
- Heritable building right (*Erbbaurecht*): The absolute owner of a plot of land can grant such a right to a third person under the Heritable Building Rights Act (*Erbbaurechtsgesetz*) for up to 99 years. The beneficiary then is entitled to erect a building on the land and is owner of the building, while the owner of the land remains in his position.

7. Is ownership of real estate and the buildings on it separate?

Question answered above.

8. What are common ownership structures for ownership of commercial real estate?

Commercial real estate can be held directly by individuals or through entities. High value commercial assets are typically held through specifically created structures which are, depending on the ultimate owner, formed inside and/or outside of Germany.

Common vehicles to hold real estate in Germany include:

- *Limited liability companies*: Limited liability companies, formed specifically for the purpose of holding the real estate in question, are a common holding structure and may be based in Germany or other jurisdictions. Corporate vehicles offer limited liability, which allows investors to ring-fence assets and liabilities, and they can also provide tax advantages for some classes of investors (for instance with respect to trade tax and capital gains taxation). Corporate vehicles are also used to provide privacy and anonymity for investors.
- *Limited liability partnerships*: Limited partnerships are also a common holding structure for German real estate. German limited liability partnerships have a legal personality and are typically transparent for corporate and individual income tax purposes. Limited partnerships are a very flexible structure from a governance perspective without many of the rules and restrictions that apply to corporate vehicles. German limited liability partnerships are registered in the commercial register and usually have a general partner with unlimited liability which in turn is usually a limited liability company.
- *REITs*: The German real estate investment trust (G-REIT) is formed as a stock corporation with a number of key tax advantages. However, G-REITs are subject to relatively strict governance rules (e.g. minimum distribution rules, minimum number of shareholders, minimum capital and leverage rules), and hence are often not suitable for individual investments of one investor. They are subject to the laws of the German Stock Corporation Act (*Aktiengesetz*) as well as the REIT Act (*REIT-Gesetz*) and may only hold ownership in real estate (excluding existing residential real estate) as well as participations in real estate companies.
- *Open-ended funds*: The German open-ended fund is a mutual investment scheme issuing units and regulated by fund rules. It is usually open to a broad range of investors, aimed at multiple investments and managed by a

financial investment management company (*Kapitalverwaltungsgesellschaft*, KVG) as asset management company. The fund as such does not have a legal personality, but its assets are legally owned by the KVG as a so-called "separate asset" (*Sondervermögen*) on behalf of the open-ended fund. The KVG needs authorisation of a management company for UCITS purposes or as an AIFM. The open-ended fund has various tax advantages.
- *Closed-ended funds*: In contrast, German closed-ended funds are investment schemes typically set-up for one investor or a limited number of investors to collect capital for specific investments or types of investments. They are also managed by an asset management company which has authorisation as an AIFM.

9. What is the usual legal due diligence process that is undertaken when acquiring commercial real estate?

For asset sales of commercial registered real estate, the buyer's lawyer will typically:

- review the title documents (i.e. a copy of the land register for the property, any encumbrances on title, the public building charges register) and establish the boundaries and assess superstructures to/from neighbouring properties if any;
- where the property is subject to leases, review the leases (though the extent of this review will depend heavily on the nature of the property and why the buyer is buying the property);
- review the public law situation of the property as concerns zoning, permits, compliance of buildings and uses with applicable law, outstanding charges and the like as well as information on contamination of the property; and
- raise further enquiries and make additional document requests to the seller concerning disputes, copy rights of architects, agreements pertaining to the property that the buyer wants to assume, issues in relation to ongoing works at the property (if any) etc., and evaluate any other matters arising from the wider due diligence.

Such due diligence process can take several weeks (particularly as some of the key searches can take several weeks to be produced if not available in a data room) and may prove to be expensive depending on the size of the property and its legal complexity. Proper due diligence is important though as sellers in Germany do not generally make representation and warranties regarding the condition of the property or other issues if they can be reviewed in a customary due diligence process. In certain cases (such as where the seller is selling complex or numerous properties via a competitive bid process), the seller may decide to instruct its lawyers to prepare a so-called vendor due diligence report by itself in order to speed up the sale process or to avoid numerous bidders having to carry out the same due diligence.

Where a property is sold by way of a transfer of the shares in the entity or entities by which such property is held, the process is generally the same but with additional due diligence in respect of the relevant entities.

Where the purchase of a property is financed by external debt, the lender will often require a copy of the due diligence report of the buyer's lawyers (and/or a separate one by the lender's own lawyers) on which it may rely.

10. What legal issues (if any) cannot be covered by usual legal due diligence?

There are some land interests that bind a buyer even though the interest is not registered in the land registry.

In addition, the buyer's lawyers cannot (or only to a limited extend) assess compliance of the building with building permits and zoning laws (as most of this will depend on factual questions) as well as superstructures (for the same reason) and they will not cover technical issues and defects, building control, health and safety or environment issues as part of the legal due diligence. Specialist surveyors and technical experts can be employed to deal with these issues.

11. What is the usual process for transfer of commercial real estate?

Transaction Steps	Seller	Buyer	Comments
Heads of terms ("HoT")	· Prepare and negotiate HoT · Collate data room documentation comprising title documents and property information	· Negotiate HoT · Where hereditary building rights are sold, and land owner's consent is required, collate relevant information about buyer and any guarantor	· HoT are not binding save for agreed exclusivity and confidentiality provisions in particular, one may not enforce an obligation to sell or buy a property · Depending on parties involved: Parties need to provide KYC/AML documentation
Due Diligence	· Provide required documentation and respond to any queries raised by buyer.	· Conduct legal, technical, commercial and other due diligence as required.	· Most data rooms are hosted on virtual data sites · Buyer may request a power of attorney from the seller to obtain additional documents from public authorities
Preparation of sale and purchase agreement ("SPA")	· Prepare draft property sale and purchase agreement · Prepare any ancillary documents (e.g. annexes such as rent roll, list of agreements to be transferred etc.) · Negotiate SPA and ancillary documents · Prepare release mechanism for existing financing and mortgages with financing banks	· Negotiate SPA and ancillary documents · Arrange new financing	· No prescribed form of SPA but industry standard terms depending on market circumstances · Asset deal SPA requires notarisation in front of a German notary · Under certain circumstances cartel clearance is required (depending on income derived from the property and revenues of the buyer)
Signing to closing	· Satisfy any seller's conditions to closing · Obtain redemption statement and release documentation from existing lender · Obtain any public law approvals (such as waiver for statutory pre-emption right which applies for most real estate transactions)	· Payment of a deposit if agreed at or shortly following signing · Arrange funding including new bank debt and agree on a land charge on the property to secure such financing · Pay real estate transfer tax (percentage of purchase price, depends on German state where property is situated)	· Often a deposit is agreed on signing, which will forfeit if the buyer fails to complete acquisition (unless failure was due to the seller) · Deposit will typically be paid to notary's escrow account
Closing	· Use price to pay off existing debt (through use of purchase price funds) · Terminate existing insurances	· Satisfy new lender's loan conditions precedent · Pay balance of price (e.g. minus any deposit) · Put new insurances in place	· "Automatic closing" (i.e. no closing meeting required; possession on property transfers without any action being required) · After payment of the purchase price notary will apply for registration of change of title in the land register, which regularly takes a few weeks. Until registration buyer is secured by a so-called priority notice in the land register (condition to completion). · As of closing, parties treat each other as if handover has occurred
Post-closing	· Physical hand-over of property from seller to buyer (keys etc.) · True up of property charges and service charges · Send rent authority letter to tenants with new payment instructions · Transfer tenants' rent deposits from seller to buyer · Hand over other relevant documents		

12. Is it common for real estate transfers to be effected by way of share transfer as well as asset transfer?

Yes, both deal structures are very common. As noted in Q7, real estate is commonly held through specially formed entities and there may be tax advantages to transferring the interests in those entities rather than the underlying asset (for example, there may be (i) a real estate transfer tax advantage under certain circumstances for the buyer and, in the case of corporations, (ii) an advantage with regard to capital gains taxation and/or a with regard to trade tax for the seller).

13. On the sale of freehold interests in land does the benefit of any occupational leases and income automatically transfer?

Yes – no formalities are required; leases transfer automatically at the time of registration of transfer of ownership in the land register. However, as transfer of title only occurs some weeks or months following closing (see Q10 above), leases are typically assigned to the buyer as of closing (as part of the SPA provisions for closing).

14. What common rights, interests and burdens can be created or attach over real estate and how are these protected?

In addition to rights created by virtue of contracts only (such as leases), a wide variety of rights, interests and burdens can be created over or attached to real estate *in rem* (i.e. they are secured by registration in the land register). There are complex rules governing the creation of such rights. *In rem* rights may generally only be deleted by the beneficiary (sometimes in conjunction with the person who created them), which sometimes causes some issues, in particular with respect to ancient registrations. Some of the key interests which can be registered in the land register are:

- *Easements:* for example, rights of way over a property, tenancy easements;
- *Restrictive covenants*: for example, an obligation to build a certain property on a plot of land, not to lease the property to certain parties etc.;
- Land charges/mortgages;
- Options to purchase, priority notices, pre-emption rights;
- Usufructrights;
- Rights of permanent use, condominium rights;
- Heritable building rights (forming its own sub-register, the heritable building rights register).

The above rights and interests must be registered in the land register in order to be fully protected and, unless agreed differently with all existing higher-ranking creditors, their rank follows the timing of application for

registration.

In addition to these “private” rights certain public-law obligations or rights of authorities can be registered in the register of public building charges (*Baulastenverzeichnis*) which however does not exist in all German states (e.g. not in Bavaria).

Please note: Particular rights registered might interfere with the interest of the lender and its security (lien). Solving those issues will be the obligation of the buyer.

15. Are split legal and beneficial ownership of real estate (i.e. trust structures) recognised

Generally, trust structures are possible, but not commonly used in Germany, as strictly speaking, German law does not foresee beneficial ownership. An exception can be seen in the open-ended fund structure, where the KVG as legal owner holds the property on behalf of the fund, which does not have a legal personality. (see above Q7)

A person dealing with the owner who is registered in the land register can generally assume and rely that the registered owner has unlimited power to dispose of the property, unless there is a restriction or other limiting entry in the land register.

16. Is public disclosure of the ultimate beneficial owners of real estate required?

No, generally, public disclosure of ultimate beneficial owners of real estate is not required. However, pursuant to German anti-money laundering legislation, notaries, lawyers and others may be obliged to review and properly document the ultimate beneficial owners of real estate (sell and buy-side) in real estate transactions, to report critical cases and/or provide the documentation to tax and other authorities when requested to do so.

17. What are the main taxes associated with commercial real estate ownership and transfer of commercial real estate?

Ownership: Land tax is payable to the local authority. Taxes vary depending on where the property is situated as land tax is a local tax.

Direct taxes: In general, letting and leasing of real estate is VAT exempt. However, the lessor is entitled to opt for the application of VAT with respect to a lease agreement if the property is used by the tenant for services and supply’s which are subject to VAT.

Corporate income tax and trade tax (if the income is derived through a German permanent establishment) apply to income, profits and gains arising from the real estate. These will vary depending on whether the real estate is owned by an individual or entity, the nature of the entity and if the owner is resident in Germany. If and to the extent the profits being subject to trade tax, the so-called extended trade tax deduction for real estate companies (*erweiterte Kürzung*) (“**TT-Exemption**“) may be applied for if the rather strict requirements are met.If the TT-Exemption is granted, the income from the leasing and letting of own real properties will be exempt from TT.

Taxes on asset sales are:

Real Estate Transfer Tax (RETT): RETT is based on the purchase price for the property, and typically born by the buyer. The tax rates vary between 3.5% and 6.5% depending on the state where the property is located. In share deal transactions it may under certain conditions be possible to structure an acquisition RETT exempt. However, the German RETT rules for share deals have recently be tightened which makes it more difficult to achieve a RETT exempt share deal and further amendments including a potential complete overhaul of the share deal RETT rules are under consideration.

Value Added Tax (VAT): At (currently) 19%. However, sale of real estate is in general exempt from VAT or may qualify as a VAT-free transfer of a going concern (i.e. a business that is operating and making a profit), depending on the facts. The seller can make an election to charge VAT (which invariably it would do to enable it to recover and retain VAT it incurs or has incurred in relation to services and supplies received with regard to the real estate).

Capital Gains Tax (CGT): (Currently) 15.825% corporate income tax (combined rate including solidarity surcharge) if the seller is a corporation. In addition, German trade tax may apply if the income is derived through a German permanent establishment; trade tax rates vary regionally, the effective trade tax rates presently range between 7% and approx. 19%. In case of individuals as sellers a progressive income tax rate is applied; the top rate amounts to 45% (plus solidarity surcharge and church tax (if applicable)).

18. What are common terms of commercial leases and are there regulatory controls on the terms of leases?

The below summary focuses on typical occupational

leases rather than lease-back arrangements or heritable building rights, which generally have substantially different terms.

Generally, German statutory lease law is rather tenant-friendly and provides for the rent being a "gross rent" including most of the service charges, repair works etc. Material deviations from that framework may be regarded as null and void under German statutory law. Therefore, "triple net" leases are not the normal case in Germany, but rather so-called "*Dach & Fach*" leases where the landlord bears all obligations and costs in relation to maintenance and repair of roof and building structure. (called NN-leases)

Typically, terms include the following:

Duration: Leases term can be indefinite or fixed. The maximum fixed duration for a lease is 30 years after which the lease is terminable within a statutory notice period (generally 3-6 months). For residential leases a fixed term without termination rights for the tenant is only allowed in very limited cases. The duration of office and industrial leases will usually not be more than between 10-15 years plus extension rights; however, 5 years (or even shorter) terms with extension options for the tenant giving tenants more flexibility are frequently seen as well.

Rent: There are no regulatory controls as to the amount of rent other than for the residential market which faces heavy rent controls – however, rent controls even for certain commercial leases are being discussed in politics recently. Rent is usually payable monthly in advance. In commercial leases, landlords will generally grant tenants rent-free periods (or other incentives, such as one-time payments) to cover costs of moving, fit-out works or simply to incentives the tenant to sign the lease.

VAT: Generally, leasing is not subject to VAT, therefore the landlord has to opt for VAT if it wants to recover VAT that it has paid with respect to investment on the premises. With regard to residential use, it is not permitted to opt for the application of VAT and the same applies to the uses by banks, insurances and certain other financial institutions (and consequentially the landlord cannot recover VAT paid on services and supplies received with regard to the relevant real estate in such a case). Whether the landlord may opt for VAT depends on the actual use of the premises, therefore a commercial lease agreement will typically limit the allowed type of use to such use that does not prohibit the landlord from opting for VAT.

Rent review: Other than in the residential sector which is subject to heavy limitations as concerns rent increases, there are no regulatory controls as to when or how the rent may be increased and parties are free to determine the type and frequency of the review. However, there are certain restrictions even for commercial leases if automatic indexation clauses are used: Generally, those may only be used if the lease has a fixed term of at least 10 years (with no early termination rights for the landlord) and if other statutory limitations for indexation are observed.

Types of rent reviews (which can particularly also be combined) are:

- Stepped rents, when the rent is increased at agreed intervals by agreed amounts;
- Index linked rents, where the rent increases in accordance with an agreed index (such as the consumer prices index which must work upwards and downwards, though) at an agreed frequency (often annually);
- Turnover rent, where the rent is an agreed percentage of the tenant's turnover subject to agreed minimum and maximum rents. These types of review are common in retail leases; and
- Less frequently: Mark-to-market reviewed, where the rent is reviewed by reference to the rents payable in comparable properties. If the parties cannot agree what the open market rent is, it is typically determined by reference to an independent expert. Mark-to-market reviews are typically carried our every 3 or 5 years depending on the duration of the lease.

Permitted Use: The permitted use obviously depends on the public law situation of the property; in addition, protection from competition with other tenants may be agreed (or waived). Leases will also usually restrict a tenant's ability to change the use of the premises. See above for VAT.

Maintenance and repair: As set out above, there are severe regulatory restrictions of what may be imposed on the tenant in terms of maintenance and repair. Typically, leases will often legally be regarded as standard terms (because certain standard terms/samples are used by the landlord) for which regulations are more restrictive than for individually negotiated terms.

Service charge: All operational costs listed in the so called Operational Costs Ordinance (*Betriebskostenverordnung*) can be recharged to tenants. However, as this legislation does not cover any and all possible costs, many landlords will try to agree further cost recovery with tenants (including certain maintenance, special insurances and property management charges which must be capped).

Assignment: While assignment of the lease on the side of the landlord will automatically occur with change of title in the property, the tenant will usually not be allowed to assign the lease to a third party and being released from its obligations. Contrary to common law jurisdictions, assignment generally is not a heavily discussed topic in leases.

Subletting: Subletting by tenants is generally allowed by statutory law but is typically limited in the lease itself to avoid unwanted subtenants in the building and avoid the tenant becoming a competitor to the landlord on the leasing market. If subletting occurs, the tenant remains responsible for all obligations under the lease vis-a-vis the landlord (i.e. no releasing effect). Generally, there is no visibility on the terms of the sublease for the landlord.

Termination rights: Leases expire at the end of the term unless the tenant (or, less common, the landlord) has a contractual extension or early break option. Any lease can be terminated early for good cause under statutory law (this cannot be excluded); however, the requirements for such termination are rather restrictive (such as sever payment or other default; and relevant causes can also be agreed in the lease). Following an early termination for cause, it may prove to be cumbersome to actually vacate the premises; if the tenant does not leave voluntarily, courts need to be involved. Under certain circumstances the court may stop evacuation if there is an overarching need of the tenant for the premises (as may often be the case for residential tenants but may also be applicable for commercial tenants).

Renewal rights: Renewal rights may be contractually agreed, which is regularly the case in favour of the tenant. There are no limitations for the duration of an extension, and anything between six months and five years is within normal range.

19. How are use, planning and zoning restrictions on real estate regulated?

For almost every building project and major change of usage a permission is necessary, which has to be obtained from the local building authority. The competent authority has to review, if the planned project is in accordance with applicable regulations stemming from a patchwork of federal, state and local legislation.

The federal legislator has the competence to determine the general legal framework for zoning and planning restrictions, while the local municipalities issue the actual land use and detailed development plans. (Please refer to Q1+2 above)

Land use plan (*Flächennutzungsplan):* In the land use plan the municipality outlines the overall use of land within its territory. These plans contain little detail but set a broad framework and are thus not binding for the individual property owner, but rather a tool to steer the administration and to further develop the development plan on its basis.

Development plan (Bebauungsplan): This plan is significantly more detailed and builds on the land use plan. The procedure to set up such a plan, including all political pre-discussion and the required public hearings, can easily take more than a year. When in effect, the development plan is legally binding for all affected land owners and therefore very relevant for a given development project within is scope. It usually covers a much smaller area than the land use plan and can even govern only one property and/or a specific project (in which case it is often accompanied by a public development contract between the municipality and the developer). The development plan specifies the allowed use for each plot of land and all ancillary areas (such as parks and traffic installations). The municipality can choose between approximately ten different types of areas from the federal Land Use Ordinance (*Baunutzungsverordnung*), ranging from pure residential and core city areas to industrial and mixed uses areas. Furthermore, the development plan determines the maximum dimensions of buildings and can even provide for a detailed “window” on a given property in which a building must stand. The municipalities are not forced to issue detailed development plans; if no such plan exists, as a general rule, all new buildings must comply with the existing uses and sizes of buildings in the immediate neighbourhood.

While zoning and planning is a federal and local competency, it is the state’s legislator’s authority to set out the legal framework for technical requirements for buildings (such as concerning building materials, distances between buildings, fire prevention and other health and safety issues) and the permit procedures. This legislation differs in every state to a varying degree. The states also have authority to legislate monument protection, an issue that may have a (costly) impact if a property is protected or located close to a protected monument.

On top of these general building requirements, developments with a broader impact on the environment (such as high-rise buildings, large logistic or industrial facilities) may need additional environmental impact assessments or be subject to special permit requirements outside the regular building codes.

20. Who can be liable for environmental contamination on real estate?

Pursuant to German law, in the first place the actual polluter is liable for environmental contamination on (or in or below) real estate (no matter whether it is the owner or not). German environmental laws generally establish a “polluter pays” principle for clean-up of contaminated land and pollution of waters. If the state of the land (or waters in on or under the land) is such that there is actual significant harm, or a substantial risk of significant harm, to the environment, the regulator must designate the land as “contaminated land”. It must also serve a remediation notice on the responsible person to clean up the contaminated land / waters. Competency lies with the local or state authorities.

However, also the owner and/or occupier may be held liable for environmental pollution, even if it did not cause it. When disposing of real estate, a seller typically wants the buyer to assume any and all liability for the condition of the property and grant the seller a comprehensive indemnity. Nevertheless, under applicable environmental law, even a former owner may remain liable and be called upon by the public authorities. In addition, under certain circumstances, German law even allows so-called “piercing the corporate veil” (i.e. provides for a liability under public law of shareholders in a corporate entity which would otherwise be protected from liabilities in the company by civil law).

The authorities may, within limits, decide at their discretion which party they actually hold liable – in particular if the actual polluter cannot be determined or is not sufficiently solvent, the risks for the property owner increases. A party which was held liable, but did not cause the pollution, may have a statutory recovery claim against the actual polluter.

21. Are buildings legally required to have their energy performance assessed and in what (if any) situations do minimum energy performance levels need to be met?

On the basis of the new Building Energy Act (Gebäudeenergiegesetz, GEG) that implements the European Directive 2010/31/EU and the Directive (EU) 2018/844 and which came into force on 1 November 2020, the legislator intended to ensure the most economical use of energy in buildings, including an increasing use of renewable energies for the generation of heat, cooling and electricity for the operation of buildings (section 1 (1) GEG).

The GEG defines energy requirements for new buildings as well as for renovations or conversions and extensions in existing buildings. In principle, new buildings are to be constructed as low-energy buildings, i.e. the total energy requirement for heating, hot water preparation, ventilation and cooling, must not exceed the respective maximum value, and energy losses during heating and cooling are to be avoided through structural thermal insulation. Different requirements apply to residential and non-residential buildings; many concrete requirements result from reference to special DIN standards.

Existing buildings are generally protected. In general, the energy quality of the building must not deteriorate (section 46 GEG). However, if exterior components are renewed, replaced or installed for the first time, some of the aforementioned requirements must be met (section 48 GEG).

In addition, the building owner must have an energy certificate issued for the building not only for new buildings, but also when selling, renting or leasing an existing building and make it available to interested parties.

A declaration of compliance for buildings to be constructed is to be issued to the authority responsible under state law by the builder or owner after completion of the building unless state law provides otherwise (section 92 (1) GEG). A similar declaration for existing buildings is required only if exterior components are renewed or replaced. The relevant authority may, in individual cases, issue the orders necessary to fulfill the obligations under the GEG and there are penalties for intentionally or recklessly complying with not certain provisions under the GEG.

In addition, please see the most recent developments in this regard further described under no. 3 above.

22. Is expropriation of real estate possible?

Powers are available to public bodies, and other bodies exercising public functions, to acquire land by expropriation (or pre-emption or other means) in a variety of situations. These powers of compulsory acquisition are given to help such bodies to fulfil their statutory responsibilities. However, in practice such powers are relatively rarely exercised due to the financial situation of the communal authorities and/or expected heavy opposition by property owners. Common examples of such rights include:

- the right of local authorities to acquire land for urban planning purposes and exercise statutory pre-emption rights;

- expropriation rights in particular where land is needed for large infrastructure purposes (such as railways, underground, highways, etc.);
- the ability to carry out a re-apportionment of land in order to restructure a given area with very fragmented pieces of land; or
- redevelopment measures in urban areas where properties may also be reapportioned or other instructions (including development orders) be given if required to modernize or improve the relevant area.

When a pre-emption right is exercised, or expropriation is carried out, compensation is awarded to the affected owner and / or occupier according to applicable laws (which does not necessarily correspond to the market value of the lost asset). Redevelopment measures however will regularly result in costs to the land owners (which are generally not compensated by the public, because the law assumes that such redevelopment is also beneficial for each individual owner).

Please note: Making use of statutory pre-emption rights instead of using expropriation rights has recently become a topic in political discussions, mostly to limit the rent-increase for residential units (cl. Q17) plus is an ongoing, highly disputed topic.

23. Is it possible to create mortgages over real estate and how are these protected and enforced?

Yes, mortgages (*Hypotheken*) or land charges (*Grundschulden*) can be created over real estate, and they are registered in the land register. The main difference between a mortgage and a land charge is that, while the mortgage exists only as long as the underlying debt is not repaid, land charges are generally independent from a specific claim but are abstract in nature. That is why banks generally prefer land charges over mortgages as the former give more flexibility and higher security. In fact, land charges are significantly more common than mortgages in Germany. Once registered, any such rights provide for a secure right in the property.

Both instruments are enforced through foreclosure procedure which may take several months and typically either results in a forced sale of the property or forced administration to satisfy the secured creditor form the property's proceeds. The German foreclosure procedure is rather complicated, very formalized, contains a range of pitfalls and requires extremely careful preparation. Under both the German law governing the land register and the law of foreclosure proceedings the rank of the mortgage or land charge, as the case may be, is critical. If any other rights are registered in rank higher than the enforced lien, the higher-ranking creditors (whose rights would be deleted in the foreclosure procedure) will be compensated first – and the enforcing creditor would only receive any remaining proceeds. Hence, a detailed analysis of the value of the property and of other encumbrances on the property is essential to assess the merits of applying for foreclosure.

24. Are there material registration costs associated with the creation of mortgages over real estate?

Generally, mortgages and land charges must be notarised and typically will contain a clause submitting the property to immediate enforcement. Such a clause helps to shorten the enforcement process, because no prior court ruling on the underlying claim would be required (but the foreclosure procedure as such still needs to be carried out). Notarization of the lien and said enforcement clause will trigger notary fees.

In addition, registration (and later deletion) of the lien in the land register will trigger land register fees. A land charge or mortgage can either be certificated (i.e. a certificate will be issued by which the right can be assigned outside the land register by transfer of the certificate) or uncertificated (in which case it can only be transferred by registration of the new creditor in the land register). Many banks prefer a certified lien because it allows quicker transfer and gives more flexibility. However, issuance of the certificate results in additional costs and the beneficiary would be required to take extra care and make sure that the certificate does not get lost; reflecting it is time- and cost intensive.

There are no property or transfer taxes payable in relation to the creation of security over real property.

25. Is it possible to create a trust structure for mortgage security over real estate?

Yes. Where there are multiple beneficiaries of security, it is common to use a security trustee to hold the security on trust for the beneficiaries, which may include a syndicate of lenders. Under a trust structure, the trustee will hold the mortgage or land charge, as the case may be, and beneficiaries of the security can change without any changes being required to the mortgage/land charge documentation. However, any fee closure will them require particular steps made by the trustee, not by the multiple beneficiaries.

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