



# Federal Constitutional Court overturns “Berlin rent cap”

15 April 2021

The Federal Constitutional Court ([decision of the Second Senate of 25 March 2021, Ref. 2 BvF 1/20, 2 BvL 4/20, 2 BvL 5/20](#)) has ruled that the so-called “Berlin rent cap” is unconstitutional due to lack of legislative competence of the Federal State of Berlin and is therefore void. The decision has direct consequences for existing lease agreements.

The Federal Constitutional Court (BVerfG) has declared the so-called “Berlin rent cap” unconstitutional a little earlier than expected, but - as we anticipated - on the basis of the lack of legislative competence of the Federal State of Berlin.

In its decision published today, the BVerfG explained in detail that the Berlin Senate has no legislative competence for a “parallel rent law at the state level”. As part of civil law, regulations on rent levels for unrestricted housing fall within the concurrent legislative competence (Article 74(1)(1) of the Basic Law (GG)). The federal legislature had finally made use of this competence with §§ 556 to 561 of the German Civil Code (BGB), since they provided for comprehensive and differentiated regulations on the amount of rent in general and the rent control in particular (Sections 556d et seq. BGB) and did not

contain any opening clauses or enabling provisions for legislature on Federal State level. In particular, the authorisation of the Federal States to issue ordinances in Section 556d (2) BGB did not constitute such an opening clause, as it did not confer any independent regulatory power on the Federal States, but only authorised them to define areas with tight housing markets. As a result, the Federal States were excluded from regulating rent levels in this area (“blocking effect” of Article 72 (1) GG).

The BVerfG declared the “rent cap”, which had - accordingly - been enacted in violation of legislative powers, null and void as a whole and did not limit itself to a mere declaration of incompatibility. The BVerfG regularly resorts to such a declaration in order - as the court itself partly formulates in its case

law - to prevent "chaos" by retroactively abolishing a norm. However, the court saw no reason for this.

What does this mean for landlords and tenants in the Berlin market? Can landlords demand the rent that has been capped or withheld in the meantime from the tenant? Is it necessary to set a deadline or stagger the payments? And: who has to pay for the interest damage?

To answer the questions, a distinction must be made according to the lease agreements concerned.

### **1. Existing leases that provided for a higher rent than permitted under the "Berlin Rent Cap Act"**

In the case of these contracts, for which a rent cap-compliant rent had to be paid by law since 23 November 2020, the obligation to pay the originally agreed rent is revived without any further action on the part of the parties involved, both with effect for the future and for the past. The same applies to graduated and index-linked rents that were "frozen" by the "Berlin Rent Cap Act" as of 23 February 2020.

### **2. New contracts in which a so-called "shadow rent" was agreed upon**

From 23 February 2020 onwards, only a rent cap-compliant rent could be agreed in new contracts. Approx. 90% of these new contracts contained a clause according to which a higher rent would have to be paid in the event that the unconstitutionality of the rent cap was established.<sup>1</sup> Although these regulations are not legally uncontroversial, they are probably permissible in the opinion of some initial court rulings and the BVerfG. Here, too, the higher rents can be demanded with effect for the past as well as for the future according to the current status.

### **3. New contracts in which no so-called "shadow rent" has been agreed upon**

In cases where new leases were simply concluded within the rent limits provided for in the "Berlin Rent Cap Law", landlords are limited to a regular increase of the rent according to Section 558 BGB up to the local comparable rent. However, such an increase

can only be considered after 15 months of unchanged rent.

### **4. When can the back payments be demanded and is interest payable?**

Since a monthly rent is usually due at the beginning of a month, landlords can theoretically demand the outstanding rent payments for past rents immediately. However, a landlord will not be able to claim lost interest for the unpaid rent from his tenant. The latter is not responsible for the late payment of arrears, but was allowed to rely on the validity of the interim Berlin regulations.

### **5. Fines**

The "Berlin Rent Cap Law" also provided for fines in the event of infringements. If fines have already been imposed, it should be noted that the unconstitutionality of decisive parts of the "Berlin Rent Cap Law" leads to the nullity of the entire law. This, therefore, also applies to the administrative offences regulated therein. With the nullity of the law, the factual link to prohibited conduct also ceases to exist. However, for this reason alone, a fine already paid cannot be reclaimed without further ado: Beyond the specific proceedings, the nullity of a legal norm does not lead to the invalidity of all other decisions issued on the basis of it, Section 79(2) sent. 1 BVerfGG. Accordingly, decisions that can no longer be challenged remain effective, but can no longer be enforced pursuant to Section 79(2) sent. 2 BVerfGG. Landlords, therefore, do not have to fear enforcement of fines that have not yet been paid.

### **6. Impact on further proceedings**

In its decision, the BVerfG brought three pending proceedings to a conclusion. Proceedings 2 BvF 1/20 resulted from an application for abstract review of a statute (Article 93(1)(2) GG in conjunction with Section 13(6) and Section 76(1)(1) of the BVerfGG) by 284 members of the German Bundestag from the CDU/CSU and FDP parliamentary groups. The proceedings 2 BvL 4/20 were based on a submission by the Regional Court of Berlin, which had initiated a so-called concrete review of norms (Article 100 (1) GG) in the context of a legal dispute pending before

<sup>1</sup> Handelsblatt ed. 252 of 30 December 2020 page 30.  
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it concerning a rent increase demand. The same applies to the proceedings 2 BvL 5/20, which were initiated by the Berlin Mitte Local Court after appeals to the BVerfG. A parallel legal review procedure before the Constitutional Court of the Land of Berlin by the CDU and FDP parliamentary groups in the Berlin House of Representatives was suspended

until the BVerfG's decision, which was published today.

In addition to these proceedings, further individual constitutional complaints had been filed, for example by four Berlin housing associations. The BVerfG will now probably no longer rule on these cases.

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