



The Berlin preliminary decision: Can housing companies be expropriated?

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For some time now, Berlin has been experiencing a shortage of affordable and socially subsidized housing. In April 2021, the **so-called Berlin rent cap**, which the red-red-green Berlin Senate introduced in 2020 with the aim of curbing the rise in rents in Berlin, was declared unconstitutional by the Federal Constitutional Court.

What is less well known to the public, but with potentially very significant practical implications, are the intensified efforts in Berlin to establish and exercise statutory preemption rights for institutions established under public law to acquire residential property. These efforts are accompanied by developments in local case law aimed at extending the scope of preemption rights from asset deals to share deals. Recently, the state-owned housing companies Howoge, Degewo and Berlinovo acquired around 14,750 apartments from the private housing companies Vonovia and Deutsche Wohnen at a price of EUR 2.46 billion.

I. Berlin votes to "Expropriate Deutsche Wohnen & Co."

On September 26, 2021 - i.e., in parallel with the Bundestag election and the election for the Berlin House of Representatives - Berlin voters took the first step towards socialization of non-profit housing companies with portfolios of more than 3,000 apartments by passing a referendum to "Expropriate Deutsche Wohnen and Co.". The proposal, which is unprecedented in Germany, was supported by 56.4% of the voters.

II. Background

Strictly speaking, the very title of the referendum is misleading. This is because the initiative does not

aim at "expropriation", but at "socialization". The socialization of land, natural resources and means of production is permitted in principle by Article 15 of the Basic Law. What is meant by this is the transformation of previously private property into public property. The corresponding assets would thus be "de-privatized" and used permanently by an institution established under public law. At the same time, the housing stock would be withdrawn from future privatization.

In order to implement such socialization, legislation would be needed to regulate the details. According to the initiative's draft bill, the properties in question are to be transferred to a public-law institution. It is not the companies that currently own the apartments that are to be socialized, but the housing stock as such. Approximately 240,000 apartments would be affected, or about 15% of Berlin's rental housing stock.

In accordance with Article 15 of the Basic Law, socialization is only permissible in return for payment of an adjudicated sum. According to forecasts by the Berlin Senate, the compensation costs for the housing companies affected would range from approximately EUR 29 to 36 billion, while the initiators of the referendum estimate a range of approximately EUR 7.3 to 13.7 billion. The affected real estate companies would be compensated not with cash but with bonds, which are to be repaid from the proceeds of rental income over a 40 year period.

III. Is there now a threat of socialization?

It is not yet certain that socialization will actually take place. The vote of September 26, 2021 is not legally binding on the Berlin Senate. Whether the Berlin Senate will now draft a corresponding bill depends on various factors.

According to the text of the initiative's resolution, the new Berlin state government is first called upon to "initiate all measures" required to transfer real estate to common ownership. The new Berlin Senate cannot therefore ignore the vote from the outset, but must deal with it seriously and, if necessary, also initiate a corresponding draft law.

The new mayor of Berlin, Franziska Giffey (SPD), has already announced draft legislation, but at the same time she said that it would first have to be legally examined whether such legislation could actually be implemented.

Whether such a plan can be implemented, however, is subject to considerable doubt. To date, there has never been a previous example of such socialization in accordance with Article 15 of the Basic Law in Germany. Accordingly, it is largely unclear what concrete requirements would need to be met for such a project to be permissible as a matter of constitutional law. Moreover, the Berlin state constitution (in contrast to the Basic Law) does not provide for the mechanism of socialization at all. Given the referendum stipulates that only housing stocks above a threshold of 3,000 apartments are to be socialized, conflicts with the constitutional principle of equality are expected to arise.

After all, the political support for such a bill are anything but assured. Only Berlin's Left Party is clearly in favor of the planned socialization; the Greens consider it worthy of political discussion only as a "last resort". All other political parties - including the SPD - reject such an intervention in Berlin's housing market. Regardless of the constitutional question as to whether and under what conditions socialization would ultimately be permissible, implementation of the referendum is highly uncertain, if only in view of the current lack of support for such a proposal amongst the majority of the Berlin Senate.

IV. Legal protection options

Should a bill nevertheless be introduced, various legal remedies are conceivable:

Individuals and, as a rule, legal entities can file a constitutional complaint against a law passed on the basis of a referendum. It would be conceivable to file a complaint based on an alleged violation of the Berlin state constitution with the state constitutional court, as well as a complaint based on an alleged violation of the Basic Law with the Federal Constitutional Court. Both forms of constitutional complaint can be pursued in parallel. Such forms of constitutional complaint would also not necessarily be precluded by the requirement of the subsidiarity of the constitutional complaint. Under Article 15 of the

Basic Law, socialization must be effected directly by law, and there would be no legal remedy against this before the specialist administrative or civil courts. However, if the particular amount of compensation is disputed or an enterprise objects to being designated a housing enterprise which reaches or exceeds the threshold of 3,000 apartments, legal recourse would be an option before the specialist administrative or civil courts - and would therefore need to be taken to such applicable court prior to lodging a constitutional complaint. Details as to the appropriate means of legal redress would need to be determined on the basis of the future legislation, when the details become known.

Socialization could prove disproportionate in particular because alternative and less drastic measures to ease the situation on Berlin's housing market could be considered, in particular the purchase of companies, the grant of minority blocking rights or parts of the companies' housing stock by the public

sector in line with market conditions, as has recently happened.

V. Summary and Outlook

Taking into account the complex factual situation, the legal hurdles and the political pitfalls, lawful socialization of private-sector housing portfolios seems unlikely at the present time and in the medium term.

In purely constitutional terms, however, Berlin does not represent a special case in Germany. Plebiscitary instruments such as the Berlin referendum can also be found in the constitutions of other German states. However, developments similar to those in Berlin are not discernible in the other states; the housing markets in other large conurbations such as Frankfurt or Munich are quite different from that in Berlin, and therefore the developments in Berlin cannot be readily extended to the markets in those other major cities.

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