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CORPORATE REAL ESTATE

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THE CORPORATE REAL ESTATE MARKET

1. What have been the main trends in the real estate market in your jurisdiction over the last 12 months? What have been the most significant deals?

In the first six months of 2012, the investment volume reached about EUR9.42 billion. Compared to the equivalent period of 2011, investments declined by 15%. While the transaction volume in the second half of 2011 reached EUR12.13 billion, total investments in the past four quarters amounted to about EUR21.46 billion.

As before, the results of the second quarter of 2012 were dominated by transactions in individual properties, which amounted to EUR3.47 billion, equating to a decline of 19% compared to the previous quarter. Over the entire first half of 2012, such investments totalled EUR7.76 billion, while investments in portfolios amounted to only EUR1.68 billion.

The transaction volume of the second half of 2011 and the first half of 2012 consisted of, among others:

- 34.15% retail.
- 38.39% office property.
- 5.98% logistics or industrial properties.

The following transactions are among the most important deals that took place in Germany (according to DTZ research):

- The sale of Allianz headquarters (Unterföhring) for about EUR288 million to IVG Private Funds (Euroselect 21).
- The sale of Maximilianhöfe (Munich) for about EUR275 million to Pembroke Real Estate.
- The sale of 50% in Ruhr-Park-Center (Bochum) for about EUR200 million to Unibail Rodamco.
- The sale of 45% in Europa-Passage (Hamburg) for about EUR184 million to Allianz Real Estate Germany.

REAL ESTATE INVESTMENT

2. How is real estate investment carried out in your jurisdiction and what structures do investors use?

Common structures

Investors can use any form of property company (partnership or corporation) under German law to invest in real estate, and property companies structured according to the law of a foreign state. The following German property company structures are commonly used:

- Co-ownership.
- Civil law partnership.
- Limited liability company.
- Commercial law partnership (general or limited partnership).
- Public limited company/stock corporation.

In addition, investors can choose closed-ended and open-ended funds as well as joint ventures for investment. Finally, there are special investment funds managed by investment companies for selected investors.

REITs

REITs are still a relatively new kind of real estate vehicle in Germany since the introduction of REITs legislation in 2007. Although REITs were expected to become major players in the market, in 2011 there were only four German REITs (Alstria Office REIT AG, Fair Value REIT AG, Hamborner REIT AG and Prime Office REIT-AG which became a German REIT in July 2011).

Institutional investors

Institutional investors are a driving force in German markets. Opportunity and equity funds from foreign countries, as well as international property companies, have been the biggest investors. Open-ended funds and other German investors, such as insurance companies, now account for far less transaction volume than before. Open-ended funds were still under pressure as several funds remained closed through the past year.

Private investors

Private investors are becoming increasingly active, particularly in relation to single investments, where they represent an important group of buyers.

REAL ESTATE LEGISLATION

3. What is the main real estate legislation that applies in your jurisdiction?

The main sources of real estate law are the:

- Civil Code (*Buergerliches Gesetzbuch mit Einfuehrungsgesetz*).
- Notarisation Act (*Beurkundungsgesetz*).

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- Land Register Ordinance (*Grundbuchordnung*).
- Act on Transfer of Real Property (*Grundstuecksverkehrsgesetz*).
- Federal Building Code (*Baugesetzbuch*).
- Building Ordinances of the Federal States (*Bauordnungen der Laender*).
- Act on German REITs (*Gesetz zur Schaffung deutscher Immobilien-Aktiengesellschaften mit boersennotierten Anteilen*).

TITLE TO REAL ESTATE

Title and registers

4. What constitutes real estate in your jurisdiction? Is land and any buildings on it (owned by the same entity) registered together in the same title, or do they have separate titles set out in different registers?

Real estate consists of land and buildings attached to the land (*section 90, Civil Code*). Therefore, buildings are automatically in the possession of the land owner. In exceptional cases, ownership of buildings and land can be separate, for example, when heritable building rights are involved, or if the building was constructed by a tenant (*see Question 9*). However, there is no separate registry for title to buildings.

Evidencing title

5. How is title to real estate evidenced?

Legal title to real estate is evidenced in the public Land Register (*Grundbuch*) kept at the district courts (*Amtsgerichte*) (*see Question 6*). In the Federal State of Baden-Wuerttemberg, the Land Register is kept in notary offices.

Information in the public register

6. What are the main information and documents registered in the public register of title?

The Land Register holds property information in the Land Register Index (*Bestandsverzeichnis*) and there are also three divisions, providing further information (*see below*). The index provides general property information, such as:

- Cadastral details.
- Postal address.
- Use.
- Size.

The divisions provide the following information:

- **Division I.** The legal owner of the property is registered here.
- **Division II.** This sets out property encumbrances, such as:
  - easements;
  - priority notices;
  - public notices.
- **Division III.** Mortgages (*Hypotheken*) and land charges (*Grundschulden*) are registered here.

Acquisition of title requires, among others, registration of the buyer in division I. Accordingly, legal ownership is usually evidenced by a copy of the Land Register for the property, which can be an ordinary or certified copy.

Protection from disclosure

7. Can confidential information or documents be protected from disclosure in the public register of title?

Confidential information or documents are protected by law, which grants individuals with a legitimate interest the right to inspect or obtain a copy of the Land Register. Only reasonable interest justified by the circumstances is deemed sufficient. However, the threshold is not unreasonably high. Economic reasons such as serious acquisition negotiations are sufficient.

State guarantee of title

8. Is there a state guarantee of title? Is title insurance available? If so, is it commonly used?

There is no state guarantee of title, but the seller is fully liable for defects in title and liability cannot be limited or excluded. Registration involves formal Land Register procedures taken care of by notaries. Notaries have statutory liability to the parties and must maintain professional indemnity insurance of at least EUR500,000. However, if the Land Register is at fault, parties can bring compensation claims against the Federal state, for wilful or negligent acts or omissions relating to the Land Register. A buyer who relies in good faith on the actual entries in the Land Register is regarded by statute as a bona fide purchaser.

Title insurance is generally unavailable in Germany and usually not offered by German insurance companies.

Tenure

9. How can real estate be held (that is, what types of tenure exist)?

The most common way to hold real estate is land ownership, that is, buying the land with the buildings on it. Generally, title to buildings and land are not legally separate, except in special circumstances, for example in:

- **Flat ownership (*Wohnungseigentum*).** Title is to specific, legally separate premises, with a co-ownership share in communal areas and installations.
- **Hereditary building rights (*Erbbaurechte*).** Buildings are constructed and remain legally separate for a certain period, so the buildings can be sold separately from the land.

Country Q&A

As an alternative to buying real property directly, an investor can often buy (indirect purchase) shares of a company that owns the property (special purpose vehicle). Investments in this form are particularly popular in project developments. Although an indirect purchase follows separate rules, careful evaluation of the property is still important.

Additional types of tenure besides ownership include the:

- Right to possess and use due to long-term tenancy (*Pacht*).
- Lease (*Miete*).
- Right to use *in rem* (*Nutzungsrecht*).

SALE OF REAL ESTATE

Main stages and documents

10. What are the main stages and documents in the sale of real estate?

Marketing

A seller is usually first contacted through one of the major international investment consultancy firms and, less frequently, through smaller regional estate agents. Open tenders, where major real estate portfolios are offered by public tender, follow separate rules to some extent.

Commercial negotiation

Investors conduct commercial negotiations in a transaction with support and advice from surveyors, lawyers and tax advisers. Usually, commercial negotiation starts between the seller and the buyer before the involvement of other advisers to assess whether the expectations differ too much.

Pre-contractual arrangements

Pre-contractual arrangements are not valid, unless the major points of the main contract are agreed, and the content of the main contract is determinable. Further, pre-contractual arrangements relating to real estate are only binding if authenticated by a notary. Therefore, pre-contractual arrangements are not common in Germany. Instead, parties often sign a non-binding letter of intent to set out their mutual negotiating positions. Non-compliance with the letter of intent before the transaction begins can lead to compensation claims.

Sale contract

The purchase price is only payable after certain conditions have been satisfied, rather than on the date when the purchase agreement is concluded. The most common conditions include:

- Registration of a priority notice in favour of the buyer.
- Waiver or negative clearing certificate of statutory pre-emption rights from the local authority.

When the purchase price is paid, occupation of the property and the right to its benefits (and the burden of its obligations) pass to the buyer, so the property passes to the buyer commercially, but not legally at this stage. Generally, rent claims arising after the purchase price is paid are assigned to the buyer. The purchase and payment of the purchase price can be subject to certain notification duties under tax law and banking law.

When legally binding

The purchase agreement becomes binding on the parties after:

- A public notary has notarised the purchase agreement.
- All outstanding conditions, approvals and declarations have been obtained.

The most common conditions are:

- Approval of declarations in the agreement by one party, if it has been represented by an attorney-in-fact who may (intentionally or otherwise) have acted without a sufficient power of attorney.
- Consent to sell under certain administrative regulations, such as in eastern Germany, and in certain areas where administrative procedures apply.
- Conditions precedent in the purchase agreement being satisfied.
- Expiration of terms before which the agreement cannot become binding on the parties.

Registration

Registration requires:

- A notarised conveyance of ownership (*Auflassung*) between the buyer and seller.
- A clearance certificate (*Unbedenklichkeitsbescheinigung*) of payment of real property transfer tax, issued by the tax authorities and submitted by the buyer.
- The local authorities to confirm they are not entitled to a right of pre-emption, or will not exercise such right (*see Question 24*).
- In certain cases, official permission for, among others, the sale of agricultural or forestry land (*Grundstuecksverkehrsgesetz*). In the five eastern states, transfer of real property requires a permit under the Real Estate Transaction Ordinance (*Grundstuecksverkehrsordnung*) from the public authorities, because properties there can be subject to unresolved restitution matters.

Usually, the public notary collects the required documents and applies for registration of title in the land register once the purchase price has been paid and the clearance certificate has been sent to him as evidence that the transfer tax has been paid (*see Question 18*).

When title transfers

Title passes when the buyer is registered as owner on the Land Register for the property, which can happen some time after the purchase agreement has been concluded. Title does not pass at the moment the purchase agreement is concluded.

Seller's liability to the buyer

11. Does a seller have any statutory or other liability to the buyer in a disposal of real estate?

The seller's statutory liability for property and construction defects is generally excluded. The buyer is responsible for carrying out due diligence to obtain information about possible damage to the property, and about the overall legal position (*see Question 12*).

However, the seller has statutory liability for title. The seller is fully liable for title defects, and liability cannot be limited or excluded. In addition, the seller is responsible for disclosing any technical damage or property defect which is both:

- Known to it.
- Not easily discoverable through due diligence.

The seller is deemed to have acted fraudulently if it fails to disclose technical damage or property defects. Therefore, it is common to include a clause in the contract that, to the best knowledge of the seller, there is no such damage or defect.

Due diligence

12. What real estate due diligence is typically carried out before an acquisition?

Real estate due diligence is common, although in Germany, it is not regulated by law. Traditionally, due diligence is carried out on behalf of the buyer, but current trends involve due diligence being carried out on the seller's request, which is sometimes also made available to the buyer.

Real estate due diligence is complex and can be divided into four main parts:

- Legal due diligence.
- Technical/environmental due diligence.
- Tax due diligence.
- Financial due diligence.

It involves assessing:

- Deeds.
- Land registry records.
- Loan documents.
- Lease and employment agreements.
- Service and advertising contracts.
- Insurance policies.
- Licences.
- Permits.
- Zoning.
- Environmental and engineering inspection and surveys.
- Financial and tax records.

Sellers' warranties

13. What real estate warranties are typically given by a seller to a buyer in the sale of corporate real estate and what areas do they cover?

In the sale of commercial property, the scope of a warranty depends on individual circumstances. It depends on whether buyers are speculative or conservative investors (for example, open-ended funds). While speculative investors tend not to demand strict warranties (for example, concerning rental income), conservative investors generally do so. Conservative investors usually demand the following warranties from the seller:

- The transfer of the property without defects in quality, including the residual pollution risk.
- Compliance with construction permits or certain existing agreed features.
- That the transfer of the property is free from environmental damage.
- Validity of existing leases and guaranteed rental income.
- The absence of pending legal disputes or remedy proceedings.
- A guarantee that there are no arrears of real estate taxes or public liens at the time of transfer of possession.

In the sale of large real estate portfolios or companies holding real estate, sellers usually give only very limited representations and warranties.

Inheriting liability

14. Can an owner or occupier inherit liability for matters relating to the real estate even if they occurred before it bought or occupied it?

The present owner of the real estate does not generally inherit liability for pre-ownership matters such as municipal duties and taxes. Exceptions apply when provided by law or when contractually agreed with the former owner. For example, the present owner is jointly liable for real estate tax accrued since the start of the calendar year before the acquisition (*Real Estate Act (Grundsteuergesetz)*). In addition, the present owner of a property can always be held responsible and liable by the competent authorities for contamination of soil and groundwater, even if he did not cause the contamination (*Federal Soil Protection Act (Bundesbodenschutzgesetz)*). Expenses incurred by the public authorities to remedy contamination accrue as a public burden on the real estate. Existing leases bind the new owner, unless the lease states otherwise (*Civil Code*).

Retention of liability after disposal

15. Does a seller or occupier retain any liabilities relating to the real estate after it has disposed of it?

The seller is liable for defects and damages to buildings for five years after handover of the property. However, this

statutory warranty is usually excluded in the purchase agreement. Therefore, the parties can agree that the seller give representations and warranties on the basis of the information the buyer has become aware of during due diligence.

For new building developments, the seller usually assigns claims against contractors, architects and engineers to the buyer, together with warranty bonds.

The seller is responsible for public burden payments in certain circumstances. In relation to the removal of pollution by the authorities, the environmental liability of a former owner can last a considerable time. If the seller does not comply with its duty to sell the property in a state that is free from title defects, the buyer can demand the removal of the defect as a supplementary form of specific performance. Charges secured on the real estate are a title defect.

Seller and buyer costs

16. What costs are usually paid by the buyer? What costs are usually paid by the seller?

Buyer's costs

The buyer typically pays:

- Transaction costs, notary costs and court fees. Notary costs and court fees are fixed by law and based on the value of the property.
- Real property transfer tax (*see Question 18*).
- Estate agents costs, at between 1.5% to 3% of the purchase price plus VAT, depending on the purchase price, which is subject to negotiation.

Seller's costs

The seller typically pays its own costs relating to the purchase agreement, including legal fees.

REAL ESTATE TAXES AND MITIGATION

17. Is value added tax (VAT) (or equivalent) payable on the sale or purchase of real estate?

The sale and purchase of real property is generally VAT exempt. However, parties can decide to subject the transaction to VAT, in which case, the seller must reimburse VAT to the tax authorities deducted in connection with construction costs. The buyer pays VAT at 19% of the net purchase price. The parties must provide a tax registration number and apply an invoice number to the purchase agreement for VAT purposes.

18. Is stamp duty/transfer tax (or equivalent) payable on the sale or purchase and who pays?

The acquisition of real property is subject to real property transfer tax. Both parties are jointly liable to the tax authorities for the real property transfer tax, while between the parties it is usually agreed that the buyer pays this. Federal states can change the tax rate at their discretion. The actual rates are (as a percentage of the purchase price):

- Baden-Württemberg: 5%.
- Bavaria: 3.5%.
- Berlin: 5%.
- Brandenburg: 5%.
- Bremen: 4.5%.
- Hamburg: 4.5%.
- Hessen: 3.5% (increase to 5% planned as from 1 January 2013).
- Mecklenburg-Western Pomerania: 5%.
- Lower Saxony: 4.5%.
- North Rhine Westphalia: 5%.
- Rhineland-Palatinate: 5%.
- Saarland: 4.5% (increase to 5% as from 1 January 2013 is being discussed).
- Saxony: 3.5%.
- Saxony-Anhalt: 5%.
- Schleswig-Holstein: 5%.
- Thuringia: 5%.

19. Are any methods commonly used to mitigate real estate tax liability on acquisitions of large real estate portfolios?

Tax-efficient acquisition structures involve one or more special purpose companies holding real estate to avoid real property transfer tax. However, transfer tax can also apply in an indirect purchase of real property. An indirect purchase of real property takes place if at least 95% of the shares in a company holding real property are acquired at once, or if at least 95% of the interest in a partnership holding real property is transferred during a period of five years.

HOLDING BUSINESS PREMISES

Climate change targets

20. Are there targets to reduce greenhouse gas emissions from buildings in your jurisdiction? Is there legislation requiring buildings to meet certain minimum energy efficiency criteria?

The government is committed to the reduction of greenhouse gas emissions and the efficient use of renewable energies. The Energy Savings Ordinance (*Energieeinsparverordnung*) which was amended in October 2009, contains a full set of measures to obtain this goal. An energy pass (*Energieausweis*) is mandatory from 1 July 2008 for residential buildings completed before 1965. An energy pass for other residential buildings is mandatory from 1 January 2009, and for all non-residential buildings from 1 July 2009. The energy pass contains information about current consumption relating to the general demand of energy used for heating and hot water. Its aim is to provide information on the energy

efficiency of the building. It can be issued by architects, engineers, chimneysweepers and so on, and is valid for ten years. A potential buyer can waive its right to obtain an energy pass. If it does not, failing to provide an energy pass is an administrative offence.

Further measures contain tighter requirements for energy savings from newly built houses of 30%, including material variation of existing buildings and the obligation to refit old equipment and buildings.

Third party outsourcing

21. Is it common for companies to manage their real estate portfolios and their accommodation needs by using third parties through outsourcing transactions?

Some companies have assigned property management of their real estate portfolios to estate agencies or property managers. Large real property holders such as insurance companies have also begun to use asset management subsidiaries which are intended to provide third party services themselves. Some large estate agencies already maintain special departments or subsidiaries for this purpose. Property managers typically provide services concerning commercial and technical management of real estate portfolios.

Restrictions on foreign ownership or occupation

22. Are there restrictions on foreign ownership or occupation of real estate, or on foreign guarantees or security for ownership or occupation?

There are no restrictions on foreign individuals or entities owning or occupying real estate. However, implicit restrictions for entities may result from land registers refusing to acknowledge foreign entities as being vested with legal capacity and therefore refusing registration.

Issues on change of control

23. Does change of control of a company affect its holdings of real estate?

Change of control does not affect a company's holdings of real estate. However, in partnerships (*Personengesellschaften*), particularly civil law companies (*Gesellschaften buergerlichen Rechts*), company changes may require amendments to the Land Register.

Compulsory purchases

24. In what circumstances can local or state authorities purchase business premises compulsorily? Is the purchase price market value?

The authorities can demand expropriation for certain purposes, which generally involve infrastructure planning. All expropriation is subject to paying compensation at market value. In addition, the relevant local authority has a statutory pre-emption right for a real estate purchase to, for example, secure land for infrastructure.

If the local authority exercises the right of pre-emption to which it is entitled, it must in principle pay the purchase price agreed by the buyer and seller. If the local development plan for the property to be sold involves public use (for example, surfaces for public good) or environment-protecting balance measures, the authorities can determine that the market value of the property is owed at the time of the purchase (compensation value (*Entschädigungswert*)) instead of the purchase price.

Municipal taxes

25. Are municipal taxes paid on the occupation of business premises? Are there any exemptions?

Real property tax is a local tax levied on a specific tax value, which is generally considerably below the property's market value. The actual tax payable depends on the municipality where the real property is located. Real property tax is deductible as a business expense from the income derived from the real property. It is imposed on the registered landowner. For the period between the economic transfer (the handover) and the legal transfer (registration of the buyer), the parties in practice agree that real property tax and other public burdens pass to the buyer (*see Question 10*).

REAL ESTATE FINANCE

26. How are acquisitions of large real estate portfolios or companies holding real estate generally financed?

Acquisitions of large real estate portfolios are usually financed by secured lending (*see Question 27*) (particularly land charges), through sale and leaseback, and asset-backed securitisations.

27. How is real estate commonly used to raise finance?

Business premises can be encumbered with mortgages, or more commonly with land charges as security for business credit agreements, and for the acquisition of the property. In addition, there have been an increasing number of sale and leasebacks.

Real property can also be used in structured finance products such as asset-backed securitisations.

28. What are the most common forms of security granted over real estate to raise finance? How are they created and perfected (that is, made valid and enforceable)?

In most cases, property financing is secured by a mortgage (*Grundpfandrecht*). As a charge on property, it gives the lender a power of sale *in rem* (*dingliches Verwertungsrecht*). There are two types of mortgage:

- **Hypothek.** This is dependent on a claim, which means it cannot be created or assigned without a claim. It identifies a sum of money, which is paid on the borrower's default, from the encumbered property, to satisfy the claims of the mortgage creditor against the proprietor or a third party. The proprietor is not obliged to pay the claim directly.

The proprietor only has to allow compulsory execution (*Zwangsvollstreckung*) over the property and objects on the property. As a statutory assignment, a *Hypothek* is automatically transferred on assignment of the claim.

- **Grundschuld (land charge).** This is the more commonly used type of mortgage. It is abstract and therefore independent from a claim. The link between a claim and a land charge is made by agreement, which involves specifying the purpose of the mortgage (*Sicherungsabrede*). A land charge also identifies a sum to be paid. Payment of this sum under the land charge does not automatically settle the underlying claim, as the land charge is still legally independent from the claim. The proprietor must also allow execution over the property. Independence from a particular claim makes the land charge much more flexible than the *Hypothek*, because it can be used by a variety of claims. Consequently, the land charge has far greater significance in practice.

29. Is real estate securitisation common in your jurisdiction?

Real estate securitisation is common. Encumbrances on real estate (*Grundpfandrechte*) serve as safeguards. Land charges are the most common method of securing real estate because of their legal organisation (*see Question 28*). Financial institutions may refinance using the German covered bond (*Pfandbrief*).

REAL ESTATE LEASES

Negotiation and execution of leases

30. Are contractual lease provisions regulated or freely negotiable?

Rent is generally freely negotiable. However, excessive rent above a certain level when compared to the usual rent is prohibited. If rent is about double the rent customarily in place, the internal lease may be ineffective due to usury (*paragraph 1, section 138, Civil Code*). Agreeing excessive rent, taking advantage of and exploiting the other party's exigence, are also prohibited.

Lease terms are regulated by sections 535 et seq. of the Civil Code. These regulations are usually modified in commercial leases. General terms and conditions of trade are also regulated.

31. What are the formal legal requirements to execute a lease?

Generally, there are no specific formal legal requirements to execute a lease. A valid lease only requires a mutual agreement between landlord and tenant, which can be concluded orally. However, leases with a fixed term must be in line with the written form requirement under section 550 of the Civil Code, to avoid triggering statutory termination rights.

If the lease object is located in a redevelopment area (*Sanierungsgebiet*), consent from the competent redevelopment authority is required. A lease concluded without this consent is invalid. In addition, a lease must be notarised if it includes, for example, a pre-emption right.

Rent levels and reviews

32. How are rent levels usually reviewed and are there restrictions on this? Is VAT (or equivalent) payable on rent?

Recurring rent reviews during the term of the lease are uncommon. However, rent is often connected to the cost of living index for all households (*Verbraucherpreisindex*). Usually, the parties agree to adjust rent in line with the index. This indexation is only possible if the lease is binding on the landlord for a period of at least ten years. It must not be limited to a rent increase but must include a decrease according to the index.

Rent is generally free from VAT. However, the landlord can opt for rent to be subject to VAT. The tenant only needs to pay VAT on rent if this is agreed in the lease.

Length of term and security of occupation

33. Is there a typical length of lease term and are there restrictions on it? Do tenants of business premises have security of occupation or rights to renew the lease at the end of the contractual lease term?

Parties can freely negotiate the term of the lease. A fixed lease term of several years is often agreed (for example, five, ten or 15 years). The term of a lease is often combined with a right for one party to renew the lease for a further fixed term, and/or a tacit extension of the lease if neither party terminates before expiry. If no fixed term is agreed, the lease can be terminated by either party giving a statutory notice period (*see Question 38*).

Tenants of business premises generally have no security of occupation. Therefore, in some leases, a restricted personal servitude (*beschraenkte persoenliche Dienstbarkeit*) in favour of the tenant is agreed. This is a right *in rem* and allows the tenant to occupy the rented premises during the term of the lease. The right must be registered in the Land Register, and is particularly beneficial if the landlord becomes insolvent because, unlike a lease, it cannot be terminated easily by an insolvency administrator.

Rights of renewal at the end of the contractual lease term only exist if they are agreed in the lease.

Restrictions on disposal

34. What restrictions typically apply to the disposal of the lease by the tenant?

A transfer of the lease by one party to a third party requires the consent of the other party, unless the owner sells the property, in which case, the lease generally automatically passes to the buyer. Parties do not usually deviate from this.

Tenants are not generally allowed to share their business premises with group companies (third parties) without the landlord's consent. Some leases provide for the landlord's consent to a future subletting of the premises to companies specified in the lease.

Use of premises within a corporate group

35. Can tenants usually share their business premises with companies in the same corporate group?

Tenants must generally have the landlord's consent to sublet if the lease does not include its consent to a future subletting of the premises, for example to affiliated companies (*see Question 33*).

Repair and insurance responsibilities

36. Who is usually responsible for keeping the leased premises in good repair?

The landlord is legally responsible for all repairs to the premises. This consists of structural and decorative repairs.

The parties often agree that the landlord is responsible for structural repairs to the building and the rented premises, and the tenant is generally responsible for all internal repairs. In this case, the obligation for decorative repair must depend on the actual state of wear and tear. A duty of decorative repair in a strict time frame is prohibited.

37. Who is usually responsible for insuring the leased premises?

Most leases state that the landlord must take out property insurance and third party liability insurance, and the tenant pays the premiums.

Grounds for termination

38. On what grounds can the landlord usually terminate the lease? Can the tenant terminate the lease in certain circumstances?

Landlord

The landlord can terminate an indefinite lease at any time by observing the statutory notice period. The notice periods are about six to nine months for commercial leases, and about three months or longer, depending on the duration of the terminated lease, for residential leases. A fixed-term lease can only be terminated by the landlord if the parties agree a termination right for the landlord. However, any lease can be terminated by the landlord for cause, particularly if:

- The tenant violates the landlord's rights by endangering the premises due to its negligence, or by giving the premises to a third party without the landlord's consent.
- The tenant is in arrears with rent for two months, or with an amount equal to two months' rent.
- The tenant disturbs the sanctity of the property, to the extent the landlord cannot be expected to continue the lease with the tenant.
- The landlord cannot be expected to continue the lease with the tenant, taking into consideration the circumstances, and any fault and/or negligence of the parties.

Often the parties specify additional events allowing termination for cause in the lease. Termination for cause generally requires prior warning from the terminating party.

Tenant

The tenant can terminate an indefinite lease at any time by observing the statutory notice period (*see above, Landlord*). A fixed-term lease can be terminated by the tenant if the parties have agreed a termination right for the tenant. However, any lease can be terminated by the tenant for cause, particularly if:

- The contractually agreed undisturbed use of the premises is breached. This only applies to substantial breaches, and only if the landlord does not provide relief.
- The condition of the premises is detrimental to health.
- The landlord disturbs the sanctity of the property to the extent that the tenant cannot be expected to continue the lease.

Tenant's insolvency

39. What is the effect of the tenant's insolvency under general contract terms and insolvency legislation?

If the tenant becomes insolvent, the lease generally continues. After a petition to begin insolvency proceedings has been filed, the landlord cannot terminate the lease due to default in payments or deterioration of the tenant's financial situation. However, the landlord has the right to terminate once the insolvency proceedings have begun and the tenant defaults in payment again.

The insolvency administrator can terminate the lease at any time by observing the statutory notice period, irrespective of any agreed fixed term. If a fixed-term lease is terminated by the insolvency administrator, the landlord can claim damages on grounds of premature termination from the insolvency administrator (for example, rent for the remaining period of the fixed term). However, this claim may not be (or may only be partly) successful, due to the insolvent tenant not having any assets.

If the insolvency administrator does not use this termination right, the landlord can claim rent from the insolvency administrator that is due on and after the start of insolvency proceedings. The insolvency estate must be used to settle this claim as a priority before the assets are distributed to creditors.

A landlord's claim for rent or other payments that accrued before the start of insolvency proceedings is not settled in advance, so the landlord may only have this claim satisfied if sufficient assets are available.

PLANNING LAW

40. What authorities regulate planning control and which legislation applies?

Based on the land use plan (*Flaechennutzungsplan*), the local authority develops a local development plan (*Bebauungsplan*), which is a more detailed zoning plan covering parts of a certain area. This is a public procedure, which includes publishing a draft plan and an invitation for suggestions from the public,

Country Q&A

and is finalised by the municipal council which then adopts the plan as a bye-law. The local development plan determines certain characteristics of permitted uses and/or building specifications in the plan's jurisdictional area, such as size and type of use, but can include further requirements about the design, for example type of roof, facade and building materials.

A building permit must comply with the relevant local development plan and the requirements of the Building Ordinance of the Federal State. However, the building authority has certain discretion to grant partial relief (*Befreiungen*) from the restrictions set out under the plan and the code. If no land use plan applies, whether a building is allowed depends on whether it will comply with the existing neighbourhood. Common practice and a broad range of case law allow a fair evaluation of this criteria.

Planning law consists of federal, state and local law, including the:

- Federal Building Act, as amended on 23 September 2004 (*Baugesetzbuch*), which sets out how plots of land are prepared by zoning and planning for construction.
- Building Ordinances of the Federal States (*Bauordnungen der Laender*), which defines, among others, permission procedures and technical, safety and fire protection requirements.
- Land use plan produced by the local authority, to define territory, including industrial, commercial and residential areas.

41. What planning consents are required and for which types of development?

Every kind of construction which is not of minor interest (for example, certain cabins, attachments and some types of temporary buildings) generally requires building permission. In addition, certain alterations of existing buildings or changes of use require approval from certain authorities.

Planning law has been deregulated over recent years. Many types of residential buildings or buildings limited to a certain height are regulated by a simplified permission process (as defined in Building Ordinances of the Federal States). In these cases, an architect or construction engineer must confirm in writing that the building complies with the relevant building regulations. In addition, the local authorities can also verify compliance during construction (*see Question 40*).

42. What are the main authorisation and consultation procedures in relation to planning consents?

Initial consents

The municipal authorities grant initial planning consents.

Third party rights

Third parties may have a right to object to a building permit within a limited time, stating that their rights have been violated. Usually, this right will be limited to adjacent neighbours, and recent legislation has limited these objections, to assist real estate investment.

REAL ESTATE ORGANISATIONS

Federal Government (*Bundesregierung*)

Main activities. The official website of the Federal Government shows annual reports of real property information.

W *www.bundesregierung.de*

Investment Fund Association (*BVI Bundesverband Investment und Asset Management eV*)

Main activities. This association represents, among others, open-ended real estate funds.

W *www.bvi.de*

Notaries Institute (*Deutsches Notarinstitut*)

Main activities. This is the institute of German notaries.

W *www.dnoti.de*

Association of publicly certified and qualified experts (*Bundesverband öffentlich bestellter und vereidigter sowie qualifizierter Sachverständiger eV*)

Main activities. This is the association of real estate experts.

W *www.bvs-ev.de*

Federal Government for foreign investment

Main activities. The official website provides information for foreign investors in Germany.

W *www.invest-in-germany.de*

Public inquiries

The local development plan and certain buildings for industrial use may require a public inquiry (*see Question 40*).

Initial decision

Under most state law, a permit should be granted or denied within three months. However, the authorities may extend this period.

Appeals

The owner can appeal a decision about a building permit within one month by filing an objection with the municipal authority. If the objection is denied, it can appeal to the administrative courts.

REFORM

43. Are there any proposals to reform real estate law in your jurisdiction?

Fund regulation regime

At present, there is no uniform regulatory system for funds in Germany, just a series of fragmented rules governing different segments of the industry. Apart from certain prospectus requirements under the Financial Assets Act, which entered into force on 1 June 2012 and which replaced, as a part of the Amendment

of the Law of Investment Intermediaries and Financial Assets Act (*Gesetz zur Novellierung des Finanzanlagenvermittler- und Vermögensanlagenrechts*), the Sales Prospectus Act, closed-ended private equity funds are currently almost unregulated in Germany. However:

- The distribution of closed-end funds via a bank or a financial services institution (*Finanzdienstleistungsinstitut*) is subject to the rules of the Securities Trading Act.
- Independent intermediaries require authorisation under the Trade, Commerce and Industry Regulation Act.
- Certain financial services in relation to closed-ended funds are subject to licensing requirements under the Banking Supervisory Act.

This regulatory regime is likely to co-exist with any regulatory scheme transposing Directive 2011/61/EU on alternative investment fund managers (AIFM Directive) into national law. The AIFM Directive sets out common requirements for, and the supervision of, the mangers of alternative investment funds (AIF). The AIFM Directive must be implemented in national law by 22 July 2013 and on 20 July 2012, the German Ministry of Finance (BMF) published the discussion draft of an Act for the Implementation of the AIFM Directive (AIFM-UmsG).

AIF are investment funds that do not constitute undertakings for collective investment in transferable securities (UCITS) under Directive 2009/65/EC on undertakings for collective investments in transferable securities (UCITS) (UCITS IV Directive), for example, closed-ended funds, hedge funds, or special funds. The rules of the AIFM Directive generally concern only the managers of the AIF, not the AIF themselves. The AIFM-UmsG establishes a uniform set of rules for UCITS and AIF in the form of a Capital Investment Act (KAGB). The German Investment Act (*Investmentgesetz*) (InvG) is cancelled, but the core of its rules will be integrated into the KAGB in accordance with the requirements of the AIFM Directive. The discussion draft thus goes far beyond the AIFM Directive.

Provisions concerning the application of two European Regulations are also included in the KAGB, these are the:

- Regulation on European Venture Capital Funds.
- Regulation on European Social Entrepreneurship Funds.

Both Regulations are still in their draft stage. The draft of the KAGB also contains extensive references to EC Regulation (Level 2 Regulation) specifying the AIFM Directive, which is so far also only available as a draft. Real estate funds will be issued only as closed-ended public or special AIF in the future.

Arguments made by the German Ministry of Finances for the abolition of open-end real estate funds include their susceptibility to economic crises and the inconsistency between the short term redemption possibility for investors and the long-term investment in illiquid assets. This is surprising, since the same ministry officials who are presenting the AIFM-UmsG, introduced far-reaching changes into the InvG only in spring 2011 to limit these risks. Existing open-end real estate funds will enjoy grandfathering protection.

ONLINE RESOURCES

W *www.gesetze-im-internet.de*

Description. This is the official website of the German Federal Ministry of Justice. Some Acts and Ordinances are translated. The translations of these materials into languages other than German are intended solely as a convenience to the non-German reading public. Any discrepancies or differences that may arise in translations of the official German versions of these materials are not binding and have no legal effect for compliance or enforcement purposes.

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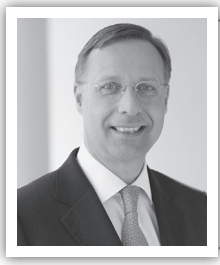

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Recent transactions. Real estate related advice for:

- Nationwide Building Society.
- Deutsche Land.
- Mariner Financial.
- Teachers (TIAA).
- Allianz Global Investors.
- Morgan Stanley Real Estate Fund VI.
- Lone Star.

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Recent transactions. Real estate related advice for:

- Internationales Immobilien Institut.
- DEGI Deutsche Gesellschaft für Immobilienfonds.
- Morgan Stanley Real Estate Investment Fund.
- Arminius Real Estate Opportunity Fund I.
- Internationales Immobilien-Institut.
- VALAD Property Group.
- Rynda Property Investors LLP.

Tower 185, Mayer Brown's new Frankfurt office; Photo: CA Immo

What does the Real Estate Market in Germany look like?

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If you want to learn more about real estate in Germany, please contact us.

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