

Expropriation of Residential Property Investors in Berlin — A Realistic Scenario?

While the German capital continues its political efforts to tackle the housing crisis, a commission has validated the feasibility of expropriating housing providers.

On June 28, 2023, a legal expert commission appointed by the City of Berlin (Commission) published its final report (Report),¹ examining whether private residential investors could be expropriated under certain conditions. According to the Commission, the State of Berlin has jurisdiction to enact laws transferring privately owned real estate to publicly owned companies (nationalization, *Vergesellschaftung*), and such laws would comply with both the federal and the state constitution. Should these laws be implemented, they would likely target private investors who own more than 3,000 residential units in Berlin.

Context

The Commission was appointed by Berlin's government (Senate) in 2022, in response to a local protest movement calling for the expropriation of large housing providers. The protest movement, known as *Deutsche Wohnen & Co. Enteignen* (which translates to "Expropriate Deutsche Wohnen & Co."), emerged as a response to the housing crisis in the city (characterized by high rents and a shortage of affordable housing) and is still active today. Over 200 tenant initiatives came together, gathering approximately 350,000 signatures to force a referendum on the issue of "expropriating" large housing providers. The referendum took place across Berlin on September 26, 2021. The initiative aimed to expropriate all companies that owned more than 3,000 residential units in Berlin, while granting compensation to the owners. The main targets of the expropriation were large real estate companies.

The majority of voters supported the initiative (56.4% voting in favor of the expropriation). Despite the referendum being legally non-binding, its outcome pressurized the Senate to address the housing issue. In April 2022, the Senate appointed the Commission to evaluate the legal tools available and to establish whether the State of Berlin has jurisdiction to enact legislation as requested by the referendum. Therefore, the scope of the Report is defined by the demands of the protest movement.

The fact that the Senate appointed a Commission instead of directly enacting a legislation stems from experiences with the previous major legislative project to tackle rent regulation. In 2019, Berlin introduced a very rigorous rent control law (*Mietendeckel*), which would have forced landlords to lower the rent under specific circumstances. In 2021, the German Federal Constitutional Court struck down this state law as

the State of Berlin lacked authority to regulate rental prices. According to the Federal Constitutional Court, rent control laws are generally a matter of federal jurisdiction.

Main Legal Takeaways

- **Jurisdiction:** The Report confirms that the German Constitution generally grants the State of Berlin jurisdiction to legislate on the expropriation of land and properties for public purposes, and identified Article 15 of the German Constitution (*Grundgesetz*, GG) as the relevant legal tool. Article 15 GG allows for the nationalization of land, natural resources, and means of production, i.e., transferring these assets to public ownership or other forms of social economy.
- **Scope of nationalization:** The legislation would target all real estate companies with residential portfolios exceeding 3,000 residential units located in Berlin. Properties owned by cooperative, state-owned, and recognized non-profit housing providers would be exempt. The Commission based its analysis on the threshold included in the referendum.
- **Mandatory compensation:** The Constitution requires the owners of the residential properties to receive compensation.

Legal Hurdles

- **Lack of experience:** The nationalization process would face steep legal hurdles and require substantial effort from the public authorities involved. As of today, neither the federal government nor any state government has made use of Article 15 GG.
- **Adequacy:** The Commission finds that the proposed nationalization would be adequate, as no alternatives exist that would be equally effective, restrict property rights less, and impose fewer burdens on third parties and the general public. Most German legal scholars, however, do not share this view. As Article 15 GG has never been used by a legislator, no relevant court decisions are available. Nonetheless, Article 15 GG contains a reference to Article 14 GG, which defines the scope of the fundamental right to property and sets the conditions for expropriations. Since a significant body of case law concerning Article 14 GG exists, these precedents would likely be used in this context.
- **Compensation:** The Commission acknowledges that affected housing providers are entitled to compensation for expropriation. Market participants have differing views on the valuation of compensation, ranging from low amounts up to market value, but also considering future public sector revenues or the current market value. A central point of discussion prior to the referendum was whether the affected real estate investors could be compensated below market value. The majority of the Commission decided that this should be possible. The Report concludes that the legislator has significant discretion in determining compensation. The Commission proposes various approaches, considering:
 1. the (hypothetical) proceeds from a nonprofit management for the remaining lifespan of the buildings, based on a total lifespan of 40 years.
 2. whether the State of Berlin is fiscally capable to finance the nationalization. If nationalization cannot be realized for financial reasons (i.e., the State of Berlin cannot afford a compensation at market value), the State should be authorized to provide compensation aligned with its fiscal capabilities.

3. the hypothetical market value based on potential regulatory restrictions. Regulatory restrictions promoting public welfare beyond the purpose of nationalization would be accepted by the affected parties without compensation and would simultaneously reduce the value of the property.

A minority of the Commission dissented and stated that the market value of any properties affected should primarily define the compensation. In our view, this concept is likely in alignment with the majority of German legal scholars and existing jurisprudence on Article 14 GG.

- **Equal treatment:** The Commission recognizes that the proposed threshold for expropriation, i.e., companies with more than 3,000 residential units in Berlin, may raise concerns about unequal treatment. However, the Report argues that this distinction is justified based on the increased efficiency in achieving the desired number of social housing units. As an alternative to a fixed threshold, the Commission discussed “capital market orientation” according to §264d German Commercial Code to identify the companies to be nationalized. This scope would include any companies that have issued shares, certificates representing shares (like ADRs or CDIs), bonds, and other similar financial products that are tradeable on the financial markets.

Next Steps

As a first step, the current Senate intends to enact a framework law (*Vergesellschaftungsrahmengesetz*) for the State of Berlin. The framework law will include the scope for the nationalization process in the sectors of public services (e.g., water, energy, housing) as well as guidelines for the appropriate compensation that is required. The framework law is scheduled to become effective two years after its publication. During this time, the framework law will be subject to review by the German Constitutional Court.

This procedure aims to resolve any legal challenges and avoid any pitfalls similar to the previous rent control legislation. Effectively, the framework law serves as a trial balloon. The protest movement *Deutsche Wohnen & Co. Enteignen* has expressed concerns over delays and calls for a direct nationalization.

Conclusion

While the Report provides insights into the legal dimensions of potential nationalization measures, the current political landscape in Berlin suggests that immediate implementation is unlikely. The Commission was appointed by the previous Senate, which featured a different political composition. The only political party supporting the nationalization process dropped out of the governing coalition, while the current Senate’s parties show minimal enthusiasm for such actions. However, the Report reflects both a political and social issue, and the Commission’s findings offer reference for policymakers across Germany by showcasing a comprehensive examination of the legal and regulatory aspects surrounding property expropriation and nationalization. This Report underlines the ongoing efforts to recalibrate the real estate landscape and foster social housing policies in Berlin and beyond.

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Endnotes

¹ Expert commission on nationalization of large residential portfolios, final statement, June 2023, *available at* <https://www.berlin.de/kommission-vergesellschaftung/downloads/> (German-language only).