

UPDATE ON THE ALLOCATION OF CO²-COSTS BETWEEN LANDLORD AND TENANT

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Legal Briefings

The principle that consumption-based ancillary costs can be shifted in full to tenants will no longer be applicable as of January 1, 2023.

INTRODUCTION

On November 10, 2022, the German Parliament (*Bundestag*) passed a draft bill on the Carbon Dioxide Cost Allocation Act (*Kohlendioxidkostenaufteilungsgesetz CO²KostAufG*). On November 25, 2022, the upper house of the German parliament (*Bundesrat*) is scheduled to hold final deliberations on the law. The CO²KostAufG stipulates that, depending on the energy efficiency of the relevant building, landlords will have to bear a certain portion of the CO² levy costs themselves.

In the past, there have already been attempts to govern the (re)distribution of the carbon prices arising from the Fuel Emissions Trading Act (*Brennstoffemissionshandelsgesetz BEHG*), which will rise continuously until 2025. In this respect May 12, 2021, the German Government (*Bundeskabinett*) passed a draft bill that foresaw that the carbon dioxide price incurred under the BEHG should be shared equally between landlords and tenants. However, such draft bill never came into force.

Consequently, the Operating Costs Ordinance (*Betriebskostenverordnung*) and the Heating Costs Ordinance (*Heizkostenverordnung*) continued to allow the costs for the operation and consumption of (heating) and hot water to be allocated to (residential) tenant. Rising prices in recent years, for example for the fuels, were borne by the tenant in full, regardless of the energy efficiency of the building.

The CO²KostAufG now follows a different approach. The law stipulates that the carbon dioxide cost burden is to be distributed among both parties to a lease agreement in accordance with the energy efficiency of a relevant building. The aim of the law is to stimulate energy savings and energy-efficient refurbishments in the building sector. The law also affects existing lease agreements

BACKGROUND ON THE BEHG

With the BEHG, a national CO² emissions trading system was introduced in January 2021. Under the BEHG, anyone wishing to emit one metric ton of carbon dioxide from certain fuels, such as heating oil or heating gas, requires an emissions certificate, provided they are not covered by the European Emissions Trading Scheme. In this context, the BEHG stipulates that the carbon dioxide price will rise continuously each year until 2025.

GRADUATED MODEL FOR RESIDENTIAL BUILDINGS

The CO²KostAufG attempts to reduce the burden imposed by the rising costs of carbon dioxide on tenants by means of a tiered model. The carbon dioxide costs are determined as per the building's carbon dioxide emissions per square meter of lease area, and such costs are then distributed between landlords and tenants based on the building's energy quality. The model envisages ten tiers. On the lowest level, tenants will only have to bear 5 percent of the CO² levies, while landlords will have to pay 95 percent. In the top tier, which is relevant for buildings with very high energy efficiency, the tenant bears pay 100 percent of the CO² levies.

REGULATIONS FOR NON-RESIDENTIAL /COMMERCIAL BUILDINGS

For non-residential buildings, a lump sum 50:50 division of the carbon dioxide costs will initially be introduced. An agreement between landlord and tenant that more than 50 percent of the costs are borne by the tenant is invalid pursuant to Section 8 (1) of the CO²KostAufG. By the end of 2025 at the latest, the CO²KostAufG is to be supplemented by a tiered model for non-residential buildings and evaluated by September 30, 2026. The necessary data basis is to be developed by the end of 2024.

EXCEPTIONS

The percentage share that the landlord must bear will be reduced by half if public law requirements prevent a significant energy improvement of the building or a significant improvement of the heat and hot water supply of the building. Public law requirements include restrictions under historical building protection, legal obligations to make use of heat supplies, and the fact that the building is located within the scope of a preservation statute pursuant to Section 172 I No. 2 Building Law (*Baugesetzbuch*).

EFFECTS ON EXISTING LEASES

To have the same effect on existing leases, the allocation of carbon dioxide costs under the transition rule also applies to leases entered before January 1, 2023, pursuant to Section 12 (1) of the CO₂KostAufG. Contractual agreements that permit the allocation of all operating costs to tenants are not applicable with respect to carbon dioxide costs.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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