ZIA
GERMAN PROPERTY FEDERATION

GREEN LEASE 2.0

From Green Lease to ESG Lease

This publication was compiled in cooperation with:

Freshfields Bruckhaus Deringer

Foreword 4
The project group and its contacts 6
Partners 7
Thoughts and impulses from the project group 8
Introduction 12

Part 1 – Basic green lease 23
Executive summary 24
I. Programme clause on the sustainability objectives 25
1. Model Provision 1.1 (Programme clause with reference to EU taxonomy) 25
2. Model Provision 1.2 (Programme clause without reference to EU taxonomy) 26
II. Consumption and emissions 26
1. Model Provision 2.1 (Exchange of data) 26
2. Model Provision 2.2 (Promotion of sustainable energy sources) 28
3. Model Provision 2.3 (Saving energy and water, reducing waste) 29
III. Supplementary clauses: Sustainable use and management in operation 30
1. Model Provision 3.1 (Maintenance and other construction work) 30
2. Model Provision 3.2 (Operating and ancillary costs) 33
3. Model Provision 3.3 (Cleaning and waste) 34

Part 2 – Expanded green lease 37
Executive summary 38
I. Additions to the basic green lease 39
1. Addition 1 (Energy modernisation measures) 39
2. Addition 2 (Energy monitoring and determination of CO_2 emissions) 42
3. Addition 3 (Sustainability dialogue) 43
4. Addition 4 (Social and governance aspects) 44
II. Certification-specific provisions 46
1. New-construction certificate has been granted 47
2. (Existing-construction) certificate sought 47
3. Existing-construction certificate has been granted 50
III. Further issues relating to green leases 52
1. Mobility 52
2. Sustainability handbook 53
3. Green levies 53
4. Staff training 54
5. Photovoltaic systems 54

Part 3 – Proposals for implementing the “green” model provisions 57
I. Endeavour commitments 58
II. Legally binding obligations 59
III. Incentive systems 60

Notes 62

Foreword

Environmental protection and sustainability in contractual form? The publication of the "Green Lease – der grüne Mietvertrag für Deutschland" in 2018 was regarded as pioneering work, and much has happened since. An update to the handbook seems appropriate for multiple reasons: alongside regulatory reforms and an expansion of the concept of sustainability from one focused primarily on environmental factors to one that now includes social and governance considerations, noticeable progress has also been made, and practical experience gained, since the publication of the first edition. In short, a lot has changed.

This publication also reflects the real estate industry's ongoing commitment to sustainability and environmental compatibility. This is because the use and management of real estate under the banner of "Environmental, Social, Governance" (ESG) is not only the foundation for a sustainable and stable real estate industry, but also a guarantee for the responsible use of resources. The sector has been committed to this goal for years, with the green lease being – literally – tangible proof.

The real estate sector has recognised that it can play a key role in reducing its environmental footprint and promoting sustainable practices in the use and management of buildings, not least because of its significant contribution to global CO_2 emissions. Green leases are an important instrument in this development, as they enable landlords and tenants to work together transparently towards a more sustainable future.

Even if, in times of multiple crises and economic downturn, the imperative of profitability may at first glance take precedence over environmental protection goals, social responsibility and sustainable corporate management, we as the real estate industry are making a clear commitment to greater sustainability and responsibility. After all, we are convinced that only focusing on environmental and, in particular, climate targets will result in truly sustainable profitability for undertakings, the real estate industry and the economy as a whole. In line with the project group, we therefore also see Green Lease 2.0 as an instrument that can be evolved into an ESG lease and supplemented by social responsibility and sustainable corporate governance features in the individual lease agreements.

This updated version of the Green Lease 2018 edition has been developed to reflect changes, best practices and legal requirements relating to sustainability and environmental friendliness in commercial real estate leases. It serves as a guide and reference tool for all those in the real estate sector who are committed to implementing measures and solutions for the sustainable use and management of buildings in the context of lease agreements. Yet it is still the case that there is no single green lease that suits all landlords and tenants equally. Rather, the following Green Lease 2.0 is to be understood as a toolkit with which the parties can individually design and shape their own green lease or ESG lease in any given case.

In Green Lease 2.0 you will find tried and tested contractual clauses, for example on data exchange, the joint definition of savings targets and the promotion of renewable energy sources, recommendations on the introduction of environmental standards, particularly for construction work, as well as practical advice on the implementation of further ecological and social standards in the use and management of real estate. This guide is designed to help landlords and tenants make responsible decisions and a positive, joint contribution to sustainability, while profiting from long-term benefits such as cost savings, an improved health and social environment for users and greater (energy) efficiency in the operation of buildings. We are delighted to be able to offer the real estate industry this enhanced toolkit and hope that it will be well received and used in a variety of ways.

Photograph: Laurence Chaperon

Photograph: Chacris Chuesai Polar Studio Fotostudio

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Thoughts and impulses from the project group

With Green Lease 2.0, we, as the real estate industry's umbrella association, want to provide the sector with a tool that takes into account the latest developments and facilitates contemporary contractual design for the sustainable use and management of buildings through a targeted selection of possible provisions. Broad consultation has enabled us to incorporate the practical experience of association members and other market players, so as to take the interests of landlords and tenants into account in a balanced manner. I would like to thank everyone involved for their cooperation and hope that Green Lease 2.0 will contribute to a more sustainable real estate industry.

Torsten Labetzki
Member of the management
Head of Legal and Tax
ZIA Zentraler Immobilien Ausschuss e.V.

Creator: Chacris Chuesai Polar Studio Fotostudio

Green Lease 2.0 marks another important milestone in the sustainable use and management of real estate. This is because Green Lease 2.0 focuses on its core ecological elements such as data exchange, energy-saving measures and renewable energy sources, while at the same time opening up to new social and governance aspects. We are pleased to have provided legal support in the creation and evolution of this important ESG contractual framework.

Dr Julia Haas
Lawyer and Partner
Freshfields Bruckhaus Deringer

Picture: blende11 Fotografen

With Green Lease 2.0, we have succeeded in harnessing the opportunities arising from the current ESG provisions to add useful clarity to green leases.

Dr Niklas Keller
Lawyer (in-house lawyer)
Real I.S. AG

The implementation of green leases is a key objective of our sustainability strategy. Our aim is to support property owners on their way to a sustainable, climate-neutral real estate portfolio. At the same time, tenants also benefit, as lower energy and operating costs can be expected in sustainable properties. Green leases therefore represent a win-win situation for all parties.

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Green leases have now found their way into the real estate industry and reflect the growing awareness in recent years of the need to operate in an environmentally sustainable manner. The new green lease is intended to support these efforts, and help meet EU climate targets and the obligations under the Disclosure Regulation It not only provides the parties with suggestions and assistance, but also gives them broad scope to contractually reflect the goal of making the use of real estate environmentally friendly and ensuring ecologically sound operation.

Sabine Reimann
Lawyer and Partner
Hogan Lovells Int. LLP
Rechtsausschuss Deutsche Gesellschaft für Nachhaltiges Bauen – DGNB e.V.

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Almost 40% of global CO_2 emissions are directly or indirectly attributable to the buildings sector. The transparent and constructive cooperation in this project group shows that the real estate sector is aware of its environmental, economic and social responsibility and is prepared to help shape the transition to a sustainable real estate industry. The sustainable management of buildings is a central building block on this path and can only be ensured in the long term through binding lease agreements. Green leases help to ensure that properties meet today's usage requirements without jeopardising the needs of future generations.

Prof Dr Gabriele Bendixen
Lawyer CPM Legal Contracts & Consulting
Commercial Property Management
IU Internationale Hochschule

The Mercedes-Benz Group wants to create sustainable value – economically, environmentally and socially. This guiding principle applies not only to our own products and production sites; it also encompasses the upstream and downstream value chain. For us, green leasing in the real estate sector is therefore an important element of our day-to-day business.

Dr Marc Bahnmüller
Head of Transaction and Legal Germany
Mercedes-Benz Real Estate GmbH

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If the landlord is the building's captain, then the tenant is not just a passenger, but a co-pilot when it comes to minimising the building's environmental footprint. Only transparency helps to fulfil this responsibility within the framework of a lease agreement. It is therefore important that a green lease does not just consist of nice declarations of intent, but contains a clear baseline with targets for both parties that can be reviewed annually.

Robert Kitel
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We are delighted that in Green Lease 2.0 valuable tool has been created for all market players who want to manage and use real estate with an awareness of the environment and society. It is now the responsibility of the industry to put sustainability into practice and establish the green lease across the board in the market.

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Lawyer
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Tim Oberschelp
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Sustainability has become an integral part of contract design. Based on the 2.0 model, the green lease will therefore finally become the standard. After all, these provisions should really be common sense when it comes to the collective interest of environmental protection.

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Reinhard Scheer-Hennings
Lawyer and Partner
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In addition to environmental factors, holistic sustainability also includes social aspects and corporate governance issues. These three pillars must be incorporated as overarching guidelines in all areas of our economic activity – including in the relationship between landlords and tenants. Questions of social responsibility and sustainable corporate governance should therefore be included in the relevant lease agreement at an early stage.

Karin Barthelmes-Wehr
Managing Director
ICG e.V. Institut für Corporate Governance

Introduction

Taking responsibility as a society for nature and the environment is increasingly becoming a focus of worldwide attention. Particularly in view of climate protection, there are more vehement demands than ever before in many areas to set and meet specific sustainability targets. To this end, national and international measures are increasingly being taken to combat climate change. Until now, however, the economy has relied heavily on individual undertakings engaging in corporate social responsibility.[1]

However, the shared responsibility of businesses in promoting sustainability has morphed in recent years from one of independent action to mandatory participation as a result of a number of (European) sets of rules: In December 2019, the European Commission published the "European Green Deal" (Green Deal), which provides for a commitment by EU Member States to achieving climate neutrality by 2050.[2] In this context, and in order to achieve the objectives of the Green Deal, the Taxonomy Regulation[3] (Taxonomy Regulation), the Disclosure Regulation[4] (Disclosure Regulation) and the Corporate Sustainability Reporting Directive[5] (CSRD) were adopted. In addition to these mandatory rules, the omnipresent debate in politics, business and society about "environmental, social and governance" (ESG) is also increasing the pressure on undertakings to address environmental, social and corporate governance-related sustainability considerations.

The demand for greater sustainability, and a heightened sense of responsibility on the part of many undertakings, is also increasingly evident in the real estate industry. As real estate is responsible for more than 30% of global CO_2 emissions[6], the real estate sector has a particular role to play in what happens to the climate. In addition, the real estate industry uses significant natural resources, for example through the use of natural building materials or through the water and energy supply to a building. It is therefore itself dependent on the preservation of these resources, and should therefore endeavour to act as sustainably as possible.

These efforts are already evident with "green building" certification, which is now documented by numerous national and international quality seals. The number of certifications has increased fivefold since 2013.[7] By contrast, such an increase has not yet had a widespread impact on the sustainable structuring of commercial tenancies. This is likely to change in view of the growing corporate responsibility for both landlords and tenants to act sustainably, as a lease agreement geared towards sustainability can be of considerable importance for achieving the parties' corporate sustainability goals.

Against this backdrop and the increasingly extensive regulation by the European Union (EU) and national legislators (e.g. through the German Building Energy Act or GEG)[8] on sustainability issues, as well as practical experience with green leases in the German real estate market to date, a revision and update of the green lease published by the ZIA in 2018 (Green Lease 2018) is required.[9] This has resulted in a transparent and interdisciplinary project group meeting since January 2023 to discuss the evolution of an overall concept for sustainable commercial leases[10] as a recommendation and guidance for the German real estate industry in virtual and recorded meetings lasting several hours.[11] On the basis of these discussions, the editorial team produced a concept paper in February 2023[12] which contains key considerations on the realignment of the green lease ("Green Lease 2.0 – From Green Lease to ESG Lease"). This concept paper was sent to the project group members, among others, and comments were obtained from the project group and other market players at the sustainability congress organised by the ZIA in Berlin at the end of March 2023, as well as in a large number of bilateral discussions in April and May 2023, and a final project group meeting in October 2023.

The discussions focused on the following issues:

- Positioning of the green lease in the light of current ESG regulations (in particular EU legal requirements) and options for expanding it into an "ESG lease";
- Optimising the practicality and specificity of green-lease provisions;
- Redefining minimum standards, but retaining an optional variety of themes; focusing on property-related provisions versus interventions in the operative tenant domain;
- Binding regulations versus mere endeavour clauses;
- Sanctions versus incentive systems (particularly possible ways out of the "investor-user dilemma");
- Dealing with (general-terms-and-conditions-related) legal risks as well as tax, data protection and other regulatory risks.

The results of these open discussions are a crucial part of the basis for the subsequent revision of the Green Lease. However, the regulatory proposals derived from this are merely non-binding recommendations. By contrast, the specific selection and wording of the contractual clauses in individual cases is done solely by the parties at their own discretion.

I. The "green lease" concept

1. Definition

In principle, the previous definition of a green lease in the field of commercial leases can still be used. Accordingly, the following still applies:

"A green lease is a sustainability-oriented lease agreement which, by way of its particular structure – flanked where appropriate by the requirements of any existing certification of the property – is intended to encourage the tenant to use the property as sustainably as possible and the landlord to manage the property as sustainably as possible."[13]

2. Focus on the concept of sustainability and its specification via EU rules

The definition of a green lease focuses on the concept of sustainability.[14] It is therefore crucial that this concept is interpreted as uniformly as possible so as to act as a benchmark for sustainable lease agreements. Although the concept of sustainability is currently not uniformly defined at either national or international level, and in particular not at European level, the sets of rules that use or define the term themselves can provide the necessary guidance. For example, the sets

of rules issued in connection with the Green Deal, in particular the Taxonomy Regulation, the Disclosure Regulation and the CSRD, define when an investment is sustainable.[15]

2.1 Sustainability under the Taxonomy Regulation

As a uniform EU classification system, the Taxonomy Regulation is intended to help determine whether an economic activity is environmentally sustainable and, if so, to what degree.[16]

According to Article 3 of the Taxonomy Regulation, an economic activity is considered environmentally sustainable if it

a) contributes substantially to one or more of the environmental objectives set out in Article 9 of the Taxonomy Regulation,
b) does not significantly harm any of the environmental objectives[17] set out in Article 9 of the Taxonomy Regulation,
c) complies with the minimum safeguards set out in Article 18 of the Taxonomy Regulation (OECD Guidelines, United Nations Guiding Principles on Business and Human Rights); and
d) complies with technical screening criteria that have been established by the Commission as delegated acts.

The Taxonomy Regulation defines in abstract terms when an economic activity makes a substantial contribution to the relevant environmental objective and when there is significant harm to the environmental objectives (the "Do No Significant Harm" principle, DNSH) (see Articles 10-17).[18] These abstract definitions are specified by technical screening criteria.[19]

Finally, to be considered sustainable, economic activities must provide a minimum level of social protection that ensures that guiding social principles[20] are taken into account, including the protection of human rights, the fight against bribery, compliance with mandatory taxation and fair competitive behaviour.[21]

2.2 Sustainability under the Disclosure Regulation

The Disclosure Regulation obliges financial market participants to disclose sustainability-related information, in particular adverse impacts of investment decisions on sustainability factors (known as "Principle Adverse Impacts" – PAI)[22] as well as sustainability risks and their impact on investment decision-making processes.

In contrast to the Taxonomy Regulation, the Disclosure Regulation therefore does not impose any qualitative requirements on assets and investments, but only on the disclosure of information.

The Disclosure Regulation defines the term "sustainable investment" as: Investment in (a) an economic activity that contributes to either an environmental or social objective, (b) that does not significantly harm any other of these objectives, and (c) that benefits companies that demonstrate "good governance".[23]

In addition, the Disclosure Regulation defines sustainability risks as events or conditions in the fields of environmental, social or governance that could have an actual or potential negative material impact on the value of the investment.[24]

Like the Taxonomy Regulation, the Disclosure Regulation is detailed in a Delegated Regulation[25], in which the latter specifies which of the indicators to

be taken into account under the Disclosure Regulation for the most important adverse impacts of investment decisions on sustainability factors (PAI indicators) must be published. Accordingly, the following are examples of PAI indicators that are significant for investments in real estate:

a) greenhouse gas emissions caused by real estate,[26]
b) intensity of energy consumption by the real estate in GWh per square metre,[27]
c) waste generation in operation (proportion of real estate not equipped with waste sorting facilities and for which no waste recovery and recycling contract has been concluded),[28]
d) raw material consumption for new buildings and major renovations,[29]
e) level of construction (proportion of non-vegetated areas compared to the total area of all facilities),[30]
f) proportion of investments in real estate related to fossil fuels or with poor energy efficiency.[31]

2.3 Sustainability under the CSRD

The CSRD[32] regulates sustainability reporting by undertakings. Undertakings subject to reporting requirements[33] should include the requisite details in their management reports[34] to provide an understanding of the impact of the undertaking's activities on sustainability matters and the impact of sustainability matters on business performance, business results and the undertaking's position.[35] Sustainability matters include environmental, social, human rights and governance factors, including the sustainability factors specified in the Disclosure Regulation.[36] Accordingly, the CSRD is largely based on the concept of sustainability found in the Disclosure Regulation, which is based on environmental and social criteria.[37]

2.4 Similarities and differences

The Disclosure Regulation and the CSRD are largely similar and differ primarily in their relevant addressees. Both sets of rules specify the sustainability information financial market participants and businesses of the real economy must disclose and how sustainable financial products are.[38] By contrast, the aim of the Taxonomy Regulation is to place economic activities into a classification system in order to determine the degree of environmental sustainability of the activity.[39]

Despite the different objectives, the sets of rules have decisive similarities, particularly with regard to the assessment factors for sustainability. According to the regulations, the basic prerequisite for a sustainable activity or investment is that a contribution – in the case of the Taxonomy Regulation, a substantial contribution – is made to an environmental objective and that there is no significant harm done to another environmental objective.[40] The regulations are also based on an almost identical understanding of the intended environmental objectives. It is of no relevance to this overlap that the Taxonomy Regulation names the environmental objectives directly, while the Disclosure Regulation describes them only indirectly as factors by which an activity that contributes to achieving of an environmental objective is "measured". Finally, the sets of rules apply comparable benchmarks, for example by defining greenhouse gas emissions or the intensity of energy consumption as fundamental sustainability factors.[41]

A significant difference can be seen in the fact that the Disclosure Regulation and the CSRD have a broader understanding of sustainability than the Taxonomy Regulation. The latter concentrates on a primarily environmental concept of sustainability, while the Disclosure Regulation and the CSRD extend the concept equally to social matters[42] in addition to environmental ones. By contrast, the Taxonomy Regulation merely requires compliance with a minimum level of social protection,[43] without granting these social objectives equal importance. However, there are efforts to introduce a social taxonomy in addition to the taxonomy for sustainable economic activities, but this has not yet been implemented by European legislators.[44] The social taxonomy is likely to set similar criteria for socially sustainable economic activity as the Disclosure Regulation and the CSRD.[45]

2.5 A broad understanding of sustainability as a benchmark for the green lease

The green lease's concept of sustainability should be based on the common features of the aforementioned regulations as regards the definition of a sustainable activity. According to this, an activity is sustainable if it promotes an environmental objective and does not adversely affect another environmental objective. When determining the environmental objectives, the objectives set out in Article 9 of the Taxonomy Regulation, which are in line with those of the Disclosure Regulation, can be used as a guide. The promotion of one environmental objective without impairing another is therefore the basic prerequisite for classifying possible uses and management of a property as sustainable.

In addition to environmental factors, however, the areas of "social" and "governance" should also be included, since – as described above – there are already proposals for a social taxonomy and it will therefore only be a matter of time before these areas play a role in the taxonomy and therefore at EU level.[46] Consequently, the green lease – similar to the Disclosure Regulation – should be based on a broad understanding of sustainability. For this reason, the substantial contribution requirement as contained in the Taxonomy Regulation is not mandatory. Rather, any contribution to promoting an environmental objective for sustainable action for the purposes of a green lease should be sufficient to establish green leases more firmly in the market. However, this should not stand in the way of further reaching ambitions to make a "substantial" contribution.

The above-mentioned broad understanding of sustainability requires a case-by-case specification and adaptation to the relevant circumstances. Parallel to this dynamic and the need for evolution of the concept of sustainability in ESG rule sets, the new Green Lease 2.0 will also not be complete in itself, either conceptually or in terms of content. Rather, it should remain an "open, learning" system that adapts as dynamically as possible to the ongoing development of sustainability requirements and provides appropriate guidance.

3. Core elements and evolution of the ESG Lease

Against the backdrop of the aforementioned regulatory developments and previous contractual practice, the image of the core elements of a green lease has changed.[47]

Following the discussions in the Green Lease 2.0 project group, the core elements that essentially make up a green lease are as follows:

a) mutual exchange of consumption data,
b) promotion of sustainable energy sources for energy and heat supply,
c) saving resources (energy and water) and reducing waste, and
d) environmentally-friendly and resource-friendly implementation of construction and repair work.

However, the dynamic approach to the green-lease definition of sustainability also allows it to be extended to an ESG lease, i.e. increasingly expanding the content to include social and governance issues. This means that, in addition to the focus on environmental matters, social responsibility and sustainable corporate governance features can be included in the relevant lease agreement at an early stage.

There are already European and national requirements in the area of social responsibility, e.g. in the German Supply Chain Duty of Care Act (LkSG), the CSRD, and the German General Equal Treatment Act (AGG). In an ESG lease, these requirements can be further specified or other social aspects can be included, for example by expanding provisions on accessibility or making the leased premises temporarily available to the public, e.g. for cultural events. In the area of governance, provisions on data-exchange transparency and open communication between landlord and tenant could be integrated into the ESG lease.[48]

II. Objectives and benefits of the Green Lease

A green lease pursues a variety of objectives that are beneficial to both parties to a lease agreement. These objectives are as follows:[49]

1. From an economic perspective, a green lease can be attractive in several respects: firstly, it can offer the contracting parties financial benefits. A green lease encourages the parties to use resources such as water and energy sparingly, which represents the potential for specific cost savings for landlords and tenants. In addition, the optimisation resulting from a green lease increases a property's chances of certification, which can have an impact on its attractiveness for (re)sale and financing. Secondly, a green lease can potentially protect the parties from financially disadvantageous consequences (contributes to avoiding stranded assets).[50] In addition, by introducing "green" lease clauses, the parties can prepare themselves now for any further future tightening of the legal requirements for climate protection in the use and management of buildings[51] and thus use long-term planning to avoid risks and additional costs that could potentially arise due to short-term developments.

2. From an ecological point of view, a green lease most notably serves to reduce emissions and waste, save water and energy, promote and use renewable energy sources and use environmentally friendly building materials. Landlords and tenants thus make a decisive contribution to environmental and climate protection.

3. The social dimension of sustainability can be seen in the fact that the tenant contributes to an improved, in some cases healthier, working environment and increased productivity in the workplace with the help of a green lease, while the landlord may contribute to better integration of the property into its surroundings by improving accessibility and making the property temporarily available for public events. The exchange of data on consumption values envisaged in a green lease and the resulting optimisation of consumption are also accompanied by transparency, efficiency and cooperation in the relationship between tenant and landlord (social and governance aspects). This promotes the partnership inherent in the green lease between the parties in the joint pursuit of sustainability goals, some of which they have set themselves. This solidarity is also likely to extend to other areas of the contractual relationship. In addition, both parties are likely to benefit from the fact that by promoting climate protection, they fulfil or optimise the legally prescribed directives or the self-imposed sustainability goals, for example as part of the ESG strategy of the relevant undertaking.

Green Lease – "win win" for tenants and landlords – the benefits at a glance:

- Contribution to environmental and climate protection by reducing emissions and waste
- Cost savings through lower consumption
- More attractive properties for sale and financing
- Precautionary measures with regard to further changes to climate protection legislation in the future
- Substantial contribution to the implementation of ESG strategies
- Improved working environment for building users
- More transparency, efficiency and partnership-based cooperation

III. Current status of green leases in Germany

Unlike in Anglo-Saxon countries,[52] France,[53] the Netherlands[54] and Sweden[55], the German real estate market has long lacked uniform guidelines that could have served as a reference framework for a green lease. After an interdisciplinary project group made up of business people, engineers and lawyers in 2012 developed 50 model provisions which were tested on the market as guidelines,[56] these guidelines were revised by a second project group in 2015 with the aim of developing a small number of objectives that were as easy to implement as possible.[57]

As part of the steadily growing importance of climate protection and the fulfilment of sustainability goals by undertakings as part of their CSR strategies, the demand for uniform guidance and recommendations for sustainability clauses has also grown in the German real estate market. Against this backdrop, the Green Lease 2018 was developed by the ZIA project group and published by ZIA.[58]

Parallel to developments in other countries,[59] there is still a need to adapt and update Green Lease 2018 in Germany, as well. Despite the increased number of regulatory requirements on environmental and climate protection and the existing range of flexible recommendations by Green Lease 2018, the majority of commercial leases in the German real estate market do not yet contain any green lease clauses.[60] Taking into account the shared regulatory responsibility of the entire real estate sector for climate protection and the conservation of environmental resources, as well as advancing ESG regulation, progressive market penetration of green leases therefore appears to be beneficial.[61]

IV. Modular system of the "basic green lease" and "expanded green lease" and their implementation

In order to promote the spread of green leases, two generally applicable variants for commercial leases – i.e. independent of a specific asset class – are offered below, namely a "basic green lease" (part 1), which focuses on the core elements, and an "expanded green lease" (part 2), which is supplemented by further model provisions. Both variants contain a catalogue of model provisions for drafting green leases and can be introduced both at the time of a new tenancy and as an amendment to an existing tenancy.

1. “Basic green lease”

The “basic green lease” in Part 1 focuses on the following core elements, which should be regarded as equally important “levers” for achieving the objectives associated with a green lease:

a) mutual exchange of consumption data: e.g. provisions on the exchange of past and current energy consumption to enable recording and evaluation of both the initial basis of energy consumption and how it changes over time;
b) promotion of sustainable energy sources for energy and heat supply: e.g. provisions on the preferential use of renewable energy;
c) saving resources (energy and water) and reducing waste: e.g. provisions on the use of modern building technology (e.g. smart metering systems and building automation), recycling measures and
d) environmentally friendly and resource-friendly implementation of construction and repair measures: e.g. in connection with tenant fixtures and fittings, modernisation of the rental property by the landlord or cosmetic repairs.

The interests of maximising the spread of the basic green lease should be sufficiently met if a specifically worded endeavour or commitment clause on each of the four aforementioned categories is included in a basic green lease.[62]

2. “Expanded green lease”

The “expanded green lease” in Part 2 builds on the “basic green lease” and also contains additional provisions. It is aimed at market players who have already gained some experience with the basic green lease and/or want to increase their commitment to sustainability within the framework of green leases. These expanded provisions can be divided into the following three groups:

a) additions to the core elements of the (basic) green lease;
b) certification-related provisions in the event of certification of the rental property;[63]
c) other issues relating to a green lease (without specific model provisions).

3. Enforcement: endeavour and commitment clauses

Part 3 will present model provisions and proposals for enforcing the “green” contractual clauses that apply to both green lease variants, in particular mandatory (sanction-based) provisions versus incentive systems (e.g. through options for cost sharing between tenant and landlord or also through innovative incentive systems such as “gamification”).[64]

In the interests of maximising the flexibility of green leases, effort and commitment clauses should be offered as alternatives for implementing the content of the provisions. In order to prevent difficulties of interpretation and conflicts in the application of endeavour clauses, these should be preceded by an overarching definition of “endeavour” to the effect that the parties to the lease agreement do not have an obligation to succeed, but merely to act. Particular care must be taken to ensure that the content and the action owed are described as precisely and specifically as possible. In addition, a deadline for the implementation of the relevant measures should be included for each endeavour clause. Specific legal consequences should be included to govern cases in which a contractually agreed “endeavour” is entirely absent.

In addition to the flexibility of endeavour clauses, such clauses are also advantageous insofar as the risk of invalidity due to general terms and conditions is considered to be rather low precisely because of the limited liability of the parties for the sustainability obligations due to the obligation merely to make endeavours. This is because if the clause is structured as an endeavour rule – as already described – only

V. Instructions for implementing the model provisions

Finally, the following aspects must be considered when implementing the following model provisions for both the basic green lease and the expanded green lease:

1. Case-by-case provisions and dealing with legal risks

By their very nature, the model provisions are abstract proposals that should be individually refined by the parties and their legal advisors in subsequent negotiations, adapted to the individual case and supplemented so as to adequately account for the needs of the parties and the characteristics of the rental property and its use, as well as any consequences that may arise in terms of financing and valuation. It is also important to consider that the model provisions aim to achieve the greatest possible balance between landlord and tenant so as to avoid undue disadvantages for one of the parties as far as possible. The explanations therefore deliberately provide information and assistive arguments from both the landlord's and tenant's perspective, and place particular emphasis on a balanced distribution of burdens and constructive cooperation between the parties (with the involvement of the property/facility manager if necessary) in relation to sustainable use and management.

The model provisions in the green lease can affect various areas of law. Model provisions in connection with issues such as the exchange of consumption data and the installation and operation of photovoltaic systems[66] can, for example, touch on data protection law, employment law and tax law. It is therefore advisable to negotiate each of the model provisions individually if possible[67] and also to seek specific legal advice for this in order to meet the needs of the parties, but also all relevant legal provisions in the specific case.

2. Model provisions as a guide

The green lease sample clauses are intended to provide guidance for drafting sustainable lease agreements, without serving unrestrictedly as an aid for interpreting applicable laws or as a certification and/or classification benchmark for specific investment properties. For this reason, a lease does not have to contain all of the following clauses to meet the definition of a green lease. Rather, observing the core elements described above will suffice. In line with its character as a flexible, dynamic product with an open-ended design, the green lease is meant to continue evolving in future with the help of suggestions and ideas from market participants.[68]

As already indicated, it is namely safe to assume that the next step will be for ESG matters targeting the "S" and "G" criteria to be increasingly added to green leases. The constant interaction with – sometimes changing – national and European legal rules must also be considered in this respect, potentially requiring certain model green lease provisions to be adapted. Alongside general tenancy law and general terms and conditions requirements, examples of such rules include the provisions of the aforementioned EU regulations and national laws such as the German

Building Energy Act (GEG), the Carbon Dioxide Cost Allocation Act (CO_2KostAufG), the German Supply Chain Duty of Care Act (LkSG) and the German Property Valuation Ordinance (ImmoWertV) (on considering the potential increase in value caused by green building certificates and other sustainability aspects in real estate valuations).

3. Location in the lease agreement and written form requirement

The "green" model provisions can either be incorporated into the relevant lease agreement in the appropriate places (e.g. as part of the preamble, in the operating and ancillary costs, in the maintenance/repair of the rental property, in the provisions on construction work or as a separate section) or as an annex to the lease agreement. Most notably, the written form requirement of section 550 of the German Civil Code (BGB) should be complied with for annexes and addenda – just like a "normal" lease agreement – insofar as these contain written-form-relevant, i.e. essential, components of the lease agreement.[69]

4. Adapting to the "asset class" and involving technical consultants

Before the details of a green lease are negotiated, the parties should consider the starting point of the property in question and the objectives being pursued, such as the type of building / asset class, the use ("single" or "multi-use") and the sustainability plans of the owners and users. This also includes the landlord determining the baseline energy consumption and the current energy consumption of the property with the help of the tenant. In this way, changes in consumption over time could be tracked on the basis of the status quo once it has been recorded and the consumption costs incurred could be divided between the tenant and landlord depending on consumption, for example. Once the green lease is being structured, there should be close cooperation with (internal and/or external) technical consultants and ESG experts/officers, and the green lease should also be coordinated with other service contracts relating to the property, particularly with regard to green lease obligations to be passed on, e.g. to property and facility management.

5. Outlook for green leases in the residential rental sector

Finally, green leases or even ESG leases are also likely to become more important in the residential rental sector in the future. However, the model provisions presented here focus on commercial leases, as did the ZIA green lease of 2018. In particular, deviations from mandatory tenant protection requirements in favour of sustainability are much more difficult and risky than in commercial leases due to the very far-reaching protection of residential tenants by mandatory statutory law, especially since in residential tenancy law, ecological considerations (e.g. use of more expensive electricity from renewable energy source, energy modernisation, etc.) are often likely to be in tension with social considerations (especially affordable housing). It is primarily for legislators to strike a balance between the conflicting objectives. Until then, the parties can only rely on voluntary, individually negotiated sustainability agreements.[70]

Part 1 – Basic green lease

Executive summary[71]

I. Programme clause on the sustainability goals

1. Programme clause with reference to EU taxonomy

Declaration of intent by the parties to comply with sustainability objectives in the use and management of the rental property with reference to EU taxonomy

2. Programme clause without reference to EU taxonomy

Declaration of intent by the parties to comply with sustainability objectives in the use and management of the rental property without reference to EU taxonomy

II. Consumption and emissions

1. Exchange of data

General clause on the exchange of information and data, in particular on energy and water consumption and waste generation, as well as compliance with data protection requirements

2. Promotion of sustainable energy sources

Procurement of energy / a certain (minimum) amount of energy for electricity and heat supply from renewable energy sources wherever possible

3. Saving energy and water and reducing waste

Setting joint savings targets and achieving these targets, e.g. through the use of energy/water-saving appliances, recycling concepts, timers for lighting and air conditioning units

III. Supplementary clauses: Sustainable use and management in operation

1. Maintenance and other construction work

a) (Initial) fixtures and fittings

Reciprocal information and verification obligations as well as approval requirements for structural changes / construction work; (endeavor) obligation to use certain environmentally friendly and resource-friendly materials

b) Cosmetic repairs and final renovation

Measured needs assessment and implementation in an environmentally friendly and resource-friendly manner

2. Operating and ancillary costs

Strictly consumption- and cause-based cost allocation of all ancillary costs; appropriate deviation from and restriction of the general efficiency principle in the interests of environmental sustainability considerations, particularly with regard to the use of renewable energy sources

3. Cleaning and waste

Compliance with environmental requirements when cleaning the rental property (especially environmentally friendly cleaning agents (those displaying the German “Blauer Engel” symbol for environmental friendliness)); transfer of obligations to providers of facility management services; provisions on separating types of waste for collection and disposal; possibility of optimising recycling options

I. Programme clause on the sustainability objectives

As an introductory provision, a programme clause – for example as part of the preamble to the lease agreement – is useful in order to sharpen the parties' understanding of the subsequent operative clauses and to provide a certain benchmark for interpreting these provisions, even if the programme clause may not have any direct regulatory content of its own.
Two options are proposed below:

Due to the growing importance of the EU taxonomy for all financial market participants, the language of the programme clause in the first option (Model Provision 1.1) refers to the concept of sustainability defined there. In order to be able to accommodate future amendments to EU rules, this and the following references are deliberately worded in an abstract and dynamic manner (see also the introduction to the EU taxonomy above, Section I.2.1).

Depending on the parties' intentions, however, it may also be appropriate to define the key terms specifically and statically in the text of the clause instead of making dynamic references to the Taxonomy Regulation.[72] Under no circumstances, however, can merely using the programme clause alone or the following model provisions guarantee that the property conforms with a particular taxonomy. This always requires a comprehensive review of the property itself and the entire management concept in each individual case.

For market participants to whom the taxonomy is not (yet) of relevance, the alternative programme clause (Model Provision 1.2) completely dispenses with references to the EU Regulation. The list of objectives it describes is not necessarily exhaustive and can be expanded and specified as desired by the parties.

1. Model Provision 1.1 (Programme clause with reference to EU taxonomy)

Model Provision 1.1

"The Parties are aware of their responsibility to protect natural resources and the climate in the interests of future generations; they agree that they wish to base the implementation of the tenancy on the most sustainable criteria possible [in relation to the environment, social issues and responsible governance ("ESG")].

Therefore, the Parties particularly wish to use resources and energy sparingly and economically in the management and use of the Rental Property, to avoid emissions and to cooperate constructively in order to also pursue innovative ways of making a [significant] contribution to achieving at least one of the environmental objectives set out in Art. 9 of Regulation EU 2020/852 ("Taxonomy Regulation")[73], not to significantly impair any of these objectives [within the meaning of Art. 17 Taxonomy Regulation] and at the same time to ensure the minimum protection[74] set out in Art. 18 Taxonomy Regulation. Economic, environmental and social factors should be taken into account (summarised as "Sustainable Use and Management").

The Parties shall [endeavour to][75] encourage their employees in accordance with the principles of good corporate governance as well as subtenants, service providers (e.g. property and/or facility managers) and other contractual partners relevant to the use and management of the property to observe the factors of Sustainable Use and Management.

NOW, THEREFORE, the Parties agree as follows:"

2. Model Provision 1.2 (Programme clause without reference to EU taxonomy)

Model Provision 1.2

"The Parties are aware of their responsibility to protect natural resources and the climate in the interests of future generations; they agree that they wish to base the implementation of the tenancy on the most sustainable criteria possible.

Therefore, the Parties particularly wish to use resources and energy sparingly and economically in the management and use of the Rental Property, to avoid emissions and to cooperate constructively in order to also pursue innovative ways of making a [significant] contribution to achieving the following (environmental) objectives:

a) promotion of sustainable energy sources

b) environmentally friendly and resource-friendly use of energy, water and waste,

c) avoidance of emissions (especially CO_2),

d) reduction of inefficiencies and unnecessary economic and environmental costs by considering the entire life cycle of the Rental Property,

e) continuous, systematic improvement of the sustainability of the Rental Property due to co-operation between landlord and tenant,

f) promotion of health, satisfaction and well-being as well as the quality of life of the users of the Rental Property.

Economic, environmental and social factors should be taken into account (summarised as "Sustainable Use and Management").

The Parties shall [endeavour to] encourage their employees in accordance with the principles of good corporate governance as well as subtenants, service providers (e.g. property and/or facility managers) and other contractual partners relevant to the use and management of the property to observe the aspects of Sustainable Use and Management.

NOW, THEREFORE, the Parties agree as follows:"

II. Consumption and emissions

1. Model Provision 2.1 (Exchange of data) [76]

The following general clause (Model Provision 2.1.1 (general clause on the exchange of data)) is intended to ensure that the parties exchange data that is particularly relevant to the evaluation of consumption by and emissions from the property. It can be included in the lease agreement either as a separate clause or as an addition in the context of the ancillary costs provision. The general clause is supplemented by Model Provision 2.1.2 (data protection), the main intention of which is to ensure compliance with data protection regulations for the protection of personal data.

a) General clause on the exchange of data

Model Provision 2.1.1 (General clause on the exchange of data)

"The Parties shall [endeavour to] provide each other with the following information, records and documents ("Data") relating to the Sustainable Use and/or Management of the Rental Property ("Sustainability Information"), insofar as this is available to the relevant party and does not constitute trade secrets within the meaning of section 2 no. 1 of the German Act on the Protection of Trade Secrets (GeschGehG):

a) Data on energy, gas and water consumption,
b) Data required to determine the carbon footprint of the Rental Property (e.g. all information provided by the relevant energy suppliers),
c) additional Data in connection with social and governance criteria, such as information on money laundering prevention, corruption prevention, diversity policies, etc,
d) [If applicable, further Data required to comply with European and/or national regulatory requirements in connection with sustainable investments (e.g. EU Taxonomy Regulation) and/or sustainability-related disclosure obligations (e.g. EU Disclosure Regulation),]
e) [If applicable, further Data required to comply with [future] European and/or national regulatory requirements with regard to building energy efficiency (e.g. EU Energy Performance of Buildings Directive (EPBD), German Building Energy Act (GEG)) and]
f) [If applicable, add Data to achieve Sustainable Use and/or Sustainable Management, e.g. for energy audits, certification].

To this end, both Parties shall [endeavour to] regularly provide each other with the Sustainability Information that can be collected with existing metering equipment or determined without further metering equipment in electronic (where possible, machine-readable) form and within a reasonable period of time at the request of the other party. The Landlord shall request this Data from the Tenant on a regular [monthly] basis. [The Tenant shall regularly transmit this data to the Landlord.] In addition, each Party is entitled to collect the Sustainability Information themselves. The other Party shall support them in this regard to the best of their ability. [In this context, the Landlord shall be entitled to equip the Rental Property with appropriate sensor units to collect sustainability information.] [In order to reduce the Tenant's workload, the Tenant may authorise the Landlord to request Sustainability Information from third parties (e.g. utility companies, facility or property management) in accordance with the template attached to this Lease Agreement as Annex [●].] [The Parties shall not be liable to each other for the accuracy and completeness of the Data that each provides to the other Party.]

Data for these purposes can also be personal data, i.e. all information within the meaning of Art. 4 no. 1 of Regulation (EU) 2016/679 (General Data Protection Regulation). When applying § [reference to this Model Provision 2.1.1], the Parties shall endeavour to protect the interests of the other Party to the best of their ability and are obliged to ensure compliance with the applicable legal requirements for data protection, data security and fair competition. The obligations under § [reference to this Model Provision 2.1.1] to process, and particularly to provide, personal data within the meaning of Art. 4 no. 1 of the General Data Protection Regulation shall not apply if this processing is prohibited under data protection law.

To the extent permitted by law, the Landlord shall be entitled to collect the Data and the information obtained with the Digital Control Devices, and to store and use it at their own discretion.[77] The Tenant is aware that, in order to achieve the (environmental) objectives pursued, the Landlord intends to keep all Data, in particular the Sustainability Information, regarding the Rental Property in a central location (e.g. in their IT systems) beyond the term of the lease, without restriction and permanently, in order to cover the entire life cycle of the Rental Property since its planning and construction. The Tenant shall support the Landlord and third parties (e.g. utility companies, facility or property management) to the best of their ability.

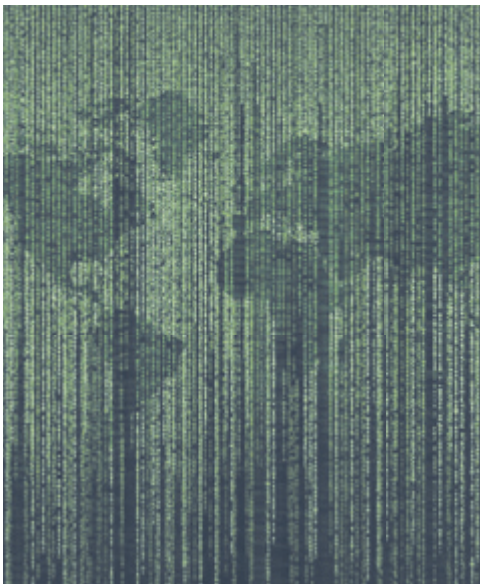
The Tenant shall permit the Landlord to enter the Rental Property during normal business hours to set up, maintain, service, repair and extend metering, measuring and control equipment installed within the Rental Property – including Digital Control Devices – after prior agreement with the Tenant.

For the avoidance of doubt: the authorisation to collect, store and use Data pursuant to this § [reference to this Model Provision 2.1.1] expressly does not extend to the other Party's trade secrets within the meaning of section 2 no. 1 of the German Trade Secrets Protection Act (GeschGehG).

Should a Party wish to exchange additional Sustainability Information in the future, the Parties shall coordinate on this."

Exchanging consumption data and information on sustainable building operation is becoming increasingly important. The data is not only used to determine and optimise sustainability standards, create sustainability reports or carry out sustainability benchmarking. It also helps in reducing operating costs and increasing the energy efficiency of the building's operation, for example by enabling automated analyses and optimisations (including increasingly through artificial intelligence) – savings of more than 20% can generally be achieved here.[78] However, the reciprocal obligation to exchange such comprehensive (possibly also personal) data must comply with the applicable data protection regulations.[79] The second part of the model provision above therefore already contains some data protection information and clarifications. These are supplemented by the following Model Provision 2.1.2 (Data protection).

If the green lease – over and above the basic variant proposed here – is also to include provisions on energy monitoring (see the additions to the basic green lease in Part 2, Section I. below, Addition 2 (Energy monitoring and CO_2 calculation)) or on the certification of the property (see the model provisions in Part 2, Section II. below), it is advisable under f) to add the data required for the implementation of the energy monitoring and/or the sustainability certification of the building, the building operation and/or the use of the rental property to the above general clause on the exchange of data. Finally, in an expanded green lease that goes beyond the basic variant, data collected by providers of services or work in connection with Sustainable Use and/or Sustainable Management, data on the use of the property (e.g. on the number of people, opening hours, core usage times per day and week, closing times – including of individual parts of the property – and, if applicable, on special use covered by the purpose of the lease) and/or data on waste generation could also be recorded at the request of the parties.



b) Data protection

The following model provision is intended to ensure that the tenant is informed about the processing of personal data. Another intention of the following Model Provision 2.1.2 (Data protection) is to ensure that any employees or subtenants of the tenant who may be affected are adequately informed:

Model Provision 2.1.2 (Data protection)

"Further information regarding the processing of personal data by the Landlord can be found in the information sheet[80] on data protection, which is attached as Annex [●]. The Tenant undertakes to pass on the information contained in the information sheet to their employees or subtenants where applicable."

2. Model Provision 2.2 (Promotion of sustainable energy sources)

It stands to reason that one key aspect of a green lease is promoting the use of sustainable sources of electricity and heat. The following Model Provision 2.2 is intended to encourage the parties to use renewable energy sources for the supply of electricity and heat to the rental property:

Model Provision 2.2

"Each Party shall, insofar as it procures electrical energy for the Rental Property and/or insofar as it is responsible for supplying heat to the Rental Property, [endeavour to] ensure, by choosing a qualified green electricity supplier [with the label [●]]], that the amount of electrical energy it procures [insofar as technically possible and economically reasonable] is generated exclusively [alternatively: at least [●]%] from renewable energy sources and fed into the electricity grid[81] and at least [●]%[82] of the heating demand is covered by renewable energy sources [as far as technically possible and economically reasonable]. Renewable energy sources within the meaning of this provision are energy sources within the meaning of section 3 no. 21 of the German Renewable Energy Sources Act in the version valid at the time of conclusion of this Lease Agreement, as well as other energy sources that may be recognised as renewable energy sources in the future under relevant German federal laws. Any stricter legal requirements introduced during the term of this Lease Agreement to cover the demand for electrical energy through renewable energy sources shall take precedence."

Photovoltaic systems are an important source of sustainable energy (see expanded green lease, Part 2, Section III.5.).

3. Model Provision 2.3 (Saving energy and water, reducing waste)

Saving energy and water and reducing waste are key to achieving overarching environmental goals and reducing CO_2 emissions from buildings. To this end, green leases must also contain basic incentives for economical and resource-friendly behaviour. Depending on the will of the parties, it may be appropriate to word the corresponding model provisions abstractly and with a view to the taxonomy objectives, meaning the parties have the flexibility to choose the means to achieve the best possible savings effects without prescribing any specific measures. At the same time, however, tenants and landlords should agree on a specific reduction path and annual savings targets, the achievement of which must be regularly reviewed and evaluated.[83] Depending on the energy quality of the building, tenants and landlords have varying degrees of influence on the reduction of building emissions. The allocation of responsibility should therefore be based on the tenant's options for more economical consumption and the landlord's options for energy modernisation in the specific case.

Model Provision 2.3

"In order to achieve the defined (environmental) objectives, the Parties shall [endeavour, by mutual agreement, to] take appropriate measures to:

- save energy and reduce CO_2 emissions,
- reduce water consumption and
- prevent, reduce and recycle waste and to document these accordingly.[84]

Based on the building energy demand certificate [building energy consumption certificate], the Parties shall establish a baseline within [●] weeks of handover to determine the previous energy consumption of the Rental Property. The Parties shall [endeavour to] reduce the building CO_2 emissions caused by the consumption of electricity and heating energy and water by [●]%. Depending on the energy quality, the Tenant shall be responsible for [●]% and the Landlord for [●]% of the savings target. At the end of a calendar year, the Parties shall review the achievement of this savings target against the baseline using the consumption data determined in accordance with [reference to Model Provision 2.1 (exchange of data)] and [endeavour to] take appropriate further savings measures if the target is not met."

A further suggestion that goes beyond a basic green lease would be the introduction of energy monitoring (see expanded green lease, Part 2, Section 1.2. below) or comparable energy management systems (e.g. in accordance with ISO 50001). The "Act on Restarting the Digitisation of the Energy Transition" will make the installation of smart electricity meters mandatory for many consumers[85]. The parties must check in each individual case to what extent this obligation already applies to them and to what extent they wish to contractually go beyond it.

Details can also be regulated in the sustainability handbook (see expanded green lease, Part 2, Section III.2. below). Water monitoring – possibly together with energy monitoring (see expanded green lease, Part 2, Section I.2. below) – could also be introduced.

Finally, additional (endeavour) obligations of the parties to reduce the amount of waste and to engage in sensible recycling can be agreed. These can either be reflected in the lease agreement or in the sustainability handbook (see expanded green lease, part 2, section III.2. below).

Other supplementary suggestions that go beyond a basic green lease would also be conceivable here, such as cooperating with an expert contractual partner to maximise reuse and recycling, and to minimise waste disposal, or introducing an environmental management system (e.g. in accordance with EMAS, ISO 14001).

III. Supplementary clauses: Sustainable use and management in operation

Provisions on the sustainable use and management of the rental property during its operation are also important "levers" for implementing the objectives associated with a green lease. The focus below is on provisions relating to maintenance and other construction work, operating and ancillary costs, cleaning and waste.

1. Model Provision 3.1 (Maintenance and other construction work)

Maintenance and other construction work by the tenant and the landlord also offer important starting points for sustainable use and management of the rental property. The use of sustainable building materials is particularly important in this regard.

In the lease agreement, the following "green" model provisions are probably best embedded in connection with the general provisions on construction work / installations and conversions by the tenant / landlord.

a) (Initial) fixtures and fittings

Tenants of commercial/office space often carry out more or less extensive interior fitting measures for which they themselves are responsible or equip the rental property with various fixtures and technical equipment that they need for their business. The following Model Provision 3.1.1 aims to ensure that the implementation of such measures is as compatible as possible with the principles of sustainable use of the rental property.

Model Provision 3.1.1

"Insofar as the Tenant is entitled or obliged under this Lease Agreement to make structural changes to the Rental Property and/or to provide the Rental Property with fixtures and fittings (hereinafter collectively referred to as "Tenant Fixtures and Fittings"), the following shall apply without prejudice to other provisions contained in this Agreement for Tenant Fixtures and Fittings to promote Sustainable Use and Management:

a) The Tenant shall inform the Landlord in advance [by means of digital resource or material passports] about the Tenant Fixtures and Fittings and, in particular, the extent to which the Tenant Fixtures and Fittings promote Sustainable Use and Management and contribute to achieving the objectives set out in § [reference to Model Provision 1.1 or Model Provision 1.2].

b) At the Landlord's request, the Tenant shall discuss the Tenant Fixtures and Fittings, including the manner of their implementation, with the Landlord and shall consider the Landlord's ideas for promoting Sustainable Use and Management at their reasonable discretion (section 315 BGB).

c) The Tenant shall [[use their best efforts to] endeavour to] implement the Tenant Fixtures and Fittings in an environmentally friendly and resource-saving manner and to use only zero-emission (if not possible: low-emission) materials that can be considered environmentally friendly and resource-saving on the basis of a life cycle assessment and to avoid adverse effects caused by the Tenant Fixtures and Fittings on the energy consumption and air conditioning of the entire property and/or the Rental Property as far as technically possible and economically reasonable. Permitted materials include, in particular, recycled construction materials or those that have been awarded a "Der blaue Engel" certificate, European eco-label, the "FSC" or "PEFC" seal or other Type I environmental seals within the meaning of ISO 14024, as well as materials from the list of ecological construction materials[86] and the materials recommended in the building criteria catalogue.[87] The Tenant shall base their tenders for construction services on the building ecology requirements listed in c) of this § [reference to this Model Provision 3.1.1] and in Annex [●] and shall ensure compliance with them.

d) Any measure relating to the Tenant Fixtures and Fittings requires the prior written consent of the Landlord. The Landlord may only refuse consent to Tenant Fixtures and Fittings for good cause. In addition to § [reference to other provisions on consent-based Tenant Fixtures and Fittings], good cause exists [inter alia] if (i) the Tenant Fixtures and Fittings is incompatible with the Sustainable Use and Management of the Rental Property or (ii) there is or would be a deviation from the requirements set out under c) in the construction measures with regard to the Tenant Fixtures and Fittings, but compliance with the ecological construction requirements does not constitute undue hardship for the Tenant.

e) The Tenant shall provide the Landlord with suitable evidence [using digital resource or material passports] of compliance with the provisions in c) of this § [reference to this Model Provision 3.1.1].

f) The Landlord hereby grants their consent to the installation of such Tenant Fixtures and Fittings that is intended to save final or primary energy [or water, insofar as this does not impair the hygiene of the pipe systems in the building] and/or the more efficient use of energy and/or the sustainable production of the energy used or is otherwise suitable for promoting the Sustainable Use and Management of the Leased Property, [in particular for the installation of charging stations for e-mobility], insofar as the Tenant has provided them with suitable evidence of compliance with the requirements in c) of this § [reference to this Model Provision 3.1.1]. Section [●] [where applicable, reference to the certification-specific model provisions in Part 2, Section II – in particular no actions that jeopardise certification] remains unaffected."

If the landlord furnishes and equips the rental property for the first time, in some cases it may be in the tenant's interest to subject the landlord to obligations similar to those set out in Model Provision 3.1.1 above. In addition, the following endeavour-obligation for the landlord in relation to modernisation work could be included:

Model Provision 3.1.2

"In the event of any future modernisation of the (Rental) Property, the Landlord shall make their best endeavours to ensure that the (Rental) Property is equipped in accordance with the then state of the art, in a way that is environmentally friendly and enables Sustainable Use and Management."

In addition, the following model provision for construction work on outdoor areas could be included in the lease agreement:

Model Provision 3.1.3

"In the event of any future construction work on the outside areas of the Rental Property, the Landlord shall use their best endeavours to achieve the lowest possible surface sealing [of a maximum of (*) % of the property area], taking into account the location of the Rental Property and individual requirements (e.g. by installing grass pavers)."

Particularly when letting older, not yet refurbished existing properties, a specific provision on future "upgrades" to the building fabric may be appropriate, in addition to or as an alternative to Model Provisions 3.1.2 and 3.1.3. The type and scope of the work primarily dependent on the age, condition and technical equipment of the property as a whole, as well as the type of use, which would have to be reflected in a special provision.

b) Cosmetic repairs and final renovations

The options for obliging the tenant to carry out cosmetic repairs are also limited in commercial tenancy law. If the tenant's obligation to carry out cosmetic repairs is not to be completely waived (it is conceivable, for example, for the landlord to merely be exempted from the obligation to carry out cosmetic repairs and to leave it up to the tenant to decide whether or not to carry out cosmetic repairs themselves), the need for cosmetic repairs should at least be determined in a measured manner in a green lease and a sustainable quality standard for any cosmetic repairs to be carried out should be agreed. The following model provision serves this purpose:

Model Provision 3.1.4

"The need for ongoing cosmetic repairs shall be determined in a measured manner, taking particular account of the parties' efforts surrounding the Sustainable Use and Management of the Rental Property. When carrying out the cosmetic repairs, the party obliged to carry out the repairs must be guided by the (environmental) objectives of § [reference to Model Provision 1.1 or Model Provision 1.2] and [as far as technically possible and economically reasonable] use only zero-emission (where not possible: low-emission) materials that can be considered environmentally friendly and resource-saving on the basis of a life-cycle assessment.

Permitted materials include, in particular, recycled construction materials and such materials that have been awarded a "Der blaue Engel" certificate, the "EU Ecolabel", "FSC", "PEFC" or other Type I environmental seals within the meaning of ISO 14024, as well as materials from the list of ecological construction materials[88] that meet the DIN Plus requirement listed there, and the materials recommended in the Building Products for Tenant Improvements manual (reference to the annexes mentioned above in Model Provision 3.1.1).[89]"

Instead of an obligation to carry out cosmetic repairs, lease agreements for commercial premises often stipulate that the tenant is obliged to carry out final renovations at the end of the lease. Irrespective of the question of whether and in what way such provisions can also be agreed with legal effect in general terms and conditions, any agreed final renovations in a green lease should be subject to the same sustainability benchmarks as those set out in Model Provision 3.1.4 for cosmetic repairs. The following Model Provision 3.1.5 serves this purpose:

Model Provision 3.1.5

"Insofar as the Tenant is obliged to carry out final renovations under this Lease Agreement, the need for final renovations shall be determined in a measured manner, taking particular account of the Parties' efforts to ensure the Sustainable Use and Management of the Rental Property. When carrying out the final renovations, the Tenant must [as far as technically possible and economically reasonable] use only zero-emission (where not possible: low-emission) materials that can be considered environmentally friendly and resource-saving on the basis of a life-cycle assessment.

Permitted materials include, in particular, recycled construction materials and such materials that have been awarded a "Der blaue Engel" certificate, the "EU Ecolabel", "FSC", "PEFC" or other Type I environmental seals within the meaning of ISO 14024, as well as materials from the list of ecological construction materials[90], and the materials recommended in the Building Products for Tenant Improvements manual (reference to the annexes mentioned above in Model Provision 3.1.1).[91]"

For the maintenance and repair of the rental property, it should also be noted that maintenance work should not jeopardise any existing certification of the rental property (see the certification-specific regulatory model provisions in Part 2, Section II below).

Where applicable, the provisions on cosmetic repairs and final renovations as well as other maintenance and repair work may also be subject to corresponding application of the provisions on construction measures (see Model Provision 3.1.1 above).

2. Model Provision 3.2 (Operating and ancillary costs)

In commercial tenancy law, just as in residential tenancy law, the principle of economic efficiency and thrift applies without a special agreement between the parties. This states, among other things, that the landlord may only allocate costs to the tenant relating to the management of the rental property that are justified on the basis of conscientious consideration of all circumstances and proper management. The landlord must respect an appropriate cost-benefit ratio, but, within the scope of their discretion, is not obliged to always choose the cheapest solution, rather may also consider other criteria relevant to proper management.[92] Whether and to what extent ecological sustainability factors are included in these criteria has not yet been clarified at supreme-court level. Their inclusion is at least supported by the fact that criteria other than costs may also be taken into account in the decision-making process by the landlord at their discretion if these represent an objective reason for choosing a more costly solution.[93] The criterion of sustainability can be one such objective reason which may be included in considerations during the decision-making process.[94]

Ecological management options are increasingly viewed as a commercially sensible choice. Ecologically sustainable management services are therefore no longer seen as a restriction, but rather as a manifestation of the general efficiency principle.[95] The law also gives ecological matters priority over purely economic considerations in other areas, namely the Heating Costs Ordinance or modernisation cost allocation in residential tenancy law.[96]

However, an ecologically inclined interpretation of the efficiency principle also requires that the landlord always chooses the most favourable of several alternatives that are equally suitable from the point of view of ecological sustainability.[97] In order to ensure that both the landlord and the tenant share in any additional cost incurred on sustainability grounds in as balanced a way as possible, it is also advisable – including from the point of view of the law governing general terms and conditions – to only charge the tenant the additional costs up to a certain cost limit or a certain cap (if this clause is not already included in the lease agreement by means of an individual agreement,

see Part 3 below – Suggestions for enforcing the "green" model provisions).

Model Provision 3.2.1

"The Landlord is entitled to have management services, the costs of which are passed on to the Tenant, provided in the most environmentally sustainable manner possible to promote the Sustainable Use and Management of the Rental Property, which is the case if the management services contribute to achieving the sustainability objectives set out in § [reference to Model Provision 1.1 or Model Provision 1.2]. In accordance with the general efficiency principle, preference is to be given to the most economical manner of execution out of several equally suitable and equivalent manners of execution from the perspective of environmental sustainability, with the Tenant only required to bear any additional costs caused by Sustainable Use and Management up to [[●]% of the annual advance payment of ancillary costs[98] / EUR [●]]."

Even if this may be a matter of course for many landlords and tenants anyway (and is sometimes also required by law for certain ancillary costs), a strict consumption-based cost allocation should also be agreed as part of the ancillary-cost provision, especially in a green lease, in order to not only take account of the "principle of causation", but above all to create incentives for the economical use of resources. This requires the allocation to be agreed equally with all tenants in the property. The following Model Provision 3.2.2 contains a corresponding provision:[99]

Model Provision 3.2.2

"The ancillary costs that depend on consumption or causation being recorded by tenants are to be allocated exclusively according to a benchmark that takes into account the varying consumption or the varying causation.

In all other respects, the Landlord shall determine the allocation benchmark at their reasonable discretion (section 315 BGB), taking into account the principle of equal treatment of tenants and in compliance with mandatory statutory provisions, and taking particular account of the ratio of the rental area of the Rental Property to the total area of the building."

3. Model Provision 3.3 (Cleaning and waste)

Cleaning is by far the most common regular maintenance work for a property, and at the same time one of the areas in which sustainability considerations can be easily introduced into the tenancy agreement. As a rule, the landlord is responsible for cleaning the communal areas of the (rental) property (with it apportioning the costs of this to the tenants) and the tenant (at their own expense) for cleaning the areas of the rental property used exclusively by them. The following Model Provision 3.3.1 can likely best be integrated into the lease agreement in the provisions on the maintenance and use of the rental property. It sets out criteria that must be taken into account in relation to cleaning (in particular the use of environmentally safe cleaning agents (e.g. those displaying the "Blauer Engel" certification)). If the parties do not wish to commit to specific standards and labels in advance, the model includes an alternative whereby the parties regularly agree on the requirements for the ecological safety of the cleaning agents to be used. It also encourages the parties to impose the obligation to comply with these agreements on the providers of cleaning/facility management services. In addition, the facility manager could also be required to train their employees in accordance with the green lease requirements for environmentally friendly cleaning.

Model Provision 3.3.1

"When cleaning the (Rental) Property, the Parties shall [endeavour to] use the most environmentally friendly of several equally effective cleaning methods in each case. Insofar as cleaning agents are used for regular maintenance cleaning, the Parties shall [as far as technically possible and economically reasonable] only use environmentally safe cleaning agents, meaning those that have been awarded the "Blauer Engel" eco-label or other type I eco-labels within the meaning of ISO 14024 [Alternatively: do not use cleaning agents that contain a higher proportion of solvents than 2% in the concentration or dilution used (the European Regulation on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH, (EC) No. 1907/2006)]. [Alternatively: The Parties shall agree at regular intervals on the standards that the cleaning agents to be used must meet beyond any legal requirements in order to be considered ecologically safe for these purposes.]

These requirements [are to/shall] be imposed on the contracted providers of cleaning and/or facility management services accordingly and compliance with these requirements shall be demonstrated to the other party on an annual basis [if possible] (e.g. by presenting receipts or written confirmation from the contracted service providers)."

The following Model Provision 3.3.2 is primarily aimed at sustainable handling of waste for disposal that is generated during use of the rental property. For certain uses, it may be advisable to agree a provision at an earlier stage in addition to Model Provision 3.3.2, under which the parties must comply with the waste hierarchy of section 6 of the German Recycling Act (KrWG) for the handling of waste. This states that waste must be avoided as a priority, then prepared for reuse, recycled, otherwise (energetically) utilised and finally disposed of. For example, an additional provision could be included whereby certain materials arising from the use of the rental property (e.g. used toner cartridges) must be returned to the manufacturer or other relevant companies for reuse. However, the question as to the extent to which the parties are willing and able to go beyond existing and changing legal provisions with regard to waste disposal must be answered on a case-by-case basis. If such a detailed structure as in Model Provision 3.3.2 is not desired, the issue of waste can also be resolved in a very abstract manner and via a clause simply requiring the parties to discuss the matter, as in Model Provision 3.3.3.

Model Provision 3.3.2

"The Parties shall agree on how waste arising from the use of the (Rental) Property within the meaning of section 3 KrWG can be avoided from the outset, prepared for reuse, recycled or otherwise utilised. Waste for disposal must be separated into paper, metal, glass and plastic (section 20 KrWG, section 3 GewAbfV) as well as wood and textiles (section 3 GewAbfV), energy-saving light bulbs (ElektroG), batteries (section 11 BattG), printer/toner cartridges, packaging materials with the "Grüne Punkt" (Green Dot) (or other materials that may be assigned to separation systems introduced generally in the future), organic waste (section 20 KrWG, section 3 GewAbfV) and other waste, with any further-reaching legal obligation to treat waste that exists today or is introduced in the future taking precedence. The Landlord is entitled to prohibit the storage of waste that is not separated in accordance with this requirement. The Landlord must provide waste collection systems for the entire property and the Tenant for the interior of the Rental Property that enable the separate collection and disposal of waste in accordance with sentence 1. The Parties shall comply with any documentation obligations (e.g. in accordance with section 3 (3) GewAbfV) and coordinate in advance in this regard. [Furthermore, the Parties shall exchange information on the amount of waste to be disposed of, in particular the number and type of waste bins used and their emptying frequency, through the use of appropriate sensor technology]."

Model Provision 3.3.3

"The Tenant is obliged to comply with all applicable requirements and recommendations made by the competent authorities with regard to waste disposal on the property. To the extent possible, the Parties shall [endeavour to] jointly determine a plan for further waste reduction and recycling."

Part 2 – Expanded green lease

Executive summary

I. Additions to the basic green lease

1. Energy modernisation measures

Potential allocation of a (limited) part of costs to the tenant, and as appropriate in consultation with the tenant and subject to certain restrictions (including, for example, no hardship for the tenant)

2. Energy monitoring and determination of CO_2 emissions

Comprehensive assessment of energy consumption and necessary transmission of data as well as development and implementation of an energy optimisation concept – regular review and adjustment of the concept (referred to as "smart meter rollout"). Determination of the carbon footprint of the rental space based on the data provided by the tenant; supporting the landlord with implementation; communicating suggestions for improvement after the examination

3. Sustainability dialogue

Regular contact between the parties on sustainability issues involving the property/facility management

4. Social and governance aspects

Fundamental rights and duties of the parties regarding accessibility, in particular the right to carry out related modernisation measures; ensuring healthy working conditions for both the tenant's employees and both parties' service providers

II. Certification-specific provisions

1. New construction certificate has been granted

Obligation of the parties to endeavour not to deviate adversely from the standard underlying the certificate

2. (Existing construction) certificate sought

Obligation of the parties to take the measures required for certification as well as supportive acts to maintain certification, landlord's consent to tenant's installations and alterations

3. (Existing construction) certificate has been granted

Obligation of the parties to take action in support of maintaining certification, in particular in the event of maintenance and repair measures; landlord's consent to tenant's installations and alterations

III. Further issues relating to green leases

1. Mobility: e.g. installation of bicycle racks/storage and incentives to use public transport

2. Sustainability handbook: user guidelines, e.g. for saving water and energy

3. Green levies: now expressly regulated by the German CO_2 Cost Allocation Act (CO_2KostAufG), but preparation for further state levies as appropriate

4. Staff training on sustainability issues

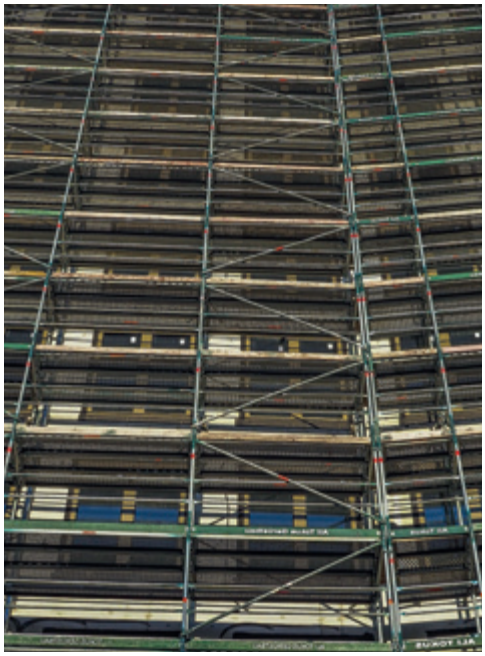
5. Photovoltaic systems: incentives for equipping the property with PV systems

I. Additions to the basic green lease

Below you will find some options for additions to the basic green lease along with related model provisions.

1. Addition 1 (Energy modernisation measures)

The legislator has already regulated a core area of what makes a lease agreement "green" for residential leases and now also for commercial leases, namely in the form of the landlord's right to modernise the rental property to increase energy efficiency and – at least in the case of residential leases – to charge the tenant for part of the costs. This is probably one of the most important instruments for "greening" a property, as it allows the landlord to adapt it to the ever-changing ecological conditions during the rental period. This is particularly true for the long lease terms that are common in Germany compared to some other countries. The following additions aim to further promote this principle on the basis of freedom of contract in order to achieve a modernisation-friendly approach that is compatible with tenants' interests. The first step in this context is Addition 1.1, which grants the landlord the right to carry out "green" modernisation measures and obliges the tenant to tolerate them.



Addition 1.1 (Right to "green" modernisation measures and obligation to tolerate)

"The Landlord has the right to carry out measures on the Rental Property [in consultation with the Tenant] that are intended to save final or primary energy and/or water and/or to use energy more efficiently and/or to produce energy more efficiently or are otherwise suitable to promote the Sustainable Use and Management of the Rental Property, and/or that the Landlord has to carry out due to circumstances beyond their control and that do not solely serve the purpose of maintenance and repair, in particular adjustments of the Rental Property or entire property to stricter requirements under the German Building Energy Act ("GEG") (and/or comparable rules and regulations) or otherwise ("Landlord Measures").

The Landlord shall inform the Tenant no later than [●][100] months before the commencement of such Landlord Measures and shall in particular state how such Landlord Measures promote the Sustainable Use and Management and contribute to achieving the objectives set out in § [reference to Part 1 Section I, Model Provision 1.1 or Model Provision 1.2].

At the Tenant's request, the Landlord shall discuss the Landlord Measures, including the manner of their implementation, with the Tenant and shall endeavour to consider the Tenant's ideas for promoting the Sustainable Use and Management at their reasonable discretion (section 315 BGB).

The Landlord shall endeavour to ensure that the work and materials used are environmentally friendly and resource-friendly and shall base its tenders for construction work on what is referred to as the "ecological construction specifications" attached to this Lease Agreement as annex [reference to the annexes set out in Part 1 Section III Model Provision 3.1.1][101] and shall ensure compliance with such specifications.

The Tenant must tolerate such Landlord Measures. [Their right to rent reduction is excluded in this regard [for a period of [●]]; the Tenant's other rights remain unaffected.]"

In the interest of promoting "green" modernisation measures, Addition 1.1 thus goes beyond the provisions of sections 555b et seqq. BGB, which now are also largely applicable in commercial tenancy law pursuant to section 578(2) BGB. Exclusion of the tenant's special right of termination under section 555e BGB has been deliberately waived, due to section 307 BGB, as has the additional exclusion of tenants' warranty rights.[102] However, this and the following considerations on modernisation clauses in this Addition 1 do not release the parties from the obligation to always negotiate each individual clause individually in practice – including in the overall context of the lease agreement – and on a case-by-case basis and/or, as appropriate, to check/have checked their validity under the general terms and conditions (Allgemeine Geschäftsbedingungen, T&Cs) in order to balance interests appropriately and avoid potential T&C risks.

Particularly in view of such potential T&C risks, there is a need for an additional adjustment to the landlord's right set out in Addition 1.1 to carry out "green" modernisation measures at any time (in consultation with the tenant, as appropriate): this is achieved by means of the following Addition 1.2 and 1.3, which ensure that the tenant's legitimate interests are adequately considered when answering the questions of "whether" and "how" green modernisation measures are carried out.

Addition 1.2 (No obligation of the Tenant to tolerate in the case of hardship):

"The Tenant is not obliged to tolerate measures where such measures, if implemented, would mean hardship for them that is not justified even when considering the legitimate interests of the Landlord, other Tenants of the building[/property] and the objective of the Parties to use and manage the Rental Property as sustainably as possible (in particular for saving energy and climate protection). The work to be carried out, the structural consequences and previous expenses of the Tenant must be primarily considered."

Addition 1.3 (Minimum impairment of the Tenant):

"The Landlord must carry out Landlord Measures pursuant to this § [reference to Addition 1.1 (Right to "green" modernisation measures and obligation to tolerate)] in such a way that the Tenant's business operations are impaired as little as possible, unless the avoidance of such impairments leads to significantly increased costs of the relevant measure."

The following Addition 1.4 governs the landlord's right to demand a rent increase as a result of the modernisation measures. This is because landlords will not be motivated to make investments if they have to bear the costs alone, whereas a return in the form of savings on water and energy costs or in the form of sustainable energy generation primarily benefits the tenant by reducing their ancillary costs (referred to as the "user-investor dilemma").[103] The law regulates the landlord's option to invest in the rental property, for example to save energy or water (section 555b BGB), and – in the context of residential tenancy law – to pass on at least part of the resulting costs to the tenant (section 559(1) BGB; the relevant reference for commercial leases is absent from section 578(2) BGB). As it does not seem reasonable in terms of environmental and climate protection why the landlord of residential space should be entitled to pass on to the tenant part of the costs of modernisation measures that result in sustainable energy or water savings, whereas the landlord of commercial space should not be so entitled, the inclusion of a corresponding contractual provision is recommended here for this case.

Addition 1.4 (Rent increase):

"The Landlord is entitled to demand an increase in annual rent by [●] percent of the costs incurred for implementing these measures. If the measures have been carried out in respect of several areas used exclusively by different Tenants and/or common areas, the costs have to be allocated appropriately to each of the Tenants. To the extent that the measures are subsidised by the public sector, relevant subsidies must be deducted when calculating the allocation. Sections 559a and 559b BGB apply accordingly. The rent deposit provided for in [●] of this Lease Agreement remains unaffected. The Landlord's right to increase rent is excluded to the extent it would mean hardship for the Tenant, including in consideration of the Tenant's expected future operating costs, which is not justified even when considering the Landlord's legitimate interests. This does not apply where the rental property is merely being placed in a condition that is generally customary for similar sustainably managed properties [or where the measures are carried out due to circumstances beyond the Landlord's control]."

The above provision pursues as balanced an approach as possible in order to appropriately balance tenant and landlord interests with regard to the rent increase, and in particular refrains from excluding tenant rights such as rights to reduction or compensation. The tenant's special right of termination pursuant to section 561 BGB does not apply anyway if not separately agreed on, as the regulatory regime of sections 559 et seqq. BGB only applies to residential tenancy law.

Even though this does not appear necessary in the context of a standard form contract, even if this Addition 1.4 has been incorporated into the agreement,[104] it may still be advisable, as an additional safeguard under the law on general terms and conditions, to link the "whether" and the extent of a rent increase to a specific benefit for the contractual use by the tenant, as is intended, for example, in Addition 1.5 below (as an alternative to Addition 1.4). The allocation of modernisation costs has to be negotiated primarily on a commercial basis, with the main aim ideally being a fair distribution of costs / savings between the landlord and the tenant. This distribution could be based on the costs of investment, on the one side, as provided for by the legislator in residential tenancy law (Addition 1.4), or based on the cost saving to the tenant due to reduced energy or water consumption (Addition 1.5), on the other; it should be considered in the latter case that cost savings will not be easy to quantify because their calculation would ultimately be based on an average value over several years.

Addition 1.5 (Alternative to Addition 1.4):

"The Landlord has the right to demand an increase in annual rent by [●] percent of the amount the Tenant is expected to save annually as a result of the measures (determined in relation to the first full calendar year following completion of the relevant measure) in connection with ancillary costs or in connection with costs of the Rental Property's ongoing management to be borne directly by the Tenant. In the event of a dispute, the expected saving shall be determined by a certified expert appointed by the [●] Chamber of Industry and Commerce."

What also has to be considered in connection with any modernisation-related rent increase is that relevant agreements between the parties in the case of lease agreements concluded for more than one year should currently still be made in the form of an addendum to the lease agreement complying with written form requirements, in order to exclude the possibility of early termination of the agreement for breach of formal requirements (sections 578, 550 and 126 BGB).

2. Addition 2 (Energy monitoring and determination of CO_2 emissions)

Consumption-based operating costs for commercial real estate use are constantly rising – in particular due to ever-increasing energy prices, with the costs of electricity and fossil-fuelled energy likely to record the sharpest increases. Energy consumption has a direct influence on the property's carbon footprint. Its determination and improvement are increasingly the focus of attention. However, determination of the carbon footprint over the entire building life cycle also includes determining "grey emissions". Therefore, monitoring energy consumption and establishing an energy concept can significantly contribute to achieving environmental targets and lead to considerable cost savings, which also benefit the tenant due to reduced consumption levels / operating costs (for incentive systems, see Part 3 Section III. below).

Addition 2 (Energy monitoring and determination of CO_2 emissions)

"[The Parties intend that] The [Landlord/Tenant] shall comprehensively assess the energy consumption of the Rental Property ("Energy Monitoring"). The [Parties also intend that the] Landlord shall also determine the CO_2 balance of the rental areas, including common areas, every [●] years to the extent that CO_2 emissions are attributable to energy consumption [water consumption and/or waste disposal] ("CO_2 Determination"). [Energy Monitoring also includes the determination of "grey emissions", which are caused during production, transportation and processing of raw materials throughout the building life cycle. The [Landlord/Tenant] may use digital building resource/material passports to determine them.]

The [Landlord/Tenant] shall support them in doing so and, in particular, provide the necessary data pursuant to § [reference to Part 1 Section II, Model Provision 2.1 (Exchange of data), adding data on Energy Monitoring and the determination of CO_2 emissions], in full and in an appropriate form without delay. Based on such Energy Monitoring and CO_2 Determination, the [Landlord/Tenant] shall develop a concept for the environmentally friendly and resource-friendly use of energy, utilising the Carbon Risk Real Estate Monitor (CRREM) tool[105] and based on the trajectories provided there, which contains recommendations for Sustainable Use and Management and which they shall submit to the [Landlord/Tenant] without delay ("Energy Optimisation Concept").

The Parties shall [endeavour to] implement the recommendations in the Energy Optimisation Concept within the framework set by this Lease Agreement within a reasonable period of time.

The [Landlord/Tenant] shall review the Energy Optimisation Concept and its implementation every [12] months based on the Energy Monitoring and CO_2 Determination and adjust it as necessary.

Paragraph 1 sentence 2 of this § [reference to this Addition 2] is to be applied accordingly when adjusting the Energy Optimisation Concept. If the Energy Optimisation Concept provides for material amendments or additions to this Lease Agreement, the Parties are obliged to agree on the relevant Energy Optimisation Concept in an addendum to this Lease Agreement that complies with the written form requirement. Until such addendum has been concluded, the Energy Optimisation Concept is only binding to the extent that it does not contain any significant changes or additions to the Lease Agreement.

[The costs of such [energy monitoring and/or Energy Optimisation Concept after deduction of state subsidies received, if any,] shall be borne [equally] by the [Landlord/Tenant]."

3. Addition 3 (Sustainability dialogue)

It is also advisable for the parties to ensure ongoing communication on sustainability issues during the term of the lease agreement in order to jointly exploit the property's full potential for Sustainable Use and Management by working together as partners:

Addition 3 (Sustainability dialogue)

"[At the Tenant's request, the Landlord is available at any time by prior appointment to discuss any questions concerning the lease [alternatively: the Sustainable Use and Management of the Rental Property].] The Parties wish to regularly [also] discuss the Sustainable Use and Management of the (Rental) Property and its promotion within the framework of this Lease Agreement ("Sustainability Dialogue")."

The practical implementation of such a sustainability dialogue can pose major challenges, particularly for landlords who manage a large number of properties with several tenants. Regular personal meetings promote trust and are therefore desirable. Nonetheless, the above Addition 3 leaves the matter of how the parties conduct such sustainability dialogue up to the parties themselves. Their dialogue could, for example, take place via video conferencing. Dialogue may also be conducted as a meeting with all tenants of a property or with a single tenant only.

Those acting as specific points of contact will not be expressly named in the contract, since frequent personnel changes harbour the resulting risk of frequent amendment requirements (including in the form of addenda required to be in writing, as necessary).

If the parties wish to further formalise their sustainability dialogue, provisions on a regular cycle (e.g. quarterly / half-yearly / as required, but with minimum intervals) or obligations to keep records or minutes may also be included in the lease agreement. If the parties wish to commit to implementing certain recommendations mentioned in sustainability dialogue minutes or records, it should be clarified that neither party can derive any direct claims to the amendment of the lease agreement from the sustainability dialogue. It would then have to be expressly stipulated that, if, as part of their sustainability dialogue, the parties agree on any arrangements beyond the lease agreement / other amendments to the lease agreement, such arrangements or amendments will only take binding effect when the parties conclude an addendum to the lease agreement that complies with the written form requirement. Such an addendum should also contain an agreement between the parties on a balanced distribution of any additional costs, considering the benefits of the measures and the principle of economic efficiency.

If the green lease provides for a sustainability committee, for example due to the size of the property / the large number of tenants, the sustainability dialogue would be held most efficiently when integrated into this committee's regular meetings. This committee is a body consisting of landlord and tenant representatives that supports implementation of the "green" aspects of the green leases concluded with the tenants, e.g. by monitoring compliance with the requirements of the sustainability handbook, analysing consumption data, optimising Sustainable Use and Management, and preparing an annual sustainability report.

4. Addition 4 (Social and governance aspects)

In addition to the issues discussed above, which mainly serve to achieve the environmental objectives defined in the programme clause in Part 1, Section I, Model Provisions 1.1 or 1.2, the following section considers social and governance aspects. Placing the focus of the green lease on environmental and climate protection alone does not do justice to the current market conditions, which call for a holistic "ESG approach". At the same time, however, it should be noted that "governance" obligations imposed on the tenant necessarily encroach heavily on the tenant's sphere of operation. The extent to which the parties wish to agree on relevant corresponding provisions in the lease agreement must therefore be examined and discussed in each individual case.[106] Accordingly, the above model provisions initially focus on social aspects sufficiently related to the rental property.

A key aspect of social participation is ensuring maximum accessibility of rental properties. Addition 4.1 set out below serves to implement relevant statutory provisions and obliges the parties to make additional arrangements where possible.

Addition 4.1 (Basic rights and obligations of the Parties regarding accessibility)

"The Parties agree that it is their common objective to make the Rental Property as accessible as possible in order to make it easier for people with disabilities to access, and work in, the premises. The Landlord shall ensure, on an ongoing basis, that the Rental Property is equipped in accordance with applicable national and European legislation on accessibility. The Tenant can demand that the Landlord allows them to make more extensive structural alterations to improve use and access for people with disabilities, unless the Landlord cannot reasonably be expected to accept any such structural alterations, paying due regard for the Tenant's interests."

The landlord will generally only be motivated to comply with accessibility requirements for the premises that go beyond their legal requirements if they can pass on part of the costs incurred to the tenant. It has not yet been clarified by the highest courts and continues to be disputed whether developing the rental property to make it more accessible to people with disabilities is considered modernisation for the purposes of section 555b BGB in any case, i.e. even if it is not primarily intended for use by people with disabilities, for example as a measure that sustainably increases the utility value of the rental property or that permanently improves general living conditions.[107] In this regard, Addition 4.2 below is to be understood as an additional provision to the list of modernisation measures in Addition 1.1 and should be inserted at the appropriate place in the lease agreement.

Addition 4.2 (Right to carry out modernisation measures with regard to accessibility):

"In addition to the Landlord's measures pursuant to § [reference to Addition 1.1 (Right to "green" modernisation measures and obligation to tolerate)], the Landlord [in consultation with the Tenant] also has the right to carry out such measures on the Rental Property that serve the use of, and access to, the Rental Property for people with disabilities. § [reference to Addition 1.2 to 1.5] apply accordingly."

As a further supplement to both the landlord's modernisation measures and the tenant's construction and fit-out measures, it may be appropriate to agree on a provision requiring both parties, when selecting the service provider commissioned to carry out such measures, to pay particular attention to such service provider's compliance with all relevant labour law regulations and, as necessary, further criteria that serve its employee's welfare. In addition, local businesses may be selected as a matter of priority in order to strengthen the local labour market and keep travel distances short in view of ecological and economic costs.

Addition 4.3 (Commissioning of local businesses)

"To the extent that the Tenant carries out installations and conversions pursuant to § [reference to Part 1 Section III Model Provision 3.1.1] or the Landlord carries out modernisation measures pursuant to § [reference to Addition 1.1 (Right to "green" modernisation measures and obligation to tolerate)] et seqq., they must ensure when selecting the relevant businesses and service providers commissioned that they comply with all applicable labour law regulations and ensure appropriate working conditions and fair wages for their employees.[108] [Furthermore, where there is a number of equally qualified or capable businesses or service providers the Parties shall [endeavour to] commission the business or service provider whose location and distance from the Rental Property is the most ecologically reasonable when taking account of journey and transportation]."

Ensuring ideal and healthy working conditions within the premises is particularly relevant for commercial properties. The aim here can be to obtain and maintain certain certificates that have become established in the market (for example, the WELL certificate from the International WELL Building Institute).[109] Reference is made in this regard to the statements on certification-specific model provisions (see Part 2 Section II. below). If the parties do not wish to refer to a specific certificate with regard to their mutual obligations, but nevertheless wish to make efforts in this direction, the following Addition 4.4 may be used. In addition to the environmental and working conditions specifically described there, the parties can also monitor other parameters, such as nutritional, fitness, and community options. In individual cases, however, these topics may encroach to different degrees on the tenant's business operations and should therefore be regulated on an optional basis:

Addition 4.4 (Ensuring healthy working conditions):

"The Landlord shall [endeavour to] monitor indoor air and water quality, temperature and acoustics in the Rental Property at regular intervals, for example by installing appropriate electronic meters and measuring equipment. As part of the sustainability dialogue conducted pursuant to § [reference to Addition 3 (Sustainability dialogue)], the Tenant shall [endeavour to] inform the Landlord at regular intervals of any need for improvement regarding working and environmental conditions and [to] discuss possible improvements with the Landlord."

In addition to these aspects, for the purposes of social participation, it may also make sense to include provisions under which tenants and landlords create opportunities to “open” the property to the public where possible. Parts of the property that are suitable for this purpose, such as larger halls and open spaces, could regularly be dedicated to public events or made available to public bodies.

II. Certification-specific provisions

Even if a green lease fundamentally goes beyond the sustainable design of the building fabric, the parties will often wish to also make provisions regarding certification of the rental property, which either exists at the time the lease agreement is concluded or may be obtained in the future, according to certification systems established on the market (currently these include certification according to the BREEAM, LEED, WELL and DGNB systems as well as the special “HafenCity Umweltzeichen” certificate widely used in Hamburg). This applies particularly to new buildings, but will also play an increasingly important role for existing properties.

From the landlord’s point of view, the main matter relating to certification is the tenant’s appropriate involvement in creating and maintaining the certification requirements as well as the extent or, as applicable, exclusion of the landlord’s liability to the tenant for the continued existence, renewal and accuracy of certificates. The tenant, on the other hand, will have an understandable interest in contractually securing maintenance of the certification once granted and in defining the scope of their obligations to ensure user conduct that conforms to the certificate.

The provisions proposed below aim to appropriately consider both perspectives. They are deliberately neutral, i.e. not geared towards a specific certification system, but should in practice, where certification is already in place, be based on the relevant certification system and otherwise, if possible, on the certification system sought by the parties. When concluding a green lease, a distinction must generally be made as to whether the rental property has a new-construction certificate or an existing construction certificate, or whether the latter is being sought:

1. New-construction certificate has been granted

At present, a new-construction certificate usually only determines whether the certification requirements have been met at the time the certificate is issued, i.e. it is a mere snapshot of the building's performance at the time of construction. New-construction certificates are normally valid indefinitely, meaning that subsequent changes cannot lead to the certificate being revoked.

Due to constantly increasing regulatory requirements and technical progress, many requirements for new construction certificates are regularly outdated after a few years. The contracting parties should therefore refrain from contractually stipulating that the continuation of the requirements that led to obtaining a new-construction certificate should be an essential characteristic of the rental property. Instead, what would be appropriate here is an agreement that the parties endeavour not to deviate adversely from the standard underlying the certification:

Certification-specific Model Provision 1 (New-construction certificate has been granted)

"The Rental Property has been evaluated in accordance with the [●] certification system (version [●]) and, based on the result of this evaluation, has been granted the [●] ("Certificate") with the [●] degree of excellence by [●] ("Sponsor") on [●]. A copy of this Certificate, including a list of the certification criteria met, is attached to this Lease Agreement as Annex [●]. Both Parties shall [endeavour to] not deviate adversely from the standard of the certificate and shall consult with each other before making any structural or operational changes to the building."

2. (Existing-construction) certificate sought

If no certification exists on conclusion of the lease agreement, but future certification in the form of an existing-construction certificate is sought, the following arrangement is recommended:

Certification-specific Model Provision 2 ([Existing-construction] certificate sought)

"The [Landlord/Tenant] seeks to obtain initial certification of the Rental Property and/or its Sustainable Use and/or Management in accordance with the [●] certification system (version [●]) by [●] ("Sponsor") by [●] ("Certification"). To this end, the Parties shall take the measures described in Annex [●] to this Lease Agreement in consultation with each other and in accordance with the allocation of responsibilities and costs set out therein. They shall refrain from doing anything that would jeopardise the certification sought.

Measures pursuant to this provision must be carried out such that the business operations of the Tenant and any other tenants are impaired as little as possible, unless this leads to significantly increased costs of the measures taken.

Where the Landlord carries out measures pursuant to this provision, the Tenant must tolerate these measures. [The Tenant's right to rent reduction is excluded in this regard [for a period of [●]]; the Tenant's other rights remain unaffected.] The Tenant is only not obliged to tolerate measures where such measures, if implemented, would mean hardship for them that is not justified even when considering the legitimate interests of the Landlord, other tenants of the Rental Property and the objective of the Parties to use and/or manage the Rental Property as sustainably as possible or to obtain a certification, and/or where such certification can be achieved without incurring additional costs when taking different measures.

In the event of certification, the Parties shall document the fulfilled certification criteria in an addendum to this Lease Agreement that complies with the requirement of written form."

Similar to modernisation measures (see Section I., Addition 1 (Energy modernisation measures) above), general restrictions on the tenant's (termination) rights are also likely to be problematic under the law on general terms and conditions in the case of standard form contracts where the landlord implements construction measures that are relevant to certification. This applies particularly where the measures relevant to certification have a similarly profound effect on the tenant or, at the same time, even qualify as modernisation measures for the purposes of Section I., Addition 1 (Energy modernisation measures) of this agreement. In this case, the regulatory regime should be based on the provisions proposed in Section I., Addition 1 (Energy modernisation measures). As a precaution, it is advisable to refrain from a general exclusion of all the tenant's termination rights, even leaving the tenant's right to reduce rent unchanged, where appropriate. However, the fact that obtaining a certificate may also be in the tenant's interest supports the view in such cases that there is no unreasonable disadvantage for the tenant and that their related (warranty) rights may be restricted. This applies all the more where obtaining certification is agreed as an essential contractual characteristic whose non-achievement would in turn establish warranty rights for the tenant (see below). As a general rule, the relevant provisions of a lease agreement should be negotiated as specifically as possible or, where standard form contracts are used, be checked in each case whether they are consistent with the law on general terms and conditions.

From the tenant's point of view, it is preferable to make the desired certification a contractually agreed characteristic of the rental property whose loss would in any case result in a rent reduction. The amount of such rent reduction, however, as in the case of other defects, should be determined on a case-by-case basis. If desired by the parties, the applicability of section 536a(2) BGB may be excluded in this context. This provision stipulates that, under certain circumstances, the tenant can remedy a defect in the rental property themselves and demand compensation for the necessary expenses incurred. This right to remedy defects may sometimes not be appropriate in the case of "certificate-related" defects, as such remedy would interfere with a complex interplay of various circumstances "relevant to certification".

"The Parties further agree that obtaining certification within [●] months of the commencement of the lease for the rental property and the continued fulfilment of the criteria to be met for certification are essential characteristics of the rental property. This [also applies/does not apply] if the Sponsor imposes stricter requirements for certification in the future."

Optional Addition 1 from the tenant's perspective:

"If the desired certification is not obtained within [●] months of the commencement of the lease or if and for as long as the criteria whose fulfilment was a prerequisite for certification of the rental property are no longer fulfilled in whole or in part and this is not due to a breach of duty by the Tenant, the rent shall be reasonably reduced without prejudice to any other rights of the Tenant. Section 536(1) and (2), section 536b and section 536c BGB apply accordingly."

Optional Addition 2 from the landlord's perspective:

"Section 536a(2) BGB does not apply in this regard."

Other legal consequences in the event certification is not granted, such as a special right of termination for the tenant, are conceivable in principle. However, such serious consequences are likely not acceptable for the landlord, in particular where they are not responsible for not obtaining certification, especially as the continuation of the lease agreement would then also depend on the acts of a third party, namely the certification body, among others. The tenant could otherwise be sufficiently protected in most cases by means of less stringent consequences, such as a right to reduce rent. A "supportive" obligation for the tenant to act in the event that the landlord endeavours to obtain certification in the future should usually be limited by the criterion of reasonableness, which is admittedly subject to interpretation in each case. As an alternative, the tenant's obligation to act could be limited by agreeing on a cost cap (e.g.: "...with the tenant only being obliged to take such measures that cause a cost burden of no more than [●] for the tenant in relation to the remaining term of the lease."), which may be determined by reference to a specific amount or a percentage of the net basic rent payable during the remaining lease term.

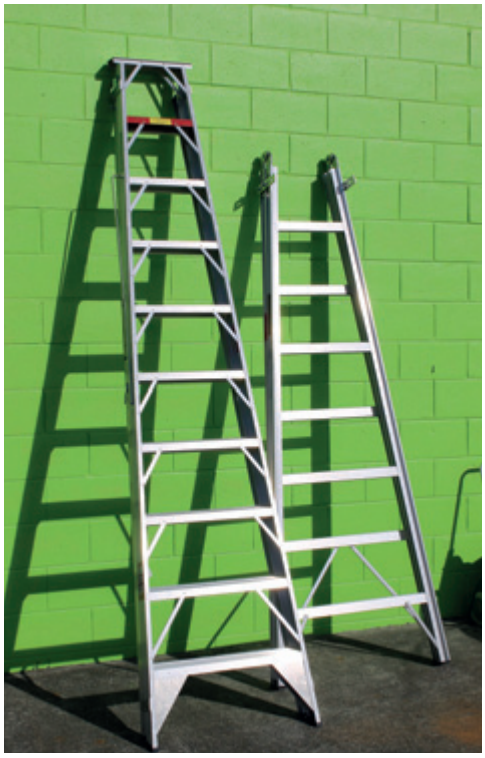
"The Parties undertake to take all actions necessary for the continuation of certification, including those that may incur costs, and to refrain from any acts that would jeopardise certification. In particular, the Landlord shall align any structural or operational changes to the building with certification requirements. Installations or alterations by the Tenant require the Landlord's prior consent, which may only be withheld for good cause. Good cause exists in particular where such installations or alterations would jeopardise the certification sought or its continued existence. The Tenant's aforementioned obligations to act only apply to those certification criteria which, according to the general provisions of this lease, fall within the Tenant's area of responsibility and only to the extent that they are reasonably acceptable for the Tenant."

The tenant should also be obliged to inform the landlord immediately of any damage to the rental property that jeopardises certification.

"As soon as the Tenant becomes aware of damage to the Rental Property that jeopardises the certification sought or the continued fulfilment of the criteria whose fulfilment was necessary for granting the existing certification, the Tenant must inform the Landlord in writing of such damage without delay. Section 536c BGB remains unaffected."

Finally, a provision should be made in respect of the case that the certification system selected by the parties is no longer continued.

"In the event that the Sponsor does not continue the certification system, the Parties shall agree on a successor arrangement."



3. Existing-construction certificate has been granted

Where an existing-construction certificate has already been granted on conclusion of the lease agreement, the following arrangement is recommended:

Certification-specific Model Provision 3: ([Existing-construction]] certificate has been granted)

"The Rental Property and/or its Sustainable Use and/or Management have been evaluated in accordance with the [●] certification system (version [●]) and based on the result of this evaluation has been granted the [●] ("Certification") with the [●] degree of excellence by [●] ("Sponsor") on [●]. A copy of this Certification, including a list of the certification criteria met, is attached to this Lease Agreement as Annex [●].

The Parties agree that the continued existence of certification (in particular re-certification) is an essential characteristic of the Rental Property. This [also applies/does not apply] if the Sponsor imposes stricter requirements for certification in the future."

Optional Addition 1.1 from the tenant's perspective:

"If and for as long as the criteria whose fulfilment was a prerequisite for certification of the Rental Property are no longer fulfilled in whole or in part and this is not due to a breach of duty by the Tenant, the rent shall be reasonably reduced without prejudice to any other rights of the Tenant. Section 536(1) and (2), section 536b and section 536c BGB apply accordingly."

Optional Addition 1.2 from the tenant's perspective:

"Section 536a(2) BGB does not apply in this regard."

What will be of particular concern for both parties, especially in the case of an existing certification, is that the other party will do everything necessary to maintain such certification and will not take any action jeopardising its continued existence.

However, the obligation to actively adhere to the certification requirements should only apply to each party with regard to those certification requirements that fall within the relevant party's area of responsibility according to the general provisions of the lease agreement. In contrast to this, the obligation to refrain from taking any action that jeopardises certification should be comprehensive.

In the interest of a clear, comprehensible arrangement, the following general wording may be supplemented with a list of actions, which may only provide examples and not be exhaustive, that must be complied with to adhere to certification requirements. The sustainability handbook attached to the lease agreement (see Part 2, Section III., Sustainability Handbook, below) provides a good example for this purpose. If there is no sustainability handbook, this list of actions may also be provided in this certification-specific Model Provision 3 itself. As the actions to be complied with may differ depending on the certification system and certification level, no wording was used here that includes examples.

"The Parties undertake to perform all actions necessary for the continuation of certification, including those that may incur costs; this applies to each party with regard to those certification criteria that fall within their area of responsibility according to the general provisions of this Lease Agreement. The Parties must refrain from taking any acts that would jeopardise certification or prevent the fulfilment of certification criteria.

In particular, the Landlord shall align any structural or operational changes to the building with certification requirements. Installations or alterations by the Tenant require the Landlord's prior consent, which may only be withheld for good cause. Good cause exists in particular where such installations or alterations would jeopardise the continued existence of certification.

Details of the Parties' obligations to act in order to maintain certification are set out in the sustainability handbook attached to this Lease Agreement as Annex [●]. The special provisions of this part [●] of the Lease Agreement take precedence in respect of maintenance/repair measures.

The Tenant's aforementioned obligations to act only apply in respect of those certification criteria which, according to the general provisions of this lease, fall within the Tenant's area of responsibility and only to the extent that they are reasonably acceptable for the Tenant."

As soon as the Tenant becomes aware of damage to the Rental Property that jeopardises the continued fulfilment of the criteria whose fulfilment was necessary for granting the existing certification, the Tenant must inform the Landlord in writing of such damage without delay. Section 536c BGB remains unaffected.

In the event that the Sponsor does not continue the certification system, the Parties shall agree on a successor arrangement."

Certification-specific Model Provision 3, for the sake of clarity, could be supplemented by a provision specifying that the parties will align maintenance and repair with the requirements of the existing certification. In principle, two variants are conceivable: Optional Addition 2.1 below contains a static provision that only aims to maintain the status quo of certification. Optional Addition 2.2 goes beyond this by establishing a dynamic obligation aimed at fulfilling future (more stringent) certification requirements:

Optional Addition 2.1 (Static option):

"As part of their maintenance and repair obligations under this Lease Agreement, the Parties must also take any action necessary to maintain all conditions that were necessary for obtaining the existing certification. However, the Parties are not obliged to take any action to fulfil any future (in particular more stringent) requirements whose fulfilment may be necessary in the future for again obtaining a [specification of the relevant certificate level, e.g. gold] level [name of the relevant certificate] certificate."

Alternatively: Optional Addition 2.2 (Dynamic option):

"As part of their maintenance and repair obligations under this Lease Agreement, the Parties must also take any action necessary to maintain all conditions that were necessary for obtaining the existing certification. The Parties are further obliged to take any action to fulfil any future (in particular more stringent) requirements whose fulfilment may be necessary in the future for obtaining a [specification of the relevant certificate level, e.g. gold] level [name of the relevant certificate] certificate in order to adjust the Rental Property to future changes to the requirements for granting a [specification of the relevant certificate level, e.g. gold] level [name of the relevant certificate] certificate; this obligation does not apply to the extent this is no reasonably acceptable for the relevant party in financial terms; otherwise, this obligation only applies for a period of [●] years from the conclusion of this Lease Agreement [and up to a cost ceiling of EUR [●]]. However, for the entire term of the lease, the Parties are in any case obliged to take any action necessary to maintain all conditions that were necessary for obtaining the existing certification for the first time."

Finally, where certification has already been obtained, the landlord could be expressly granted the right to implement measures aimed at obtaining a better certification in the future. In connection with the model provision below, it is advisable in the lease agreement to refer to the provision on "green" modernisation measures (see Section I., Addition 1 (Energy modernisation measures) above) and to agree that this provision applies (at least accordingly) to a potential "certification upgrade".

Optional Addition 3:

"Notwithstanding section 555a through section 555f BGB, the Landlord has the right to carry out any measures on the Rental Property that are necessary to replace the existing certification with a higher-level certification. To the extent that such measures affect areas used exclusively by the Tenant, the implementation of such measures must be agreed with the Tenant.

"The Landlord must give prior notice of any measures carried out pursuant to the above provision and must carry them out in such a way that the Tenant's business operations are impaired as little as possible, unless avoidance of such impairments leads to significantly increased costs of the relevant measure. Otherwise, the provisions of § [reference to Section I., Addition 1 (Energy modernisation measures)] of this Lease Agreement apply accordingly."

Finally, it could be stipulated that the non-fulfilment of certification requirements due to culpable acts of either party may give the other party the right to extraordinary termination of the lease agreement without notice. As is the case where certification is not granted (see certification-specific Model Provision 2 above), such extraordinary termination without notice appears to be a particularly severe consequence where certification requirements are no longer met. Neither party would be expected to accept this consequence particularly in the case of only minor violations, especially since the continuation of the lease would then indirectly depend on the acts of a third party, namely the certification body. Defining the details of such termination right should be left to the parties, as necessary, based on the particularities of the specific case.

III. Further issues relating to green leases

A number of other issues relating to green leases will now be set out below without specific model provisions being recommended:

1. Mobility[110]

The sustainability of a property can be increased by giving its users incentives to avail of more sustainable mobility options. Thus, the landlord could, for example, provide a sufficient number of bicycle racks and the tenant could provide public transport or car-sharing options for its employees. Installing charging outlets for electric vehicles is another important element in this context. Where possible, long business trips and journeys to work should be generally avoided. In recent years (and at the latest since the COVID-19 pandemic), office work has already changed significantly due to advances in video, telephone and internet conferencing as well as working-from-home options, which can support environmental sustainability goals, although social aspects such as direct (human) contact, which is important for teamwork, should not be neglected. Tenants should give their employees the freedom they need and support them – where necessary – by providing them with modern technology and equipment.

However, any proposed lease agreement provisions in this context would effectively represent a significant

interference with the tenant's business operations. Any such interferences with the tenant's operational processes would also meet with criticism in some cases due to their potential employment law implications. Relevant experience shows that, in practice, rules on sustainable mobility options should have less of a place in lease agreements due to the tenuous link to land law, and rather be implemented independently by businesses with a progressive ethos – in line with their own ESG strategy. By creating incentives to use sustainable mobility options, progressive businesses can set themselves apart from the rest of their industry.

2. Sustainability handbook[111]

A sustainability handbook can be useful to help implement the sustainability goals for the rental property in practice. A sustainability handbook is a type of property-specific "green code of conduct", which is attached to the lease agreement and explains how the property as a whole and the rental property are to be used and managed sustainably "on a day-to-day basis". Generally, the sustainability handbook should not form part of the lease agreement itself and should not be legally binding as such. However, if the parties do wish to agree that a breach of the provisions of the sustainability handbook should have consequences in the eyes of the law, then provisions of the sustainability handbook must be reflected in the clauses of the green lease or the binding effect of the sustainability handbook must be explicitly agreed in the lease agreement.

For example, the sustainability handbook may contain instructions on saving water, rules on the use of energy-saving timers, and similar provisions. If necessary, the provisions of the sustainability handbook can also be integrated into a general user manual, which combines and explains the key functions of sustainable building use for all parties involved in the use of the property (e.g. tenants or third-party businesses and contractors) and is usually produced in cooperation between property and facility management. Here, for example, general matters relating to building use (e.g. points of contact, public transport connections, parking, bicycle racks/storage, smoking areas / smoking bans), climate control plan (e.g. façade, ventilation / room temperature control, functions / operation of lighting and sunshade installations) and the services in the building (e.g. waste disposal / separation, cleaning service, facility management) can be linked to specific sustainability elements (e.g. measures / course of action in relation to current or planned certification; sustainability dialogue / communication on sustainability topics). It is advisable to regularly update and revise the user or sustainability handbook in cooperation with property/facility management. If there are several similar properties, it may be a good idea to draw up a common sustainability handbook for them all.

3. Green levies[112]

Environmental regulation in the building sector essentially follows three different approaches: First of all, certain mandatory requirements must be complied with and may even be subject to fines, such as those under the (new) German Building Energy Act (GEG). The second area covers the incentive systems designed to make it easy and attractive for building owners to voluntarily invest in the energy-efficient renovation of their property (e.g. the loan and grant support provided under the Guidelines for the Federal Promotion of Energy-efficient Buildings – BEG). The third "pillar" is a market-based approach, under which government levies on environmental aspects of the (rental) property make it increasingly unattractive, in economic terms, to maintain the status quo.

For example, this third pillar has manifested itself in the context of the allocation of the CO_2 levy on fossil fuels in the landlord/tenant relationship, with this

issue now being expressly governed by the German Carbon Dioxide Cost Allocation Act (CO_2KostAufG)[113] since 1 January 2023. The CO_2 price for commercial properties is initially divided equally between landlords and tenants in accordance with section 8(1) CO_2KostAufG. Any other agreements to the detriment of the tenant are invalid. A graduated model is to be introduced here from 2025, which is based on the model already in place for residential buildings, i.e. the allocation depends on the building's energy quality. The more inefficient a building's energy quality, the greater the share that the landlord has to pay.

In the event of future changes in the law in this area and the introduction of similar government levies, the parties should, to the extent the relevant provisions leave room for manoeuvre, agree on how these can best be complied with and whether they may wish to make more far-reaching provisions. In particular, they can agree in advance, even if this is only in the form of an EPA (economic price adjustment) clause, on how the relevant levy is to be allocated between them in order to live up to the relevant ecological responsibility and influence of each party.

4. Staff training[114]

An obligation on the part of the tenant to provide regular training for its staff can also be conducive to the efficient implementation of sustainability goals. However, such clauses would also encroach heavily on the tenant's business operations and thus involve the potential for conflict. If desired, the obligation to take part in training courses can be governed by a provision stating a certain number of employees and for a certain duration per year. It would also be necessary to provide for who is responsible for carrying out the training (e.g. those responsibly for sustainability, qualified employees of both parties, facility management, or qualified third parties). Obligations to provide supporting evidence could also be added to the provision (in compliance with relevant data protection and employment law provisions).

5. Photovoltaic systems

A property's sustainability can also be increased by equipping it with photovoltaic systems (PV systems). PV systems convert sunlight directly into electricity and are also promoted by public policy due to their key role in Germany's energy policy reform (see, for example, the strategy of the German Federal Ministry for Economic Affairs and Climate Action (BMWK) to accelerate the expansion of PV systems).[115] A lease agreement that is geared towards sustainability could therefore provide appropriate incentives for the installation of such systems, though separate advice on tax law and, if necessary, investment law is clearly also advisable here:[116]

a) As lease agreements regularly contain a clause stating that structural alterations to the leased property are subject to the landlord's consent, an exception to this consent requirement could, for example, be made for the installation of PV systems by the tenant.

b) If the tenant installs a PV system on the landlord's property, the creation of a photovoltaic easement should be considered in order to avoid property law issues. Such an easement is usually created as a restricted personal easement (sections 1090 et seq. of the German Civil Code (BGB)) for the benefit of the system operator and serves to secure the right of use granted under the law of obligations by providing proprietary interests in this context, in particular in the event of succession in title on the owner's side. In addition, the easement ensures that the system does not become part of the property in accordance with section 95(1) sentence 2 BGB and that the tenant's/leaseholder's ownership rights in the system are not "lost" as a result of its installation on the property.[117]

c) Even if, depending on the law of the relevant state, there are already "photovoltaic obligations" under statute[118], the landlord could also be contractually obliged to install PV systems. The parties could also agree, by means of a "tenant electricity model", that the landlord provides the tenant with electricity that is produced by a PV system on, in, or at the leased building or other buildings

in the vicinity and is then supplied to the tenants by the landlord, or – in the case of contracting – by a third-party electricity provider without being fed into the general grid. The legal framework for such tenant electricity models in the German Renewable Energy Sources Act (EEG) and the German Energy Industry Act (EnWG) is expected to be expanded for commercial properties from 2024, with the planned legislation to increase the expansion of photovoltaic energy generation ("Solar Package I")[119], thereby implementing the "Photovoltaic Strategy" of the German Federal Ministry for Economic Affairs and Energy. Introducing what is referred to as "communal building supply" is intended to provide system operators who provide electricity directly to tenants with an exemption from supplier obligations and the obligation to supply residual electricity. In addition, changes to the EEG are also planned to make it easier to feed electricity into the general grid.

d) That being said, the following tax law aspects must be taken into account here: In the past, a landlord exclusively managing their own assets was at risk of losing the extended reduction under section 9(1) sentence 2 of the German Trade Tax Act (GewStG) due to the situation that the activity associated with the operation of the PV system was deemed subject to trade tax. However, in passing the Act on Strengthening Germany as a Fund Location (Fondsstandortgesetz), which came into force on 1 July 2021, the legislator expanded the list of ancillary activities not subject to trade tax to include electricity supply from the landlord's own energy installations for the purposes of the EEG (in particular photovoltaic plants) and also from the operation of electric charging stations (section 9(1)(b)(aa) and (bb) GewStG, as amended). As a result, this means that generating income from supplying electricity from the landlord's own electricity generation systems for the purposes of the EEG or from operating charging stations for electric vehicles no longer means a loss of the extended reduction under section 9(1) sentence 2 GewStG. However, this only applies if the income from these electricity supplies does not exceed 10% of the total income generated from the property and the electricity produced in a photovoltaic system is not supplied directly to end consumers who are not tenants of the system operator. In this respect, feeding the electricity produced into the public electricity grid and supplying electricity to the landlord's own tenants for a fee ("tenant electricity") is not subject to trade tax. There is no restriction requiring that the supply of electricity be to tenants whose rental units are located on the same property as the photovoltaic systems.[120] However, in addition to the trade tax issues, electricity tax issues (in the case of tenant electricity) and VAT issues (e.g. when renting out PV systems) may also come into play here.

e) It is also worth mentioning the German Federal Ministry of Finance's draft bill for the German Financing for the Future Act (ZuFinG), in which significant regulatory relief for real estate funds investing in PV systems had been planned, but was then removed before the act came into force. The draft bill sought to allow open-ended real estate funds to equip their properties with renewable energy systems, operate them themselves, and feed the electricity generated in the process into the public grid. The current provisions of the German Investment Code (KAGB) do not allow for investments in PV systems for open-ended funds. The current administrative practice of the German Federal Financial Supervisory Authority, BaFin, is that it is possible, in principle, to acquire and manage these systems, but only to a very limited extent. Criticism has been voiced that a corresponding amendment to the German Investment Tax Act had not been planned and that operating PV systems in buildings would continue to result in considerable tax risks, such as the loss of status as a special investment fund. The German Federal Government intends to change this, mostly likely as part of the German Annual Tax Act 2024, along with making provision for the regulatory relief that was also placed on hold.[121]

Part 3 – Proposals for implementing the “green” model provisions

Finally, one of the key considerations when including "green" provisions in a lease agreement is the question of how such provisions are to be enforced and to what extent they should be binding. The entire spectrum of (non-)binding legal mechanisms is conceivable here – from "proper" legal obligations that are subject to penalties to mere endeavour clauses that impose moral rather than legally binding obligations on the parties. It is clear that neither end of the extreme is desirable in the long term: The parties to a green lease are not properly served by imposing a straightjacket of rules on them with as many harsh penalties as possible, which may well also prove to be impracticable, thus harming general market acceptance of "green" leases; at the same time, no credible landlord and tenant, if they are seeking to make the transition towards green leases and to avoid accusations of "greenwashing"[122], would limit themselves to a small number of abstract aspirations without providing any basis for specific action, and would thus at least want to consider provisions that cover the key elements of a green lease.[123]

Above all, it cannot be ignored that market participants have the enduring concern that entering into a green lease could trigger an avalanche of costs. As desirable as the increasingly binding nature of "green" model provisions appears to be in the medium to long term, it is also important to provide market participants with a "soft" green lease based on endeavour commitments as an entry-level model at the present time in order to lay the groundwork for the widest possible use of green leases on the market. Thus, all three options, i.e. endeavour commitments, incentive systems, and binding obligations, will be presented below.

I. Endeavour commitments

The basic green lease presented above in Part 1 should offer even sceptical market participants easy access to this area if the recommended provisions mentioned there – as proposed as an alternative in the text of the provision – are merely formulated as endeavour commitments undertaken by the parties. Binding enforcement of the "green" obligations and sanctions such as damages or contractual penalties in the event of non-performance do not then normally come into play. The following suggested wording can be tailored by the parties, depending on the desired degree of binding force (also for each individual clause). However, in order for endeavour clauses to have some effect despite the lack of an intention to be legally bound with regard to the success of the actual commitment, care must be taken to ensure that they specifically relate to each individual case. In particular, the activity described in connection with the endeavour clause or the related objective should be described as specifically as possible so that the contracting parties are required to take specific action or achieve a specific objective without, however, being under a binding obligation to be successful in their endeavours. Deadlines for specific endeavours are intended to motivate the parties to take action without a claim for damages hanging over them like the sword of Damocles if the activity proves to be unsuccessful. However, there is still an obligation to take technically and economically reasonable action for the purposes of the following endeavour clause.[124]

Suggested wording for an endeavour clause:

""Endeavour" for the purposes of these provisions shall mean that the Parties are not under a binding obligation to be successful, but are only required to take technically and economically reasonable action [within a reasonable period]. Action is reasonable if its performance involves a reasonable financial outlay (the Parties generally understand reasonable outlay as being up to € [*] per measure to be taken) and a reasonable amount of time (depending on the specific case)."

II. Legally binding obligations

As part of the expanded green lease set out in Part 2, not only could the content of the basic green lease be expanded – for market participants already acquainted with green leases – but the specific provisions could also be made more binding (e.g. in the case of provisions that are particularly important from the parties' perspective). This could be achieved by choosing the binding obligation option instead of the endeavour commitment for the model provisions in Parts 1 and 2 above. In such a case any breaches of duty would be subject to sanctions: Where one of the parties culpably (i.e. intentionally or negligently) breaches one of their contractual obligations, they will be liable to compensate the other party for the resulting damage.

However, this fundamental legal position, which also applies to breaches of obligations arising from the proposed model provisions, will always prove to be less of a deterrent where there are question marks over whether a breach of duty has resulted in quantifiable recoverable damage. Even if it could be argued in current regulatory discourse that non-compliance with certain green lease requirements could bring a property closer to being a "stranded asset", thus bringing the consequences of the breach of duty more into the realm of measurable damages,[125] there are still a number of uncertainties surrounding the burden of proof and problems with the quantification of the specific damage. In order to avoid these uncertainties, it could also make sense – as another "level of obligation" – to add special sanctioning provisions, e.g. a contractual penalty, to precisely the obligations where it is questionable whether their breach can result in quantifiable recoverable damage. Since the purpose of the contractual penalty is not to compensate for any specific damage incurred or even to provide satisfaction to the party who is adhering to the contract, but merely to ensure the fulfilment of contractual obligations by threat of a penalty, provision would have to be made for an obligation to use any contractual penalty received under the green lease. Based on the specifics of an individual case, it would be up to the parties to decide whether they want to extend the contractual penalty to breaches of all provisions of the green lease or limit it only to (possibly even only intentional or grossly negligent) breaches of selected provisions that are considered to be particularly important, e.g. of the basic green lease. The following suggested wording thus deliberately leaves the scope of the contractual penalty provision open.

Suggested wording for a contractual penalty:

"For all [culpable/intentional and grossly negligent] breaches by the Tenant or the Landlord of any of the obligations governed by [●] of this Tenancy Agreement, the party suffering the breach shall be entitled to demand payment of a contractual penalty of up to [●] from the party in breach – in addition to compensation for any damage in accordance with general rules. The amount of the contractual penalty shall be determined at the reasonable discretion of the party suffering the breach of contract (section 315 of the German Civil Code (BGB)). This shall not affect the claim to performance and section 343 BGB.

The sum received by way of a contractual penalty is to be used for [state the relevant measures to promote the Sustainable Use and Management of the Rental Property or to promote general sustainability goals]."

The intended use of the sum received by way of a contractual penalty should also be specified by the parties to the lease agreement. However, it is advisable to use the penalty payments primarily for measures in connection with the Sustainable Use and Management of the rental property (e.g. for environmentally friendly construction measures on / in the building or – following a legal/tax review by the parties – to create new "green" facilities on the property, such as charging stations, "smart" meters, greening flat roofs, areas to promote biodiversity, etc.) or alternatively to promote general sustainability goals (e.g. to purchase regulated emission certificates to offset CO_2 emissions or to support social projects).

In addition to the contractual penalty mentioned above, other sanctions – which are very far-reaching for the parties and therefore not always desirable – are also conceivable, such as a right of termination for cause being given to the other party if one of the parties breaches "green provisions". If the landlord breaches certain "green" obligations, granting the tenant an entitlement to a rent reduction may also be a conceivable option here.

The best way to avoid any risks under the law on general terms and conditions[126] in this context is to negotiate the provisions individually, i.e. to adapt the model clauses proposed here to the specific individual case, to be provided by the user to the other party to the contract to maximise their freedom of contract and thus prevent the provisions from undergoing a review under the law on general terms and conditions (Allgemeine Geschäftsbedingungen) in the first place.[127] In particular, the model provisions used here, which provide the option of choosing between a legally binding clause and an endeavour clause and whose wording is adopted by the user with the various options that the contractual partner is free to exercise, are likely to be deemed negotiated clauses. This is because, according to the federal supreme court (Bundesgerichtshof), a pre-formulated contractual term in a contract can also be deemed to have been negotiated if the user offers it as one of a number of options available for selection by the other contractual party. What is required here is that any additions made here are not merely ancillary in nature (e.g. adding names or leased property), that a level of influence can be exercised over the content of the contract, and that the freedom of choice and contract are not overridden by the party seeking to use the term.[128]

III. Incentive systems

In principle, it could be argued that the general benefits of a green lease – such as cost savings, transparency, property value appreciation, increased productivity in the workplace, and positive effects for the ESG efforts being made by the relevant business – should be incentive enough for commercial landlords and tenants to include "green" model provisions in their leases. However, given that we are looking for a comprehensive overview of the options here, we should also not disregard the fact that incentive schemes represent a significant counterweight to the potential sanctioning in the event of the breach of certain "green" model provisions and can increase the acceptance of green leases among traditionally sceptical market players. At first glance, there are practically no conceivable limits placed on the parties when it comes to structuring incentive systems within the bounds of the law.

At second glance, however, it should be borne in mind that the specifics are likely to depend heavily on the type of use (e.g. retail, office), the tenant situation ("single tenant" / "multi-tenant"), and the location. In this respect, the ostensibly simplest solution from the landlord's point of view of granting the tenant certain monetary incentives (e.g. by giving certain tenants preferential treatment in the allocation of other energy-related ancillary costs – which are not strictly consumption- and cause-based – if they behave in a particularly resource-friendly way compared to other tenants) could contravene the principle of equal treatment of all tenants, especially in multi-tenant situations (e.g. in a shopping centre), as it favours larger tenants.

Care should thus be taken in such situations to ensure – particularly due to the classification of ancillary costs as "additional rent" – that the specific concerns of smaller tenants are taken into account in this context. Against this backdrop, there are three approached to incentives:

A general letter of intent by the parties on the fair distribution of the costs and cost savings resulting from the sustainable use and management of the rental property, which in turn refers to any particular incentive provisions to be specified by the parties (see below for examples), could serve as the basis for a set of incentive provisions:

Suggested wording for an incentive provision:

"The Parties shall endeavour to distribute the costs resulting from the provisions of this lease agreement for the Sustainable Use and Management of the Rental Property, as well as any cost savings, fairly and appropriately. Further details can be found in § [●] [reference to provisions of the Lease Agreement that govern the Parties' obligations to bear costs with regard to Sustainable Use and Management]."

In addition, for example, special provisions on the tenant getting a share of cost savings achieved through sustainable use and management could be agreed as tenant incentives, e.g. the tenant gets a share of any cost savings in the event of reduced energy consumption through reduced ancillary costs.[129] There is plenty of scope here for a variety of solutions – primarily based on monetary incentives – which must be negotiated individually between the parties in each individual case and therefore cannot be specified in detail here. Finally, other incentive systems can also be considered that are not directly related to cost savings:

For example, certain processes could be made easier for the tenant as a "reward" for compliance with green obligations, such as the landlord's prior consent to certain environmentally friendly measures, e.g. in the case of tenant improvements or other construction measures by the tenant (see Part 1, Section III.1.a above) or things could be made simpler for the tenant with regard to the scope of obligations and the bearing of costs for removal/dismantling measures to be taken upon termination of the tenancy.

In addition, completely new approaches could be taken here and – in view of advancements in digital technology – gamification[130] could be used to motivate the contracting parties, usually the tenant, to perform a certain activity as part of a "game". The game-like or playful element can be facilitated primarily through the use of technology e.g. apps and artificial intelligence. In addition, this approach can be used both in the context of a single lease agreement, for example by allowing the tenant to "play" against themselves in the "game" of savings, as well as in a multi-tenant context. For example, all the tenants of a shopping centre could compete against each other as "players" and try to achieve a specified sustainability goal in a game-like or playful competition. As there should be no unequal treatment of tenants, this approach should ensure that the playful aspect is predominant here, and not the monetary aspect, e.g. in the form of prize money. In addition, there must be compliance with the requirements of data protection and competition law.

Finally, the disclosure of certain mutual targets, but possibly also certain landlord or tenant sustainability targets in the lease agreement should also provide an incentive to comply with them (in the same way that the failure to achieve them would constitute a "sanction through transparency"). Depending on the parties' intentions, the mutual sustainability efforts could also be publicised outside of the lease agreement – taking into account competition law and data protection rules: For example, the landlord of a "multi-tenant" property could hold a competition to find the tenant with the most sustainable business based on objectively measurable criteria, with the winner then having the opportunity to advertise this status to the public. On the other hand, tenants could also be given the opportunity to evaluate the landlord's sustainability efforts (e.g. on the landlord's website).

Notes

** Special thanks go to Esther von Bronk and Maximilian Rottmann (both Freshfields) for their hard work and support.

[1] Communication from the European Commission "Renewed EU strategy (2011-14) for Corporate Social Responsibility (CSR)" of 25 October 2011, COM (2011) 681 final, at 3.1.

[2] Communication from the European Commission "The European Green Deal" of 11 December 2019, COM (2019) final, p. 1.

[3] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 ("Taxonomy Regulation").

[4] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector ("Disclosure Regulation").

[5] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (Corporate Sustainability Reporting Directive, "CSRD").

[6] See e. g. ZIA, Klimaschutzreport (2021), p. 3, available at https://t1p.de/zia-klimaschutzreport (last accessed on: 13 February 2024); World Economic Forum, New Nature Economy Report II – The Future of Nature and Business (2020), p. 60.

[7] See BNP Paribas Real Estate, Green Buildings: Nachhaltiges Bauen in Deutschland weiter auf dem Vormarsch, posted on 20 April 2023, available at https://t1p.de/green-buildings (last accessed on: 13 February 2024).

[8] Act on Energy Conservation and the Use of Renewable Energies for Heating and Cooling in Buildings, in force since 1 November 2020; further amendments took effect on 1 January 2023 and 1 January 2024.

[9] ZIA, Green Lease – Der grüne Mietvertrag für Deutschland (2018), available at https://t1p.de/zia-broschuere-2018 (last accessed on: 13 February 2024).

[10] Although the topic of green leases is likely to become increasingly important to residential leases as well, the following comments and model provisions solely focus on commercial leases (for the reasons of such focus on commercial leases, see Section V.5. of the Introduction).

[11] Although the Green Lease 2.0 is an update to the Green Lease of 2018, it does not make it obsolete. Against this backdrop, adjustments to existing lease agreements based on the content of the Green Lease 2018 are not required.

[12] For more on the editorial team and the project group, see p. 6 above.

[13] ZIA, Green Lease – Der grüne Mietvertrag für Deutschland (2018), p. 11.

[14] For the "three-pillar model" used to date (e. g. also in the ZIA Sustainability Code), see, for example, Kleine, Operationalisierung einer Nachhaltigkeitsstrategie, 2009, p. 5; Corsten/Roth, Nachhaltigkeit – Unternehmerisches Handeln in globaler Verantwortung, 2012, p. 2.

[15] See Article 2(17) of the Disclosure Regulation; Article 2(1) and Article 3 of the Taxonomy Regulation.

[16] See Article 1 of the Taxonomy Regulation.

[17] The environmental objectives covered by Article 9 of the Taxonomy Regulation are climate change mitigation, climate change adaptation, the sustainable use and protection of water and marine resources, the transition to a circular economy, pollution prevention and control, and the protection and restoration of biodiversity and ecosystems.

[18] Articles 10-15 of the Taxonomy Regulation set out when a substantial contribution will have been made to climate change mitigation (Article 10), to climate change adaptation (Article 11), to the sustainable use and protection of water and marine resources (Article 12), to the transition to a circular economy (Article 13), to pollution prevention and control (Article 14), and to the protection and restoration of biodiversity and ecosystems (Article 15). For example, Article 10 of the Taxonomy Regulation states that an economic activity shall qualify as contributing substantially to climate change mitigation where that activity contributes substantially to the stabilisation of greenhouse gas concentrations in the atmosphere at a level which prevents dangerous anthropogenic interference with the climate system by, inter alia, (i) generating, transmitting, storing, distributing or using renewable energy, (ii) improving energy efficiency, and (iii) increasing clean or climate-neutral mobility. Furthermore, a substantial contribution to the transition to a circular economy pursuant to Article 13 of the Taxonomy Regulation is made, for example, by (i) reducing the use of primary raw materials, (ii) increasing the recyclability of products, and (iii) reducing the content of hazardous substances and substances of very high concern in materials and products.

[19] The technical screening criteria provided for in Article 3(d) of the Taxonomy Regulation shall be adopted by the European Commission as delegated acts. For the two climate-related environmental objectives (i.e. climate change mitigation and adaptation), technical screening criteria have been defined in Delegated Regulation (EU) 2021/2139, available at https://t1p.de/dv-eu-2021-2139 (last accessed on: 13 February 2024). This Regulation was amended on 21 November 2023 with effect from January 2024, available at https://t1p.de/dv-eu-2023-2024 (last accessed on: 13 February 2024). On the same day, the European Commission published a further Delegated Regulation (EU) 2023/2486 for the four non-climate-related environmental objectives, which has also been in force since January 2024. Relevant news is available at https://t1p.de/dv-eu-2023-2486 (last accessed on: 13 February 2024).

[20] These guiding principles are: OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights, including the principles and rights set out in the eight fundamental conventions identified in the Declaration of the International Labour Organisation on Fundamental Principles and Rights at Work and the International Bill of Human Rights.

[21] Schrimpf-Dörges, Green and more: Minimum Safeguards gemäß EU-Taxonomie-Verordnung, WPG 2022, p. 1381 (1382 et seq.).

[22] In accordance with Article 2(24) of the Disclosure Regulation, sustainability factors mean environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters.

[23] See Article 2(17) of the Disclosure Regulation; a contribution to achieving an environmental objective is measured, for example, by key resource efficiency indicators on the use of energy, renewable energy, raw materials, water and land, on the production of waste, and greenhouse gas emissions, or on the impact on biodiversity and the circular economy. An investment contributes to a social objective, however, if it tackles inequality, fosters social cohesion, social integration and labour relations or is for the benefit of socially disadvantaged communities.

[24] See Article 2(21) of the Disclosure Regulation.

[25] Delegated Regulation (EU) 2022/1288 on the presentation of information in pre-contractual

documents, on websites and in periodic reports, as amended and corrected by Delegated Regulation (EU) 2023/363 for fossil gas and nuclear energy (Delegated Regulation (EU) 2022/1288).

[26] Annex 1, Table 2 No. 18 of Delegated Regulation (EU) 2022/1288.

[27] Annex 1, Table 2 No. 19 of Delegated Regulation (EU) 2022/1288.

[28] Annex 1, Table 2 No. 20 of Delegated Regulation (EU) 2022/1288.

[29] Annex 1, Table 2 No. 21 of Delegated Regulation (EU) 2022/1288.

[30] Annex 1, Table 2 No. 22 of Delegated Regulation (EU) 2022/1288.

[31] Annex 1, Table 1 Nos. 17 and 18 of Delegated Regulation (EU) 2022/1288.

[32] On 5 January 2023, the CSRD entered into force at EU level; it must have been implemented in the EU Member States by 6 July 2024. The CSRD significantly expands the Non-Financial Reporting Directive (NFRD), which has applied to certain public-interest entities since 2014, with regard to the group of companies subject to reporting requirements and the scope of the disclosure obligation, available at https://t1p.de/csrd-2023-2024 (last accessed on: 13 February 2024).

[33] The reporting obligation will thereby be successively extended to certain entities, starting with the obligation of public-interest entities with a number of employees in excess of 500. The obligation will then apply to all large undertakings in terms of accounting legislation as from 1 January 2025 and to all small and medium-sized undertakings with a capital market orientation as from 1 January 2026. According to Article 3 of Directive 2013/34/EU, the categories used for the classification of undertakings due to their size are based on the balance sheet total, the net turnover and the average number of employees.

[34] In accordance with Article 19 of Directive 2013/34/EU, the management report presents the development and performance of the undertaking's business and of its position.

[35] See Articles 19a and 29a CSRD.

[36] See Article 2(17) CSRD.

[37] In parallel to the Taxonomy and Disclosure Regulations, the CSRD shall be specified in more detail by delegated acts in accordance with Article 29b CSRD. In this context, Delegated Regulation (EU) 2023/2772 was published on 22 December 2023 fixing general reporting requirements and principles as well as ten specific topic-related standards. These standards concern the topics of climate change, pollution, water and marine resources, biodiversity and ecosystems, resource use and circular economy, own workforce, workers in the value chain, affected communities, consumers and end-users, and business conduct. The Regulation entered into force on 1 January 2024 and applies for financial years beginning on or after 1 January 2024, available at https://t1p.de/dv-eu-2023-2772 (last accessed on: 13 February 2024).

[38] See Article 1 of the Disclosure Regulation.

[39] See Article 1 of the Taxonomy Regulation.

[40] See Article 2(17) of the Disclosure Regulation and Article 3 lit. a) and b) of the Taxonomy Regulation.

[41] Annex 1, Table 2 Nos. 18 and 19 of Delegated Regulation (EU) 2022/1288; for example in No. 7.1 of the Annex to Delegated Regulation (EU) 2021/2139, referring, for example, to the energy performance or the life-cycle global warming potential for the construction of new buildings.

[42] Article 2(17) of the Disclosure Regulation.

[43] See Article 18 of the Taxonomy Regulation.

[44] The "EU Platform on Sustainable Finance" working group published proposals for a social taxonomy, see Final Report on Social Taxonomy (February 2022), available at https://t1p.de/report-taxonomy (last accessed on: 13 February 2024). The report also includes ideas for anchoring regulations in the area of "governance", see the paper prepared by the Scientific Services of the German Bundestag, Environmental Social Governance (ESG) in der EU-Taxonomie – Bauen, Wohnen und Energie, p. 16 et seq., available at https://t1p.de/social-taxonomy-report-2022 (last accessed on: 13 February 2024).

[45] The Final Report on Social Taxonomy (February 2022) of the "EU Platform on Sustainable Finance" working group addresses the following three main criteria for socially sustainable economic activity: decent work, adequate living standards and wellbeing for end-users as well as inclusive and sustainable communities and societies, see p. 34 et seq., available at https://t1p.de/social-taxonomy-report-2022 (last accessed on: 13 February 2024).

[46] See Article 3 lit. c), Article 18 of the Taxonomy Regulation.

[47] See as to the previous core elements: ZIA, Green Lease – Der grüne Mietvertrag für Deutschland (2018), p. 15. The core elements required were: (i) sustainable use and management of rental property in ongoing operations, (ii) reduction in waste, consumption and emissions, and (iii) ecologically harmless implementation of maintenance, modernisation and other construction measures.

[48] See, for example, Model Provision 2.1.2 of the basic green lease in Part 1, Section II.1.b and the proposal for the sustainability dialogue in the expanded green lease in Part 2, Section I.3.

[49] As to the attractiveness of sustainability, see, among others, Lindner-Figura/Sittner, Die Entwicklung des Gewerberaummietrechts 2022, NJW 2023, p. 1027 (1031); Union Investment, Ergebnisse der Markterhebung 2022 zum nachhaltigen Vermögensmanagement institutioneller Anleger in Deutschland (2022), available at https://t1p.de/union-investment-studien (last accessed on: 13 February 2024); PwC, Real Estate Benchmark Studie 2021, ESG – der große Wandel in der Immobilienbranche (2021), available at https://t1p.de/re-benchmark-studie-2021 (last accessed on: 13 February 2024).

[50] In the real estate sector, a "stranded asset" is a property that can no longer be used, or can no longer be used in full, due to a restriction of the CO_2 budget, see Nietsch, Nachhaltigkeit als Aufgabe vom Compliance? – Grundsatzüberlegungen zur organisatorischen Zuweisung im Unternehmen, CCZ 2023, p. 61 (67).

[51] For example, with regard to the most recent amendment to the GEG: Since it came into force on 1 January 2024, new buildings in development areas have been subject to the statutory obligation to cover at least 65% of their heat supply by using renewable energies for newly installed heating systems. For other new and existing buildings, this requirement applies depending on the age of the previously installed heating system and subject to certain hardship regulations as soon as the relevant municipal heating plan has become available or the applicable statutory time-limits have expired. The relevant date will be 30 June 2026 for municipalities with a population of 100,000 or more and 30 June 2028 for smaller municipalities. From 1 January 2045 onward, all existing buildings must be heated in a climate-neutral manner using renewable energies.

[52] For example, in Australia, the UK, Canada and the USA; see, for example, the BBP Leasing Standard Template Clauses (2016) of the Australian Better Building Partnership, available at

https://t1p.de/bbp-model-lease-clauses (last accessed on: 13 February 2024) and, for corresponding proposals for provisions in the United Kingdom, the BBP Green Lease Toolkit (2013), available at https://t1p.de/green-lease-toolkit (last accessed on: 13 February 2024). See also the NHS Green Leases Framework (2022) for the United Kingdom, available at https://t1p.de/green-lease-clauses-template (last accessed on: 13 February 2024). An example of Office Green Lease in Canada is the brochure REALPAC Office Green Lease (2021), available at https://t1p.de/office-green-lease (last accessed on: 13 February 2024). The Chancery Lane Project has also summarised proposals for provisions, available at https://t1p.de/chancery-lane (last accessed on: 13 February 2024).

[53] In France, a green annex ("annexe environnementale") has even become mandatory for larger commercial and office leases with a rental space of more than 2,000 sqm since 2013, see the corresponding regulation based on the French environmental law: Décret n° 2011-2058 du 30 décembre 2011, available at https://t1p.de/umweltgesetz-frankreich (last accessed on: 13 February 2024).

[54] Green Lease Guidelines ('Leidraad Green Lease' (2011)) of the Dutch Ministry of the Interior, available at https://t1p.de/green-lease-guide (last accessed on: 13 February 2024).

[55] Comprehensive model provisions ("Grüner Annex zum Mietvertrag") with minimum requirements for green leases and further additions, including explanations and action plans for landlords/tenants, published by the Swedish Association of Property Owners ("Fastighetsägarna") as a joint product of a working group of well-known landlords and tenants and the Sweden Green Building Council (February 2023), available at https://t1p.de/regelung-schweden (last accessed on: 13 February 2024).

[56] Green Lease – Der grüne Mietvertrag für Deutschland (2012), available at http://www.der-gruene-mietvertrag.de (last accessed on: 13 February 2024).

[57] ZIA, Green Lease – Der grüne Mietvertrag für Deutschland (2018), p. 11.

[58] ZIA, Green Lease – Der grüne Mietvertrag für Deutschland (2018). See also the Introduction above, p. 11.

[59] For example, various Baltic countries, associations, undertakings and organisations have formed the "Effect4buildings" group with the aim of increasing the number of energy efficiency measures in existing public buildings in the Baltic Sea region. For this purpose, various methods have been developed to improve profitability, facilitate financing and reduce the risk of energy investments in public properties. The project is supported by the EU funding programme Interreg Baltic Sea Region and Norwegian national funds. Further information is available at https://t1p.de/green-lease-contracts (last accessed on: 13 February 2024). The green lease has also been further developed in England, for example through a government-funded project (among others): Model form green lease clauses-template (2022), available at https://t1p.de/green-lease-clauses-template (last accessed on: 13 February 2024).

[60] For example, an analysis of 60 lease agreements of logistics companies showed that around 75% did not contain any green lease clauses, see https://t1p.de/trendradar (last accessed on: 13 February 2024); in general on the current status of green leases in practice: Sittner in Lindner-Figura/Opree/Stellmann, Geschäftsraummiete-HdB, 5th edition 2023, section 24. Green Leases – Der grüne Mietvertrag, para. 7 et seqq.

[61] The green lease presented herewith is also likely to be increasingly influenced by relevant European standards and will thus be subject to dynamic

further developments in the future: In addition to considerations based on European green lease models, which have already been incorporated into the German green lease, "green" corporate guidelines and best practice standards adopted by renowned international/European investors are also likely to influence the German green lease in the future. Vice versa, the core topics of the German green lease are also likely to be increasingly considered in other (European) countries by investors who have gained experience with the German green lease and apply its guidelines to real estate investments outside Germany. Thus, the continuous further development of the German green lease due to European influences and its potential spillover effect on European real estate investments also offers opportunities for a growing exchange and increasing integration and consolidation of green leases in Europe.

[62] Alternatively, there may also be a replacement with elements of the expanded green lease, although the project group considers the focus on the aforementioned core elements/categories to be particularly expedient for the wording of a basic green lease.

[63] Although, due to the fact that not every property is/shall be certified, the provisions on the certification of the rental property are only listed in the expanded green lease (see Part 2, Section II. Below), they can – depending on the parties' interests – also become part of a basic green lease.

[64] "Gamification" describes the use of game elements in an environment that is actually game-free. The aim is to increase motivation for a particular activity, see Haußmann/Schaller, Arbeit als Spiel/spielend Arbeiten – Gamification?, DB 2021, p. 901 (901).

[65] For details, see Part 3, Section I. below and Sittner in Lindner-Figura/Opree/Stellmann, Geschäftsraummiete-HdB, 5th edition 2023, section 24. Green Leases – Der grüne Mietvertrag, para. 45.

[66] See Part 2, Section III. 5. Below.

[67] In general, individual negotiations help avoid the need for a review of a clause under the law on general terms and conditions. A further reduction of potential risks under the law on general terms and conditions can be achieved by drawing up clauses as mere endeavour clauses (for details, see Part 3, Section I.).

[68] As in the case of the Green Lease 2.0, there will again be an opportunity to participate as soon as there is a need to update the Green Lease 3.0. For information on a potential participation, please refer to the link on the ZIA website: https://t1p.de/zia-green-lease (last accessed on: 14 February 2024).

[69] Lindner-Figura in Lindner-Figura/Opree/Stellmann, Geschäftsraummiete-HdB, 5th edition 2023, section 6. Form des Mietvertrags, para. 48. With the draft bill for the Bürokratieentlastungsgesetz IV (German Bureaucracy Relief Act IV), the German Federal Ministry of Justice is currently planning, among other things, to abolish the written form requirement for commercial leases by deleting section 550 BGB (German Civil Code) from the reference included in section 578(1) BGB. This rule is intended to apply to newly concluded leases and to existing agreements after a twelve-month transition period from the date on which the Act comes into force. As of February 2024, the draft is still being in a process of hearing associations. It is available at https://t1p.de/entlastungsgesetz (last accessed on: 13 February 2024).

[70] For first initiatives concerning green leases in residential leases, see Ochs, D.i.i. ist Pionier beim Green Lease für Wohnräume, Immobilienzeitung 23/2023 of 9 June 2023, available at https://t1p.de/iz-green-lease (last accessed on: 13 February 2024).

[71] Although, due to the fact that not every property is/shall be certified, the provisions on the

certification of the rental property are only listed in the expanded green lease (see Part 2, Section II. below), they can – depending on the parties' interests – also become part of a basic green lease.

[72] See footnotes 73 and 74.

[73] Other objectives of the Taxonomy Regulation can also be listed as alternatives: "(...) to also pursue innovative ways to make a [significant] contribution to climate change mitigation, climate change adaptation, the sustainable use and protection of water and marine resources, the transition to a circular economy, pollution prevention and control, or the protection and restoration of biodiversity and ecosystems, (...)".

[74] As an alternative: "(...) while ensuring the alignment with the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights as well as the Guiding Principles of the International Bill of Human Rights (...)".

[75] With regard to the model provisions in the basic green lease and the expanded green lease in the form of endeavor clauses, a time-limit should also be fixed for the specific individual case apart from a definition of endeavor that is as precise as possible (see the Introduction, Section IV.3. and a proposal for a corresponding provision in Part 3, Section I.).

[76] Any exchange of data must be in compliance with antitrust law requirements that prohibit the exchange of competitively sensitive information between competitors. According to those rules, the exchange of certain competitively sensitive data may be prohibited in the specific case if the landlord has a (potentially) competitive relationship with the tenant. Furthermore, in individual cases landlords may be prohibited from passing on certain competitively sensitive data of a tenant to a (potential) competitor of the tenant. In addition, any exchange of personal data must also comply with data protection requirements, in particular under the GDPR. As to the latter requirement, see Model Provisions 2.1.1. and 2.1.2.

[77] The use of the data by the landlord includes, in particular, its disclosure to third parties for analysis purposes.

[78] Beucker/Hinterholzer, Energieeinsparung durch Gebäudeautomation – Ausgewählte Fallbeispiele, Berlin: Borderstep Institut, 2021.

[79] In particular, data can also be anonymised for the purpose of processing.

[80] The data controller is required to inform data subjects about the processing of their personal data in a precise, transparent, comprehensible and easily accessible form. Articles 13 and 14 GDPR stipulate that the data subject shall be informed in particular of the identity of the controller, the contact details of the data protection officer (where applicable), the purposes of and the legal basis for the processing, any legitimate interests, the recipient in the event of a data transfer and any transfer to third countries. In addition, the duty to provide information shall also include details on the period for which data will be stored, the rights of the data subject, the right to withdraw consent, the right to lodge a complaint with the supervisory authority, and the statutory or contractual obligation to provide personal data. Landlords should seek advice from their data protection officers when drawing up data protection notices. When preparing the information sheet, it should be reviewed – especially in cases where smart meters are used – whether further requirements of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (ePrivacy Directive) must be observed.

[81] In contrast to the supply of heat, it is physically impossible, given the unified power system, to guarantee that the electricity consumed locally was actually generated from renewable energies. By choosing a qualified green electricity provider, you can at least make sure that the KWh of electricity consumed was generated sustainably elsewhere and fed into the grid. See https://t1p.de/umweltbundesamt-oekostrom (last accessed on: 13 February 2024).

[82] With the entry into force of the amendment to the GEG on 1 January 2024, new buildings in development areas and in areas with completed municipal heating planning are subject to a statutory obligation to cover at least 65% of their heat supply by way of renewable energies for newly installed heating systems (see also footnote 51).

[83] As to the development of an energy optimisation concept by using the Carbon Risk Real Estate Monitor (CRREM) tool, see also Addition 2 in the expanded green lease, Part 2, Section I.2. below.

[84] If the parties wish to specifically regulate certain savings measures, this can be done in catalogue form. One could think of: Using only energy-saving light sources (especially those with LED technology), using timers and motion detectors, using devices with particularly low energy consumption, using water-saving dishwashers, toilets, etc., reducing water pressure, reducing paper consumption, recycling old devices, etc. See also ZIA, Green Lease – Der grüne Mietvertrag für Deutschland (2018), Model Provisions 2.3.1 to 2.3.4.

[85] The term "consumer" in this context also includes companies/commercial enterprises because the obligation to install a meter is based on an annual electricity consumption (6,000 kWh/year or more) for end-users pursuant to section 29(1) of the German Metering Point Operation Act (Messstellenbetriebsgesetz).

[86] DGNB-Kriterienmatrix ENV1.2 Anlage.pdf (DGNB criteria matrix ENV1.2 Annex).

[87] DGNB criteria catalogue available at: https://t1p.de/dngb-kriterienkatalog (last accessed on: 14 February 2024).

DGNB criteria catalogue

[88] DGNB-Kriterienmatrix ENV1.2 Anlage.pdf (DGNB criteria matrix ENV1.2 Annex).

[89] DGNB criteria matrix available at: https://t1p.de/dngb-kriterienmatrix (last accessed on: 14 February 2024).

DGNB criteria matrix

[90] DGNB-Kriterienmatrix ENV1.2 Anlage.pdf (DGNB criteria matrix ENV1.2 Annex).

[91] DGNB criteria catalogue available at: https://t1p.de/dngb-kriterienkatalog (last accessed on: 14 February 2024).

[92] Zehelein in Lindner-Figura/Opree/Stellmann, Geschäftsraummiete-HdB, 5th edition 2023, section 11. Betriebs- und sonstige Nebenkosten, para. 9.

[93] See Sittner in Lindner-Figura/Opree/Stellmann, Geschäftsraummiete-HdB, 5th edition 2023, section 24; Green Leases – Der grüne Mietvertrag, para. 60 and Schur in Herberger/Martinek/Rüßmann/Weth/Würdinger, jurisPK-BGB, 10th edition, section 556 BGB, para. 83 (as of 1 February 2023), according to

which such other criteria may include, for example, protection and maintenance of the building, lower administrative costs or reliability and size of the contract partner.

[94] See Sittner in Lindner-Figura/Opree/Stellmann, Geschäftsraummiete-HdB, 5th edition 2023, section 24; Green Leases - Der grüne Mietvertrag, para. 60; Schur in Herberger/Martinek/Rüßmann/Weth/Würdinger, jurisPK-BGB, 10th edition, as of 1 February 2023, section 556 BGB, para. 83; opinion of the Legal Committee on section 556 of the German Civil Code (BGB), see Bundestag document no. 14/5663, p. 79; Rips, Die ökologische Kompetenz der Mietrechtsreform, WuM 2001, p. 419 (421).

[95] Rips, Die ökologische Kompetenz der Mietrechtsreform, WuM 2001, p. 419 (421); Hinz, Klimafreundliche Wärmeversorgung der Mietwohnung, NZM 2022, p. 681 (691).

[96] See section 555b BGB in conjunction with section 578(2) BGB; see also Sittner in Lindner-Figura/Opree/Stellmann, Geschäftsraummiete-HdB, 5th edition 2023, section 24; Green Leases – Der grüne Mietvertrag, para. 60; Rips, Die ökologische Kompetenz der Mietrechtsreform, WuM 2001, p. 419 (421).

[97] See Reimann/Achtermann, „Grüne" Mietverträge zur nachhaltigen Bewirtschaftung von Gewerbeimmobilien (Teil 2), ZfIR 2019, p. 217 (220); Schmid, Betriebskosten – Berücksichtigung des Wirtschaftlichkeitsgrundsatzes bei der Umlegung von Modernisierungskosten, MDR 2014, p. 1237 (1239); Hinz, Klimafreundliche Wärmeversorgung der Mietwohnung, NZM 2022, p. 681 (691).

[98] In this case, the customary 10% limit defined in rulings of the German Federal Court of Justice (BGH) for the allocation of repair and maintenance costs incurred for common areas could be used as a guideline. See also Sittner in Lindner-Figura/Opree/Stellmann, Geschäftsraummiete-HdB, 5th edition 2023, section 24. Green Leases – Der grüne Mietvertrag, para. 61.

[99] The complete allocation of heating and hot water costs depending on consumption is permitted by contractual (individual) agreement in accordance with section 10 HeizKV. However, it is a controversial issue whether an allocation exclusively based on consumption can be effectively agreed through general terms and conditions; see overview of Pfeifer in BeckOK Mietrecht, 32nd edition, as of 1 May 2023, section 10 HeizKV, para. 9 et seqq. The prevailing view is that this is possible as long as a building's energy quality is not so poor that tenants are hardly able to control consumption through their individual behaviour. In any case, the same allocation formula must be agreed with all tenants.

[100] The time-limit specified in section 555c BGB (notice no later than three months before starting with the modernisation measure) could be used as a guideline here.

[101] DGNB-Kriterienmatrix ENV1.2 Anlage.pdf (DGNB criteria matrix ENV1.2 Annex).

[102] Insofar as the landlord's measures relate to energy modernisation within the meaning of section 555b no. 1 BGB, a rent reduction is, in any case, subject to a statutory three-month exclusion period pursuant to section 536(1)(a) BGB. It is correct that it is possible to exclude any further warranty claims and claims for reimbursement of expenses as well as the special right of termination of the tenant. However, the supreme court has not yet ruled on the admissibility of such a far-reaching restriction of the tenant's rights under general terms and conditions law, so this may involve considerable risks. The following should be noted in the context of the risk assessment under the law on general terms and conditions: The more the parties depart in individual cases for the benefit of the landlord as the regular user of the GTC from the statutory model according to which, for example, the reduction of

the rent is intended to restore the equivalence relationship of the contract that has been disturbed as a result of the impairment of use, and the more they go beyond exceptional provisions such as section 536(1)(a) BGB, the greater the risk of invalidity under section 307 BGB (see Schüller in BeckOK Mietrecht, 32nd edition, as of 1 May 2023, section 536 BGB, para. 50; Eisenschmid in Schmidt-Futterer Mietrecht, 15th edition 2021, section 536 BGB, para. 65).

[103] See, for example, Börstinghaus in Schmidt-Futterer, Mietrecht, 15th edition 2021, section 559 BGB, para. 6; Theobald/Theobald, Grundzüge des Energiewirtschaftsrechts, 3rd edition 2013, para. 568.

[104] Claiming that sections 307 et seqq. BGB do not apply to the question of a rent increase for modernisation in commercial tenancy law because it is not a deviation from or addition to statutory provisions within the meaning of section 307(3) BGB, Dickersbach in Lützenkirchen, Mietrecht, 3rd edition 2021, before sections 558-561, para. 14 et seqq.: The parties are therefore supposed to be free to decide whether to declare sections 558 et seqq. BGB to be applicable in their entirety or only in individual parts.

[105] For more information on the CRREM tool, see the official website at https://www.crrem.eu/ (last accessed on: 13 February 2024).

[106] For governance aspects, see, for example, the Corporate Governance Code of the German real estate industry (CGK-i) of the Institute for Corporate Governance (ICG) (2023), available at https://t1p.de/icg-kodex (last accessed on: 13 February 2024).

[107] Against this, for example, Eisenschmid in Schmidt-Futterer, Mietrecht, 15th edition 2021, section 555b BGB, para. 109; for this, for example, Artz in MüKoBGB, 9th edition 2023, section 555b, para. 20.

[108] Irrespective of and beyond this Addition 4.3, the German Act on Corporate Due Diligence Obligations in Supply Chains (Lieferkettensorgfaltspflichtengesetz – LkSG) has required companies with at least 1,000 employees to observe in their supply chains certain human rights and environmental due diligence obligations since 1 January 2024. Any non-compliance with these obligations is subject to a fine of up to EUR 8 million or up to 2% of annual turnover. See also the Federal Government's information page on corporate social responsibility at https://t1p.de/faq-lieferkettengesetz (last accessed on: 13 February 2024).

[109] See the website of the WELL Building Institute at https://t1p.de/about-iwbi (last accessed on: 13 February 2024).

[110] For specific model provisions on the mobility aspect, see ZIA, Green Lease – Der grüne Mietvertrag für Deutschland (2018), Part 1, Section I.5.

[111] For specific model provisions on the sustainability handbook aspect, see ZIA, Green Lease – Der grüne Mietvertrag für Deutschland (2018), Part 1, Section I.6.

[112] For specific model provisions on the green levies aspect, see ZIA, Green Lease – Der grüne Mietvertrag für Deutschland (2018), Part 2, Section I.1.

[113] Available at https://t1p.de/co2-kosten-aufteilungsgesetz (last accessed on: 13 February 2024).

[114] For specific model provisions on the employee training aspect, see ZIA, Green Lease – Der grüne Mietvertrag für Deutschland (2018), Part 1, Section I.7.

[115] See BMWK, Photovoltaik-Strategie – Handlungsfelder und Maßnahmen für einen beschleunigten Ausbau der Photovoltaik (as of 5 May 2023), available at https://t1p.de/pv-strategie (last accessed on: 13 February 2024).

[116] See the Introduction above, Section V.1.

[117] See Voß in Jeromin/Klose/Ring/Schulte/Beerbühl, StichwortKommentar Nachbarrecht, 2021, Photovoltaikanlage, para. 13.

[118] See, for example, Schäfer/Antoni/Paintner, ZUR 2022, p. 393 et seqq.

[119] For more information on this and on the amendments contemplated for the future "Solar Package II", see BMWK, bill on the further expansion of photovoltaic energy supply (Entwurf eines Gesetzes zur Steigerung des Ausbaus photovoltaischer Energieversorgung) (as of 29 June 2023), available at https://t1p.de/solarpaket-pv (last accessed on: 13 February 2024).

[120] Identical decisions of the supreme tax authorities of the German federal states dated 17 June 2022 – G 1425, para. 12 et seq.

[121] See the original draft bill of the Federal Ministry of Finance and the Federal Ministry of Justice – Draft of a Financing for the Future Act (Gesetz zur Finanzierung von zukunftssichernden Investitionen – Zukunftsfinanzierungsgesetz) of 12 April 2023, available at https://t1p.de/zukunft-investitionen; the ZIA press release related thereto dated 12 April 2023, available at https://t1p.de/zia-pv-anlagen and the Financing for the Future Act as promulgated on 14 December 2023 at https://t1p.de/zukunft-finanzierungsgesetz (each as last accessed on: 13 February 2024).

[122] For the term "greenwashing", see Schwarz/Schleifer, Greenwashing – Ermittlung von Greenwashing-Vorwürfen, CCZ 2022, p. 345 (345); Zeidler/Dürr, Greenwashing – Haftungsfallen und ihre Vermeidung, CCZ 2022, p. 377 (377).

[123] For the essential core elements of a green lease, see the Introduction above, Section I.3.

[124] See in this context already the Introduction above, Section IV.3.

[125] In December 2023, the European Commission reached a political agreement with the Parliament and the Member States on an amendment to the Energy Performance of Buildings Directive ("EPBD"). The aim is to achieve climate neutrality of the entire building stock by 2050. For this purpose, it is intended to introduce binding minimum energy performance standards ("MEPS") for non-residential buildings. To comply with these standards, the 16% worst-performing buildings will have to be renovated by 2030 and the worst-performing 26% by 2033. Residential buildings will be subject to more flexible provisions. Member States must ensure a reduction in the average primary energy used in existing buildings by 16% by 2030 and by 20-22% by 2035. See the EU Commission's press release of 8 December 2023 available at https://t1p.de/energie-effizienz (last accessed on: 13 February 2024).

[126] Such risks arise in particular in the case of "hard" commitment clauses, i.e. clauses that are subject to penalties, but only if they deviate from the statutory model or violate other principles of the law on terms and conditions (such as the transparency requirement or the prohibition of surprise clauses). The other option of a mere endeavour clause also offered in the model provision is likely to be much less problematic under the law on general terms and conditions because such a clause does not involve any intent to create a legally binding commitment with regard to the success of an action owed. See also Sittner in Lindner-Figura/Opree/Stellmann, Geschäftsraummiete-HdB, 5th edition 2023, section 24; Green Leases – Der grüne Mietvertrag, para. 45; different view Graf v. Westphalen, Bemühensklauseln in "Grünen" Mietverträgen – Eine AGB-rechtliche Antwort, NZM 2022, p. 1 (5); Vogel, Implementierung von Green Lease-Vertragsklauseln in Gewerberaummietverträgen, ESG 2022, p. 295 (297).

[127] Fornasier in MüKoBGB, 9th edition 2022, BGB section 305, para. 37; Stadler in Jauernig, 18th

edition 2021, BGB section 305, para. 9. See also ZIA, Green Lease – Der grüne Mietvertrag für Deutschland (2018), p. 16, 52 and the Introduction above, Section IV.3.

[128] BGH NJW 2003, p. 1313; BGH NJW 2018, p. 2039, para. 13; different view Graf v. Westphalen, Bemühensklauseln in "Grünen" Mietverträgen – Eine AGB-rechtliche Antwort, NZM 2022, p. 1 (2).

[129] See, for example, Model Provision 2.3 in Part 1, Section II.3.

[130] "Gamification" describes the use of game elements in an environment that is actually game-free. The aim is to increase motivation for a particular activity; see Haußmann/Schaller, Arbeit als Spiel/spielend Arbeiten – Gamification?, DB 2021, p. 901 (901).

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