

## Commercial Property - Germany

### Allocation of administrative costs in commercial lease agreements

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#### Case Comment

#### Case

In its ruling of December 9 2009 (XII ZR 109/08), the Federal Court of Justice significantly simplified the allocation of property management costs to tenants by landlords. The court ruled that a provision in a commercial lease agreement stating that the costs of commercial and technical property management are to be assigned to the tenant as part of the auxiliary costs is valid even without any defined or maximum amount.

According to previous rulings from the higher regional courts, administrative costs could be validly allocated to the tenants in commercial lease only if there was either a defined sum or an annual upper limit. This restriction was formerly justified by the need to provide the tenant with a transparent and reliable basis of calculation.

The court has now changed its evaluation of the matter. It stated that a limitation on the amount in the contract is unnecessary because the tenant is protected from excessive auxiliary cost demands by the general requirement to manage the property economically. The court stated that the costs of property management must therefore be kept at the level that is normal in the location, so that a commercial tenant is able to make a rough estimate of the costs in advance. In the specific case in question, the court ruled that administrative costs of 5.5% of the gross rent (excluding heating) were reasonable.

It also ruled that the concept of the 'costs of commercial and technical property management' was sufficiently clear. Insofar as the costs of technical property management could overlap with other costs (eg, the costs for a caretaker), the court stated that care must be taken in the auxiliary cost statement to ensure that no costs are charged twice. The court stated that this potential risk of double charging did not in itself lead to a lack of transparency in the provision, although it admitted that confusion could arise if the general terms and conditions stipulate that in addition to administrative costs, similar costs such as the costs of centre management are also allocated to the tenants.

#### Comment

The 'costs of commercial and technical property management' can be allocated to the tenant in a commercial lease agreement using this phrase, without any defined limitation of the amount. However, the list of auxiliary costs should then omit dissimilar items (eg, "centre management") in order to avoid the risk of confusion.

*For further information on this topic please contact [Claudia Schilling](#) at SIBETH Partnerschaft by telephone (+49 89 38 80 80), fax (+49 89 38 80 81 01) or email ([c.schilling@sibeth.com](mailto:c.schilling@sibeth.com)).*

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#### Author

[Claudia Schilling](#)





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