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COVID-19 measures may entitle tenants to rent reductions

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The closure of shops in an attempt to prevent the spread of COVID-19 may entitle tenants to reduced rent and ancillary costs. However, this measure does not entitle tenants to terminate their lease for cause.

Trade limitations

In an effort to reduce the spread of COVID-19, the government has ordered all shops and service providers, except those providing certain vital services, to close to customers from 17 March 2020 until 13 April 2020. The prohibition was introduced through a federal minister for social affairs, healthcare and consumer protection regulation (BGBl II Nr 96/2020), which was issued under the COVID-19 Measures Act (BGBl I Nr 12/2020).

The regulation prohibits individuals from entering the customer area of retailers' and service providers' premises in order to purchase goods or services. It also prohibits the use of leisure or sports facilities. Further, all restaurants must close. The regulation contains a conclusive list of vital facilities which are exempt, including:

- supermarkets;
- pharmacies;
- car and other vehicle repair shops;
- petrol stations; and
- legal services.

According to a recent study, these measures will result in a loss of turnover of approximately €113 million per day for shops and €44 million per day for restaurants.

At present, there are no restrictions imposed on other facilities, such as offices. Despite the government urging employers to encourage remote working, there is currently no prohibition on the use of offices (where no customers are involved).

Additional local restrictions apply to parts of Austria. In particular, hotels have been closed in some provinces.

Can tenants of affected businesses pay reduced rent?

The General Civil Code provides that a tenant may pay reduced rent where the leased premises cannot be used for the agreed purpose due to extraordinary circumstances, such as war, fire, flooding or disease (Section 1104 *et seq*). The government-imposed restrictions introduced under the COVID-19 Measures Act will most likely qualify as such extraordinary circumstances.

The essential question is thus if and to what extent the agreed use of premises is restricted by the regulation.

As outlined above, the regulation covers only the customer area of business premises. If premises are not used to service customers, as may be the case for certain office buildings, the use of the leased premises is not impaired. Likewise, the use of shops which are exempt from the regulation is not impaired. Thus, despite a possible drop in customer frequency and earnings, tenants of such buildings are not entitled to reduced rent.

In many cases, leased premises are only partially affected. For example, a car dealer which also runs a garage can no longer sell cars, but can continue repairing cars. A fashion retailer can no longer sell apparel, but can still use the storage and office areas of its premises. Restaurants cannot open to the public, but can offer food delivery services. However, the lease agreement must permit the tenant to use the premises in question for this second purpose.

In these cases, rent may be partially withheld. Of course, determining which part of premises can be used will often be difficult.

Do tenants of affected businesses have to pay service charges?

This is not entirely clear. In regular cases of rent reduction, service charges are reduced by the same percentage as the rent. In contrast, according to some case law, tenants cannot pay reduced service charges in cases of *force majeure*. As such, it remains to be seen how the courts will deal with this issue.

Can tenants pay reduced rent if their staff are quarantined or working remotely?

As this is something that affects the tenant and not the leased premises, rent must be paid in full in such cases.

Can the right to claim a rent reduction be excluded in the lease contract?

A lease agreement can exclude the tenant's right to pay reduced rent in extraordinary cases. However, such clauses are valid only if:

- they are sufficiently clear in the sense that they explicitly state which risks (eg, flooding, fire or disease) are borne by the tenant; and
- there is an objective justification for such clause, in the case of standard form agreements.

The courts are expected to scrutinise such clauses in the upcoming months and years.

Can tenants terminate their lease for cause?

This depends on how long the current shop closures remain in force and the remaining duration of the lease. At present, the measures are in place only for a relatively short time. Absent special circumstances, this will not permit tenants to terminate their lease.

Guidance for tenants

Tenants should take the following steps:

- If they are entitled to a rent reduction, they should inform their landlord in writing.
- The right to reduced rent should not be overestimated, as non-payment could entitle the landlord to terminate the lease agreement.
- If in doubt, rent should be paid in full and a with prejudice letter should be sent to the landlord in order to retain the option to reclaim the rent or an offset at a later stage.
- Tenants should check whether they have business interruption insurance, as this can cover closures due to disease.

Guidance for landlords

Landlords should take the following steps:

- Tenants should be given unrestricted access to the lease object; limited use may mitigate a rent reduction.
- Full invoices for ongoing rent payments should be sent, but value-added deferrals should be requested as landlords may not be entitled to full rent.
- If full rent is not requested, without prejudice letters should be sent.

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