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COVID-19 and commercial leases – one year on

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Two lower court decisions have confirmed tenants' right to claim a COVID-19-related rent reduction in general. However, both decisions must be read carefully and leave many questions unanswered, particularly in cases where shops made or could have made limited use of their premises during the national lockdowns by offering online delivery or click and collect services. In addition, state aid may affect rent reductions. This uncertainty has led to many mutual agreements in the market.

Lockdowns

Since the start of the COVID-19 pandemic, there have been three lockdowns in Austria. During each of these periods, the customer area of shops had to be closed to the public, except for certain essential retail stores (ie grocery stores and pharmacies).⁽¹⁾ Restaurants could offer takeaway and delivery services only (subject to certain restrictions) and hotels were shut subject to certain exceptions (eg, persons who were staying at the hotel at the start of the lockdown could remain and certain business-related lodging was permitted).

First lockdown

Retail stores were closed from 16 March 2020 until 14 April 2020. Retail stores with a customer area larger than 400 square meters were allowed to reopen as of 30 April 2020.⁽²⁾ Similarly, entering restaurant facilities was prohibited between 17 March 2020 and 15 May 2020.⁽³⁾

Second lockdown

The second lockdown commenced on 17 November 2020. Shops were allowed to reopen on 6 December 2020.⁽⁴⁾ Hotels and restaurants remained closed until this date.

During this lockdown, shops were closed only to end consumers (and not to professional shoppers). Upmarket brands made use of this, increasing their marketing efforts to *daigous* from China and their colleagues from various Asian (and Arab) countries.

Third lockdown

The third lockdown forced shops to close (for end customers) between 26 December 2020 and 8 February 2021.⁽⁵⁾ During this period, all shops – from diners to bookstores – were allowed to offer pick-up services.⁽⁶⁾

Other restrictions

During the periods in which shops could open, certain restrictions remained in place, such as:

- restrictions on the number of customers in each shop;
- social distancing regulations; and
- the requirement to wear a tight-fitting mask in closed rooms.

Tourist-driven retail shops have also suffered from severe travel restrictions. Further, shopping centres have experienced shorter customer dwell times due to the lack of restaurants and customer experience gadgets.

First court decisions

A district court has issued two decisions⁽⁷⁾ on COVID-19-related rent reductions during the first lockdown (for further details please see "COVID-19 measures may entitle tenants to rent reductions"). One decision concerns a high street fashion brand and the other concerns a barbershop. Unfortunately, neither decision has been appealed, so there is no Supreme Court case law on this question yet.

The court's findings can be summarised as follows:

- The government measures aimed at preventing the spread of COVID-19 constitute a *force majeure* event which generally entitles tenants to a rent reduction.
- The degree of each rent reduction depends on if and to what extent the tenant can use the premises for the type of use provided for in the lease agreement. Thus, if the premises were rented for the purposes of operating a barbershop or fashion shop and this is forbidden by government measures, the tenant need not pay rent.
- In one case, the landlord argued that the shop could still be used for storage purposes. However, the court dismissed this argument with respect to cases where such storage serves only the shop in question. In this case, the fact that the tenant could store items on the premises was of no use to the tenant, because he could not operate the store (and sell or use the stocked items). However, a tenant could use the premises in question in cases where they are used to store items sold elsewhere.
- The obligation to pay operating costs is reduced in the same way as rent.
- The 'catch-up effect' (meaning that the tenant will benefit from higher turnover once the lockdown ends because customers will buy the goods which they had previously wanted to buy) is irrelevant in the context of rent reductions. However, the court may have come to this decision in each case because:
 - the first case concerned a hairdresser (for which the catch-up effect was ruled out since hair can be cut only once); and
 - in the second case (which concerned a fashion shop), the catch-up effect was not supported by the sales numbers presented to the court.
- The advertising effect of the mere existence of the shops (and shop windows) was not considered a relevant use of the premises; thus, it did not warrant the payment of rent during the lockdown. This may be because during the lockdown in question, curfews were in place and therefore few people were strolling the high streets.

State subsidies

Five government aid programmes are in place to support retail shops. Each of these pertains to a different period and has different preconditions. Landlords frequently dispute that rent reductions should be granted in cases where the tenant's losses are, at least partially, compensated through government relief.

While the details are up for debate, there are two cornerstones in this respect:

A rent reduction applies irrespective of a relief programme (or money received from third parties).

A tenant cannot claim compensation from the government for rent which has not been paid.

Two of the government's aid programmes are aimed at directly compensating tenants' rent payments. The terms and conditions of these aid programmes specifically oblige tenants to make use of the statutory rent reductions.⁽⁸⁾ This is actively enforced by the aid agency, which requests that, at a minimum, payments are made only on a without prejudice basis.

If a tenant ignores this and pays the rent in full, it may be liable to repay the subsidy (or worse).

Comment

While these two initial decisions on rent reductions are helpful, they leave many questions unanswered. In particular, as outlined above, retail shops were entitled to make some use of their premises during the second and third lockdowns, many of which did so (eg, via click and collect sales, sales to professional shoppers and online sales).

However, given the economic reality, this limited use of leased premises must be reviewed carefully. Was such use a desperate attempt to keep staff motivated and brands alive or a real business activity? Did tenants earn or lose money by opening? Would tenants deliberately have leased the premises solely for these activities and, if so, what rent would they have been prepared to pay? The answer to these questions will affect the level of rent reduction available to each tenant.

The court stressed that the relevant test is whether the type of use agreed in a lease agreement is prohibited. However, this must be read carefully. In many (high street) lease agreements, the type of use is defined broadly (eg, use as a "retail shop"). It could be argued that a fashion retailer was allowed to use its retail premises to operate during the lockdown (eg, as a pharmacy, the operation of which was permitted during the lockdown). However, it would be far from economic reality to request a fashion shop to switch to an entirely different line of business for a few weeks.

Lastly, although the statutory rent reduction applies irrespective of money received from third parties (eg, state aid), this may entitle landlords to raise claims against tenants for unjust enrichment.

Clearly, significant uncertainty remains with regard to COVID-19-related rent reductions. This uncertainty has prompted many landlords and tenants to reach a mutual agreement on this matter. The agreements that have been seen in the market are varied, with solutions ranging from 50% to (in exceptional cases) 100% rent reductions for the periods of lockdown.

For further information on this topic please contact Martin Foerster at Pitkowitz & Partners by telephone (+43 1 413 01 0) or email (m.foerster@pitkowitz.com). The Pitkowitz & Partners website can be accessed at www.pitkowitz.com.

Endnotes

(1) The list of stores which were allowed to open varies for the different lockdowns.

(2) This differentiation between shops which are smaller and larger than 400 square metres was subsequently declared unconstitutional by the Constitutional Court.

(3) BGBl II Nr 96/2020, BGBl II Nr 110/2020 and BGBl II Nr 151/2020.

(4) BGBl II Nr 479/2020.

(5) BGBl II Nr 598/2020.

(6) Section 5(1 2), COVID-19-Notmaßnahmenverordnung (FN 4).

(7) BG Meidling, Cases 9 C 361/20y and 9 C 368/20b.

(8) Point 3.1.6 of the *Förderrichtlinien Fixkostenzuschuss I* and Point 3.1.10 of the *Förderrichtlinien Fixkostenzuschuss II* (€800,000).