

COVID-19 Update

New Lockdown - Effects of the Federal-State Resolution of 13 December 2020 on the Commercial Rental Law

DECEMBER 2020

Obligation to pay rent and the Federal-State Resolution of 13 December 2020

On 13 December 2020, the Federal Chancellor and the Prime Ministers of the Federal States again decided, in view of the current development of the Covid-19 pandemic, to impose far-reaching measures for contact restrictions. As it did already last spring, this comprises among other measures the closure of large segments of the retail business and of the services sector. The addressees of these measures are the business operators, many of whom are tenants. Whereas the comparable measures in the spring included a restriction of the landlord's right to terminate on the ground of failure to pay the rent in the period from April to June 2020 (Art. 240 Sec. 2 EGBGB), the economic burdens arising from the new restrictions are now to be divided up between tenants and landlords, apparently in accordance with the principles governing frustration of contract.

Court decisions taken so far in this connection have mostly attributed the restrictions of use under public law within the context of the Covid-19 pandemic to the tenant's personal and business circumstances instead of considering them to constitute a defect of the rented premises. Consequently, the tenant was not accorded any statutory right to reduce the amount of the rent pursuant to Sec. 536 BGB. However, there is some disagreement among the courts about a right to contractual adjustments on the basis of the principles governing frustration of contract (Sec. 313 par. 1 BGB). Apart from doubts about the applicability of this legal instrument, which is in principle of a subsidiary nature, the courts have differently answered the question in individual cases whether a tenant can reasonably be expected to continue the unchanged contract.

The Federal Chancellor and the Prime Ministers have now taken a position on this, stating in Point 15 of the above-mentioned Federal-State Resolution:

„For commercial tenancy and lease agreements affected by governmental Covid-19 measures, there is a legal presumption that considerable restrictions (of use) in consequence of the Covid-19 pandemic can constitute a serious alteration of the foundations of the transaction. This will simplify the negotiations between commercial lessees or tenants and landlords.“

This puts into effect the intention declared already in November by members of the SPD parliamentary group as well as the Federal Ministry of Justice and Consumer Protection that restrictions of commercial business imposed by governmental order because of Covid-19 should generally be regarded as a "frustration of contract". In any case the Federal-State Resolution wants to clarify the basic applicability of Sec. 313 BGB, and it is to be legally

presumed in the future that considerable restrictions (of use) in consequence of the Covid-19 pandemic "can constitute" a serious alteration of the foundations of the transaction.

First evaluation

The objective of the planned presumption rule is to make a contribution to legal certainty. However, given the information available so far, it is doubtful that this objective, although to be welcomed as such, can in actual fact be achieved: Although the Federal-State Resolution as such does not have any normative effect whatsoever and requires legislative action for implementation, it should at least encourage the courts to focus more strongly on Sec. 313 BGB to resolve rental disputes. Moreover, a statutory implementation of the Federal-State Resolution might facilitate reliance on Sec. 313 BGB in spite of its subsidiary nature, so that a tenant would have a claim against the landlord for a contractual adjustment, provided further conditions are fulfilled.

However, it remains open whether the legal presumption would apply also to months in the past and to disputes already pending and, in particular, to the rents for December, which will in most cases have already been (fully) paid. If the transposition of the Federal-State Resolution into law is to have a (far-reaching) retroactive effect, this should constitute a so-called "genuinely retroactive effect", which is constitutionally allowed only in exceptional cases. Although it cannot be ruled out with any certainty that courts currently dealing with legal disputes of this kind will take the proposed legislation into consideration already at this point in time, this is not legally required, let alone mandatory. Equally uncertain is whether newer or future lease agreements will also be covered by these rules or whether the handling of these issues will be up to the contracting parties themselves. In addition, there is a multitude of further details that still need to be examined and discussed in the light of the concrete draft bill, e.g. whether Sec. 313 should remain applicable in principle and whether or how any aspects of unreasonableness should be included in the considerations also on the landlord's side (e.g. through contractual loan obligations).

Outlook

The Federal-State Resolution is to be transposed into law already before the end of the year through an „Act to Allocate the Risks Under Commercial Tenancy and Lease Agreements During the Corona Pandemic“ and should lead to an amendment of Art. 240 EGBGB (contractual provisions due to the Covid-19 pandemic) or to a new parallel rule. But in the final analysis, this can also not be expected to clarify the legal consequences in individual cases and consequently the concrete contractual adjustment will develop only through a process of differentiated case histories and precedent. This would also be consistent with the information so far, namely that neither the SPD nor the CDU/CSU parliamentary group strives to regulate individual scenarios but instead deliberately intends "just and fair" solutions to be found in practice on the basis of Sec. 313 BGB.

An obvious solution would appear to be - disregarding any special facts and circumstances in individual cases - to basically divide the risk up equally between the tenant and the landlord in cases where premises are shut down completely to the public. In any case, this conclusion is already reflected by contractual adjustments widespread on the market and by first court decisions.

We will provide an update as soon as the exact wording of the law has been decided and a further evaluation of the legislative project is possible.

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