

Mannheim/Frankfurt/Munich, March 2020



COVID-19 - expected changes in tenancy law - by Dr. Michael Kühn

On 23 March 2020, the Federal Cabinet passed a "formulation aid" for a law to mitigate the consequences of the Covid 19 pandemic, which also temporarily reorganises **parts of the tenancy law**. The amendments are to enter into **force on 1 April 2020**. According to the current draft version, the following effects can be expected:

1. Protection against dismissal in case of non-payment of rent due to pandemic

Residential and commercial tenants as well as **lessees** (the latter particularly in the severely affected hotel-, leisure- and restaurant-sector) can suspend rent and lease payments **due** in the period from **1 April to 30 June 2020 without** having to fear termination for **this reason** (for reasons of simplification, we shall refer to them hereinafter only as "**tenants**").

The Federal Government can **extend** the affected **due date** by decree until 30 September 2020 if necessary, and even beyond that date with the approval of the Bundestag.

The law **protects** the tenant from **losing the rental property** if he is temporarily unable to pay the rent due on time due to the effects of the pandemic. In our understanding, this should **also** include **incidental expenses**, as the draft law does not distinguish between cold and warm rent.

2. Connection to the Corona pandemic to be substantiated by the tenant

However, a **concrete connection** to the pandemic is necessary for dismissal protection. Contrary to what was provided for in preliminary drafts, this is no longer presumed, the **tenant** must rather make it **credible**. This means that he has to present facts to the landlord or, in the event of a dispute, to a court, from which it can be concluded that there is an **overwhelming probability** that the non-payment of rent (i.e. "not being able to pay") is actually **caused by the pandemic**.

Appropriate means of establishing credibility are, for example, an **affidavit in lieu of an oath** ("Versicherung an Eides Statt") or documents such as a **certificate from the employer** confirming loss of earnings or a **sovereign closure order**, as it is currently the case for many restaurants and leisure facilities. The explanatory memorandum also lists legal ordinances and official orders that "**considerably restrict**" the business. It remains to be seen what this means in individual cases. In the case of restaurants, the requirement that food may only be sold "to go" may be included.

3. Negotiations and contractual arrangements possible?

In the current situation, it seems to make more sense than ever before for the parties to a lease to **communicate with each other at an early stage** if the tenant experiences a foreseeable liquidity bottleneck in order to avoid escalation. The law does not prohibit a negotiated solution.

However, it is not allowed to deviate from the new legal rule (temporary exclusion of the right of termination due to non-payment of rent) at the expense of the tenant. It is therefore a matter of "**mandatory law**". Conflicting contractual regulations (also in the **general terms and conditions**) are therefore ineffective or inapplicable as long as the new law is valid. This is likely to apply in particular to (old) **contractual provisions** which provide for a right of termination for the landlord in case of non-payment by the tenant due to **force majeure** ("pandemics"). Thus, under certain circumstances, old contract law is temporarily suspended - contrary to the agreement of the parties to the contract.

However, the parties to the contract can and may, in our opinion, agree on **interest** or a notarial acknowledgement of debt as an **enforcement instrument**, particularly with regard to the **period** in which the overdue rent will be paid in arrears. Whether a **rent security** can be agreed over and above an already existing deposit

is doubtful, at least in residential tenancy law. In individual cases, however, especially in the case of commercial leases, there is a chance that the landlord may be allowed to **hold himself harmless on the deposit** because of the loss of rent, especially if he has to pay bank liabilities with regard to the property (see also 6. below).

4. **When and how can notice of termination be given? What other options do landlords have?**

As from **1 July 2022**, landlords would be able to terminate their contracts under general rules for non-payment of rent due in the period concerned (1 April to 30 June 2020). This gives tenants two years from **30 June 2020** to make up any rent arrears from this period without having to fear termination.

However, the new regulation **does not** give tenants a **general right to refuse payments**. They remain obliged to pay rent, may be in **default** and, in particular, may be **sued for payment**. Landlords can also apply for a **default summons**. The draft bill does not answer the question of whether **enforcement protection** is to be granted against the tenant for rents from the period in question in the context of the enforcement of a payment title. The courts' assessment will have to wait and see; the legal regulation appears (also) incomplete here.

It is important to note that the restriction on the right to terminate the lease **only** applies for the time being to rent arrears from the period 1 April to 30 June 2020. This means that the landlord can terminate the lease even during the period of validity of the new law on the basis of **rent arrears** that have accrued in an **earlier period** or that result from a **later period**.

In addition, it is permitted to terminate the **contract for** any period of time due to **breach of contract of any other kind**, for example unauthorized transfer of the rental property to third parties (§ 543 paragraph 2 sentence 1 number 2 BGB) or due to personal use ("Eigenbedarf") (§ 573 paragraph 2 number 3 BGB).

The ordinary termination options pursuant to § 580a BGB also remain in effect. In the case of **business premises rent**, the notice of termination can only be given at the beginning of the quarter up to the third working day and then takes effect at the end of the following quarter. This results in an (ordinary) notice period of almost **six months**. Short-term termination in Corona times is therefore not possible under this regulation in the area of business premises rentals. The periods of notice from

§ [580a](#) BGB can also be waived and are typically waived in the case of business premises rental with fixed rental periods.

5. What rights does the landlord have if he runs into liquidity problems due to a lack of rent ("domino effect")?

The CDU/CSU parliamentary group was unable to assert itself with the demand for a **reasonable or hardship clause** in favour of the landlord. The explanatory memorandum to the law speaks at most in very special individual cases of a possible recourse to the principles of good faith.

If the landlord is in financial difficulties vis-à-vis third parties, for example, **utilities, service providers or e.g. because of property tax payments**, he stays obliged to perform; for the above-mentioned period he bears the "liquidity risk" of the residential tenant and the "operating risk" of the commercial tenant.

The landlord may be entitled to **rights to refuse performance** under the general "moratorium" provided for in the Covid Act. However, the law is not clearly formulated here. In our understanding, the explicit exclusion of the "moratorium" on rental and lease agreements should only apply to the relationship between the tenant and the landlord, but not to the latter's legal relationships with third parties. This means that recourse to the "moratorium" may remain permissible for the landlord.

A prerequisite is, however, that the **landlord** for its part is **at most a micro-enterprise** within the meaning of the EU Commission's recommendation. It may not employ more than ten people and its annual turnover may not exceed EUR 2 million. It is unclear whether these upper limits in the case of mixed businesses ("letting plus") refer only to the letting part of the business or to the entire business of the landlord. In particular in the case of **"housing companies"** ("Wohnungsunternehmen"), it will therefore always have to be carefully examined whether a "moratorium" can be invoked.

In addition, the refusal to perform must be **reasonable for the creditor of the landlord** (i.e. the utility company, the service provider). According to the government's announcements, this will be assumed without further ado in the case of public authorities as creditors. For all other business partners of the landlord, a reasonableness test must be carried out, which can also be reviewed in court.

6. Special rules for leveraged real estate

Special rules apply again with regard to any liabilities of the landlord to banks. Here, relief is **only provided for consumers** (but not for micro-enterprises as in the case of the general "moratorium") by means of legally ordered deferral of interest and repayment of principal and protection against dismissal. However, **landlords are regularly considered to be entrepreneurs**. The landlord therefore remains obliged to pay his annuities as a borrower.

However, the Federal Government may, by means of a statutory order which may only be amended or rejected by the Bundestag, **extend** the facilities previously provided to **SMEs** ("KMU") (i.e. also small and medium-sized enterprises and, in this context, in particular to "housing companies" ("Wohnungsunternehmen")). If it becomes foreseeable in practice that structural imbalances will arise here, it can be assumed that the Federal Government will make use of this authorisation. According to the explanatory memorandum to the Act, however, the **other public assistance offers** for the economy, especially state liquidity assistance, are to be given **priority**.

7. Are changes in the legislative process still to be expected?

Changes are not ruled out, although not particularly likely, after Chancellor Merkel had already declared on Sunday evening, with a view to the cabinet meeting, that the federal government would consult with all government factions and states in advance. In this respect, it is more likely that the "formulation aid" passed by the cabinet will pass through the Bundestag and Bundesrat without any relevant changes.

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