

COVID-19: Crisis-related exclusion of termination right on landlords takes effect

April 2020

On April 1, 2020, an exemption from the landlord's termination right comes into force, which protects tenants against the loss of their apartment or commercial space in the event of late payment of the rent. However, this does not simply lead to a deferral of payment obligations without consequences. Only tenants who actually suffer an acute liquidity shortage due to the pandemic will be protected. In addition, the rent payments remain due and are subject to interest during the period of default. Furthermore, landlords can enforce rental securities. Landlords do not have to accept a simple reference to the pandemic to justify the exemption from their termination right. Rather, tenants must credibly demonstrate the connection between their inability to pay rent and the effects of the COVID-19 pandemic.

The COVID-19-pandemic continues to significantly affect the economic life in Germany. As of 1 April 2020, Article 5 of the Law on Mitigation of the Consequences of the COVID 19 Pandemic in Civil, Insolvency and Criminal Procedure Law (hereinafter "**COVID 19 Pandemic Act**") entered into force, to at least reduce the economic consequences for tenants and leaseholders.

The full wording of the law can be found [here](#).

For tenants and landlords, the temporary exclusion of the termination right for non-payment of rent due for the months of April to June 2020, which has already been widely reported in the press, will be of particular importance. It is stipulated in Art. 240 § 2 para. 1 EGBGB as amended by Art. 5 of the COVID-19 Pandemic-Law

The wording of the new provision is as follows:

- 1) *The landlord may not terminate a lease of land or premises solely on the grounds that the tenant fails to pay the rent in the period from 1 April 2020 to 30 June 2020 despite the fact that it is due, if the failure to pay is due to the effects of the COVID 19 pandemic. The connection between the COVID 19 pandemic and non-payment must be substantiated. Other termination rights remain unaffected.*
- 2) *Paragraph 1 cannot be deviated from to the detriment of the tenant.*
- 3) *Paragraphs 1 and 2 shall apply to usufructuary leases (Pachtverhältnisse) accordingly.*
- 4) *Paragraphs 1 to 3 shall only apply until 30 June 2022.*

What this provision means - and what it does not mean - becomes clear from the reasoning of the act.

First of all: Obligation to pay rent is not affected

The legislator has deliberately not granted the tenant a general right to refuse the payment of the rent going beyond general civil law. However, it is currently intensively being discussed whether the obligation to pay rent can be suspended or at least reduced in accordance with general principles, for example due to a defect in the rented property (*Mangel*), impossibility of granting contractual use (*Unmöglichkeit*) or disruption of the basis of the transaction (*Störung der Geschäftsgrundlage*). The legislator does not comment on this, but assumes that the obligation to pay rent principally remains unaffected. It is to be expected, that this assessment by the legislator will therefore also influence the current discussion on rent reduction possibilities.

However, this explicitly does not mean that there cannot be situations in which the obligation to pay the rent may be suspended or reduced according to the aforementioned general principles of civil law. However, one can very well assume that the requirements for this will be high.

Conditions for the exclusion of termination

The legislator enacted a prohibition on the landlord to terminate the lease agreement due to late payment if (1) there is a connection between the late payment and the COVID 19 pandemic and (2) the late payment is the "sole" reason for the termination.

- So what exactly is the **connection between the delay and the COVID 19 pandemic**? Is the connection already given if the tenant suffers from the general economic consequences of the pandemic? Is it sufficient if the tenant's operations have been shut down due to orders of the public authorities? Admittedly, the wording of the law would allow a simple causal connection to be sufficient.

However, these circumstances initially only indicate an overriding probability that the required connection exists. Only through reading the **reasoning to the draft act** it becomes clear how to establish this connection: the regulation is intended to prevent tenants from having to fear the loss of the rented property if they are temporarily unable to pay the rent on time. As a general principle, the tenant is liable even if he is **not able to pay** his rent due to economic difficulties beyond his responsibility. Only from this principle, and only with regard to the landlord's right of termination, an exception shall be made. If the tenant's non-performance is based on other reasons, for example because he is "unwilling to pay", termination shall not be excluded.

As for commercial lease agreements, the **inability to perform** is likely to be assumed if insolvency (*Zahlungsunfähigkeit*) within the meaning of § 17 the German Insolvency Statute (*Insolvenzordnung - InsO*) applies. Furthermore, in our opinion and within a narrow scope, there are good arguments for holding that threatening insolvency (*drohende Zahlungsunfähigkeit*) of the tenant within the meaning of § 18 InsO also falls within the scope of application of the legal provision if it is imminent in the individual case at very short notice (e.g. in a few weeks, possibly even months). For it seems obvious that also such tenant should be protected, who could still pay his rent in April, but then in May can no longer pay the wages of his employees.

- The non-payment caused by the COVID 19 pandemic must also be the **sole reason** for termination.

Can a default therefore give rise to termination despite the connection with the COVID 19 pandemic, if it only establishes a right of termination together with other circumstances? For example, could the termination be based on the default of the March and April rent?

The wording and the exceptional character of the law argue in favor of actually allowing such a termination. However, § 2 para. 1 sentence 3 of the new Art. 240 EGBGB states that other termination rights shall remain unaffected. Also the purpose of the law may be read in favor of excluding any delay in payment in connection with the COVID 19 pandemic as a basis for termination.

Therefore, a termination which is also based on a default in payment that falls in the period from April to June 2020 is likely to be burdened at least with legal uncertainty.

Credibility of the connection to the COVID 19 pandemic

The connection between the COVID 19 pandemic and the delay only needs to be reasonable demonstrated to the satisfaction of the court (*glaubhaft machen*) according to (§ 294 of the German Civil Procedures Act (*Zivilprozessordnung - ZPO*)). This **reduces the burden of proof** for the tenant who is burdened to supply such evidence. However, this does not mean that the evidence mentioned in the reasoning to the draft bill is always sufficient. For the tenant's credibility can also be shaken by the landlord's counter-statement that the tenant is merely unwilling to pay, for example. Also the landlord must also only demonstrate his counter-statement in a reasonably satisfactory manner.

Temporal Scope

§ 2 para. 4 of the new Art. 240 EGBGB governs the applicability of the provision until **30 June 2022**. This gives tenants two years from 30 June 2020 onwards to compensate for any rental arrear that otherwise allow for a termination of the lease. However, this also means, that after this date landlords can terminate the lease if the tenants have not paid the due receivables.

If the crisis persists, the temporal scope of the provision can be further extended by the Federal Government, which then has the option of extending the exclusion on the termination to also cover rental arrears originating from the period between 1 July 2020 and 30 September 2020 at the latest. In the event of continued impairment an even further **extension** beyond 30 September 2020 is possible.

Contacts



Dr. Martin Haase
Partner, Real Estate
martin.haase@hoganlovells.com



Sabine Adams
Senior Associate, Real Estate
sabine.adams@hoganlovells.com



Maria Weiss
Senior Associate, Litigation
maria.weiss@hoganlovells.com

www.hoganlovells.com

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