COVID-19: Proposed federal act on rent payments during COVID-19 lockdown

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Introduction

To address the legal uncertainty around rent payments for business premises that had to close due to the emergency regulations issued by the Federal Council to combat COVID-19, both the National Council and the Council of States adopted two identical motions during their recent summer session (for further details please see "Legal uncertainty over rent reductions due to COVID-19 remains"). Therefore, the Federal Council was asked to submit a draft act to Parliament reflecting the concerns of the motions.

On 1 July 2020 the Federal Council submitted a preliminary draft federal act on rent payments during the COVID-19 lockdown (Preliminary draft of the Federal Act on Rent and Usufructuary Lease During Business Closures and Restrictions to Combat Coronavirus (COVID-19) (COVID-19 Business Rental Act)) together with an explanatory report and opened the consultation procedure with the cantons, political parties and interested organisations. The shortened consultation procedure will end on 4 August 2020.

The dispatch is intended to be submitted to Parliament in September 2020 so that the proposed act can be discussed as soon as possible.

Key elements of preliminary draft federal act

As essentially required by the two motions, the preliminary draft of the COVID-19 Business Rental Act imposes a rent reduction of 60% on certain rental and usufructuary lease agreements concerning business premises – in particular:

- shops (excluding shops which offer food or objects for daily use);
- restaurants;
- bar establishments, discotheques, nightclubs and erotic establishments;
- entertainment and leisure establishments;
- establishments which provide personal services involving physical contact; and

- healthcare establishments, such as hospitals, clinics and medical and dental practices.

The rent reduction shall apply in the following cases with certain modalities:

- If publicly accessible facilities and businesses had to close to the public due to official measures to combat COVID-19, the rent reduction shall apply during such time.
- If healthcare facilities had to restrict their operations due to official measures to combat COVID-19, the rent reduction shall apply during such time up to a maximum of two months.
- In any case, the rent reduction shall apply only if the regular net rent payment for the concerned business premises does not exceed Sfr20,000 per month.

The applicable rent corresponds to the net rent without ancillary costs and without taking into account turnover- dependent portions of the rent.

If a regular monthly rent payment amounts to between Sfr15,000 and Sfr20,000, each party may waive the act's application.

The act also governs the compensation that may be granted to landlords which suffer from an economic emergency as a result of loss of rent payments due to the act. The confederation shall make available a maximum of Sfr20 million to provide such financial support to landlords.

Finally, the act shall not apply if:

- the parties to a contract have expressly agreed the amount of rent to be paid during the period of closure due to official measures to combat COVID-19; or
- there is a legally binding court decision.

Questionable constitutional basis of act

Understandably, the Federal Council mentions in the explanatory report that it is difficult to identify the constitutional competence to enact the measures requested by the two parliamentary motions (Explanatory report to the preliminary draft of the COVID-19 Business Rental Act, Section 5.1.).

The government's right to issue emergency regulations does not apply to the suggested act. The constitutional competence to issue regulations against abuses in the rental sector is not pertinent. Further, the Federal Council denies the application of the constitutional competence relating to civil law in general. Given the subject matter's close connection with the public law-based mandatory measures to combat COVID-19, applying the general competence to enact civil laws is questionable. This also casts doubt on the legal qualification of the act and its relationship with existing civil law – in particular, substantive tenancy law.

Based on certain economic policy considerations and the requirement to provide support to a large number of affected businesses quickly, the Federal Council considers it reasonable to base the act on the constitutional provision governing economic policy (Article 100 of the Federal Constitution).

While measures of economic policy must, as a general rule, respect the constitutional principle of economic freedom, the Federal Constitution explicitly allows measures in the three classic fields of economic policy activity (ie, money and banking, foreign economic affairs and public finance) (Article 100, Section 3 of the Federal Constitution) to deviate from this principle if necessary.

Based on the history of this constitutional provision, it may be assumed that measures of income policy and pricing, as well as measures to curb the construction industry, are not among the classic fields of activity and are therefore not covered by the aforementioned entitlement to deviate from the principle of economic freedom.

It is difficult to allocate interference with the substantive tenancy law to the aforementioned classic fields of economic policy activity. Rather, such interference might be comparable with measures of income policy and pricing. Rent is the price paid to use certain premises and usually affects the prices of goods and services provided by the tenant. Further, the prevention and combating of unemployment, as referred to in the explanatory report, (Explanatory report, Section 5.1) might be considered a measure of income policy.

Against this background, whether the provision governing economic policy or any other provision of the Federal Constitution may serve as the proper legal basis of the proposed act is questionable. It is also questionable whether the act has a proper legal basis to deviate from the principle of economic freedom and the constitutional property guarantee (Explanatory report, Section 5.1).

Questionable form of act

The Federal Council suggests that the act be declared urgent and submitted to a facultative referendum, and that its validity be limited from 17 March 2020 to 31 December 2022. Declaring the act urgent would allow Parliament to enact it immediately (Article 165, Section 1 of the Federal Constitution).

This suggested approach requires the act to have a proper constitutional basis. A federal act which has no constitutional basis and is declared urgent ceases to apply one year after its adoption by Parliament, unless approved by way of a referendum (Article 165, Section 3 of the Federal Constitution).

As outlined above, the act's constitutional basis is questionable, and even the Federal Council has pointed out that it is difficult to identify the constitutional competence to enact the measures requested by the two parliamentary motions.

In this context, the suggested approach of declaring the act urgent and submitting it only to a facultative referendum is surprising. The same applies to the suggested retroactive effect from 17 March 2020 until the end of 2022, as this exceeds the one-year period during which

Parliament may deviate from the Federal Constitution without an approving referendum.

The act's urgency is also questionable. There is no indication that its purpose cannot be achieved by following the ordinary procedure.

Contrary to the explanatory report (Explanatory report, Section 5.3), the fact that the COVID-19 closures and operating restrictions are still affecting businesses and that many contracting parties have yet to find a solution does not justify enacting the act immediately. Rather, a temporary restriction of landlords' right to terminate a lease due to default of rent payment could ease the situation until the act has followed the ordinary procedure.

Room for improvement of certain provisions

A number of the suggested provisions of the act leave room for improvement.

First, the act's scope of application is vague, which may result in legal uncertainty and discussions among the parties to a lease agreement. Also, a broad scope would lead to a disproportionate restriction on ownership. In the explanatory report, the Federal Council considers the restriction on the property guarantee proportionate because the COVID-19 lockdown was limited to two months (Explanatory report, Section 5.1).

Therefore, the act should explicitly limit its scope to rental payments for business premises that had to close due to the lockdown as of 16 March 2020. The act should apply only to lease agreements that were affected by the emergency regulations to combat COVID-19 that were issued by the Federal Council on 13 March 2020 and subsequently amended (Ordinance on Measures to Combat the Coronavirus (COVID-19) (COVID-19 Ordinance 2), SR 818.101.24).

Any subsequent entire or partial lockdown ordered by the federal or cantonal authorities might be addressed separately and shall not be governed by the act (Explanatory report, Section 1.2.6). Applying the act to such situations would exceed its scope. This would be particularly inappropriate if a tenant will be partly responsible for a future closure of the rented premises because it failed to comply with all applicable rules (eg, by not keeping a complete and correct list of visitors if required).

Second, the act's temporal scope of application to the Spring 2020 lockdown is to be distinguished from the limited validity of the act itself. The act's limited validity until 31 December 2022 may be required to declare the act urgent, but leads to additional legal uncertainty. What will be the legal situation in 2023 if, for whatever reason, disputed issues between contractual parties remain unresolved?

Against this background – and given that, as mentioned above, declaring the act urgent is a questionable approach – the act's validity should not be limited.

Third, each party's right to waive the act's applicability if the monthly rent payment ranges from Sfr15,000 to Sfr20,000 seems strange. As the rent reduction's purpose is to protect small and medium-sized enterprises, it is odd that the other party to a contract, which the act does not intend to protect, may unilaterally waive the act's application for a certain range of rents. To

deviate from dispositive legal provisions usually requires both parties' consent. The opting-out clause should therefore be reconsidered.

Comment

The act, particularly the amount of rent reduction granted, is a political decision. However, the act should have a proper constitutional basis and its form should meet the applicable legal requirements. Whether this is the case is questionable. This is particularly bad given that there will be no constitutional jurisdiction with regard to the act and the courts must apply the act even if it contravenes the Federal Constitution.

With this unclear legal situation, it seems inappropriate to restrict the economic freedom and constitutional property guarantee of a large number of landlords based on the act. If the legislature deems it appropriate to interfere with existing contracts among private parties – and to do so with retroactive effect – it should consider paying the related costs using the state treasury instead of imposing them on private parties.

The act's objectives could arguably be achieved with the existing instruments of rental or contract law (eg, the clausula rebus sic stantibus). However, it is up to the courts and not the legislature to determine whether this is the case.

Finally, certain provisions of the act leave room for improvement – namely, the scope of application should be clear and limited to rental payments for business premises that had to close due to the lockdown as of 16 March 2020.

This article has been published by Michael Lips (Partner) and Andrea Rohrer-Lippuner (Associate) on 24 July 2020 at International Law Office (ILO), London.

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Michael Lips

Partner
Attorney at Law, Dr. iur., LL.M., Certified Specialist SBA Construction & Real Estate Law
Head Real Estate & Environment

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 67
michael.lips@pestalozzilaw.com