



Deloitte Legal Newsflash

Real Estate Team

Retail leases after a year of coronavirus

In more than a year since the pandemic onset, non-essential shops and stores (amongst others) have been forced to close during three distinct periods of time following measures taken by the Government to limit the spread of the coronavirus.

Each Ministerial Decree modulated the lockdown differently but, during these closure periods, tenants of retail premises falling within the scope of the measures were unable to use their rented premises as intended since retail activities require direct contact with the public.

Contacts with the public were temporarily made impossible or, in the context of the Ministerial Decrees of 28 October 2020 and 26 March 2021, limited and regulated.

At the time of writing, shops have all reopened and the hotel and catering sector has partially reopened. However, this does not mean that discussions about rent payment obligations are over.

Major changes in the last closure Decree

The Ministerial Decree of 26 March 2021 provided that non-essential shops were authorised to pursue their activities by setting up a shopping system with prior appointment. This new operating alternative, combined with the other alternatives provided for in October 2020, i.e. deliveries and/or click & collect, allowed tenants to maintain a certain turnover and public presence in their shops.

During this last lockdown period, direct contact with the public remained possible even if limited. This new solution was also easier to implement than the two previous ones as it only required limited logistical resources (appointments could be organised by phone, email etc.).

Rent payments and case law

For the past year, tenants and landlords relied upon various legal grounds in order to either temporarily avoid to pay the rent or respectively deny such requests. Available case law is rather divided since lease disputes are entrusted to the lower civil jurisdiction (*vrederegerecht/justice de paix*) for which case law is less predictable and uniform than with other courts and tribunals.

Force majeure and impossibility of enjoyment

Tenants base their refusal to pay the rent for the duration of their store closure on force majeure, and particularly on Article 1722 of the Civil Code, according to which, if, during the lease term, it is impossible for the tenant to enjoy the premises according to their destination, i.e. direct contact with the public, the tenant may request a rent reduction.

The vast majority of judges recognise that lockdowns constitute a force majeure, but not all of them consider that the use of the rented premises is impossible and/or that the landlord is unable to provide the promised enjoyment of the premises.

Some judges insist that, even when closed to the public, the rented premises can still be used, e.g. to prepare deliveries or take away, which was even more true when shoppers could visit the stores with an appointment. It can be assumed that case law will evolve in this direction.

Abuse of right and execution in good faith

Some tenants also claim abuse of right against their landlords who request rent payment despite the particular lockdown circumstances and the tenant's delicate financial situation. Tenants try to argue that the landlord is exercising his right in a manner that exceeds the limits of the normal exercise of that right or that the execution in good faith of the agreement entails that the landlord should be understanding and accept partial payment.

Several judges validated the abuse of right by the landlord after having refused to enforce force majeure on 1722 CC principles in order to help tenants navigate a difficult financial situation. Other judges pointed out that there is no disproportion between the "advantage" of the landlord and the tenant's "harm" and that the landlord does not have to suffer the financial impact of the measures any more than the tenant.

With the alternatives offered to tenants in terms of operation possibilities, landlords could also argue that a tenant who did not implement them voluntarily increased damage and hence committed an abuse of right or did not execute the agreement in good faith.

Rent adjustments

Since the pandemic situation lasted for more than a year, a new legal ground is now being raised before the judges. Tenants invoke Article 6 of the Retail Leases Act of 30 April 1951, which allows them, at the end of each three-year period, to request rent adjustments provided that, due to new circumstances, the rental value of the premises is at least 15% lower compared to the applicable rent and that these new circumstances have a lasting effect justifying a rent adjustment. Tenants must demonstrate that the normal rental value of the rented building has decreased in a sustainable and continuous (almost permanent) way, i.e. that the coronavirus crisis caused a lasting change in consumer behaviour and, therefore, on the retail value of their premises.

Financial difficulties

It was observed through the available case law that even when judges refused to apply the above mentioned legal grounds, they often agreed to reduce the rent, suspend rental payments or even propose a payment plan due to the difficult financial situation of a tenant (except in specific cases such as when a

tenant was already defaulting payments before the pandemic or when a tenant refused to comply with a payment plan accepted by the landlord).

Legality of the decrees

In its ruling of 30 March 2021, the Brussels Court of First Instance sentenced the Belgian State to end, within 30 days, the illegal situation caused by the Ministerial Decree of 28 October 2020 restricting fundamental freedoms with insufficient legal basis.

If failing to comply within 30 days, the Belgian state faces a penalty of EUR 5,000 per day that this period is exceeded. Without going into further detail, it can be noted that this rather unusual decision of the civil judge, taken in an unprecedented situation, if it does not annul the Decree, provides for compensation in case of noncompliance.

Therefore, in the event that this ruling is not overturned by the Court of Appeal and/or that the Belgian State does not take the necessary measures to remove illegality, this judgment could pave the way for many plaintiffs who feel impacted by the Government measures to seek compensation. For example, tenants who have lost turnover or landlords whose rents have not been paid could take action against the Belgian State in order to be compensated for the damages suffered.

As expected, the Government appealed against the judgment to the Brussels Court of Appeal. The court will issue its decision early June. It will be very interesting to see how things will develop. In the meantime, a “pandemic law” allowing the Parliament to ratify such restrictive measures is being drafted.

Conclusion

The coronavirus crisis, which we hoped would last only a few weeks or months, has been going on for over a year. The financial situation of several sectors, such as entertainment, hospitality, personal services and retail, is deeply impacted. The retail sector was able to benefit from more flexible measures as of the second and third lockdowns, enabling tenants to maintain a certain level of turnover. Finances of tenants but also of landlords, who remain confronted with financial and other fixed costs related to their real estate, are in a precarious state and depend on Government measures. Regardless of the legal grounds chosen, it can be observed that judges are not ignoring this situation and try to help parties in dire situations, more often tenants.

Contacts

If you have any questions concerning the items in this newsflash, please get in touch with your usual Deloitte Legal - *Lawyers* contact at our office in Belgium or:

- [mvanwerve@deloitte.com](mailto:mvandewerve@deloitte.com), + 32 2 800 71 73
- jucollin@deloitte.com, +32 2 800 70 14
- lcarmans@deloitte.com, + 32 2 800 71 33

For general inquiries, please contact:

bedeloittelegal@deloitte.com, + 32 2 800 70 00

Be sure to visit us at our website: <http://www.deloittelegal.be>

As a top legal practice in Belgium, Deloitte Legal - *Lawyers* is a full service business law firm, highly recommended by the most authoritative legal guides. Deloitte Legal - *Lawyers* is based in Zaventem, Watermael-Boitsfort, Antwerp, Ghent and Kortrijk. It consists of close to 150 highly qualified Bar-admitted lawyers. Deloitte Legal - *Lawyers* offers expert advice in the fields of banking & finance, commercial, corporate/M&A, employment, IT/IP, public/administrative, insolvency and reorganisations, real estate, EU law, tax law, tax & legal services for high-net-worth families & individuals (Greenille Private Client) and dispute resolution. Whenever required to ensure a seamless and comprehensive high-quality service, Deloitte Legal - *Lawyers* collaborates closely with other professions (e.g. tax, financial advisory, accountancy, consulting), and with a select group of law firms all over the world.

Deloitte Legal - *Lawyers* provides thorough and practical solutions tailored to the needs of clients ranging from multinational companies, national large and medium-sized enterprises, financial institutions, government bodies to private clients.

More information: www.deloittelegal.be

© 2021, Deloitte Legal – *Lawyers* - The content and layout of this communication are the copyright of Deloitte Legal – *Lawyers* or its contributors, and are protected under copyright and other relevant and intellectual property rights laws and regulations. No reproduction in any form or through any medium is allowed without the explicit consent of Deloitte Legal – *Lawyers* or its contributors.

[Subscribe](#) | [Unsubscribe](#)