



# Business leases and the relief package



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## The Danish relief package - a broad outline

On 2 April 2020, the Danish Parliament adopted the long-awaited relief package for business enterprises, business lessees included. The relief package provides measures to cover fixed costs paid in Denmark such as rent, including operating expenses and other mandatory payments in addition to the rent. In the relief package, the necessary maintenance of operating equipment and business premises are also included.

Please note that income, if any, from subletting must be deducted before the rent calculation is prepared.

Respite arrangements do not preclude the option of compensation, but rent rebates and temporary rent reductions in terms of waiver of rent, not respite, during the compensation period will affect the amount of the fixed costs of rent. The issue is less clear regarding marketing contribution, which strictly speaking is an income. The Executive Order on the relief package states that no compensation will be provided for fixed costs, e.g. rent, that are compensated for in other ways. As a result, it would be a good idea to be vigilant about marketing contribution from a lessor if such contribution is coupled with an application for support under the relief package in respect of the invoiced rent.

The compensation scheme is in force during the period from 9 March until 8 June 2020.

Generally, the scheme applies to any business lessee, however the compensation amounts may differ depending on whether the business lessee in question has been ordered to close or not, and some business lessees might be in a midstream where they have not been ordered to close but ordered to restrict their activities - in the following "the activity-restricted lessees". In addition, business lessees having fixed costs (including other fixed costs) of less than DKK 25,000 pertaining to the above-mentioned period are not covered

under the scheme. This may pose challenges for small business premises outside urban districts or in marginal locations etc.

Furthermore, the maximum limit of the compensation amount is the nominal revenue decrease.

The compensation is based on a requirement of documentation for a revenue decrease **in Denmark** for the enterprises **not ordered to close** and enterprises comprised by the above-mentioned "activity-restricted" category. The revenue decrease must be documented and generally have reference to the revenue for the period 1 April - 30 June 2019. Options for other reference figures are open to enterprises having no revenue pertaining to this reference period, e.g. start-ups.

Enterprises **having been ordered to close** will get a 100 % compensation to cover the rent for the period of the ordered closure, provided that they have had no revenue pertaining to this period. As for the other parts of the period, these enterprises will for the remaining period until 8 June 2020 be comprised by the scheme for enterprises not ordered to close.

An application must include a statement of the paid fixed costs - rent etc. - for the period 1 December 2019 - 29 February 2020 and a statement of the expected fixed costs for the compensation period (9 March - 8 June 2020).

The scheme includes a control option, a requirement of repayment of any excess compensation received and a compensation adjustment option, and it is a requirement that the application be certified by an auditor.

### **Business lessees not ordered to close**

With the exception of the business lessees having been ordered to close, the compensation is - with one modification - adjusted according to the percentage revenue decrease and split into three categories:

- 80 % if the percentage revenue decrease is between 80 and 100 %
- 50 % if the percentage revenue decrease is between 60 and 80 %
- 25 % if the percentage revenue decrease is between 40 and 60 %

Thus, full compensation is not provided to business lessees not ordered to close, and in the event of a revenue decrease below 40%, no compensation will be provided.

A business lessee not ordered to close is precluded from raising any claim against its lessor, unless the lease agreement provides for special rights in addition to the provisions stipulated in the Danish Business Lease Act. In this case, the parties to the business lease agreement need to reach a balanced arrangement. Should both parties so wish, for instance due to mutual commercial interests, the possibility that the lessee may obtain compensation under the relief package could be considered.

### **"Activity-restricted" business lessees**

Restaurants with the possibility to sell take-away food and beverages are comprised by the part of the relief package applying to the business lessees not ordered to close.

This also applies to dentists and other healthcare providers that may provide critical treatments but who are otherwise subject to restrictions.

One additional issue to be considered by these business lessees is whether they may demand from their lessors rent reduction for the part of the rent for which no compensation is provided under the relief package by referring to section 23(2) of the Business Lease Act. This is still unclear and subject to uncertainty. Furthermore, in many cases, relatively small amounts will be at stake and not justify a conflict between the parties to the business lease agreement.

Some business lessees may run their business activities from more than one site, and where some business sites have been ordered to close - e.g. a shop in a shopping centre - some have not. The activities of these business lessees seem, according to the wording of the Executive Order, to be subject to assessment collectively and according to the rules on compensation for the business lessees not ordered to close.

### **Business lessees ordered to close**

To the business lessees ordered to close completely, the relief package provides 100 % compensation to cover the rent during the period where they have been ordered to close pursuant to the Executive Order.

As regards the lessees ordered to close, the relief package does not state whether the compensation depends on whether the business lessee is entitled to demand a rent reduction pursuant to either the Business Lease Act or an agreement with the lessor. This is deemed to be of no importance to the possibility for compensation.

If, however, a business lessee has received a rent reduction for the compensation period, then this reduction must be taken into account when the expected fixed costs regarding rent are to be determined.

Furthermore, please note that a lawsuit will be costly, that the situation is an emergency, and that the relief package may either preclude or restrict the possibility or desire for disputing over rights and obligations concerning a business lease agreement or section 23(2) of the Business Lease Act.

Therefore, a commercial-oriented agreement between the parties to a business lease agreement which takes the compensation possibility more or less into account may be relevant, as is the case with the business lessees not ordered to close.

Such agreements have already been concluded by a number of parties to business lease agreements, however many of them have also awaited the final contents of the relief package.

### **Liquidity**

As the relief package requires an application, certification by an auditor, documentation, and some processing time, it is also important to emphasise that the relief package does not necessarily contribute to solving the here-and-now problem - the lack of available funds.

As a result, it may still be relevant for the parties to a business lease agreement to find a solution that takes the ongoing situation and the after-effects of COVID-19 into account.

## **Agreements**

As business lease agreements may differ, and since the contents of the relief package and its consequences may not all have been fully clarified, it is important to take gentle steps and furthermore to keep in mind that the lessor and the lessee should not end up as losers in any agreement.

There are several relevant issues to include in an agreement between the parties to a business lease agreement. Rent reduction and respite arrangements are the most frequently applied measures, however, extended notice periods, non-terminability and temporary revenue-based rent and a certain revenue loss, etc., may also be relevant in order to create at least some equilibrium of the agreement and to make the agreement appear as part of a permanent contractual relation.

## **Special situations and factors**

The individual situations may well differ quite a deal from each other, and multi-faceted assessments are therefore required.

For instance, the fact that a party is either a lessee and a sub-lessor or a business lessee and a business sub-lessor at the same time may give rise to some special issues.

This also applies to a franchise relationship, where the use of premises and situations of revenue-related rent are factors.

For parties to a business lease agreement who have already concluded an agreement, questions as to the relief packages are likely to occur.

## **Our business-lease lawyers**

In DLA Piper, we are well equipped to help distressed lessors and lessees find effective solutions. We've been there before - for instance in the wake of the credit crunch and during the general financial crisis of the 1990s. For clients, e.g. shop chains which also operate on an international scale, advice is also provided on lease issues in other countries confronted by the same COVID-19 challenges as in Denmark.

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