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## News Alert

# Governmental measures to address the impact of COVID-19 on commercial lease agreements in the main Continental European jurisdictions

July 2020

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## OVERVIEW

		GERMANY	FRANCE	ITALY	PORTUGAL	SPAIN
Specific COVID-19 regulation	Waiver of rent					
	Moratorium of rent					
Other grounds for	Termination					
	Adjustment					



Not possible



Possible



To analyse on a case-by-case basis

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## FRANCE

### SPECIFIC REGULATION

- [Ordinance n°2020-316, dated March 25, 2020](#), relating to payment of rent, water, gas and electricity bills relating to the business premises of companies whose activity is affected by the spread of the COVID-19 epidemic.

If a tenant fails to pay rent or service expenses, the landlord cannot impose a penalty (for example, financial penalties, late penalties or termination of the lease agreement). This applies to rent payments due from March 12, 2020 until two months after the end of the state of emergency, i.e., until September 10, 2020.

This ordinance only applies to natural and legal persons governed by private law, which qualify as French residents for tax purposes, exercising an economic activity and meeting the following requirements:

- Not being under compulsory liquidation on March 1, 2020, employing up to 10 people, and with an annual turnover for the last financial year of less than €1 million.
  - Not benefitting on March 1, 2020, from a full-time employment agreement or old-age pension and not having benefited from social security payments of more than €800 between March 1, 2020, and March 31, 2020.
  - For associations, being subject to income taxes or employing at least one person,
  - Not being controlled by a commercial company within the meaning of article L. 233-3 of the French Commercial Code.
  - Having been prohibited to remain open to the public between March 1, 2020, and March 31, 2020, or having a turnover loss of at least 50% during this period.
- [Ordinance n°2020-306, dated March 25, 2020](#), on the extension of time limits during the period of public health emergencies and the adaptation of procedures during that period

Extensions of various deadlines and measures including legal actions, filings, sanctions, and penalty and termination clauses. Applicable to various deadlines and measures:

- Any legal action, recourse, formality, filing or notice required by law or regulation under nullity, sanction, expiry of statute of limitations, which should have been executed between March 12 and June 23, 2020, will be deemed executed on time after such period, within the postponed legal or regulatory time limit (which will not exceed two months).
- Penalty clauses or termination clauses sanctioning the non-fulfilment of obligations within a certain time limit are deemed not to have effect if this time limit has expired between March 12, 2020, and June 23, 2020. Their effects are postponed until after June 23, 2020.
- The effects of penalty clauses or termination clauses sanctioning the non-fulfilment of obligations within a certain time limit, expiring after June 23, 2020, are postponed for a period equal to that between March 12, 2020 (or the date on which the obligation has arisen if this is later), and June 23, 2020 (except for monetary obligations).

- **Tax incentive for landlords to waive rent:** The second Amending Finance Law 2020 allows landlords to deduct the loss resulting from a rent waiver from their taxable profits without having a commercial reason. This is to encourage landlords to help tenants reduce their indebtedness and enable them to resume work in better conditions after the health crisis. This measure thus broadens the tax deductibility of rent waivers landlords grant to their tenants, as landlords do not have to justify a particular interest (for example, a commercial interest).

For a tenant, a rent waiver gives rise to a taxable profit. However, this amendment also provides for a temporary increase (under the conditions in Article 209, I paragraph 4 of the French Tax Code (*Code général des impôts*)) in the capacity to carry forward tax losses. The standard €1,000,000 threshold is increased for a tenant who has been granted a waiver, by an amount equal to the amount of rent waived.

- This relief covers waivers that relate both to rent taxed as property income (bare rental) or non-commercial profits (subletting), for individuals; and rent subject to corporate income tax, for companies.

Several conditions must be met to benefit from this:

- The tenant must be a business.
- The landlord and the tenant cannot be related entities within the meaning of Article 39, 12 of the French Tax Code (*Code général des impôts*).
- If the tenant's business is operated by a landlord's relative in the ascending or descending line or a member of his/her household, the landlord must be able to cover the tenant's cash-flow difficulties.

This incentive applies to rent waivers granted between April 15, 2020, and December 31, 2020.

## GROUPS FOR TERMINATION OR ADJUSTMENT

- **Relevant force majeure rights:** There are no specific changes to force majeure provisions (Article 1218 of the French Civil Code). Force majeure is characterized as an event that prevents the debtor from carrying out its obligation because (a) it is beyond the debtor's control, (b) it could not have reasonably been foreseen when entering into the agreement, and (c) its effects cannot be avoided by appropriate measures.
  - If the impediment is temporary, the performance of the obligation is suspended, except if the delay resulting from it justifies termination of the agreement.
  - If the impediment is definitive, the agreement is deemed terminated and the parties are released from their obligations.
  - The governmental or municipal measures against COVID-19 could constitute force majeure. These will be assessed on a case-by-case basis.
- **Unforeseeable mechanism ("*Imprévision*"):** There are no specific changes to unforeseeable mechanism provisions (Article 1195 of the French Civil Code). *Imprévision* is characterized when "*if a change in circumstances unforeseeable at the time of entering into the contract makes performance excessively onerous for a party who had not agreed to assume the risk, that party may ask the other party to renegotiate the contract.*"

- Unforeseeable mechanism only applies to contracts entered into or renewed after October 1, 2016. It only applies if the parties have not excluded it expressly in a contract.
- The difference with force majeure is that force majeure renders performance of the obligation impossible, but an unforeseeable changes in circumstances renders performance of the obligation excessively onerous (but performance is possible), as regards obligations to pay a sum of money, where the sums to be paid substantially exceed the debtor's ability to pay or where the reciprocal performance of the contract becomes manifestly unbalanced.
- When the conditions are met, the process of adapting the contract takes place in three phases. First, the disadvantaged party may ask the other party, who is not obliged to accept, to renegotiate the contract. During the renegotiation process, there is no suspension of the performance of contractual obligations. Second, if the renegotiation is refused or fails, the parties may agree to terminate the contract, on the date and under the conditions they decide, or ask the judge by mutual agreement to adapt it. Finally, if no agreement is reached within a reasonable time, the court may, at the request of a party, review or terminate the contract on the date and under the conditions set out in the contract. This mechanism makes it possible to strongly influence, or even force, the other party to renegotiate the contract and reach an agreement, under the "threat" that in the end it will be the judge who adapts it. The parties to a commercial lease may renegotiate the content of the contract to postpone or suspend the payment of rent or temporarily modify mounts.

## **NON-BINDING INDUSTRY RECOMMENDATIONS**

- French landlord associations have recommended the following measures:
  - Monthly payment of rent and service expenses rather than quarterly and in advance.
  - Suspension of rent and service expenses collection from April 1, 2020, for the whole lockdown.
  - At the end of the lockdown, the rent and service expenses will be subject to deferred or staggered payment without penalties or interest, adapted to each company's situation.

Eligibility and scope:

  - Very small businesses, i.e., those employing less than 10 people and whose annual turnover or total balance sheet is less than €1 million.
  - SMEs (in French, "PME"), i.e., those employing less than 250 people and whose annual turnover or total balance sheet is less than €43 million.
- Concerning medium-sized companies, the Minister has appointed a mediator, Mrs Jeanne-Marie Prost (Senior Counsellor at the Court of Auditors) to find a solution for relations between large landlords and large tenants.

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## GERMANY

### SPECIFIC REGULATIONS

- Act to Mitigate the Consequences of the COVID-19 Pandemic under Civil, Insolvency and Criminal Procedure Law
  - Landlords are not permitted to terminate land, commercial, residential or usufructuary leases because the tenant does not make rental payments in the period between April 1, 2020, and June 30, 2020 (which, although rather unlikely, in general may be extended until September 30, 2020), even if due, when non-payment is due to the effects of the COVID-19 pandemic. Reasons for not making payments that are not based on the COVID-19 pandemic do not suspend the landlords' termination rights.
  - The link between the COVID-19 pandemic and non-payment of the rent must be proved. The tenant must show that its failure to pay is based on the COVID-19 pandemic. Commercial tenants can usually prove this by stating that the operation of their businesses was prohibited or significantly restricted as a result of legal regulations or orders by the competent authorities imposed to contain the pandemic.
  - Other termination rights not connected to default in payment of the rent due to the effects of the COVID-19 pandemic (for example, due to the tenant's serious breach of the contractually agreed duties) remain unaffected.
  - Since the tenants' obligation to make rental payments continues to exist, default interest accrues on the unpaid rent. We assume that rent securities can be drawn for due rent that remains unpaid. Whether the fact that a tenant fails to provide a renewed rent security (if due under the contract) results in a separate termination right of the landlord, is unclear.

### GROUNDINGS FOR TERMINATION OR ADJUSTMENT

- Unless expressly agreed in the lease, there are no statutory provisions granting a special termination right due to the COVID-19 pandemic.
- There are no statutory force majeure rights in the narrower sense. However, tenants may argue that circumstances like the COVID-19 pandemic and the measures implemented to contain the pandemic, in particular store closures ordered by the government, may be deemed an "interference with the basis of the contract."
- Therefore, tenants may be entitled to request an adjustment of the rent under their lease agreements for the period of the ordered closures. Available case law suggests that the consequences of the closures might be equally shared between the parties, which would mean a 50% rent reduction for the period in which the business operations are impossible due to COVID-19 containment measures. It is, however, uncertain whether courts will allow this adjustment as the legislator has opted for the above-mentioned restrictions of termination rights, leaving the obligation to pay rent unchanged.

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## ITALY

### SPECIFIC REGULATIONS

- Law Decree n°18 of March 17, 2020 (incorporated with Law n°27 of April 24, 2020) setting forth urgent regulations to contain the impacts of the health emergency on the Italian economy
  - **Tax credit in favour of retail tenants:** Tenants renting real estate assets falling under cadastral category “C1” (which is the most common category for retail buildings/units) benefit from a tax credit equal to 60% of the rent paid for March 2020. This can be used to offset certain taxes under Article 17 of Legislative Decree no. 241 of 1997 (e.g., corporate income tax (*IRES*), regional tax on productive activities (*IRAP*), municipal property tax (*IMU*) or waste tax (*TARI*)). Alternatively, the tax credit may be assigned to third parties, including credit institutions and other financial intermediaries (as provided under Law Decree n°34 of May 19, 2020, yet to be incorporated into law). It does not apply to tenants carrying out activities exempt from the lockdown (e.g., supermarkets, food shops, newsstands, pharmacies, laundrettes, tobacco shops and pet shops).
  - **Delay or failure to fulfil contractual obligations due to compliance with the health emergency regulations:** Under article n°91 of Law Decree n°18, of March 17, 2020, a party’s compliance with the Italian government’s regulations to contain the health emergency has to be considered when evaluating its contractual liability. Although the scope of this provision is debatable, tenants could use it to claim that default interest is not due on late payments.
- Law Decree n°34, of May 19, 2020, establishing further urgent regulations to contain the impact of the health emergency on the Italian economy (subject to incorporation into law. Law Decrees enter into force immediately after publication in the Official Gazette of the Italian Republic, but their effects are provisional until Parliament converts them into law within 60 days of their publication).
  - **Tax credit in favour of tenants:** Tenants renting real estate assets for industrial, commercial, artisanal, agricultural, professional and tourist activities (*attività di interesse turistico*), or businesses comprising one of the above-mentioned real estate assets, benefit from a tax credit equal, respectively, to (i) 60% of the rent paid for March, April and May 2020, for asset leases, and (ii) 30% of the rent paid for March, April and May 2020, for business leases (which is the most common contract type used in shopping centers). For seasonal tourist accommodation facilities, the tax credit is calculated with reference to the rent paid for April, May and June 2020.

To be eligible for the tax credit, a tenant must meet the following requirements:

- Have a turnover not exceeding €5 million in the 2019 tax year. This requirement does not apply to hotel and agritourism operators.
- Its turnover in the relevant 2020 reference month has decreased by at least 50% compared to the turnover of the same month during the 2019 tax year.

This tax credit can be used in the tax return for the tax period in which the expenditure is incurred or offset against other taxes, under Article 17 of Legislative Decree No 241, of July 9, 1997 (e.g., corporate income tax (*IRES*), regional tax on productive activities (*IRAP*), municipal property tax (*IMU*) or waste tax (*TARI*)), after payment of the rent. Alternatively, the credit may be assigned to third parties, including credit institutions and other financial intermediaries (who can use it in their own tax return, offset it with other taxes or re-assess it, with certain limits).

The tax authorities have clarified that the tenant may assign the tax credit to its lessor, as partial payment of the rent; if so, the tenant should pay the difference between the rent due and the tax credit assigned.

The tax credit established under Law Decree 34/2020 cannot be used jointly with that established under Law Decree 18/2020.

- **Exemptions from certain property taxes for the tourism sector:** The first instalment of IMU (municipal property tax) for 2020, normally paid by June 16, 2020, is not due on: (i) hotels, agritourism facilities and other tourist accommodation facilities specifically identified in Law Decree 34/2020, owned by the related operators, and (ii) beach clubs and spas.
- **Rent reduction for tenants of private gyms, swimming pools and sports facilities:** Law Decree 34/2020 states explicitly that the suspension of sports activities required under the COVID-19 regulations affects the contractual balance of lease agreements of private gyms, swimming pools and sports facilities, and provides for the tenants' right to obtain a corresponding rent reduction for the period between March and July 2020. This reduction, unless the party concerned proves otherwise, is assumed to be equal to 50% of the contractually agreed rent.

## **GROUNDS FOR TERMINATION OR ADJUSTMENT**

- **Termination right for serious grounds**
  - Article 27, paragraph 8 of Law no. 392, of July 27, 1978 (Italian Tenants Act), grants the tenant the right to terminate the lease for serious reasons. The serious reasons must lie in unpredictable events that occurred after the lease contract was entered into and during it.
  - The qualification of the current health emergency and the restrictive measures on business as serious reasons to terminate the lease must be assessed on a case-by-case basis, as serious reasons are not meant to be temporary constraints on the business, but rather circumstances worsening the financial situation of the lessee's business in the long-term (also taking into account the remaining contractual period).
- **Termination right due to supervened excessive onerousness**
  - Under Article 1467 of the Italian Civil Code, if extraordinary and unpredictable events make performance by one of the contractual parties excessively onerous, this party can claim for termination of the contract. According to case law, a contract is terminated for this reason if extraordinary and unpredictable events happen during it, which go beyond the normal contractual risks, thus causing an imbalance of the obligations.
  - The party against which the termination is claimed can avoid it by offering to modify the conditions of the contract to restore its balance.
- **Grounds for adjustments based on general principles of Italian law**
  - Although an "adjustment remedy" is not expressly provided for by law, tenants are using certain general principles of Italian law to argue that, due to the pandemic, the rent must be reduced or even waived. The most common arguments are indicated below:

- Temporary impossibility to enjoy the leased premises (Article 1464 of the Italian Civil Code).
  - Obligation of fair dealing (Article 1175 of the Italian Civil Code).
  - The temporary impossibility of using the leased premises for commercial purposes, during the time in which the restrictive measures imposed by the government apply, makes it impossible (limited to the validity period of these measures) to meet the purpose for which the contract was entered into: the use of the premises for the commercial activity, for the entire duration of the lease.
- **Case law**
    - **Decision on rent waiver/reduction:** No court decision has been issued yet on requests for rent waivers/reduction or termination of lease contracts.
    - **Precautionary measures (*provvedimenti d'urgenza*) in relation to the enforcement of bank guarantees/cheques and bills securing the payment of rents:** There is a trend favourable to tenants regarding precautionary measures (*provvedimenti d'urgenza*) adopted by courts when faced with landlords' enforcement of bank guarantees / cheques and bills (Court of Venice, decrees of April 14, 2020 and May 22, 2020; Court of Bologna decree of May 12, 2020; Court of Rimini, decree of May 25, 2020; and Court of Genoa, decree of June 1, 2020). It is worth noticing that, the Court of Rome decree of May 29, 2020 provides for the right of the landlord to enforce a bank guarantee but contains an obiter dictum according to which the tenant would be entitled to a 70% reduction of the rent during the period from March 11 to May 18, 2020.

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## PORTUGAL

### SPECIFIC REGULATIONS

- [Law no. 4-C/2020, of April 6](#) (amended by Law no. 17/2020, of May 29) sets forth an exceptional moratorium regime
- Law no. 4-C/2020 entitles non-residential tenants to defer their rent payment obligations for rent due during the period in which their activity was forced to close or was suspended (starting on April 1, 2020) under legislation enacted to contain the COVID-19 outbreak or any administrative act issued during this period, as well as in the month following revocation of the suspension, provided the deferral does not apply to rent due after September 1, 2020.
- To benefit from this regime, non-residential tenants whose activity has been mandatorily closed or suspended during this period must notify their landlord of their intention to defer their rent payment obligations.
- Any amounts deferred must be settled in equal monthly installments by June 2021. The first installment will be due on (i) the second month after the end of the relevant suspension period; or (ii) September 1, 2020, whichever is earlier.
- The moratorium only allows tenants to defer the payment of rent; it does not cover other expenses due under the lease, such as service charges.
- During the period in which the moratorium applies, the landlord will not be entitled to (i) terminate the lease agreement for failure to pay the rent, or (ii) apply late payment penalties.
- [Law no. 1-A/2020, of March 19](#) (amended by Law no. 16/2020, of May 29) suspends the effects of the termination of lease agreements.
- Until September 30, 2020, the effects of early termination or opposition to renewal notice served by the landlord, as well as revocation and expiry of lease agreements, are suspended unless the tenant agrees otherwise.
- Under Law no. 1-A/2020, the landlord is prevented from terminating non-residential lease agreements on the grounds of the closure or suspension of activity of commercial premises resulting from any legislation enacted to implement the state of emergency or the state of public calamity.

### GROUND FOR TERMINATION OR ADJUSTMENT

- The approval of the moratorium regime described above does not exclude the possibility of tenants relying on other legal or contractual remedies to try to reduce their rent, modify their contract or potentially terminate it. Tenants may argue that the COVID-19 outbreak (or the government's restrictive measures) constitute (i) grounds for a reduction of the rent under Article 1040 of the Portuguese Civil Code; or (ii) an extraordinary change of circumstances that entitles them to modify their lease agreement to restore the respective economical balance or to terminate it.
- [Article 1040 of the Portuguese Civil Code](#): Under this legal provision applicable to lease agreements, tenants may benefit from a rent reduction if, for reasons not attributable to them, they

are deprived from the normal use of their leased premises for a period that exceeds 1/6 of the duration of their lease agreement.

Although this remedy can be helpful in short-term leases, tenants with long-term leases are unlikely to meet the conditions to benefit from it.

- Extraordinary change of circumstances: Under article 437 of the Portuguese Civil Code, if the circumstances on which the parties based their decision to enter into the contract suffer a material, adverse and unexpected change, the injured party will have the right to terminate the contract or amend it in a fair manner, if compliance with its obligations is not in line with the bona fide principle and the extraordinary circumstance is not covered by the scope of risks inherent to the agreement.

To benefit from this, tenants must prove that: (a) the COVID-19 outbreak changes the fundamental assumptions or circumstances on which the parties based their decision to enter into the lease agreement; (b) this change was extraordinary, material and unpredictable; (c) it directly affects the existing contractual balance in a way that is not in line with the bona fide principle; (d) it clearly exceeds the scope of risks inherent to the lease agreement; and (e) they were not in arrears with respect to any of their obligations at the time when the change of circumstances occurred.

- We cannot anticipate how courts will react to claims to modify or terminate lease agreements for extraordinary changes of circumstances, particularly in situations where the tenants could have benefited from the government's regulations to deal with the effects of the outbreak, such as the moratorium regime.

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## SPAIN

### SPECIFIC REGULATIONS

- [Royal Decree-Law 15/2020](#) (“RDL 15/2020”).
- Until May 23, tenants who met the requirements of RDL 15/2020 (self-employed workers and SMEs suffering a loss of income of at least 75%) were entitled to ask large real estate holders for a deferral in the payment of rent if they had not already reached such an agreement.
- The deferral will be applied automatically and affect the period of the state of emergency (including its extensions), and the following monthly payments if the impact of COVID-19 continues (which may be extended month by month), but it will not exceed four months.
- The deferred rent must be paid back in instalments within two years from the moment the aforementioned situation or the four months expire, but always within the term of the lease.

### GROUND FOR TERMINATION OR ADJUSTMENT

- Unless otherwise agreed in the lease, tenants of premises where the pandemic is having a larger impact (i.e., premises affected by closure orders or in which the planned activity cannot be carried out because the mandatory measures of prevention and hygiene cannot be met) may argue that the relevant circumstances constitute a (i) force majeure event, or (ii) a basis for redistribution of risks within the contract relying on the *rebus sic stantibus* principle.
  - Force majeure: the coronavirus outbreak may constitute a force majeure event that, depending on the individual circumstances, may (i) excuse the tenant from liability for breach, (ii) discharge the tenant from performing its obligations, or (iii) suspend performance of the tenant’s obligations if its effects are only temporary.
  - *Rebus sic stantibus* principle: if the individual circumstances of the case do not allow the event to be considered force majeure, the tenant could consider the application of the *rebus sic stantibus* principle. Under Spanish law, contracts may be reviewed or terminated where extraordinary changes in the circumstances that existed at the time of signing upset the balance between the contracting parties, making the performance of one party unduly burdensome.
- For commercial leases, despite the fact that the specific features of each case must be analysed on a case-by-case basis, we think the existing uncertainty provides legal leverage for tenants to mitigate rent.

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