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COVID-19: IMPACT ON COMMERCIAL
LEASES REGULATION ACROSS
EUROPE

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INTRODUCTION

3 The COVID-19 outbreak is developing so rapidly that many businesses are struggling to cope with its impact. Europe is now established as the epicentre of the pandemic, and companies across the continent are having to consider what this means for their business. As retail and office closures become widespread, national law and practices have developed in different ways and at different speeds.

11 This briefing provides an overview of the impact of the recently passed regulation on commercial real estate in the listed jurisdictions. It considers the key legal and practical issues which arise in the current climate regarding commercial leases.

AUSTRIA

Jurisdiction	Existing framework	New measures	Applicable general principles of law	Other considerations
AUSTRIA <i>Schoenherr Attorney at Law</i> <i>Michael Lagler, Ayla Ilicali</i> <i>M.Lagler@schoenherr.eu;</i> <i>A.Ilicali@schoenherr.eu</i>	<p>1. No new RE-related laws</p> <p>The newly enacted Austrian laws regarding Covid-19 have <u>not</u> established any new rights for termination and/or rent reduction for commercial lease agreements. Instead, the general civil law regulations already in place for lease agreements are applied. These regulations link both the right of extraordinary termination and the right to a (partial or entire) rent reduction to the tenant's ability to use the leased object for the contractually agreed purpose.</p> <p>Since 16 March 2020 the Austrian Federal Minister of Health has issued several decrees prohibiting inter alia the entrance of "customer areas" of business premises and therefore making such business premises (partially or entirely) unusable. However, it is noteworthy that the usage of office spaces was never generally restricted.</p> <p>.</p> <p>2.2. Relaxations</p> <p>Since 1 May 2020, a decree of the Austrian Federal Minister of Health (BGBl. II 2020/197; "decree 2020/197") stipulates various relaxations of previous lockdown measures. It is no longer generally prohibited to enter "customer areas" of business premises if several restrictions are observed when doing so.</p> <p>Since 15 May 2020 also restaurants may reopen under certain restrictions.</p>	<p>1. Reopening of hotels</p> <p>The Austrian federal government has announced that hotels will be allowed to reopen again on 29 May 2020. However, this announcement has not yet been transferred into law.</p>	<p>1. Tenant's termination right</p> <p>According to section 1117 of the Austrian Civil Code ("ABGB"), the tenant is entitled to terminate the lease prior to the expiry of the agreed term, if the leased object becomes unfit for the agreed purpose without the tenant's fault or if a material part of the leased object becomes useless for a longer period due to coincidence. It does not matter whether the unfitness is the landlord's fault, the mere fact of unfitness is sufficient ground for termination.</p> <p>There is little case law regarding what duration constitutes "a longer period" within the meaning of section 1117 ABGB. However, the Austrian Supreme Court has held that "several weeks" are sufficient to meet the duration requirement. Thus, we believe that a tenant whose store was closed until 1 May 2020 (= 6 weeks), has reasonable chances to be entitled to terminate the lease. It is debatable whether a 4-week-closure (for stores which were allowed to reopen as of 14 April 2020) is sufficient as well. According to case law, a <u>tenant who wishes to terminate</u> its lease based on section 1117 ABGB <u>has to inform the landlord</u> of its decision <u>without undue delay</u> after the event causing the unfitness takes place. Since the duration of the measures was uncertain when they were enacted, it is argued that this period is measured <u>starting with the end of the governmental restrictions</u>.</p> <p>2. Relieve / adjustment of rent payments</p>	<p>1. (No) Compensation</p> <p>The COVID-19 law does not contain any compensation provisions and it states that the provisions of the Austrian Epidemic Act regarding the closure of operating sites do not apply if the Minister of Health issues a decree under the COVID-19 law.</p> <p>The Austrian Epidemic Act stipulates compensation, which is calculated on the basis of the comparable continued economic income (entitlement to loss of earnings), if a business is closed or restricted by official order under the Austrian Epidemic Act. A claim for such compensation must be filed (i.e. the application must be received by the authority) within six weeks of the day of the lifting of the official measures with the district administrative authority in whose area these measures were taken, otherwise the claim expires.</p>

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	<p>3. Continuing prohibitions</p> <p>Under decree 2020/197 it is still generally prohibited to enter both hotels and leisure/recreational facilities with only limited exceptions. Sport facilities may only be entered by non-professional athletes for sport activities in outdoor areas and if a minimum distance vis-à-vis people not living in the same household can be maintained.</p> <p>3. Maximum interest rate; out-of-court collection costs; contractual penalty</p> <p>The interest rate in case of default with any payments (including rent) which are due between 1 April 2020 and 30 June 2020 is limited to 4 % p.a. until 30 June 2022 if the contract was concluded before 1 April 2020 and the default is due to the debtor's economic performance being substantially impaired as a result of the COVID-19 pandemic.</p> <p>Under such circumstances, the debtor is also not obligated (i) to reimburse the creditor for out-of-court collection costs; and (ii) to pay any contractually agreed on penalty for default.</p>		<p>If the leased object becomes unfit for the agreed use due to an extraordinary coincidence, sections 1104 and 1105 ABGB apply. According to section 1104 ABGB, a <u>tenant is not obligated to pay any rent</u> (and presumably - based on case law to related sections of the ABGB - service charges), <u>if the leased object becomes unfit for the agreed use in its entirety</u>. Section 1105 ABGB <u>differentiates</u> between <u>rent (Miete)</u> and <u>commercial lease (Pacht)</u> agreements. According to section 1105 ABGB, a tenant may partially reduce its rent payment, if the leased object is fit for the agreed use to some extent. In such a case, the <u>rent is adjusted in proportion</u> to the fitness for the agreed use. However, in case of <u>partial (un)fitness in a commercial lease agreement</u>, the lessee may <u>only</u> reduce its payments, <u>if the duration</u> of the lease agreement <u>does not exceed one year</u> <u>and the benefits</u> of the leased object <u>are reduced by more than half</u> of the ordinary profit.</p> <p>Thus, if the entering of the business premises of a tenant was or is still prohibited under the decree 2020/197, the tenant is relieved of its duty to pay rent for that period.</p> <p>Both sections 1104 and 1105 ABGB are not mandatory law and therefore could be waived in individual contracts. However, such clauses are extremely uncommon in Austria. Also, if a tenant has undertaken all risks indecisively, only fire and water damages and weather shocks but no other extraordinary events are at his risk.</p>	<p>Although the COVID-19 law states that the provisions of the Austrian Epidemic Act do not apply, in light of the legal uncertainties, the steps necessary to safeguard a claim for compensation should also be taken in cases of doubt. This applies in particular to claims under the Austrian Epidemic Act.</p> <p>2. Government aid</p> <p>The Austrian federal government has enacted or planned several COVID-19 related liquidity measures. These include (i) working capital loans with assumption of liability provided by the Austrian Control Bank (OeKB); (ii) assumption of liability (guarantee) for new bridge financing provided by the Promotional Bank of the Austrian Federal Government (AWS) or by the Austrian Hotel and Tourism Bank (ÖHT); (iii) subsidies (non-repayable) provided by the hardship fund (Härtefonds); and (iv) deferral or an instalment payment of taxes (one may also</p>

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				<p>apply for the deferral interest to be reduced to zero).</p> <p>The Federal Ministry of Finance also authorized ABBAG, a federal company, to take financial measures on behalf of the Federal Minister of Finance in favor of certain companies (in particular with a registered office or permanent establishment in Austria), which are necessary to bridge liquidity difficulties of companies due to COVID-19</p>

FRANCE

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<p>FRANCE <i>Bredin Prat assisted by Lacourte Raquin Tatar Cyrille Bailly bailly@lacourte.com</i></p>	<p>The government introduced a mechanism prohibiting the lessor to apply late penalties and/or to require the termination of the lease if the tenant decides to suspend the payment of the rent and charges due between 12 March 2020 and the expiry of a deadline of two months after termination of the state of public health emergency (ie. two months as from 10 July 2020).</p> <p>To benefit from these measures, the tenants shall meet the restrictive and cumulative following conditions:</p> <ul style="list-style-type: none"> ▪ their workforce is under or equal to 10 employees; ▪ a turnover under one million euros in the last closed financial year. For enterprises not having approved the closed financial year, the monthly turnover shall be under € 83,333 in the period between the date of establishment of the enterprise and 29 February 2020; ▪ when they are constituted as an association, they are subject to business property taxes or employ at least one employee; ▪ they are not controlled by a company according to Article L. 233-3 of the French Commercial Code; ▪ they are : <ul style="list-style-type: none"> (ii) the subject of a prohibition to receive the public between 1st March to 31 March 2020; 	<p>At the present date, no additional measures concerning commercial leases in connection with the Covid-19 outbreak are expected to be approved.</p>	<p>1. Force majeure</p> <p>Force majeure exists in contractual relations when an event beyond the control of the obligor, that could not have reasonably been foreseen upon execution of the contract and the effects of which could not have been avoided through appropriate measures, prevents the obligor from fulfilling its obligation.</p> <p>It is not yet clear whether or not these measures imposed to curb the pandemic's progression can be said to constitute an event of force majeure. It is therefore necessary to verify, in each case, that the qualification criteria briefly reminded above are met.</p> <p>Please note, however, that:</p> <ul style="list-style-type: none"> - force majeure does not release a debtor from any obligation to make monetary payments according to case law currently in force; - the parties to a contract may limit or exclude application of the French Civil code's provisions on force majeure. <p>As the provisions on force majeure do not in principle apply to obligations to make monetary, we consider that tenants may not invoke an event of force majeure to justify any non-payment of rent under a lease.</p> <p>That said, if a tenant has had to close its business further to the Order of 14 March 2020 (Public-access buildings closed to the general public), it could potentially argue that, for the duration of the prohibition, its lessor is unable to fulfil its</p>	<p>A number of lessors' associations and federations issued a joint statement on 20 March 2020. This declaration advocates invoicing rent and service charges on a monthly (rather than quarterly) basis and deferring all payments owed in such respect as from 1 April 2020 for small- and medium-sized enterprises that have had to suspend operations as a result of the government's measures. It also states that lessors should defer or stagger payment of the outstanding rent and service charges once business resumes without applying penalties or late-payment interest.</p> <p>A number of federations representing the lessors called, in a press release dated 17 April 2020, their members to cancel three months' rents for small businesses.</p> <p>Similarly, on 17 April 2020, the Finance Ministry declared during an interview that "<i>the big real estate owners can and</i></p>

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	<p>(iii) or their turnover has been reduced by 50% at least during the period between 1st March 2020 and 31 March 2020,</p> <ul style="list-style-type: none"> - compared to the same period of the previous year; - or, regarding the enterprises established after 1st March 2019, compared to the monthly turnover during the period between the date of establishment and 29 February 2020; - or, regarding natural persons having benefited from a seek leave, industrial accident or maternity leave during the period between 1st March 2019 and 31 March 2019, or for legal entities which manager having benefited from such a leave during this period, compared to the average monthly turnover during the period between 1st April 2019 and 29 February 2020. <p>Please note that the notion of turnover shall correspond to the turnover excluding taxes, or in case the enterprise is subject to the non-commercial profits category it shall correspond to the net revenue excluding taxes</p>		<p>own obligation to ensure peaceable possession of the rented premises and cannot therefore require payment of rent over such period. However, given that the Order of 14 March 2020 specifically refers to the operators of public-access buildings rather than their owners, we are not convinced that this situation would be considered to constitute an event of force majeure.</p> <p>2. Unpredictability (for leases executed as from 1st October 2016 only)</p> <p>If a change in circumstances that was unforeseeable at the time the contract was entered into should render performance of the contract excessively onerous for a party that had not assumed such risk, such party may apply to its counterparty for a renegotiation of the contract.</p> <p>As with force majeure, the question of whether or not the coronavirus pandemic and the French government's measures to curb its spread constitute grounds to claim unpredictability will need to be assessed on a case-by-case basis.</p> <p>However, in light of the impact of the pandemic and particularly of the measures imposed by the government, which have made the continuation of any economic activity very complicated (and in some cases have banned it outright), we believe that it will be easier to claim unpredictability rather than force majeure in many cases. It should therefore be verified in each lease if a waiver of Article 1195 of the French Civil Code is provided.</p>	<p><i>shall do more to help those who are not currently in capacity to pay their rents".</i></p> <p>Please note that the abovementioned declarations are non-binding and simply give the current political tendencies.</p>

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			<p>3. Extension of payment deadlines</p> <p>Tenants could also seek the extension of payment deadlines on the grounds of Article 1343-5 of the French Civil Code, which provides that "<i>the courts may, in light of the debtor's situation and the creditor's needs, order the deferral or staggering of payments over a period of up to two years</i>".</p>	

GERMANY

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GERMANY <i>Hengeler Mueller</i> <i>Daniel Kress</i> <i>Daniel.kress@hengeler.com</i>	<p>The legislator introduced a mandatory moratorium protecting all tenants against the landlord's right to terminate the lease due to payment defaults of the tenant for the period from 1 April to 30 June 2020 (potentially to be extended by a further three months until 30 September 2020 by decree of the Federal Government). The tenant is still in arrears and owes default interest. The tenants have until 30 June 2022 for the settlement of such arrears.</p> <p>To benefit from the moratorium, tenants of commercial properties must be able to substantiate the connection between the COVID-19 pandemic and non-performance, for example by showing that the operation of their business has been prohibited or considerably restricted due to legal ordinance or official order in the context of combating the SARS CoV-2 virus.</p> <p>While the new law does not comment on this, it should be possible under certain circumstances for the landlord to draw on the rental deposit provided by the tenant. In addition, the landlord should also be able to claim the outstanding rent payments from any guarantor under the rental agreement</p>		<p>It is discussed whether general principles of law apply to the COVID-19 situation. In particular, tenant representatives take the view that the lock-down e.g. of retail businesses results in a defect of the leased object which entitles the tenants to abate rent (some argue 50%, others argue 100%).</p> <p>In addition it is discussed whether the concept of frustration of contract would apply to leases leading to similar results.</p> <p>It is expected that this matter will end up being decided by the courts.</p>	<p>Many landlords have agreed not to charge default interest and to contractually defer rental payments.</p> <p>Tenants in particularly affected industries such as retail and hospitality proactively approach their landlords to renegotiate their leases with the argument that they are no longer viable, citing a long term trajectory until their business fully recovers (if at all).</p> <p>Several retailers have already filed for insolvency and use special termination rights available in such situation as a powerful lever for such renegotiations which is further enforced by the comparatively easier redundancy rules which allows tenants to close down non-viable outlets easier and with very limited redundancy payouts.</p> <p>Landlord representatives such as the Zentraler Immobilienausschuss (ZIA) are asking for government subsidy schemes whereby the tenant may</p>

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				reduce rent by 50% and such burden is shared by the landlords and the government.

ITALY

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ITALY BonelliErede Matteo Bonelli Matteo.Bonelli@belex.com	Italian emergency legislation includes <u>no specific provisions</u> entitling tenants to rent discount, suspension of rent instalments or withdrawal from lease agreements due to COVID-9 outbreak (an exception is made for gyms and sport centres as specified below). However, several tax incentives and subsidies are granted for commercial leases. The “Cura Italia” Decree includes the following noteworthy provisions: <ul style="list-style-type: none"> ➤ Art. 65, which grants those who carry out retail and/or F&B activities a tax credit (for 2020) equal to 60% of the rent paid for March 2020. This tax credit, which may be assigned to landlords, is not applicable for tenants that provide essential services (e.g.: pharmacies, para-pharmacies and grocery shops); and ➤ Art. 91, which stipulates that compliance with the decree’s restrictions is to be taken into account for the purpose of excluding debtors’ contractual liability for non-performance of their obligations (also with regard to termination and penalties). It is still unclear whether this provision applies to private agreements (besides public contracts) and whether it entails an automatic exclusion of debtors’ liability or simply lightens the burden of proof for debtors in judicial proceedings. 	No additional measures concerning commercial leases are currently expected.	The following legal principles and related remedies may apply, even if the lease agreement in question does not contain a clause that expressly addresses pandemics or force majeure events. A. Impossibility Art. 1256 of the Italian Civil Code stipulates that a defaulting party to a contract may invoke impossibility to fulfil a contractual obligation if the impossibility: <ul style="list-style-type: none"> - is not due to causes attributable to the defaulting party; - was not foreseeable on the date the agreement was executed; or - is not resolvable through diligent and reasonable efforts. If the impossibility is permanent, the agreement is <u>automatically terminated</u> (a claim seeking termination need not be lodged with a court). If instead the impossibility is temporary, the defaulting party is <u>exempted</u> from contractual liability for delay in performance the duration of the impossibility. However, even in such case, the agreement may be automatically terminated if, in light of its scope and the duration of the impossibility, the non-defaulting party is <u>no longer interested</u> in the counterparty’s performance of the obligation, or the defaulting party can no longer be held bound to perform its obligation. If the defaulting party can perform its obligation only in part, the non-defaulting party’s obligation is <u>reduced proportionally</u> . However, the non-defaulting party may withdraw from the	The application of any legal principle or remedy requires a <u>case-by-case analysis</u> , which must consider the provisions of the lease agreement concerned and the scope of any claims brought by the tenant. A. Impossibility Typical examples of impossibility in the context of lease agreements are <u>natural events</u> (earthquakes, fires, etc.) that prevent the tenant from occupying or using the leased premises in whole or in part. Impossibility may also be caused by <u>legislative measures</u> or <u>orders</u> issued by public authorities. In the past few months, the Italian government has ordered certain facilities (e.g.: restaurants, gyms, theatres, and shopping centres) to shut down to the Covid-19 virus. Affected tenants could thus claim this constitutes an impossibility to carry on their business and, thus, to actually use the leased premises during the closure period. On the other side, landlords could argue that their obligation is limited to ensuring the

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	<p>In addition, the “Rilancio Decree” includes the following noteworthy provisions:</p> <p>Art. 28, which grants those who carry out: (a) business, art or professional activities with less than EUR 5m revenues or fees in FY 2019; and (b) hotel and agritourism activities (regardless of the amount of revenues or fees), a tax credit equal to 60% of the monthly rent paid in FY 2020 for March, April and May (except for tourist entrepreneurs with only seasonal activities, for which the relevant months are April, May and June). <u>Only</u> tenants that have suffered at least a 50% decrease in turnover (or fees) in the relevant months compared to the same months of the previous year are entitled to this measure.</p> <p>This tax credit, which may be assigned to landlords, cannot be combined with the tax credit provided by Art. 65 of the “Cura Italia” Decree;</p> <ul style="list-style-type: none"> ➤ Art. 120, which grants those who carry out hotel, F&B and cinemas activities, a tax credit equal to 60% of the expenses incurred in 2020 (up to EUR 80k) to make the premises compliant with the health regulations to prevent the spread of COVID-19; ➤ Art. 125, which grants companies, sole entrepreneurs and professionals, a tax credit equal to 60% of the expenses incurred in 2020 (up to EUR 60k) for sanitation activities within the premises and purchase of protective equipment 		<p>agreement if it is not reasonably interested in partial performance.</p> <p>B. Excessive onerousness</p> <p>The Italian Civil Code sets out a remedy that applies if, following execution of the agreement, certain events occur that materially affect the contractual equilibrium.</p> <p>Art. 1467 stipulates that if one party’s obligation becomes excessively onerous due to <u>extraordinary and unforeseeable events</u>, the party bound to that performance may demand termination of the agreement.</p> <p>In that regard:</p> <ul style="list-style-type: none"> - the excessive onerousness must exceed the normal level of business risk related to the contractual obligation concerned; - the termination of the agreement is not automatic but must be claimed before the competent court; - the party against which termination is demanded can avoid termination by offering to equitably amend the agreement’s terms and conditions; and - this remedy never applies to aleatory agreements (e.g. insurance contracts or agreements in which the parties have expressly waived the Italian Civil Code’s provision on excessive onerousness). <p>C. Withdrawal for serious reasons</p> <p>Under Art. 27, para. 8, of Law 392/1978 (“Italian Tenancy Law”), the tenant has a <u>statutory right</u> (which applies even if not envisaged under the lease agreement) to withdraw from the lease agreement if <u>serious reasons</u> occur, subject to at least six months’ written notice. Tenants who have an annual rent</p>	<p>(formal) availability of the premises for their authorised use, regardless of whether it is possible for the tenant to actually carry on its business there.</p> <ul style="list-style-type: none"> ❖ It will be easier for tenants to claim a suspension/reduction of rent if the lease agreement concerns activities which have been suspended (retail, restaurants, etc.). ❖ Tenants will have more difficulty grounding such a claim if the agreement concerns non-suspended activities (e.g., offices), as no legal restrictions have prevented business from carrying on. ❖ Hotel leases are a more complex case, as the activity has not been per se restricted (save for restrictions applicable to hotel restaurants). Nevertheless, travel restrictions had an immediate and drastic impact on the business, especially for tourist hotels, and these restrictions’ effects are somewhat similar to those of a legal prohibition on the activity. <p>B. Excessive onerousness</p> <p>Extraordinary and unforeseeable events, such as the <u>Covid-19 pandemic</u> and the public authorities’ related restrictions,</p>

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	<p>(e.g.: barriers and protective panels); Art. 181, which exempts those who carry out F&B activities from paying - from 1 May to October 2020 - taxes for occupying public areas (e.g. to place tables and chairs for clients); and</p> <p>➤ Art. 216, para. 3, which entitles tenants of gyms, swimming pools and sports centres to a 50% reduction of the rent due from March to July 2020.</p>		<p>exceeding EUR 250,000 may lawfully waive this right in lease agreements.</p> <p>Under the prevailing caselaw, serious reasons are events that:</p> <ul style="list-style-type: none"> - are beyond the tenant's control; - were unforeseeable at the time the lease agreement was executed; and - make it extremely burdensome for the tenant to carry on performance of the lease agreement. <p>Typically, Italian courts take <u>quite a conservative approach</u> and allow the application of Art. 27 only in very exceptional circumstances, such as the enactment of new laws that make it very unprofitable for the tenant to continue with the lease, or a negative or positive market trend in the tenant's sector that requires a general restructuring of its activities.</p>	<p>could detrimentally affect a lease agreement's original economic assessment agreed by the parties – primarily on the calculation and estimate of the rent due by the tenant.</p> <p>The turnover of certain businesses (e.g., hotels) is materially affected by a large decrease in guests; it is thus impossible to exclude tenants invoking an <u>alteration of the contractual equilibrium</u> to obtain a rent reduction.</p> <p>Lease agreements are generally long-term relationships, and a temporary reduction in turnover due to the pandemic should not constitute a valid ground to claim that the agreement has become excessively onerous; that said, if the situation <u>persists</u> for an extended period or causes long-term economic shock, a claim could gain merit.</p> <p>C. Withdrawal for serious reasons</p> <p>The current health emergency meets at least <u>two of the requirements</u> set out by the caselaw, i.e.: (i) it is beyond the tenant's control, and (ii) it was unforeseeable. However, to validly withdraw from leases, tenants must also prove that the pandemic's economic effects are so material that they <u>can no</u></p>

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				<p><u>longer comply</u> with the lease agreement, particularly the obligation to pay rent. A temporary downturn is not a valid ground for withdrawal for serious reasons; however, the withdrawal could gain merit if <u>long-term economic shock</u> ensues and severely affects the tenant's business for a prolonged period.</p>

PORTUGAL

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PORTUGAL <i>Úria Menéndez</i> <i>Rita Xavier de Brito</i> <i>rita.xbrito@uria.com</i>	<p>A. Suspension of termination effects</p> <p>Since 12 March 2020 and until 30 September 2020, the additional measures following effects are suspended: (i) the effects of concerning commercial leases unilateral termination (<i>denúncia</i>), revocation or in connection with the Covid-opposition to the renewal of lease agreements by 19 outbreak are expected to landlords; (ii) and the expiration of lease agreements, be approved. unless the tenant does not oppose to the termination, as well as other deadlines established in the general lease law for the tenant to return the premises. Eviction procedures are also currently suspended.</p> <p>B. Deferred payment of rent</p> <p>Commercial tenants may postpone the payment of rent that falls due from 1 April 2020 until the earlier of (i) 1 September 2020 or (ii) the month after the end of the respective closure of the tenant's establishment as imposed by a legal or administrative measure approved in the context of the Covid-19 outbreak. This also applies to contractual forms of operation of properties for commercial purposes other than the standard lease agreements.</p> <p>This exceptional regime applies to:</p> <p>(i) retail establishments that have been closed or have their activities suspended by virtue of the declaration of the state of emergency, or due to legislative or administrative orders (e.g. state of calamity currently in force), even if those establishments continue to perform their activities by way of e-commerce,</p>	<p>At the present date, no measures</p>	<p>General principles of law in Portugal allow a party to claim either (i) the objective impossibility to fulfil its obligations or (ii) temporary measures to mitigate the a change of circumstances that justify the termination or the economic and social impact of COVID-19, modification of the contract while such change persists. Either particularly relevant for commercial of these regimes require the fulfilment of certain requirements leases: and case law in Portugal has been cautious and quite demanding as to the fulfilment of the same. It should however be taken into consideration that exceptional measures have already been enacted to deal with the impact on certain commercial leases, so the possibility to resort to this general regime must be assessed on a case-by-case analysis.</p>	<p>Legislation approving extraordinary and</p> <ul style="list-style-type: none"> • Law 1-A/2020 of 19 March, as amended; • Law 4-C/2020 of 6 April, as amended; • Resolution of the Council of Ministers no. 40-A/2020 of 29 May.

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	<p>services at a distance or through an electronic platform; and</p> <p>(ii) restaurants and similar establishments, even if they continue to operate for the exclusive purpose of confection intended for consumption outside the establishment or home delivery.</p> <p>The law seems to leave outside its scope tenants with commercial establishments that according to the law sell essential goods or provide essential services, such as supermarkets. Leases intended for wholesale trade also fall outside the scope of this law.</p> <p>The deferred rents must be paid in instalments after the period during which the rents can be deferred, together with the monthly rent that is due in each month. The deferred rents' settlement period may not, in any case, end after June 2021.</p> <p>Landlords are not entitled to any interest, penalties or other compensation on the basis of this delay in the payment of the rents.</p> <p>C. Termination of the agreement</p> <p>Lease agreements cannot be terminated on the basis of (i) the closure of the establishment in the leased premises, whenever such closure results from the compliance with the measures approved in the context of the Covid-19 outbreak; and (ii) the deferral of rent payment during the months which the tenant's establishment remains mandatorily closed and the subsequent month, up until 1 September 2020.</p>			

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	If the termination of the lease agreement is at the tenant's initiative, however, upon termination of the lease the tenant must pay the landlord all rents that have been deferred as a result of these exceptional measures.			

SPAIN

Jurisdiction	Existing framework	New measures	Applicable general principles of law	Other considerations
<p>SPAIN</p> <p>Uría Menéndez Diego Armero diego.armero@uria.com</p>	<p>A. Deferred payment of rent</p> <p>Within one month from 22 April 2020, self-employed workers and small and medium-sized enterprises who lease property for non-residential purposes and who have been forced to suspend their activities, or whose income has dropped significantly as a result of the COVID-19 health crisis (the above conditions to be duly evidenced to the landlord), are entitled to a rent payment deferral under the following conditions:</p> <p>(i) As regards leases where landlords are public housing companies or entities or large property owners (i.e., natural or legal persons who own (i) more than ten urban properties (excluding garages and storage rooms); or (ii) a constructed surface area of more than 1,500 sqm), eligible tenants are entitled to apply a moratorium on the payment of rent, provided that the parties have not previously agreed on a total or partial write-off or a moratorium on the payment. This moratorium will apply while the state of emergency is in force and to the following monthly payments, which can be extended on a monthly basis if the moratorium is insufficient in relation to the economic impact caused by the COVID-19 health crisis, up to a maximum of four months.</p>	<p>At the present date, no additional measures concerning commercial leases in connection with the Covid-19 outbreak are expected to be approved.</p>	<p>Under Spanish law, should a party to a contract breach its obligations, the complying party will be entitled to seek specific performance or terminate the contract, with the right to be indemnified in both scenarios. Contractual relationships are also based on the principle that the agreements reached by the parties must be observed (<i>pacta sunt servanda</i>).</p> <p>The only exceptions to the above rules would be the following:</p> <p>(i) Occurrence of a force majeure event, which necessarily relates to extraordinary events that are beyond the control and organisational reach of a contracting party who intends to resort to it. This exception must be construed in accordance with the common intent of the parties and with regard to standard business practice and good faith as concepts inherent to contracts. Further, effects of force majeure on contractual obligations are not specific but may relate to different aspects of the contract with differing conditions and scope (i.e., force majeure may lead to or indeed justify the release from an obligation).</p> <p>(ii) Application of the principle of <i>rebus sic stantibus</i>, originated within the case law of the Spanish Supreme Court, and according to which, albeit with restrictions, a contracting party may request the modification of the terms of the contract based on an extraordinary and</p>	<p>Legislation approving extraordinary and temporary measures to mitigate the economic and social impact of COVID-19, particularly relevant for commercial leases:</p> <ul style="list-style-type: none"> • Royal Decree 463/2020, of 14 March, declaring the state of emergency to address the COVID-19 health crisis (as amended by Royal Decree 465/2020); • Royal Decree-Law 15/2020 of 21 April, on urgent complementary measures to support the economy and employment

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	<p>Lessees must return the unpaid rent to the lessor in instalments over the following two years after the contract has entered into force (or, if shorter, during the validity of the lease), free of penalties and interest</p> <p>(ii) As regards leases where the landlord does not fall under the above category, eligible tenants are entitled to request a temporary and extraordinary rent payment moratorium, which the lessor is not obliged to accept.</p> <p>To that end, the parties may use the mandatory legal deposit provided for in the Spanish letting regulation (equivalent to two monthly rent instalments), to pay the rent. If applicable, a lessee must return the amount of the deposit within one year of the termination of the agreement or within the remaining term of the lease contract, if under a year.</p>		<p>unforeseeable event, rendering the consideration excessively onerous and significantly altering over a significant period of time the economic balance of the contract, thus leading to an unreasonable disproportion between the obligations of the parties to the contract.</p> <p>Elements required to date by case law as the basis for an action based on this principle are as follows: (a) the occurrence of an extraordinary change, (b) excessive hardship of the obligation in light of the unforeseeable events, and (c) unforeseeability and, in particular, a failure to include the unforeseeable event in the contract, excluding the normal risk inherent to or arising from the contract or risks assumed explicitly or tacitly by a contracting party.</p> <p>To date, though, this principle has been applied by the Spanish courts in a very restrictive way.</p> <p>Nonetheless, both exceptions will depend on the specific contract and particular circumstances of the case.</p>	

SWEDEN

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SWEDEN <i>Mannheimer Swartling</i> <i>Tomas Johansson</i> <i>tomas.johansson@msa.se</i>	<p>Landlord Grant Scheme</p> <p>Landlords that agree to a rental discount in relation to its tenant receive a state cash grant of 50 per cent of the rental discount, under the following conditions:</p> <ul style="list-style-type: none"> (i) Tenant must be operating in one of the following sectors: Hotel, restaurant, durable goods retail or certain consumer services (e.g. beauty salon, dental office and similar). (ii) Discount must relate to fixed rent and pertain to the period 1 April – 30 June 2020. (iii) Original lease must have been executed at latest on 1 March 2020 and the amendment relating to the rental discount executed at latest on 30 June 2020. (iv) Grant is capped at the lowest of 25 per cent of the original fixed rent and 800,000 euro. (v) In assessing whether the 800,000 euro cap has been reached, also grants received by other landlords in respect of the same tenant will be considered. (vi) Landlord must submit an application for the grant with the relevant County Administrative Board at latest on 31 August 2020 (application can be submitted earliest on 1 July 2020). 	<p>Fixed Costs Grant Scheme</p> <p>The government has announced its intention to in the near future enact legislation that will provide for a state cash grant to businesses that have experienced a drop in sales of 30% or more during March and April this year. Sales will be compared to the same months of last year, i.e. sales of March and April 2019. Qualified businesses will be eligible to a cash grant amounting to part of their fixed costs including rent and excluding labor costs. The larger the drop in sales, the larger portion of fixed costs that will be reimbursed under the proposed regime. Off-shore companies in tax-havens are automatically disqualified from this regime, even if they meet all other requirements.</p>	<p>Statute of Inequitable Terms of Contract</p> <p>The statute of inequitable terms of contract (Sw. <i>oskäliga avtalsvillkor</i>) can in exceptional cases be invoked to deviate from the literal wording of a contract in Sweden. Invoking said statute comes with a high degree of uncertainty as it is only meant to be applied in exceptional cases where the applicability of a term in a certain situation would be clearly unreasonable and it is not deemed unfair in the light of all circumstances to deviate from the term to achieve a more equitable outcome.</p>	<p>Force Majeure Clause in Leases</p> <p>Leases normally contain a standard force majeure clause for the benefit of the landlord. The clause entitles the landlord to suspend performance without liability if such performance is rendered impossible or unreasonably onerous due to a force majeure event. A government order to shutdown premises/businesses could qualify as such an event, if the event as such would be deemed to be landlord's risk (which is not entirely clear under Swedish law).</p>

THE NETHERLANDS

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THE NETHERLANDS <i>De Brauw Blackstone Westbroek</i> <i>Mark Rebergen</i> <i>mark.rebergen@debrauw.com</i>	<p>1. No new RE-related laws</p> <p>The newly enacted Dutch laws regarding Covid-19 have <u>not</u> established any new rights for termination and/or rent reduction for commercial lease agreements. Instead, the general civil law regulations already in place for lease agreements are applied.</p> <p>Since 16 March 2020 the Dutch government has issued several decrees which order amongst others that the catering industry must temporarily close their restaurants, coffee bars et cetera.</p> <p>However, it is noteworthy that the usage of retail spaces and office spaces was never generally restricted.</p> <p>2. New non RE related laws</p> <p>Fairly soon after the so-called "intelligent lock down" was announced the Dutch government has introduced various financial arrangements, most of which have</p>	<p>1. Relaxations</p> <p>From 1 June restaurants, bars and cafés are allowed to reopen, with the obligation to observe a number of restrictions.</p> <p>Similar restrictions apply for the reopening of cinemas, theaters and museums.</p> <p>Gyms, indoor sports centres, casinos, saunas, amusement arcades and sex establishments will in principle remain closed until 1 September, though earlier opening possibilities are being considered.</p> <p>2. New non RE related laws</p> <p>As of mid-June two new financial arrangements are introduced:</p> <ol style="list-style-type: none"> 1. <i>Tegemoetkoming Vaste Lasten MKB</i> which helps companies (with a maximum of 250 employees) with the payment of a part of their fixed charges, 	<p>1. General Dutch contract law</p> <p>Below we have set out some general principles under Dutch contract law, with a particular focus on lease agreement.</p> <ul style="list-style-type: none"> • 'force majeure' (article 6:75 DCC): if a default of its obligations cannot be attributed to the debtor, then performance of the relevant obligations cannot be claimed and the debtor is not under the obligation to compensate damage suffered by the creditor. Economic inability to pay debts (such as rent) does however not, by itself, qualify as an impossibility under Dutch contract law. This makes it unlikely that force majeure may be invoked by lessees in connection with the COVID-19 crisis.. In the Dutch market parties often make use of the model agreements as provided by the Dutch Real Estate Council (<i>Raad voor Onroerende Zaken</i>). These models are generally considered to be lessor friendly. Possibilities to suspend rent payments are further reduced in these models. • Unforeseen circumstances (article 6:258 DCC): a creditor may request the court to amend the consequences of a contract or to wholly or partly terminate the contract on grounds of unforeseen circumstances (i.e. circumstances or risks that are not addressed in the contract). These circumstances must be of such a nature that the 	

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	<p>now been extended until 1 September, albeit with some changes to the applicable conditions. These arrangements are:</p> <ol style="list-style-type: none"> 1. <i>Noodmaatregel Overbrugging voor Werkgelegenheid</i> (the NOW-arrangement) which arrangement basically provides that in case of a turnover loss of 20% or more an employer can get subsidy for the wage costs up to 90%; 2. <i>Tijdelijke overbruggingsregeling zelfstandig ondernemers</i>; 3. Various tax measures; and 4. Corona credit and guarantees (amongst others <i>borgstelling MKB-kredieten, garantie ondernemingsfinanciering, Klein krediet corona and corona overbruggingslening</i>). <p>Although all of these measures do not directly impact the lease relation, they</p>	<p>amongst other rent. This arrangement is available for companies that have lost more than 30% of their turnover due to the COVID-19 crisis. A company can receive up to an amount of EUR 20,000 per three months; and</p> <ol style="list-style-type: none"> 2. <i>NL leert door</i> which arrangement provides for free (online) training, retraining and development advice for everyone that is hit by the COVID-19 crisis. 	<p>counterparty to the contract cannot expect, taking into account reasonableness and fairness, unchanged continuation of the contract. During the economic crisis of 2008, Dutch courts were reluctant to change or terminate contracts based on article 6:258 DCC. The general opinion was that this economic crisis was part of the normal economic risks, to be borne by businesses themselves. It is not inconceivable that courts may decide that the extreme distorting effects of the coronavirus and the government measures go beyond normal commercial risks and, as such, qualify as unforeseen circumstances. However, the first signs of case law show that courts are generally still reluctant to draw that conclusion.</p> <ul style="list-style-type: none"> • Rent reduction (article 7:207 DCC): a tenant may claim (i.e. only before a court) a rent reduction in case of a "defect" impeding the quiet enjoyment under a lease. A defect is – in short – a quality or characteristic of the leased property or another circumstance not attributable to the lessee, as a result of which the leased property does not provide the lessee the enjoyment which a lessee could have expected. Case law shows that many circumstances not relating to the leased property itself are considered to be normal economic risks, to be borne by the lessee and do not qualify as a defect. For example, a disappointing number of customers or visitors comes generally for the risk of the lessee. 	

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	<p>are aimed at creating some more liquidity for entrepreneurs which should also help them to be able to continue meeting their (payment) obligations under any lease agreements they may have.</p> <p>3. Steunakkoord Instead of putting in place new legislation to safeguard and/or improve the lessee's and/or lessor's position in the COVID-19 crisis, the Dutch government made a strong appeal on both lessors and lessees to mutually agree on a way to get through this crisis taking into account the interest of the various stakeholders. This dialogue has led to the so called Support Agreement (<i>Steunakkoord</i>) for the retail sector, between government organizations, organisations of retailers, lessors and banks. The core of the agreements in the Support Agreement is that the rent payments for the months April, May and June may partially be suspended in joint consultation between lessors and retail lessees who have a turnover decrease of at least 25%, which</p>		<p>In addition, it is possible that parties may have agreed that (a) specific circumstances should not be considered a defect, or (b) a rent reduction is excluded by contract. The latter is common for commercial leases which are based on the models of the Dutch Real Estate Council (see also above); lessees of Dutch properties in most cases will therefore not have a legal basis to claim rent reduction;</p> <p>Reasonableness and fairness (article 6:248 DCC): a court may rule that a creditor cannot invoke a certain provision in a contract on grounds of reasonableness and fairness; it remains to be seen how application of this will develop in case law. Most likely this will not easily be accepted by Dutch courts.</p>	

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	<p>suspension can in some cases rise to 75% or even 100% for the more severely affected retailers and/or (retail) craft companies that face a complete lockdown. The Support Agreement can be considered as a starting point for negotiations between a lessor and a lessee to find a tailor made solutions per retailer, per lessor and per location. For the lessees that follow this agreement there will temporarily no termination measures be taken.</p> <p>The Support Agreement also contains some agreements for the somewhat longer term. For example, remission of payment obligations may be discussed when the actual impact of the lockdown after three month is more clear. The exact details thereof will be discussed later. In a second round of discussions in relation to the Support Agreement, now called Support Agreement 2.0, the various stakeholders have agreed that amongst others 50% of the rent for the months April and May may be remitted and that 50% of the rent for</p>			

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	<p>the month June may be suspended until next year.</p> <p>For the avoidance of doubt, the Support Agreement and the Support Agreement 2.0 do not provide any binding rules, these only provide for guidelines on how to deal with the COVID-19 crisis according to the various parties and stakeholders involved in the Dutch retail sector. The major Dutch banks as well as the Dutch government support the Support Agreement and the Support Agreement 2.0.</p>			

ENGLAND AND WALES

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ENGLAND AND WALES <i>Slaughter and May</i> <i>John Nevin</i> <i>John.Nevin@slaughterandmay.com</i>	<p>The Coronavirus Act 2020 introduced a moratorium on forfeiture, preventing landlords from forfeiting a lease of business premises on the grounds of non-payment of rent until at least 30 June 2020. The moratorium extends not only to annual rent, but also to any sum which a tenant is liable to pay under its business tenancy (including insurance, service charge and interest). However, the moratorium simply restricts the landlord's ability to forfeit – it does not reduce or defer the tenant's obligation to pay the rent. Any reduction or deferral would require agreement between the landlord and the tenant.</p> <p>The UK government has since introduced, under the Corporate Insolvency and Governance Bill, further temporary measures to restrict a landlord's remedies against tenants for non-payment. In order to prevent landlords from pursuing aggressive rent collection, the new legislation prevents presentation of a winding-up petition based on a statutory demand served between 1 March 2020 and 30 June 2020 (or one month after the enactment of the Bill, whichever is the later). It will also prohibit the presentation of a winding-up petition by a creditor unless the creditor has reasonable grounds for believing that COVID-19 has not had a financial effect on the company, or that the relevant ground would have arisen even if COVID-19 had not had a financial effect on</p>	<p>At the present date, no additional measures concerning commercial leases in connection with the COVID-19 outbreak have been announced.</p> <p>We await to see whether the existing measures will be extended, particularly to cover the rent due for the June quarter (typically 24 June to 28 September).</p>	<p>It is extremely unlikely that any English or Welsh lease will contain a provision entitling the tenant to a reduction or deferral of rent as a result of the COVID-19 outbreak. Generally, rent cessers are only available if the landlord is responsible for insurance and the building is damaged by an insured risk (or, increasingly, there is damage by a risk against which it is not possible to insure).</p> <p>Under English law, a contract may be discharged on the ground of frustration if, after the formation of the contract, an unforeseen event occurs which renders it illegal or impossible to fulfil the contract, or transforms the obligation to perform into a radically different obligation from that undertaken at the point the contract was formed. While it is possible for a lease to be frustrated under English law, the bar is extremely high. It seems unlikely that the effect of the current pandemic will permit many, if any, English law contracts to be set aside – particularly a lease, where the premises will continue to be available for the tenant to use, however impractical, unless and until it becomes illegal to occupy (which is, of course, not the same as being unable to trade or to derive some other practical use from the premises). This difficulty was demonstrated in the context of commercial leases in last year's High Court decision which confirmed that Brexit was not a frustrating event for a 25-year lease to the European</p>	<p>The UK government has launched several schemes to provide financial support to businesses during the Covid-19 crisis, including business rates relief, deferral of VAT payments and business interruption loan schemes.</p>

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	<p>the company. These measures apply with retrospective effect from 27 April 2020 to 30 June 2020 (or one month after the enactment of the Bill, whichever is the later).</p> <p>The government has also announced legislation to prevent landlords using Commercial Rent Arrears Recovery (CRAR) unless they are owed 90 days of unpaid rent. CRAR is a method of enforcement to recover rent arrears in respect of tenancies of commercial premises. If rent remains unpaid after service of a notice by the landlord, the landlord can instruct an enforcement agent to recover the arrears by seizing control of the tenant’s goods and selling them at auction. Ordinarily, CRAR can be used by a landlord to recover rent where it remains unpaid for 7 days. One consequential effect of this change is that a landlord will not be entitled to require that an undertenant pays rent directly to the landlord (rather than the intermediate tenant) unless 90 days’ rent is overdue.</p>		<p>Medicines Agency (<i>Canary Wharf (BP4) T1 Limited & others v European Medicines Agency</i> [2019] EWHC 335 (Ch)).</p> <p>On a similar subject, there is no general legal concept of force majeure under English law, and is therefore only capable of being relied upon where the contract in question contains a specific force majeure clause. That would be extremely rare, if not unheard of, in a lease. In other commercial contracts which may be relevant (such as agreements for lease and development agreements) a force majeure clause typically excuses or delays performance of the contract in some way following the occurrence of certain extraordinary events. Even if a party could show that the current pandemic was a force majeure event under a particular contract (which will depend on the drafting of that specific clause), there are additional hurdles to overcome in order for a party to rely on the clause for delay or non-performance. For example, a party must also show that the force majeure event was the cause of delay or non-performance, that their non-performance was due to circumstances beyond their control and that they took all reasonable steps to mitigate the consequences.</p>	

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