- Update (05 May 2020) -

COVID-19 and commercial lease law

Belgium, Germany, France and the UK

05 May 2020

The corona virus is increasingly affecting commercial tenancies. Closed shops, closed cinemas, closed fitness studios. Shops that are allowed to remain open often suffer considerable losses in turnover, as customer frequency is sometimes outright lost.

What do landlords and tenants have to consider? Do the contractual agreements continue to apply without restriction? Under what circumstances can the rights and obligations of the contracting parties change? What possibilities for action and negotiation are available?

We at ebl legal services have ebl partner firms in Belgium, France, Germany and the United Kingdom. In a joint effort we have compiled the most important questions and answers to support you in dealing with and solving your commercial tenancy law issues.

1. For which shops and establishments is closure ordered, and for which not?

France

On 14 and 15 March 2020, two decrees relating to the fight against the spread of COVID-19, subsequently supplemented by decree n°2020-293 of March 23, 2020 concerning the measures necessary to deal with the COVID-19 epidemic in the context of the state of health emergency, established the list of places closed to the public.

A new decree n°2020-423 of 14 April 2020 extended the deadline for this closure period from 15 April 2020 to 11 May 2020.

The Government thus decided that establishments that are not essential to the life of the nation should be closed, such as :

- Halls for performances, conferences, meetings, hearings or other use;
- Sales shops and shopping centres (except for deliveries and withdrawals of orders);
- Restaurants and drinking establishments (except for delivery and take-away activities, room service in restaurants and hotel bars);
- Dance and game halls, libraries and documentation centres, exhibition halls,

Germany

On 16 March 2020, the Federal Government and the heads of government of the federal states agreed on guidelines. These are implemented by general decrees (e.g. in Bavaria) or by ordinances (as in Hessen).

Facilities, businesses and meeting places which are to be closed or discontinued (- exemplary) :

- Fairs, exhibitions, amusement arcades;
- dance events, places of entertainment;
- cultural institutions, cinemas;
- Public Pools and fitness studios.

Restrictions do not apply to individually named areas, for which, however, opening is subject to conditions. The food trade, beverage markets, post offices and wholesale trade, among others, may remain open - subject to conditions. Service providers and craftsmen may also continue to carry on with their activities.

Additionally the situation might vary in the different areas of Germany.

museums, indoor and outdoor sports facilities;
- Educational, training, holiday and leisure facilities without accommodation.

Some establishments have been allowed to remain open under certain conditions, such as establishments of worship, but any gathering or meeting of more than 20 persons within them is prohibited, with the same applying to funeral ceremonies (within the limit of 20 persons).

Certain categories of establishments are also allowed to continue to receive the public:
- General food stores and retail businesses, as well as pet food retail businesses;
- Food retail businesses;
-Retail businesses selling fuel, pharmaceutical products, medical supplies, newspapers, tobacco and stationery, computer equipment, vehicle maintenance and repairs;
- Laundry, dry cleaning and fabric stores;
- Funeral services;
- Financial and insurance activities.

Since April 3, 2020, the reopening of businesses selling vegetable seeds and plants (considered as basic necessities) has been authorized, but only if they already had an animal feed department.

These provisions are applicable throughout the territory of the French Republic.

United Kingdom

In respect of England, Scotland and Wales, with effect on 26 March 2020 (28 March in Northern Ireland), the following shops and

The situation changes on an almost weekly basis and there are differences according to the areas as well.

The lockdown meanwhile is lifted and restrictions are eased in a step by step procedure in most areas in order to gradually allow the reopening of all shops and other establishments.

Guidance and rules regarding hygiene and distance must be in place and are to be strictly observed in any case.

Belgium

Since March 13 2020, the Federal Government has adopted various urgent measures to manage the crisis related to the spread of the coronavirus COVID-19,

establishments are required, with limited exceptions, to remain closed:

A. Food and Drink

Restaurants and public houses, wine bars or other food and drink establishments including within hotels and members' clubs, cafés and canteens remain closed.

Exceptions: Food delivery and takeaway can remain operational and can be a new activity supported by the new permitted development right. This covers the provision of hot or cold food that has been prepared for consumers for collection or delivery to be consumed, reheated or cooked by consumers off the premises.

Cafés and canteens

Exceptions: Food delivery and takeaway can remain operational (and as above). Cafés and canteens at hospitals, police and fire services' places of work, care homes or schools; prison and military canteens; services providing food or drink to the homeless.

Where there are no practical alternatives, other workplace canteens can remain open to provide food for their staff and/or provide a space for breaks. However, where possible, staff should be encouraged to bring their own food, and distributors should move to takeaway. Measures should be taken to minimise the number of people in the canteen / break space at any one given time, for example by using a rota.

B. Retail

Hairdressers, barbers, beauty and nail salons, including piercing and tattoo parlours and all retail remains closed

Exceptions:

• Supermarkets and other food shops

mainly through Ministerial Orders and Royal Decrees.

In its first phase, the Government authorised the opening of sectors qualified as "essential" (see annex to the Ministerial Order of 18 March 2020 on emergency measures to limit the spread of the coronavirus) such as food shops (including night shops), animal feed stores, pharmacies, bookshops, petrol stations and fuel suppliers. Initially considered essential, hairdressing salons had to close their doors from 24 March 2020 (cf. Ministerial Order of 23 March 2020).

All other businesses and all establishments in the cultural, festive, recreational, sports, hotels and catering sectors had to close, with the notable exception of bars and restaurants offering takeaway or home delivery services, which had to limit their activity accordingly.

From 4 May 2020, industrial activities and services for businesses (B2B) were allowed to reopen, as well as telecommunications stores (excluding those selling only accessories), medical device stores, general DIY stores selling mainly tools and/or building materials, garden centres and plant nurseries selling mainly plants and/or trees, wholesale stores for the benefit of only professionals, specialised retail stores selling clothing fabrics, specialised retail stores selling knitting yarns and haberdashery, and other businesses and activities in sectors considered essential. The practice of outdoor sports, with a limited number of partners, has been authorized.

• Medical services (such as dental surgeries, opticians and audiology clinics, physiotherapy clinics, chiropody and podiatry clinics, and other professional vocational medical services)
• Pharmacies and chemists, including non-dispensing pharmacies
• Petrol stations
• Bicycle shops
• Hardware shops and equipment, plant and tool hire
• Veterinary surgeries and pet shops
• Agricultural supplies shops
• Corner shops and newsagents
• Off-licences and licenced shops selling alcohol, including those within breweries
• Laundrettes and dry cleaners
• Post offices
• Vehicle rental services
• Car garages and MOT services
• Car parks
• High street banks, building societies, short-term loan providers, credit unions and cash points
• Storage and distribution facilities, including delivery drop off points where they are on the premises of any of the above businesses
• Public toilets
• Shopping centres may stay open but only units of the types listed above may trade

Outdoor and indoor markets
Exceptions: Market stalls which offer essential retail, such as grocery and food.

C. Accommodation
Hotels, hostels, B&Bs, holiday rentals, campsites and boarding houses for commercial use.
Exceptions:

Two subsequent phases are still planned, on 11 and 18 May 2020, in order to gradually authorise the reopening of additional shops and establishments.

Where people live in these as interim abodes whilst their primary residence is unavailable, or they live in them in permanently they may continue to do so.
Critical workers and non-UK residents who are unable to travel to their country of residence during this period can continue to stay in hotels or similar where required.
People who are unable to move into a new home due to the current restrictions can also stay at hotels.
Where hotels, hostels, and B&Bs are providing rooms to support homeless and other vulnerable people such as those who cannot safely stay in their home, through arrangements with local authorities and other public bodies, they may remain open.
Those attending a funeral will be able to use hotels when returning home would be impractical.
Hotels are allowed to host blood donation sessions.

Caravan parks/sites for commercial uses
Exceptions:
Where people live permanently in caravan parks or are staying in caravan parks as interim abodes where their primary residence is not available, they may continue to do so.

D. **Non-residential institutions**

Museums and galleries, nightclubs, cinemas, theatres and concert halls remain closed
Exceptions:
Small group performances for the purposes of live streaming could be permissible where Public Health England guidelines are observed and no audience members attend the venue.

Bingo halls, casinos and betting shops, spas and massage parlours,skating rinks, fitness studios, gyms, swimming pools or other indoor leisure centres remain closed
Exceptions:
Any suitable assembly or leisure premises may open for blood donation sessions.

E. **Outdoor recreation**

Playgrounds, sports courts and pitches, and outdoor gyms or similar remain closed

2. What are the main statutory obligations of landlord and tenant with regards to the condition of the rented property during the contractual relationship?

France

The commercial lease contract is a bilateral contract creating obligations for both parties to the contract.
Thus, the owner of the leased premises must comply with a certain number of legal obligations such as :
- To deliver the rented premises of the contract, i.e. to put the rented premises at the disposal of the tenant (Article 1719 of the Civil Code);
- Maintain the leased premises (Article 1719 of the Civil Code) and thus carry out repairs other than rental repairs (Articles 605 and 606 of the Civil Code), i.e. those related to obsolescence, and major repairs;
- Grant access and use of the premises (Article 1719 of the Civil Code) without interference including no hidden defects (Article 1721 of the Civils Code) that result in the tenant not being able to make full use of the premises
- Inform the Tenant about natural and technological risks, as well as about possible

Germany

The Landlord shall leave the Unit of Hire to the Tenant in a condition suitable for use in accordance with the contract and shall maintain it in this condition during the term of hire. For this purpose, he shall bear the so-called risk of payment. The Tenant shall pay the agreed rent. The Tenant bears the risk of use and must always pay the rent even if he does not make any profits. The obligation to grant the contractual use is a so-called "cardinal obligation" of the landlord which cannot be waived in principle.

disasters suffered (articles L. 145-1 and L. 145-2 of the Commercial Code).

In return, the Tenant must respect the following obligations:
- To pay the rent as well as the related charges to the Landlord within the time limits defined in the commercial lease contract (article 1728 of the Civil Code) ;
- To carrying out the necessary rental repairs during the duration of the contract in order to be able to return the premises in the same state as at the beginning of the lease;
- Reasonably use the leased property in accordance with the purpose specified in the commercial lease (Article 1728 of the Civil Code).
In addition, even if the Tenant does not make any profit, he must pay the rent and charges for the premises leased to the Landlord. If this is not possible, the mechanisms for terminating the lease contract must be implemented.

United Kingdom
The Coronavirus Act 2020 ("the Act") came into force on 25 March and applies to England, Scotland, Wales and Northern Ireland.

In England and Wales, commercial leases are generally long in length and reflect the bargain reached between the parties prior to the grant of the lease, rather than relying on statute to stipulate the respective rights and obligations of the parties.

A commercial lease will set out in detail the obligations of the parties with regard to the maintenance repair and condition of the leased premises and where applicable, the

Belgium
The commercial lease is governed by the law of 30 April 1951 and the supplementary provisions of the Civil Code.

As regards the condition of the leased property, the Landlord is first of all required to deliver to the Tenant a property *"in a good state of repair of any kind*" (Article 1720 paragraph 1 of the Civil Code), which, according to doctrine and case law, refers to the notions of cleanliness and health conditions.

Then, during the course of the lease, the Landlord is required to maintain the

Building or Estate of which they form part. The Act does not release either party from their obligations as set out in the lease.

Depending on the precise wording in the lease, Landlords will remain liable to provide services (as in a Shopping Centre) and to maintain a building, of which the leased premises form a part, including any common areas in respect of which the tenant has been granted express rights in the lease.

An obligation on a shopping centre tenant to "keep open" will clearly not be enforceable for so long as the Government has decreed that the relevant shop remains closed.

leased building so that it remains in good condition and can be used for the purpose for which it was leased; this maintenance obligation covers the work that is necessary to preserve the building. Minor works (washing of floors, descaling, etc...) are at the expense of the Tenant.

The Landlord is also under an obligation to repair the leased property (Article 1720 paragraph 2 of the Civil Code), which covers major repairs (roof, facades, masonry, etc.) and repairs necessary for the Tenant's peaceful enjoyment of the property (replacement of pipes, heating, electricity, etc.). As for the repairs of small damages caused by the occupation of the premises or dilapidation, they are at the expense of the Tenant.

3. Do profit expectations due to expected or calculated public traffic count towards the tenant's usage risk?

France

Yes, this is part of the risks inherent to the use of the premises for the tenant. The landlord cannot be held responsible if there is a lack of public use of the rented premises. The classic case law of the Court of Cassation also holds that a Landlord cannot be held liable if there is, for example, insufficient public use of a shopping centre in which the premises are rented (*Court of Cassation of 12 April 1983 - Court of Cassation of 31 March 2005*).

Thus, the Landlord can only be held liable by the Tenant if the Landlord fails to comply with his essential obligations such as delivering the premises promised for rent,

Germany

Yes, this risk cannot be shifted to the landlord without a contractual agreement to the contrary. If a shopping centre is not visited by the customers in the manner expected by the Tenant after opening, but the business can in principle be reached without complaints and without hindrance, there is no immediate impairment of the usability of the rented property and it is not defective**.**

maintaining the premises in a fit state for use or guaranteeing their peaceful enjoyment.
However, the Landlord may be held liable if, and only if a failure to comply with these essential obligations results in a lack of commerciality.
Consequently, case law has held that the Landlord's liability may be incurred for breach of the obligation to deliver, which has been extended to the maintenance of commerciality (*Versailles Court of Appeal of 26 April 2018 No. 17/08154 - Court of Cassation 3rd Civil Chamber of 5 September 2012 No. 11-17.394*).
As a result, the causal link must always be linked to a breach of the Landlord's essential obligations under a commercial lease.

United Kingdom
A tenant that is unable to use or operate its premises in a manner authorised by the lease may claim that the Landlord is in material breach of the contract. Depending on the wording of the lease and the nature of the premises there may be a specific lease obligation on the Landlord to keep the Building/Shopping Centre, including any common areas, open during specified days and hours of the week.
Remedies for a Landlord's breach include those provided by common law and any specifically set out in the lease. Lease provisions will usually give the Landlord an opportunity to remedy the breach within a defined period, whereas common law remedies are not so constrained and may provide a basis to abate rent for the period the Landlord fails to provide (say) a shopping centre or a space for the tenant to operate its business.
Tenants whose leases contain turnover rent provisions may find that little or no rent is

Belgium
Yes, unless otherwise stipulated in the contract, the Landlord is never liable for the Tenant's commercial results related to public traffic or the use of the leased property. The Landlord shall only deliver to the Tenant an asset in a condition fit for its intended use or purpose, free from defects, maintain the asset in such condition during the term of the lease, and refrain from any act or omission that would adversely affect the frequency of public or consumer use of the asset.

due. In other cases where turnover rent is based on a specified number of months' historic trading, or where the lease contains deeming provisions which apply if the tenant is not actively trading from the premises or if the premises are closed, tenant's may wish to seek a rent holiday.

4. Is the tenant also obliged to pay the rent if the rented property has a (not inconsiderable) defect through no fault of the landlord?

France

In order to receive payment of rent and charges from the Tenant in return, the Landlord is obliged to provide commercial premises in accordance with the use for which they are intended.

Consequently, if this proves impossible, the Tenant may claim default for non-performance of the Landlord's essential duty, enshrined in Articles 1219 and 1220 of the Civil Code. It will be necessary for the commercial Tenant to demonstrate the existence of this non-performance (an exemption from the Landlord's liability being possible only by establishing, for example, the Tenant's wrongful conduct).

The cause of such non-performance is not related to a fault of the Landlord, since the absence of fault on the part of the Landlord does not prevent the application of this mechanism, which is characterised by the mere failure to deliver the actual object of the contract.

However, for this defence of default to be relied on, **it must be sufficiently serious for one of the parties to be able to free itself from its obligations**, such as the payment of rentals and charges.

Case law holds in a classic manner that "if the lessor [Landlord] does not perform his

Germany

The target quality of the rental premises owed by the Landlord is its suitability for use in accordance with the contract, this includes in particular its suitability for the contractually agreed purpose. This applies not only to the substantial condition of the leased object, but also to the lack of usability of relevant factual legal relationships, e.g. for unhindered access to the leased premises also by customers of the Tenant.

The Tenant may exercise a right to reduce the rent even if the Landlord is not at fault. This is because the decisive factor is the not insignificant deviation of the target quality from the actual quality of the rental premises - and not the responsibility of the landlord for this deviation.

The responsibility plays a role in the question of liability of the landlord for damages and for reimbursement of expenses, but not for the reduction of rent.

obligation to deliver the leased thing, the lessee [Tenant] is not required to pay the rent for it" (*1st Civil Chamber of the Court of Cassation, 20 June 1995 no. 93-16.807 - Rennes Court of Appeal, 5 June 2019 no. 16/06391*).

The Tenant will then have to inform the Landlord that he will not pay his rent during this period of non-performance.

In addition, the landlord must also guarantee the Tenant against latent defects, which are defects that prevent the use of the premises, even if the Landlord was not aware of them when the lease contract was signed.

Nevertheless, the Landlord can be exonerated from this liability if :

- The defect was apparent at the time of signing the lease and could thus be noted by the tenant during the inventory of fixtures of the premises;
- The defect results from force majeure;
- The defect is the consequence of the tenant's default and in particular if it results from a lack of maintenance of the premises.

Consequently, if the defect can be repaired, the Tenant may ask the Landlord to carry out the necessary work, to reduce the rent or to award damages.

If the operation of the premises is affected (operation is difficult or even impossible for the Tenant), the Tenant may ask for the lease to be terminated.

United Kingdom

The Act does not waive the obligation to pay rent – the tenant is not given a rental holiday. It prevents enforcement of that obligation by forfeiture. Rent remains due and if not paid on time is an unsecured debt on which interest will accrue.

Belgium

The comments below only apply to commercial leases for activities which were ore are forced to close down during the lockdown period.

Landlords cannot continue with existing possession proceedings, and existing orders will be delayed until the end of the existing moratorium (which presently applies until 30th June 2020 but may be extended).
The Act does not prevent the Landlord enforcing any rent security such as a rent deposit or pursuing a lease guarantor as a debt claim, or exercising any right in the lease to call upon the guarantor to take a lease in its own name. Depending on a number of factors where a lease has been assigned, a Landlord may pursue a former tenant or guarantor.
The Act does not prevent the Landlord from entering the premises to seize goods in lieu of payment of rent or as an unsecured creditor, submitting a winding up petition or seeking to put the tenant into administration.

Pursuant to Articles 1719 and 1720 of the Civil Code, the Landlord is required to deliver to the Tenant property in a good state of repair of any kind and to maintain this property to a standard that ensures the use for which it was leased for can be fulfilled.

Unless otherwise provided for in the lease, if during the course of a lease, the Tenant becomes aware that the leased asset has a defect or fault that renders it unfit for the use for which it was intended, and that defect or fault existed at the time the lease was entered into but was not apparent (latent defect), the Tenant may bring an action against the Landlord to enforce the warranty, even if the Landlord did not know of the defect or fault. The Landlord must therefore remedy the defect or deficiency and compensate the Tenant for the damage suffered.

If the defect or fault did not exist prior to the conclusion of the lease but appeared during the course of the lease, the Landlord is bound to remedy it if it falls within the scope of his obligations to maintain, repair and guarantee the quiet enjoyment of the Property by the Tenant.

On the other hand, if, during the course of the lease, improvements or alterations to the leased property are required to bring it in line with new standards (for example, safety or health standards) that did not exist or were not yet applicable at the date of conclusion of the lease, such improvements or alterations are not the Landlord's obligations and only the Tenant will have to adapt the property to the new requirements of the authority (Cass. 21

November 2011, Cass. 29 May 1989 and Cass. 4 February 1960).

Thus, the qualities of the property are assessed on the date of the conclusion of the lease and must be maintained throughout the term of the lease.

In the light of the foregoing, if the Landlord fails to comply with his obligations, the Tenant may be authorized, through the courts, to withhold payment of the rent, in whole or in part, up to the amount of the damage suffered, by application of an event of force majeure and/or the principle of the plea of non-performance.

5. Does closure, discontinuation and/or prohibition of use orders constitute a defect in the rental premises?

France

During the closure, interruption and/or prohibition of use of the rented premises, the quiet enjoyment, due by the Landlord, is no longer assured, as the Landlord is no longer able to meet its obligation to deliver. The Tenant is then no longer able to carry out the activity provided for in the lease, even though his premises were originally perfectly adapted.

As a result, the use of the leased premises having been made impossible to use or even greatly compromised by a mandatory order from the Government, results in the very essence of the lease contract to be affected by a defect.

Germany

A leased premises that was originally suitable and operated without any problems for use in accordance with the contract, may subsequently become defective and give rise to warranty claims (e.g. in the form of a reduction in the rent) as a result of a lawful official order that makes use impossible or significantly impairs the suitability of the leased premises for use in accordance with the contract.

United Kingdom

The fact that the lease premises may be subject to a government closure order is highly unlikely to be regarded as a defect of

Belgium

The comments below only apply to commercial leases for activities which were ore are forced to close down during the lockdown period.

such magnitude as to frustrate the contract and thereby terminate the lease.

The inability of the Tenant to use the premises for the purpose intended by the Lease is clearly a problem for Landlord and Tenant alike, but it is unlikely to be regarded as rendering impossible the performance of the contract on a permanent basis.

Frustration applies where contracts have become impossible to perform due to a supervening event that radically alters the circumstances of performance with the result that the parties are no longer required to perform their obligations. English case law suggests that the current pandemic may be unlikely to give rise to frustration, particularly so given that the current restrictions are likely to be temporary in nature.

The issue is currently controversial under Belgian law.

If a leased asset is delivered and maintained in a condition that permits it to be operated in accordance with its conventional use, but such use is rendered impossible by the effect of a decision of a public authority (prohibition of activities, closure of shops, etc.), the leased asset does not become affected by a defect as such, which would enable the Tenant to invoke the Landlord's warranty. The Landlord properly performs its obligations.

On the other hand, the impossibility, temporary or definitive, to occupy a rented property or to operate a business, resulting from a foreign cause such as a decision of a public authority, could constitute a case of force majeure which would allow the tenant to suspend the payment of his rent. While this principle has been accepted by some lower courts, the Court of Cassation continues to consider that there could be no force majeure concerning the performance of a tenants obligation to pay a sum of money (Cass. 13 March 1947). This said, the Belgian Supreme Court also ruled out in 1919 that such an event may qualify as an event of force majeure: "The lessor shall provide the lessee with quiet use of the leased property in accordance with the purpose intended by the parties. It follows that when circumstances of force majeure make it impossible or impede this destination, the obligation to pay the rent ceases in whole or in part." (Cass., 9 January 1919). Recourse to the concept of force majeure is therefore uncertain.

Moreover, the impossibility of exploitation must be total, and not partial

(for example, if the leased property still allows certain activities, such as the storage of goods, administrative management or delivery of goods, to continue) for force majeure to be accepted.
Moreover, in Belgium, the theory of hardship (i.e. the occurrence, during the course of a contract, of a reasonably unforeseeable event, independent of the will or fault of one or more of the parties, which upsets the economy of the contract and makes its performance particularly difficult) is not recognised by the courts to justify the possibility of revising the terms of a contract.
It then remains possible to consider that the object of the contract has been totally or partially destroyed or lost during the course of the lease. Such loss need not be material, but may be legal when the asset can no longer be used for its intended purpose. This legal loss of the subject matter of the lease contract allows the Tenant to request, pursuant to Article 1722 of the Civil Code, either the termination of the contract or a reduction in the rent. However, he is not entitled to any compensation.

6. Does the above statement apply without restriction?

France
No. It must be established by the Tenant of the premises that the premises cannot be used under the conditions stipulated in the lease contract due to the current health crisis.

Certain categories of businesses have been authorized to continue their activity or to

Germany
No. It must be established that, according to the specific terms of the contract, the Landlord bears the risk of the rental premises being unusable, or of the considerable restriction of its use in accordance with the contract. In this case, the respective areas of responsibility of the Landlord on the one hand and the

carry out partial activities such as delivery or take-out sales.

It seems that in order to bring into play this "defect in the leased premises", it is necessary to be able to establish concrete consequences related to the pandemic.

United Kingdom
Rather than argue that the lease has been frustrated, the Tenant may (depending on the wording of the lease) claim that the Landlord is in breach of contract. An example would be where the lease requires the Landlord to provide services and the Landlord, in whole or in part, fails to do so. In such a case, the Landlord may argue that force majeure excuses the failure to perform.
The specific lease language would need to be considered. For example, does the definition of a Force Majeure event include where the government orders closure? Force Majeure events are narrowly construed.

Tenant on the other hand must be determined with the help of risk and sphere areas and assigned to a contracting party. The criteria can be the question of whether, for example, the Landlord has clearly made the functionality of the leased property as a whole his own risk or whether, conversely, the Tenant controls the risk and must allow himself to be solely responsible for the acquisition risk.

Belgium
No, as the parties are always free to adjust the provisions of the lease agreement to control the risks associated with this type of circumstance.
Thus, the lease agreement may include an express clause that would allow the terms of the contract to be reviewed, in particular the financial terms, or even its termination, in the event of the occurrence of circumstances beyond the fault of one of the parties that would significantly impact the financial viability of the contract and make its performance significantly more difficult. These circumstances could thus be listed and include mandatory decisions by public authorities preventing, in whole or in part, the operation of the leased asset.
The lease agreement may also provide that the risks associated with such circumstances shall be borne exclusively by one or other of the parties or cause the parties to renegotiate the terms of the agreement.

7. **How does the order of a prohibition of entry by customers to the leased property or the order of access to the leased property only under conditions affect the fulfilment of the landlord's obligations?**

France

To the extent that the prohibitions cited prevent the Tenant's enjoyment of the leased premises subject to the leasing agreement, the Landlord is therefore also unable to guarantee its essential obligation, which is characterised as being the provision of the leased premises to the Tenant.

However, as recalled in Question No. 6, the Tenant must be able to establish that the prohibitions cited affect his business in such a way that it is impossible for him to use his premises under the terms of the leasing agreement.

United Kingdom

A landlord must comply with a Government order, which may mean that the Landlord is unable to fulfil its lease obligations. For example, obligations to provide services and to keep a shopping centre open during the prescribed hours.

In such circumstance, a tenant may be tempted to make a claim for derogation from grant and/or breach of the covenant for quiet enjoyment for loss of income. It will likely prove difficult for a tenant to establish such a claim where the

Germany

The Landlord shall only fulfil his obligation to make the Unit of Hire available in the condition specified in the contract during the rental period if the Unit of Hire is in a condition which enables the Tenant to use the premises without restriction for the commercial activity envisaged in the contract.

A few years ago, restaurant operators feared a considerable drop in turnover due to the absence of guests because the use of the restaurant was subsequently restricted by a statutory ban on smoking in restaurants. The courts considered this to be related only to the way the Tenant manages his business and denied a restriction of use related to the property for which the Landlord is responsible.

However, this delimitation cannot apply to cases where access to a business (barricade) is prohibited and, in the sense of the risk atmosphere considerations, lead to the rental premises being considered free of defects although it cannot be used. The defect then is one of the rental premise itself.

Belgium

Except as otherwise provided by the lease, the Landlord's duties are deemed to be performed when the Landlord delivers to the Tenant an asset in a condition fit for its intended use or purpose, free from defects, and maintains the asset in that condition throughout the term of the lease, refraining from any act or omission that would adversely affect public or consumer goodwill.

Prohibitions imposed by the public authorities (smoking ban, access by minors,

Landlord's actions are the result of a Government direction.
It will always be necessary to carefully study the precise wording of the lease and any other related documents – for example, a prior Agreement for Lease which may contain relevant Landlord obligations which continue to apply notwithstanding the completion of the Lease.

temporary closures, etc.) do not affect the condition of the leased property and are therefore not the responsibility of the Landlord.

8. Does the law on mitigating the consequences of the COVID-19 pandemic in civil, insolvency and criminal proceedings of 27 March 2020 clarify the rights and obligations of the parties to the lease?

France

➔ **Does the law n°2020-290 of March 23, 2020 to deal with the COVID-19 epidemic and the related Ordinances and Decrees clarify the rights and obligations of the parties to the lease?**

Under the terms of the Act of 23 March 2020, it was announced that measures would be taken regarding the fate of commercial rents, amounting to a suspension or deferral of these rents.
However, the Ordinance of 25 March 2020 and subsequent decrees ruled out the implementation of a suspension or deferral of commercial rents. These only allowed the implementation of a neutralisation of the sanctions related to the non-payment of rents and charges by the Tenant.
Thus, as adopted by the Ordinance, commercial lease rents and charges remain fully payable and only the mechanisms for sanctioning non-payment are neutralised.

Germany

Only partly. The Landlord's right of termination is temporarily excluded if it results from a non-payment by the Tenant in the period from 1 April to 30 June 2020, despite the rent being due. The non-payment must also be due to the pandemic, which the tenant must substantiate. Extraordinary termination without notice, based on rent arrears, can only be declared from 30 June 2022 onwards if the rent arrears from the period from 1 April 2020 to 30 June 2020, which otherwise entitle extraordinary termination without notice, have not been paid by then. This derives from Art. 240 § 2 EGBGB in conjunction with Art. 5 of the COVID-19 Act. The restriction on termination thus ends at the end of 30 June 2022.

Due to misleading wording in the explanation of the law, it is not clear whether the law also intends to make a statement on the tenant's right to a rent reduction due to missing or limited possibility of use.

Moreover, these new measures were open only to a limited number of companies, eligible according to very strict criteria laid down in various decrees over a specified period.
Consequently, there has been no clarification as to the rights and obligations of the parties to the lease, since these measures are applicable only to a very narrowly defined category of undertakings:
- that they are not free of defects since it is the virtual absence of judicial activity that leads to the suspension of financial consequences against Tenants and;
- that it is not excluded that a Landlord may succeed in enforcing, for example, a seizure-assignment clause against its Tenant if it succeeds in obtaining a judicial decision to that effect.
Discussion and the search for amicable solutions between landlord and tenant remain, to date, the best solutions to ensure the continuation of the lease contract.
At the end of this pandemic, depending on the judicial contingencies and the magistrates' assessment of each party's situation, the parties to the lease may find their salvation quite simply within the ordinary law of contracts with the application of the mechanisms of force majeure, unforeseeable circumstances and even exceptions of non-performance.

United Kingdom
In the UK, the Act imposes a moratorium on forfeiture of a commercial lease for breach by the tenant of its covenant to pay rent. The Act does not waive the obligation to pay rent. It prevents enforcement of that obligation by forfeiture.

Belgium
In Belgium, no ad hoc law or regulation has yet been passed to directly regulate the obligations arising from a lease contract and/or the consequences of their non-performance due to COVID 19.

A tenant does not need to show that its business has been disrupted due to the virus in order to benefit from the moratorium.

As already mentioned, English leases are very detailed and often run to many hundreds of pages, setting out the respective rights and obligations of Landlord and Tenant.

It is the case that particular focus will be placed on provisions which are common to most leases, but which crucially may vary in the detail of their wording and hence their effect. These provisions will include clauses addressing Force Majeure, Rent cesser, guarantees, insurance, rent review, rights to break, service charges, to name but a few.

It is to be anticipated that Landlords and Tenants will be looking to negotiate mutually acceptable solutions to the challenges that face them, including a commercially acceptable rent reduction and repayment plan. These would have regard to the fact that once the moratorium is lifted, unless the Landlord has given an express waiver, enforcement in respect of unpaid rent during the moratorium will be possible.

Once business returns to normal, the Government may well extend the moratorium in order to allow businesses that have suffered a substantial reduction in revenues through being unable to trade to repay the arrears.

It should be noted that a Landlord's obligations may not be restricted to those it has to a Tenant. The Act does not impose a moratorium on real estate lenders preventing them from enforcing loan covenants where a tenant has been unable

But Royal Decree no. 15 of 24 April 2020 has a direct impact on the execution of a lease contract. which introduces a temporary moratorium during which any debtor company that does not respect its commitments is in principle protected against protective and enforceable seizures and any declaration of bankruptcy (or judicial dissolution), until May 17, 2020, subject to further extension. Furthermore Agreements entered into by 24 April 2020 cannot be (unilaterally or judicially) terminated due to the non-payment of a debt. This measure applies to all agreements (thereby including lease agreements), but not to labour contracts. Contractual remedies connected to other (non-monetary) breaches remain possible.

In addition Royal Decree no. 7 of 19 April 2020, which provides for the deferral of tax debts (corporation tax, personal income tax, VAT, registration fees, withholding tax, etc.). Other measures, such as the deferral of credit payments and secured bank loans, can relieve tenants in payment difficulties.

to repay its rent. Lenders will invariably need to be consulted and give their approval to any rent strategy proposed to be agreed by the Landlord with its tenant.

9. Endangering the existence of the tenant and adjustment of the lease

These days, it is often said that tenants point out the unreasonableness of adhering to the lease agreement because this adherence would mean economic ruin for them. How is this to be legally classified?

France

The legal framework of the lease contract is defined in articles L. 145-1 et seq. of the Commercial Code, but it is the ordinary law of the contract that defines the obligations of the parties as regards the performance of the contract. This includes both the obligations of the Landlord (Articles 1719 to 1727 of the Civil Code) and those of the Tenant (Articles 1728 to 1735 of the Civil Code), and includes any problems that may arise between one or more of the parties.

Even if the Tenant has to bear certain risks related to the operation of the premises, if it turns out that the balance of the contract has been broken, the Tenant may request the termination of the lease. He will have to establish that the consequences are serious enough to cause an operating loss.

This is also the case if an exceptional situation arises that the tenant could not foresee. The mechanisms mentioned above, such as force majeure, unforeseen circumstances, the exception of non-performance, may be highlighted by the Tenant in order to request a reduction in the price of the rent or even the cancellation or termination of the lease.

Germany

The legal framework for this can be found in § 313 (1) BGB and 313 (3) BGB. According to § 313 para. 1 BGB, an adjustment can be demanded in case of disturbances of the basis of the contract and if the conditions of §§ 313 para. 3 BGB exist, the Tenant can also exceptionally demand a cancellation of the contract.
These rights come into consideration if the person (usually the Tenant), who actually bears the risk assigned to him (alone), is neither responsible for this extreme exceptional situation nor could have foreseen it. Due to the principle that contracts must be observed (pacta sunt servanda), it must be examined and affirmed whether the balance of performance and consideration (equivalence) is so seriously disturbed that the contractual risk to be borne by one party is unreasonably excessive.
We recommend a step-by-step approach: First, it must be processed why the contract risk is excessive in an unacceptable way. This certainly includes the party's requirement to explain and provide evidence that they have exhausted all (also governmental) support measures - and can still pay the agreed

These various mechanisms are then submitted to the trial judges for their assessment and applied on a case-by-case basis, depending on the situation of the parties to the lease.

United Kingdom

English leases are invariably tightly drawn and reflect the relative bargaining strength of the parties prior to their grant.

A Landlord will need to consider carefully how they react to a request from a tenant for an agreed rental concession, be that a temporary abatement, a reduction, or indeed a rent holiday. There are in the UK a large number of vacant properties. It must be anticipated that a number of businesses will become insolvent. Landlords will need to consider whether it is better to agree to a rent concession or more flexible lease terms, rather than having a property stay empty for a sustained period of time. This would result in having to carry out improvements in order to secure a tenant, paying agency costs of reletting and having to contribute to service charges with respect to the vacant space.

rent, at any rate but not at the present time. This also includes proof that there are no reserve funds, or that these have already been used up.

Secondly, the unacceptability of exceeding the risk must then be demonstrated. This criterion is met if the tenant is supposed to pay rent unchanged on the one hand, but on the other hand would no longer be able to provide the contractual use.

Only when all communication possibilities have been exhausted, in particular all attempts to adjust the contract have failed, does the right to terminate the rental contract by the disadvantaged contractual partner due to impossibility of adjusting the contract, or unreasonableness of the adjustment, come into consideration.

Belgium

As a reminder, in Belgian law, the theory of hardship is not applicable, and recourse to force majeure to release oneself from a lease contract remains uncertain in light of the case law of the Court of Cassation, which excludes it in the case of obligations relating to things of the kind.

On the other hand, recourse to Article 1722 of the Civil Code (disappearance of the object of the contract) may be an interesting solution for the tenant.

In any event, in order to obtain the revision of certain conditions of his lease contract in the event of total or partial impossibility to use the leased property without fault of the Landlord, the Tenant may invoke both the principle of performance of contracts in good faith (Article 1134 paragraph 3 of the Civil Code) and the theory of abuse of rights.

- Update (05 May 2020) -

COVID-19 and commercial lease law

A Tenant facing economic ruin will clearly look to negotiate with the Landlord a solution that is mutually acceptable. Any argument that the inability to trade from the premises has frustrated, and thereby terminated, the lease is unlikely to win favour with either the Landlord or the courts.

The willingness of a Landlord to listen to a claim by the Tenant that it would be unreasonable to expect it to adhere to its lease obligations given the impact of the virus will turn on a number of factors, including in particular the state of the market once businesses are again able to trade from their premises.

The principle of good faith performance of agreements enables the court to verify the initial intentions of the parties at the time of the conclusion of the contract and, if necessary, to supplement the provisions of the contract or even to modify some of them. This adapting or modifying function, which is accepted in doctrine, has however not (yet) been accepted by the Court of Cassation.

The concept of abuse of right allows the judge to prohibit the beneficiary of a right from abusing it. This moderating function of abuse of right allows the court to modify certain terms of contracts if they prove to be abusive in the light of the specific circumstances of the contract.

Thus, by the combined application of these principles, a judge could order the revision of the terms of a commercial lease, or even its termination, if the Tenant is in good faith and is seriously prevented from carrying on the activities for which the property was leased, considering that the Landlord would then abuse his right by demanding full (or even partial) payment of the rent. The outcome of such an action remains very uncertain, since the landlord will refer to the basic principle of “pacta sunt servanda”, stressing that contained clauses are law between the parties, what implies that nonfulfillment of respective obligations is a breach of the pact.

At ebl, we advise many of our clients on issues relating to COVID-19. With questions and queries wide-ranging, we are here to provide answers to your questions, to act as a sounding board for the decisions you’re planning to make and to help you make the key decisions that will protect your business and your communities in the weeks ahead.

- Update (05 May 2020) -

COVID-19 and commercial lease law

Whilst our offices are in “virtual mode” now, we remain fully operational and committed to providing an ongoing service to our clients across all areas of our business.

Please reach out to your local contact by email if you wish to discuss any of the issues in this note, or any other issues impacting on your operations in Europe further. Alternatively, just contact any of the country lead partners, listed below, for support.

Please find all details below.

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Please see here for details http://www.ebl-law.com/legal/regulatory

Please note: the guidance set out below is of a general nature and is not intended to address the circumstances of any particular individual or entity. The information herein does not constitute legal advice. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or hat it will be continue to be accurate in the future, No one should act on such information without appropriate professional legal advice after a thorough examination of the particular situation.