

COVID-19

Government assistance for tenants in the UK, France, Germany and the U.S.

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The COVID-19 crisis has resulted in the introduction, across the world, of various government-backed schemes to assist tenants who are unable to pay their rent due to the impact of the coronavirus. This note looks at the schemes introduced in the UK, France, Germany and the U.S.

United Kingdom

- The Act prevents landlords from forfeiting business tenancies of more than 6 months for non-payment of rent between 26 March 2020 and 30 June 2020.
- The term “rent” is widely defined in the Act to pick up all sums payable by tenants under leases, not just principal rent. It would therefore include payments such as service charge and insurance.
- Any rent that is not paid will only be deferred, not written off, so once the period covered by the Act expires the missed rental payments, plus interest, will become due.
- The Act does not prevent landlords from enforcing other remedies for non-payment of rent such as a debt recovery claim, issuing a statutory demand, commercial rent arrears recovery (CRAR), or claiming on a rent deposit, or parent company / bank guarantee.
- Landlords also retain the right to forfeit for other breaches, apart from the non-payment of rent, such as insolvency, repair, alienation or where the tenant failed to top up a rent deposit following draw down. In the current circumstances though we think it is likely that a court would grant relief from forfeiture at least during the standstill period and particularly where the tenant can demonstrate that the reason for the breach was connected with the pandemic.
- The Act does not apply to Scottish leases although similar provisions have recently been introduced in Scotland providing a standstill period in relation to irritancy (forfeiture) proceedings.
- In response to the perceived loopholes in the Coronavirus Act, as referred to above, the Government announced on 23 April 2020 that it would be introducing further measures to protect “high street shops and other companies under strain” from “aggressive rent collection”.
- The guidance confirms that statutory demands (made between 1 March 2020 and 30 June 2020) and winding up petitions (presented from 27 April 2020 to 30 June 2020) will be banned where the tenant company cannot pay its bills due to coronavirus.
- The Government is also intending to introduce legislation to provide tenants with additional time before landlords can use the CRAR process to recover unpaid rent. Landlords will only be able to use CRAR where the rent is overdue by 90 days or more.
- Further details of the UK government’s assistance programme can be found in a separate note entitled COVID-19: The impact on commercial leases in the UK.

France

- In France, the French Parliament passed a Public Health Emergency Law on 23 March 2020.
- The Emergency Law declared a state of public health emergency for a period of two months from 24 March 2020 i.e. to 24 May 2020. The period may be extended by the French Parliament and may be ended at any time by decree of the government.
- The Emergency Law enables the French government to legislate by ordinance on specific matters relating to leases. These include the suspension of rent payment obligations for small businesses and the suspension of enforcement provisions in leases.
- On 25 March 2020, the French government passed an ordinance that small businesses, termed “micro-enterprises”, would be protected from enforcement action by landlords. These provisions included protection in relation to the payment of financial penalties, interest payments, damages, forfeiture and enforcement of guarantees and security deposits.
- To qualify for protection, the tenant must be resident in France for tax purposes, be eligible for the “solidarity fund” set up by the French Government and have been ordered to close their premises to the public or suffered loss of revenue of 50% or more in March 2020 compared to March 2019.
- The criteria for inclusion in the solidarity fund include, amongst other things, the company having no more than 10 employees, having revenue of less than €1m in the last financial year and having a taxable profit of less than €60,000 in the last financial year. The effect of this ordinance is therefore very limited but tenants falling out of scope may be able to rely on the second ordinance outlined below.
- On 16 April 2020, the French government made further recommendations and advised commercial landlords to grant a 3-month rent waiver for micro-enterprises. The French federation of shopping malls (Conseil National des Centres Commerciaux) rejected the proposal and instead recommended staggered rent payments over a 2 year period. It remains to be seen what further action the government will take to implement these recommendations if agreement cannot be reached.
- The second ordinance, passed by the French government on 25 March 2020 and amended on 15 April 2020, provides all debtors, including tenants, with a grace period before enforcement action can be commenced. The ordinance applies both to obligations, including payment obligations, that are to be performed between 12 March 2020 and one month after the end of the state of public health emergency i.e. 24 June 2020 (the “Standstill Period”) and to non-payment obligations to be performed after the expiry of the Standstill Period.
- In relation to obligations to be performed during the Standstill Period, the counterparty will not be permitted to take any enforcement action during the Standstill Period plus a further period equivalent to the period between 12 March 2020 (or, if later, the date on which the contract / lease was entered into) and the date on which the obligation ought to have been performed.
- So, by way of example, if a lease entered into on 1st February 2020 required the tenant to pay a rent on 30 March 2020 then, if the tenant failed to pay as required, the landlord would not be able to take enforcement action until the end of the Standstill Period plus an additional 18 day period corresponding to the period between 12 March 2020 and 30 March 2020 i.e. 12 July 2020.
- In relation to non-payment obligations to be performed after the expiry of the Standstill Period, the ordinance provides that the counterparty will not be permitted to take enforcement action for a period starting from the date on which performance was due. The period is calculated by reference to the number of days between 12 March 2020 (or, if later, the date on which the contract/lease was entered into) and the end of the Standstill Period i.e. 24 June 2020.
- So, by way of example, if a lease entered into on 20 March 2020 required the landlord to carry out and complete works to the premises by 1 July 2020, then, if the landlord failed to comply with such obligation, the tenant would not be able to take enforcement action for a period equivalent to the period between 20 March 2020 and 24 June 2020 i.e. 3 months and 4 days. The earliest date of action would therefore be 5 October 2020.

Germany

- In Germany, the German government introduced legislation on 27 March 2020, effective from 1 April 2020, which has a similar effect to the lease provisions in the Coronavirus Act 2020 in the UK.
- The German legislation prevents landlords from terminating leases for a period of 24 Months in respect of any non-payment of rent due between 1 April 2020 and 30 June 2020 where the tenant has not paid due to the effects of COVID-19.
- So, by way of example, if a tenant failed to pay rent due in May 2020 as a result of COVID-19, the earliest that the landlord could terminate the lease would be July 2022, assuming the default was not remedied in the meantime. If a tenant failed to pay rent due after 30 June 2020, the landlord would not be subject to the restrictions on termination and could take action immediately.
- It will be for the tenant to demonstrate that the non-payment of rent was attributable to COVID-19. The German government has advised that tenants may demonstrate this by means of, in the case of residential tenants, proof of application for or a certificate of state benefits or proof of income and loss of earnings. In the case of commercial tenants, they will be able to rely on the official order prohibiting or significantly restricting their operations e.g. the order requiring restaurants and hotels to close.
- Both the German Government and the German Tenants' Protection Association (Deutscher Mieterbund) have recommended that tenants should liaise with their landlord as early as possible if they expect difficulties in rent payment, whether during or after the moratorium has expired.
- The German government may extend the moratorium until 30 September 2020 and it may be extended beyond that with the consent of the German Federal Council (Bundesrat). There has been no indication yet though that the Moratorium will be extended.
- As with the UK legislation, landlords retain their other remedies against defaulting tenants. Tenants will also remain liable for default interest on any unpaid rent and landlords can claim such default interest until such time as the rent is paid in full.

U.S.

- In the U.S., the position is rather patchy currently.
- New York State has introduced a moratorium on residential and commercial evictions which will run until 20 June 2020. A number of bills are currently under consideration including a bill to suspend rent payments for certain residential tenants and small business commercial tenants and certain mortgage payments for 90 days. Other bills being considered would see a ban on evictions and debt collections against residential and commercial tenants until April 2021.
- In most states there are legislation or governmental orders declaring an official eviction moratorium. The extent, duration and conditions of the moratoriums differ between states which means that there is no consistent approach. While none of these moratoriums relieve a tenant's obligation to pay rent, in certain cities and counties (e.g. City of San Francisco, Los Angeles County) a tenant can get more time to pay rent that was unpaid on the due date because of COVID-19, subject to certain conditions (such as notifying their landlord and providing documentation evidencing the extent of the business impact). In some states (such as Idaho and New Mexico) eviction hearings have been suspended (subject to certain exceptions in emergency matters). Some other states such as Colorado have introduced similar measures, although mainly focused on the residential sector.
- Different tenant associations around the country have been advocating for rent freeze bills. The Autonomous Tenants Union has a petition calling for the freeze of rent, mortgage, and utility payments (along with other demands, including housing for the homeless). RentStrike2020, a national organization, is calling for a two-month pause on rent, mortgage, and utility bill collections everywhere, with the threat of a rent strike. The LA Tenants Union is also trying to organize for a rent forgiveness program, starting by giving tenants letters to give to their landlords informing them they will not pay their rent for the month. Housing Justice For All is another advocacy group advocating to implement a rent, mortgage, and utility suspension for the duration of the pandemic.
- Our New York office is advising clients to seek rental deferments where possible with a corresponding extension of the lease term if needed to placate landlords. Most landlords it seems are co-operating at present as they wish to appear sympathetic and to ensure that they retain their tenants when this crisis eventually passes.

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