

ARTICLE

IMPACT OF THE COVID19 EPIDEMIC ON COMMERCIAL RENTS

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The emergency law no. 2020-290 to address the covid-19 epidemic issued on 23 March 2020 (the « **Emergency Law** ») resulted in the announcement of a state of health emergency across the entire national territory for an initial period of two months as from 24 March 2020.

In addition to several measures relating to movement restrictions of individuals, which are now firmly integrated into the daily life of the French population, the Emergency Law details the domains in which the Government is authorized to legislate in by way of directly applicable regulations or orders (*ordonnances*), in particular to protect public health and to address the economic, financial and social impact of the epidemic.

Consequently, article 11 of the Emergency Law entitles the Government to take, by way of orders within three months from its issuance, all necessary measures in order to, in particular, “*fully postpone or spread out the payment of rents, water, gas and electricity bills relating to professional and commercial premises and to waive the financial penalties and suspensions, interruptions or reductions in services likely to be applied in the event of non-payment of such bills, for the benefit of “micro companies”, as defined by decree no. 2008-1354 of 18 December 2008 relating to the criteria for determining the category of a company for the purposes of statistical and economic analysis, whose activity is affected by the spread of the epidemic*”.

The Government has already announced that forty-three orders are being drawn up following the issuance of the Emergency Law, twenty-five of which were submitted to the Council of Ministers and issued on 25 March 2020.

In this regard, order no. 2020-316 issued on 25 March 2020 relating to the payment of rents, water, gas and electricity bills for business premises operated by companies whose activity is affected by the spread of the covid-19 epidemic (the “**Order**”), entering into force immediately, specified the scope of the measures applicable to commercial rents, which benefit:

- i. to individuals and private legal entities carrying out an economic activity that are likely to benefit from the solidarity fund mentioned in article 1 of order no. 2020-317 of 25 March 2020, *i.e.* individuals or private legal entities “*carrying out an economic activity significantly affected by the economic, financial and social impact of the covid-19 and the measures taken to limit its spread*”. These eligibility criteria shall be specified by way of a decree, but the Emergency Law has indicated that these measures should benefit to “*micro companies*” which activity is affected by the spread of the epidemic which exceeds a “*threshold of loss of turnover observed as a result of the health crisis*”.

As such, it should be noted that “*micro companies*” are companies that (a) have less than ten employees and (b) have an annual turnover or balance sheet total which does not exceed two million euros.

However, decree No. 2020-371 dated 30 March 2020 relating to the solidarity fund for businesses significantly affected by the economic, financial and social consequences of the spread of the covid-19 epidemic and the measures taken to limit such spread (completed by Decree No. 2020-394 dated 2 April 2020) (the “**Decree**”) indicated that the solidarity fund, and consequently the measures applicable to the rent of business premises, would ultimately only concern very small businesses (or “**TPE**”) with ten employees or less, with an annual turnover of less than 1,000,000 euros and an annual taxable profit of less than 60,000 euros in the last financial year which (i) are undergoing administrative closure or (ii) will have experienced a loss of turnover of more than 50% in March 2020, compared to March 2019.

It is noted that are excluded from the benefit of such measures companies which control one or more commercial companies under the terms of Article L.233-3 of the French Commercial Code when the thresholds of employees, turnover and profit described above are exceeded at a group level. In addition, other criteria have been added by the Decree, including the exclusion of companies controlled by a commercial company within the meaning of Article L.233-3 of the French Commercial Code.

Consequently, in contradiction with the first announcements made on this matter, most of small and medium-sized companies (*PME - Petites et Moyennes Entreprises*) are *de facto* excluded from these economic measures, the scope of which is significantly reduced. The restrictive scope of these measures should be analysed in light of the measures recently announced in the United Kingdom, which provide for a three-month rent-free period for most lessees of commercial premises; and

- ii. moreover, and even if the Decree excludes companies having filed a declaration of cessation of payments on 1 March 2020 from the benefit of the solidarity fund, article 1 of the Order provides for the benefit of the measures applicable to the commercial rents subject to the communication of a certificate from one of the judicial agents designated by the opening judgment, to individuals or legal entities who are subject to safeguard proceedings, judicial settlement or judicial liquidation.





The Order confirms that mechanisms for postponing or spreading out (and not cancelling or suppressing) rents, water, gas and electricity bills relating to professional and commercial premises will be the only measures created. Thus, the beneficiaries of such measures "may not incur financial penalties or interests for late payment, damages, periodic penalties, enforcement of a termination clause, penalty clause or any clause providing for revocation, or activation of securities or collaterals, due to non-payment of rent or rental charges relating to their business and commercial premises, notwithstanding any contractual stipulation and the provisions of articles L. 622-14 and L. 641-12 of the French Commercial Code". It should be noted that these provisions apply both to rents and rental charges "for which payment is due between 12 March 2020 and the expiration of a period of two months after the date of termination of the state of health emergency" as declared by article 4 of the Emergency Law.

Nevertheless, several institutional landlords took advantage of the confinement period to take direct measures to suspend rents even before the issuance of the relevant orders. For instance, Compagnie de Phalsbourg cancelled all rents due by its non-food retail lessees from 15 March to 15 April 2020. In addition, the French National Council of Shopping Centres (*Conseil National des Centres Commerciaux*) confirmed in a press release dated 19 March 2020 that, in accordance with its recommendations, "shopping centre operators are currently implementing the monthly payment of rents and charges for the second half of 2020 in order to support the cash flow of the stores. They have also activated the suspension of the collection of rents and charges for the month of April, in particular as a priority for the benefit of smaller businesses, pending decisions to be taken by the Government after April 15".

However, in principle, commercial rents are still due during the current confinement period as a result of the covid-19 outbreak. In the light of the above, are there any legal mechanisms already in place which would allow lessees to avoid paying their rents?

Firstly, following the announcement by the French Minister of Economy and Finance that the covid-19 epidemic was to be considered as a "*force majeure* event", the question arises (i) as to the effective legal classification of the current situation as a *force majeure* event and, where applicable, (ii) as to the impact of this event on the performance of the lessee's obligation to pay the rent for the commercial premises.

As per the classification of the current situation as a *force majeure* event, article 1218 of the French Civil Code provides that "there is *force majeure* in contractual matters where an event beyond the debtor's control, which could not reasonably have been foreseen at the time of conclusion of the contract and whose effects cannot be avoided by appropriate measures, prevents the performance of its obligation by the debtor.

If the inability to perform is temporary, performance of the obligation shall be suspended unless the resulting delay justifies termination of the contract. If the inability is permanent, the contract is automatically terminated and the parties are discharged from their obligations under the conditions provided for in articles 1351 and 1351-1".

In other words, the performance of the debtor's obligation may be prevented permanently or temporarily following the occurrence of a *force majeure* event which must be (i) unforeseeable at the time of the execution of the contract and (ii) unavoidable (the externality condition being abolished by the 2016 French contract law revision in accordance with the case law of the *Cour de Cassation* (Cass., ass. Plén., 14 April 2006 no. 2-11.168)). If the performance of the debtor's obligation is temporarily prevented, it will be suspended (unless the resulting delay justifies termination of the contract) but, in the event of a definitive impossibility to perform, the contract may be automatically terminated.

With regard to the unforeseeability condition, the classification as a *force majeure* event relating precisely to the covid-19 epidemic would probably only be accepted by the courts for contracts existing prior to the epidemic or the containment measures resulting from it. From a narrower point of view, it could even be argued that such qualification should only apply to contracts executed prior to the measures taken by other countries such as China or Italy. In any event, the parties have the option of adapting the definition of *force majeure* in each contract and, where appropriate, it will be necessary to analyse the definition which has been adopted by the parties in each agreement.

Moreover, if the measures taken to address the current coronavirus epidemic are considered unavoidable and constitute a *force majeure* event, they must be unavoidable in their occurrence and insurmountable in their effects on the payment of rents. It is only when these cumulative conditions are met that these measures can justify the delay or even non-payment of rent for commercial premises. For instance, in the case of a rural lease, the Toulouse Court of Appeal had ruled that the bird flu epidemic and the containment measures applied were not unavoidable and could therefore not constitute a *force majeure* event justifying non-payment of rent (Toulouse Court of Appeal, 3 October 2019, no. 19/01579).

In this context, the *Court of Cassation* specified that the debtor of an obligation to pay a sum of money that has not been paid cannot be exempted from this obligation by claiming a *force majeure* event (Cass. com. 16 September 2014, no. 13-20.306).

Some authors consider that the situation could be different when the commercial premises are affected by an order prohibiting its opening, as is the case for the order of 14 March 2020 relating to various measures to limit the spread of the covid-19 virus, complemented by the order of 15 March 2020. Therefore, it could be considered that the landlord cannot meet its obligation to deliver the premises provided for by article 1719 of the French Civil Code, which could allow the lessee to suspend the performance of the commercial lease and, consequently, the payment of rent under the exception of non-performance provided for by article 1220 of the French Civil Code.

However, this solution seems debatable since the landlord's obligation to ensure the lessee a peaceful enjoyment of the premises is not applicable in case of a *force majeure* event (Cass. 3ème civ. 29 April 2009, no. 08-12.261).

Finally, for the few commercial leases concluded or renewed after the 2016 French contract law revision which do not waive its application, article 1195 of the French Civil Code provides for an obligation to renegotiate the contract when its performance is made excessively onerous for one party. Failure in this renegotiation may even lead to a judicial termination of the contract. However, it is important to note that each party "*continues to perform its obligations during the renegotiation*", including therefore the payment of commercial rents

At this point, it is therefore in the lessees' best interest to negotiate directly with their landlord on a case-by-case basis, as recommended by the Government, and their negotiating power will mainly depend on the strength of their brand (which will give very little leeway to small lessees) or, failing that, to continue to pay their rent as long as their financial situation allows it. Nevertheless, the current situation and the development of the new concept of "*state of health emergency*" will not be without effect on the future relations between landlords and lessees.

In this respect, the German Parliament has adopted a number of measures to counter the economic impact of the covid-19 epidemic and in particular concerning the rules applicable to commercial leases: landlords are now prohibited from evicting their lessees in the event of non-payment of rent during April, May and June 2020, with lessees having a vast period (until 30 June 2022) to regularize such payments. As these measures are applicable without specific conditions, some major retailers have already decided to suspend their payments for the month of April, such as Adidas or H&M. This is proof that the eligibility conditions of the French measures will be closely observed by market players and that landlords may soon have no choice but to enter into negotiations with each of their lessees.

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