

A comparison of real estate-focused measures in the Covid-19 pandemic

Views from Spain, Italy, Greece, England and Wales on new measures in the real-estate industry



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The Covid-19 pandemic has led to a reduction in the activity and turnover of businesses across Europe. Moreover, the economic crisis resulting from the pandemic has caused many families to fall into unprecedentedly vulnerable situations.

This has led to many states adopting measures aiming to protect businesses, vulnerable individuals and families. This article, which follows a panel on “*Real estate industry: New measures passed by the states*” on 7 October 2021 at the INSOL Europe Autumn 2021 online

conference, analyses the main measures adopted in Spain, Italy, Greece and the UK.

Spain

Spanish real estate measures, passed¹ in order to help certain tenants (self-employed or SMEs whose activity was compulsorily suspended as a consequence of the state of alarm of whose turnover decreased by at least 75%),² distinguished between “qualified” landlords (companies, public entities or “large property owners”)³ and those who are not. In the case of “qualified” landlords of commercial property and with regard to the rents until

the end of the state of alarm plus a maximum of four extra months, (i) a 50% reduction in the rent payments or (ii) an interest and penalty-free rent moratorium for the rents (of up to two years or until the termination date) was automatically applied if requested by the tenant (at the choice of the landlord).

Lessees of commercial property were entitled to request a temporary and extraordinary deferment of rent payments to the rest of non-large property holders. The parties to the lease contract were free to use the lessee’s security deposit to pay the rent (which needed to be refunded

within a year). Certain tax incentives were given to landlords, if reductions in rent were granted. These measures did not apply to landlords under insolvency proceedings or in a state of current or imminent insolvency. Measures regarding residential leases of vulnerable tenants included:

- (i) a suspension of eviction procedures;
- (ii) a moratorium on payment;
- (iii) state-bank guarantee lines or
- (iv) direct aids.

Notwithstanding the legal measures passed, Spanish courts are also applying the implicit *rebus sic stantibus* clause (extraordinary and unforeseeable alteration of the circumstances existing at the time of the contract) to rule on the suspension or reduction of rent payments. For instance, this has applied to the rentals of shops located at Madrid-Barajas airport, given the sharp drop in air passenger traffic due to the pandemic.⁴

Italy

Due to the pandemic, many disputes have arisen between landlords and tenants as to who should bear the burden of the mandatory closures of business premises imposed by law to prevent the spread of infection. Although the Supreme Court has not ruled on this issue yet, some courts have observed that, due to Covid-19, there was no total impossibility to perform the obligation under the lease agreement, but only a partial one. Therefore, the tenant may be entitled, pursuant to Article 1464 of the Civil Code, to a reduction of the rent which ceases at the time when the respondent's performance can be fully restored.⁵

Given this situation, very recently, Law-Decree no. 118 of 24 August 2021, converted into Law no. 147 of 21 October 2021, establishes that the entrepreneur who faces a state of financial or economic imbalance that makes its crisis or insolvency likely, may request the appointment of an

expert to facilitate negotiations with creditors and any other interested parties; to allow for an amicable solution to overcome the state of economic or financial imbalance, including through the sale of the company or parts of it.

The expert may invite the parties to redetermine, in good faith, the content of the contracts if execution has become excessively onerous due to the pandemic. This provision applies to contracts with continuous or periodic performance or deferred performance; but not to services that are the subject of employment contracts. If a first attempt at conciliation with the expert fails, the parties shall apply to the court, to fairly redetermine the terms of the contract for the period strictly necessary as an indispensable measure to guarantee the continuity of business and ensure the balance of services, also establishing the payment of an indemnity. The judge will decide applying the criterion of fairness, which translates, for the judge, into an instrument of control modifying or supplementing the negotiation statute to guarantee a fair balance between opposing interests.

England and Wales

In common with most countries, England and Wales introduced reliefs for tenants during the pandemic.⁶ Restrictions on recovery of possession or arrears have now largely tapered off,⁷ but have left a significant court backlog, meaning that courts are prioritising evictions of residential tenants, for example for anti-social behaviour. For residential property, notice periods were extended (depending on tenancy type) until 1 October 2021, when they reverted to pre-pandemic periods and there was a separate stay on possession claims which expired on 20 September 2021 as well as a stay on enforcement by eviction till 21 May 2021 (i.e. effectively for orders made for pre-pandemic reasons). Bailiffs must now give 14 days' notice of any eviction and should not evict anyone with Covid-19. Also for

home-owners, mortgage payments could be deferred by up to 6 months to July 2021 and, even now, the lender must take the borrower's circumstances into account in agreeing repayments of arrears.

For commercial property from 25 April 2020, there was a limit on the use of Commercial Rent Arrears Recovery ("CRAR"). There can be no forfeiture of lease for non-payment of rent from 26 March 2021 to 25 March 2022, though it was possible for other default (repairs, etc). If proceedings were already on foot, the court still cannot order possession until 25 March 2022. Rent includes service charges and insurance rent. Mortgage holidays were not available for commercial property, although there was significant other government and bank support for business.

Retail, leisure and hospitality businesses were also able to benefit from 100% business rates relief until 30 June 2021, followed by 66% business rates relief for the period from 1 July 2021 to 31 March 2022, capped at £2 million per business for properties that were required to be closed on 5 January 2021 or £105,000 per business for other eligible properties. Restrictions also remain on petitioning to liquidate a Company for business rent arrears.

The future remains somewhat uncertain. The Government has proposed an "arbitration scheme" from March 2022 for Covid-19 arrears in commercial cases. It has published a response to its earlier call for evidence, titled "Supporting Businesses with Commercial Rent Debts: Policy Statement".⁸ As recently as 9 November 2021, the Business Secretary announced the new measures, comprising a new Code of Practice,⁹ effective immediately, and draft legislation,¹⁰ intended to come into force on 25 March 2022. The Code is voluntary and seeks to provide guidance and best practice on engagement between landlords and tenants largely around trying to encourage them



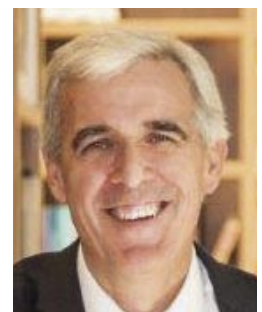
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to reach agreement. It applies to commercial tenancies forced to close by legislation following the pandemic. Annex A to the New Code sets out the Business types affected and the relevant periods as well as geographical variations.

The legislation proposes relief for “protected rent debts” but also restrictions on tenants in entering into insolvency processes, once the arbitration process is initiated. It also restricts landlord’s remedies, including retrospectively on current debt claims and bankruptcy proceedings. Either party can seek to invoke the process within 6 months of the Act coming into force, but must notify the other and try to engage and agree matters first.

Arbitration will not be available, if the tenant has entered a CVA or Restructuring Plan. However, if arbitration is entered into, the Arbitrator will weigh the effects on the businesses of both the landlord and the tenant of any relief. During the period in which reference to arbitration may be made, the landlord is restricted from recovery or winding up action.

Greece

The onslaught of the COVID-19 pandemic has prompted Greece

to adopt a set of measures to provide relief from its impact. In connection with judicially supervised enforcement, including the conduct of forced sales, it is worth noting that most court proceedings were suspended, expressly including auctions and other enforcement actions, between November 2020 and April 2021.

Additional measures related to residential and commercial leases. Legislation required compulsory rental reduction for several categories of persons, including tenants, which are affected businesses for their business establishments, employees of affected businesses for the tenancy of their primary residence, and employees in merchant marine and post-secondary students.

Redress was provided to landlords that were subject to the obligation to provide rental reductions in the form of tax relief. Moreover, fiscal relief was provided to all landlords who voluntarily provided rental reductions of more than 30%. In fact, apart from the suspension of proceedings and the rental reductions discussed above, the remaining measures generally adopted in response to the pandemic were fiscal. As noted above in connection with the suspension of court proceedings, all these measures were of limited duration for the peak of the epidemic.

By coincidence, the Greek Parliament passed a new insolvency law during the peak of the pandemic¹¹ and it is important to note that the new law, among many other reforms, introduced a primary residence preservation mechanism. The mechanism involves a private entity (**SLBO**) selected by the state pursuant to a public tender to buy the primary residence of an applicant who is characterized as vulnerable (as defined by law) and is either declared bankrupt or their primary residence is being auctioned off by the secured creditor. The SLBO acquires the residence at a market-based price

without imposing any delays in the proceedings, thereby also providing them with a reasonable recovery and liquidity.

The SLBO then leases the residence to the debtor at a rate calculated based on the then average mortgage interest rate plus a margin determined through the public tender process. Vulnerable debtors also enjoy a rental subsidy payable by the State to the SLBO (defraying part of the rental liability). The tender process to commission the SLBO has commenced and is expected to complete in first semester of 2022.

Final remarks

We can conclude that some of the measures that address the real estate-related problems derived from the pandemic have been replicated in all of the countries, while other measures are specific to each of the countries (such as the SLBO in Greece). However, all of the States have reacted proactively to try to minimise the financial and social problems derived from the non-payment of rents, for both businesses and families, in these complicated times. ■

Footnotes:

- 1 Measures included in the Royal Decree-law 15/2020 of 21 April on additional urgent measures to support the economy and employment and the Royal Decree-Law 35/2020, of December 22, 2020, on urgent measures to support the tourism and hotel industries and trade and in relation to tax matters.
- 2 Tenants must certify they comply with those requirements through a “responsible declaration” and would be liable for the damage caused in case this information proves to not correspond to reality.
- 3 Grandes tenedores were defined as those owners of more than 10 urban properties (excluding parking space or storage rooms) or a property of more than 1,500 constructed sqm.
- 4 Ruling (Auto) of Madrid’s First Instance Court nr. 39 of 23 March 2021 (ECLI:ES:JPI:2021:25A).
- 5 Trib. Roma 29 maggio 2020, available at: www.ilcaso.it/giurisprudenza/archivio/23762.pdf.
- 6 Coronavirus Act 2020 26 March 2020.
- 7 Practice Direction (PD) 51Z and CPR 55.29, and PD 55C.
- 8 See: www.gov.uk/government/publications/resolving-commercial-rent-arrears-accumulated-due-to-covid-19/supporting-businesses-with-commercial-rent-debts-policy-statement.
- 9 See: www.gov.uk/government/publications/commercial-rents-code-of-practice-november-2021.
- 10 See: <https://bills.parliament.uk/bills/3064>.
- 11 Law 4738/2020, voted October 2020, came fully into effect 1 January 2021.



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