European Real Estate Finance: Market update – Q2 2020

June 2020

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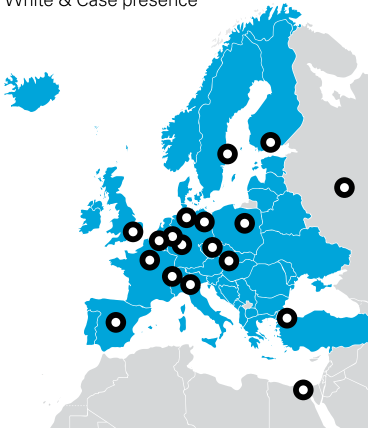
As part of our periodic updates, here is an overview of recent developments of relevance to participants in the real estate finance market across certain key jurisdictions in Europe.

Countries featured in this edition

White & Case presence



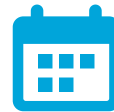
Europe

COVID-19

First and foremost, we hope all our readers and their families and friends are keeping well during these unprecedented times. As we heed the advice of our respective governments, we have adapted to remote working and continue to support our respective client and business needs. For our borrower and lender clients, we acknowledge concerns that COVID-19 may have on their new and existing loans. In our alert (available here), we considered the general themes that borrowers, lenders and financial sponsors must consider in their relevant finance documents, which include discussions on MAC clauses, force majeure provisions and frustration events (also considered here and here). Similar considerations are also of application for those clients that were involved in construction and engineering projections (see here for further information on this).

The governments across Europe have introduced fiscal stimulus measures and liquidity measures to help companies (details of the government support measures, are available here) through these difficult times. These measures can also have a drastic impact on the real estate finance markets, especially with measures such as mortgage payment holidays; a hiatus on the serving of eviction notices for rental properties and an inability for landlords to forfeit business leases due to non-payment of rent for a period of time. Greater emphasis will be placed on the terms of those rental contracts (similar to the analysis above) and whether performance can be suspended; as well as reliance on insurance policies to cover any losses. It is conceivable that construction of projects backed by real estate finance are delayed or impacted by supply-chain issues. Lenders may also need to reassess their loan portfolios if property prices drop and if the value of their secured assets are affected.

However, as we weather the storm of this pandemic, the wider impact on the economy and employment levels are becoming apparent. The impact of COVID-19 is widespread and we must all work together to overcome the difficulties.



Q3 2020

EUROPE

Lenders should be in a position to offer non-LIBOR linked products to their customers by the end of September

LIBOR discontinuation

As readers will know (and mentioned in our previous alerts), LIBOR is expected to be discontinued from the end of 2021. Great progress has been made to date, with widespread use of the rates – especially in the hedging and bond space. In the loan market, the SONIA rate has been used in a number of bilateral loans, including in the real estate finance market; and certain syndicated loans are now including a conversion mechanism for a transfer over to risk-free rates in due course. Further information on the status of the move over to risk-free rates can be found in our video series, available here.

To facilitate the transition, the Bank of England has indicated that from July of this year, it will publish a SONIA Compounded Index (with a similar index being published, since March, by The Federal Reserve Bank of New York in respect of SOFR). This is a huge step forward, as one of the lagging items for a transition away from LIBOR in the loan market, has been the lack of a screen rate and the need for a simplified method of calculating the compounded rate for different periods. This index makes this possible and it is expected that the LMA will publish revised exposure drafts of its facilities agreement incorporating its use.

However, the Bank of England has asked for more to be done. In January, it had set some interim targets to be met by the loan market to ensure that a smooth transition could be made. Whilst these are all positive steps forward, the COVID-19 pandemic has caused an unexpected disruption to these plans. In a statement released on 25 March 2020, the FCA expressed that, whilst the overall goal of a complete transition from LIBOR to SONIA by the end of 2021 remains, COVID-19 was "*likely to affect some of the interim transition milestones*" which followed in April with new target dates as follows: (i) by the end of Q3 2020, lenders should be in a position to offer non-LIBOR linked products to their customers; (ii) after the end of Q3 2020 lenders, working with their borrowers, should include clear contractual arrangements in all new and re-financed LIBOR-referencing loan products to facilitate conversion ahead of end-2021, through pre-agreed conversion terms or an agreed process for renegotiation, to SONIA or other alternatives; and (iii) all new issuance of sterling LIBOR-referencing loan products that expire after the end of 2021 should cease by the end of Q1 2021.

31 January 2020

EUROPE

The UK ceased to be a member state of the EU at 23:00 GMT on this date

Brexit

The UK ceased to be a member state of the EU at 23:00 GMT on 31 January 2020, entering a transition period until 31 December 2020. As readers will know, during this transition period, the UK will continue to operate as it did before – meaning that it will be required to continue to adhere to EU rules and the trading arrangements will stay the same. The transition period is however aimed at allowing both sides time to negotiate a free trade agreement. However, given both sides are dealing with COVID-19, questions have been asked as to whether this deadline is achievable. Whilst the UK government continues to reassure the country that meetings are progressing (now held virtually), only time will tell whether progress has been hampered.

For the real estate finance market, one of the main issues readers will want a quick and efficient resolution on is 'passporting'. The EU passporting system in place for banks and financial services companies enables firms that are authorised in any EU or EEA state to trade freely in any other with minimal additional authorisation. Certain EU legislation provides for 'third country' regimes which allow non-EU based firms (such as the UK) to offer a limited number of services into the EU if their home country regulatory regime is accepted by the EU as being 'equivalent' to EU standards. It should be noted however, that their application is more limited in scope. Accordingly, as part of the trade negotiations, a resolution on this point will be welcomed. Nonetheless, it may be advisable for banks and other financial institutions to keep their no-deal plans within close proximity.

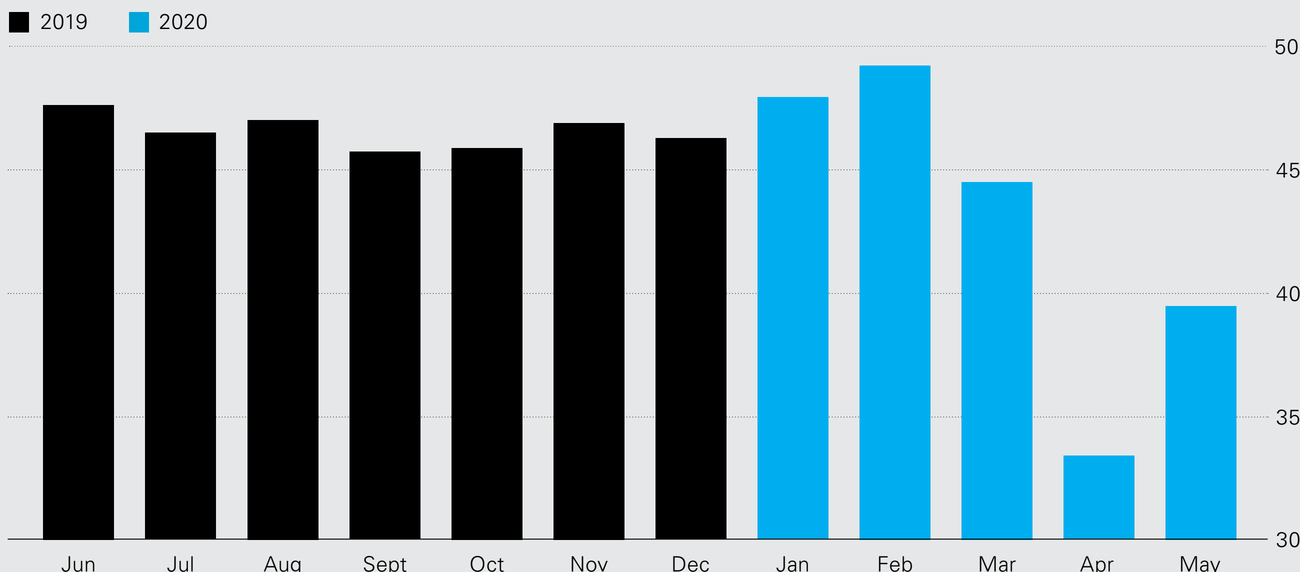
Czech Republic

Landlords prohibited from unilaterally terminating commercial leases until 30 June 2020

The Czech Parliament passed a bill prohibiting landlords from unilaterally terminating commercial leases solely on grounds of payment default with respect to lease and service charges, when such non-payment occurs between 12 March and 30 June 2020 (the "Reference Period") and is

Eurozone business activity has fallen to a record low

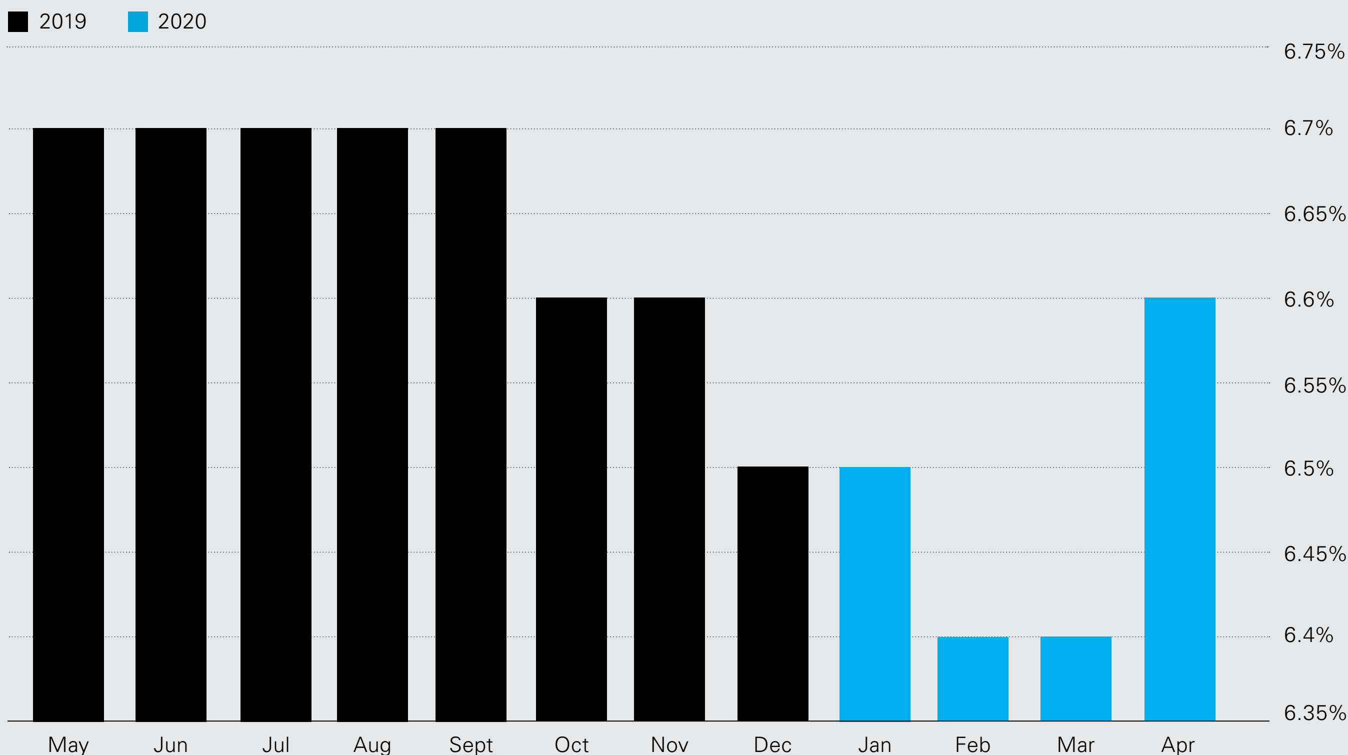
In the Euro Area, the Markit Manufacturing Purchasing Manager's Index measures the performance of the manufacturing sector and is derived from a survey of 3,000 manufacturing firms. National data are included for Germany, France, Italy, Spain, the Netherlands, Austria, the Republic of Ireland and Greece. A reading above 50 indicates an expansion of the manufacturing sector compared to the previous month; below 50 represents a contraction; while 50 indicates no change.



Source: tradingeconomics.com | Eurostat

European Union unemployment rate

Unemployment Rate in European Union increased to 6.60% in April from 6.40% in March of 2020.



Source: tradingeconomics.com | Eurostat

mainly caused by restrictions on business imposed by public authorities in connection with the COVID-19 pandemic that have prevented or substantially hampered the tenant's business activities (the "Protection Act"). The Protection Act came into force on 27 April 2020.

The Protection Act does not constitute a waiver of rent or a discount thereon, but a limitation on the consequences of late rent payment. Such protection does not apply to other payments under leases, such as payments for services related to the leased premises or common areas, marketing fees and any other agreed payments. The landlord will thus continue to issue invoices to the tenant in accordance with the lease agreement. The tenant is obliged to repay all rent debt by 31 December 2020 (the "Protection Period"). In the event they fail to do so, the landlord is entitled by law to terminate the lease, with a notice period of five days applying. This provision applies strictly, such that even if only a small portion of the total debt remains due, the landlord has the right to terminate the lease almost immediately, in principle regardless of the terms of the lease agreement. Notwithstanding the protection afforded to tenants, landlords would still be entitled to terminate a lease (i) if the tenant declares that it will not make payment within the Protection Period, or (ii) for any payment default that occurred before or after the Reference Period, or (iii) on other agreed or statutory termination grounds.

€18m to €33m

CZECH REPUBLIC

In the local Czech real estate financing market, the average loan size varies from €18 to €33 million, while the preferred range is higher, between €30 and €46 million

Source: KPMG Property Lending Barometer 2019

Facets of the Protection Act that may be deemed problematic include:

- Definition of extraordinary epidemic measures: The protection only applies to extraordinary epidemic measures specifically listed in the Protection Act, and hence each case must be assessed on a case-by-case basis.
- Prohibition to deviate by agreement: The Protection Act stipulates that arrangements that deviate from the provisions of the Protection Act to the detriment of the tenant are not taken into account. This limits the possibilities of negotiating any agreement between the tenant and the landlord that would better suit their specific situation.
- VAT: The Protection Act does not address VAT payments charged together with the rent, if the rent is subject to VAT (which is the case for the vast majority of commercial leases). This results in a situation in which landlords are still obliged to pay VAT on invoices issued (regardless of whether the tenant pays such invoices), and the tenants may claim the invoiced (but not necessarily paid) VAT from the state.

State subsidy on commercial rent

The Czech Government approved the plan of the Ministry of Industry and Trade to contribute, in the form of a subsidy programme, to entrepreneurs who have been affected by restrictive, preventative governmental measures towards the payment of rent for business facilities (the "COVID – Rent Subsidy").

Entrepreneurs whose business activities have been affected by the COVID-19 pandemic can receive a contribution from the Government towards rent due between 1 April and

30 June. The approved plan takes into account that the state will contribute to such affected entrepreneurs a sum amounting to 50% of the originally agreed monthly rent under the condition that the landlord will provide a discount of 30% from the total rent. The tenant will thus pay the remaining 20%. The amount of support per beneficiary would be limited to a maximum of CZK 10 million.

An amendment to the lease agreement, in which the landlord has agreed to a discount amounting to 30% of the monthly rent, has to be part of the application for the subsidy. The applicant will also have to prove the amount of rent which had been paid prior to the COVID-19 pandemic.

The European Commission is required to be notified of the COVID-Rent Subsidy program before its launch.

Abolishment of real estate acquisition tax

The Czech Government has approved the abolishment of real estate acquisition tax in the amount of 4% of the total purchase price for the real estate property. The bill is currently being discussed by the Czech Parliament.

The bill is proposed to have retroactive effect, meaning that the tax would not apply on transfers occurring since 1 December 2019. Those who had already paid the tax would be entitled to claim a refund.

Germany

Berlin rent cap

We informed you in our previous alert (available here), that in September of last year, a draft bill was published by the Berlin Senate applying a rent price cap to residential apartments in Berlin. In January, the draft bill (as amended) was passed in the form of the Act for Redrafting Statutory Requirements on Rent Limits (the "Rent Act") but retroactively effective since 18 June 2019, for a period of five years. Exemptions will apply for social housing, newly constructed buildings which were ready for occupancy on or after 1 January 2014 and certain other categories. In case of a breach, the authorities may impose fines of up to €500,000.

The rent freeze will apply to all existing leases at the rate applicable at 18 June 2019. This also means that rent increases that were due to occur are also prohibited (notwithstanding that they were agreed before 18 June 2019). From 1 January 2022, the rent caps are subject to an annual increase to reflect inflation – the exact rate to be determined by the Federal Statistics Office, but cannot exceed 1.3%.

In respect of new lettings, the Rent Act specifies the correct rent levels – the caps are based on the 2013 rent index, adjusted to reflect real wage developments since then. A rent table was published to that effect (setting out different rates, depending on the type of rental accommodation and property location). As a result, if rent exceeds the relevant rent levels specified in the table by more than 20%, the landlord is obliged to reduce the rent to the permitted level from November 2020.

One interesting point to note is that the Rent Act has been referred for review by the Federal Constitutional Court on 6 May 2020 to decide whether or not the state of Berlin has breached federal law by passing the Rent Act. A determination may take some time and therefore in the interim, there is a period of uncertainty for landlords and tenants.

€500,000

GERMANY

Reflecting the levels of the fines that can be imposed for a breach of the Rent Act

Italy

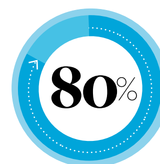
Suspension of the leasing rents in the sports sector

As part of the measures adopted by the Italian Government in response to COVID-19, article 95, paragraph 1, of so called Cura Italia Decree (as amended by Article 216, paragraph 1, of Law Decree 19 May 2020, No. 34 (the "Recovery Decree"), grants a suspension of the leasing rents due for public sports structures to companies in the sports sector until 30 June 2020. These rents must be paid either: (i) by 31 July 2020; or (ii) in five monthly instalments of the equal amount starting in July 2020.

In addition, Article 216, paragraph 2, of the Recovery Decree provides that, by reason of the suspension of the sports activities imposed by the Italian Government, the parties to the concession agreements of public sports structures may agree among themselves, upon request of the relevant licensee, a revision of the concession relationships expiring by 31 July 2023, through the amendment of the economic and financial terms originally agreed or the extension of the duration of the concession agreement, for the purpose of facilitating the gradual recovery by the licensee of the proceeds which have not being collected by it and the amortisation of the investments made or to be made by the licensee. If no agreement is reached in this respect, each party will be entitled to withdraw from the relevant concession agreement.

Article 216, paragraph 3, of the Recovery Decree provides that the suspension of the sports activities imposed by the Italian Government shall be treated as an event causing a "supervening unbalance" of the parties' obligations in respect of lease agreements regarding gyms, pools, and sports centers of all kinds. Therefore, tenants are entitled to a reduction of the rent due or already paid in respect of March 2020 to July 2020 (inclusive) by, either: (i) 50% of the amount of such rents as originally agreed; or (ii) a different percentage, determined on the basis of the evidence provided by either the landlord or the tenant, which reflects the actual "supervening unbalance" in the particular circumstances.

Other than in relation to the sports sector as described above, there are no specific provisions under the decrees issued by the Italian Government and public authorities in relation to rent abatement.



ITALY

At the end of 2019, the main source for real estate investments in Italy is still represented by foreign capital, accounting for 80% of the total, higher than previous years

Source: PwC Real Estate Market Overview

Business and property leases

In February, the Supreme Court re-characterised a business lease into a property lease. In this particular case (i.e., a retail unit located in a shopping center), in accordance with market practice, a business lease had been granted to a lessee. This is a common practice in Italy, as business leases allow a temporary transfer of the benefit of the trading licence to the individual lessee, which allows them to operate their business. This would not be possible with a property lease.

In re-characterising the lease as a property lease, the court stressed the circumstance that the assets granted to the lessee (i.e., the use of the premises, a cash register and other minor movable assets) were lacking the pre-existing organisation as a going concern.

Although this decision is not necessarily a binding precedent for other courts, it will be interesting to see the impact on the contractual relationships between the shopping centre owners and their lessees.

Luxembourg

Limitations on tax deductibility

On 25 March, the Luxembourg government published draft legislation, expected to come into force on 1 January 2021, which limits the tax deductibility of interest and royalties paid or payable by Luxembourg entities to entities established in countries that are now on an EU list of non-cooperative countries and territories. The legislation will however take into account those jurisdictions on the list as at 1 January 2021 and is expected to be updated on an annual basis.

The following conditions need to be met, before the entity is denied tax deductibility: (i) the beneficiary (i.e., the beneficial owner) of the interest or royalty is a collective entity (as defined under Luxembourg legislation); (ii) that beneficial owner is an associated entity (as defined under Luxembourg legislation); and (iii) that entity is established in a country or territory listed on the EU list of non-cooperative countries and territories.

Tax deductibility will not apply if the taxpayer provides proof that the transaction to which the interest or royalties corresponds is in the context of valid commercial reasons which reflect economic reality.

Poland

Update on Polish tax reforms

We previously informed you of the new Polish withholding tax regime, which effectively made it more difficult for Polish tax residents to apply for withholding tax exemptions or reduced rates. Our main concern related to the simultaneous application of two regimes in respect of withholding tax, which caused uncertainty in the market- both for the taxpayers and tax remitters. The regime took effect from 1 January 2019, however as the entry into force of the main rules have been continuously deferred, we use this opportunity to update you on the current status of the new regulations and approach to this regime.

As was mentioned in our previous alert, on 19 June 2019, the Polish Ministry of Finance published a draft "tax explanation". The purpose of the draft explanations was to help foreign entities obtaining payments from Poland, as well as Polish tax remitters, to re-evaluate their position with respect to withholding liabilities in Poland. However as a number of points were not explained, the new withholding tax regulations remain unclear and difficult to apply in practice. Since then, no final and official tax explanations (not being in draft form) have been published.

Most likely as a result of the above, on 27 June 2019, the Polish Minister of Finance issued a regulation which deferred entry into force of the main rules of the new withholding tax regulations primarily until the end of December 2019. However this period has been continuously extended. As it stands now, the regulation should enter into force on 30 June 2020. However, another amendment extending this time period to 31 December 2020 is currently being processed by the government. Under the abovementioned regulations, the obligation to collect withholding tax at the statutory rates, regardless of relief at source available under a double tax treaty or EU directives, is further deferred.

In practice, this means that for over a year now, withholding tax regulations in Poland have been governed by two regimes, i.e.,: (i) the previous regime in the form applied before 1 January 2019 (but with some amendments regarding, for instance acting with due diligence by the tax remitter); and (ii) new withholding tax regime which should have applied from 1 January 2019. With the deferrals mentioned above, it looks like Poland will still be governed by such two regimes for some time.

Spain

Mortgage-backed loans index references – ECJ findings

In our previous alert, available here, we informed you that a Spanish first instance court had filed a request for a preliminary ruling with the European Courts of Justice ("ECJ") to determine whether the use of *Índice de Referencia de Préstamos Hipotecarios* ("IRPH") was unfair, contrary to the terms of The Unfair Contract Terms Directive 93/13/EEC.

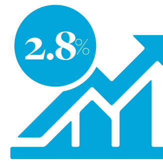
In agreeing with the conclusions of the General Advocate of the ECJ, the ECJ held that whilst this case fell within the scope of the Directive, as national legislation did not require the use of IRPH, it was for national courts to determine, on a case-by-case basis, whether there was any breach of any of the transparency control measures specified in the Directive. The ECJ stated that only the Spanish courts could determine, taking into account the full factual matrix, whether the borrower obtained all relevant information at the time of entry into the mortgage loan.

The ECJ went on to state that in certain circumstances, the national courts would be entitled to substitute onerous provisions with others, if the contract would otherwise be frustrated. In this case, for example, if the use of IRPH was found to be unfair, the Spanish courts could replace it with another index, if terminating the contract would expose the borrower to undesirable consequences. Accordingly, Borrowers wanting to rely on this Directive will first need to establish that the transparency control measures were not met (and therefore the mortgage loan is unfair), before the Spanish courts can determine whether any substitution can take effect.

New decision from the Supreme Court affecting the Stamp Duty Exemption

Under Spanish tax legislation, notarial documents, whereby a novation of loans secured by a mortgage ("Mortgage Loan") is effected, are generally subject to stamp duty. The stamp duty may range from 0.5% to 1.5% (depending on the region), levied upon the amount of the obligations secured by the mortgage. However, there is a special stamp duty exemption (see article 9 of Spanish Act 2/1994 on subrogation and mortgage loans novation) available for certain amendments to the conditions of Mortgage Loans extended by credit financial institutions (the "Stamp Duty Exemption").

Over the years, the Stamp Duty Exemption applicability has been considered controversial and subject to different interpretations amongst the Spanish tax authorities and taxpayers. For instance, the Spanish tax authorities' narrow interpretation of the Stamp Duty Exemption meant that they saw it to be applicable only when the sole content of the public deed of novation was the change in the interest rate and/or the term of the relevant Mortgage Loan; any other changes or new provisions would automatically exclude the application of the Stamp Duty Exemption.



LUXEMBOURG

GDP growth of 2.8% is forecast for Luxembourg in 2020, ahead of the eurozone average of 1.4%

Source: PwC Emerging Trends in Real Estate 2020

SPAIN

Central business district office vacancies in Madrid fell below 5% in 2019. The same rental tension applies in Barcelona across stock which is 1/3 the size of Madrid

Source: PwC Emerging Trends in Real Estate 2020

On 26 February 2020, the Spanish Supreme Court ruled a new interpretation overriding the previous approach by the Spanish tax authorities. In particular, this decision establishes that: (a) novations on interests and/or the term thereof executed through notarial deed qualify for Stamp Duty Exemption notwithstanding that the novation might contain other amendments or new provisions; and (b) it will be necessary to analyse, on a case-by-case basis, whether or not the novation meets the stamp duty application requirements, and should stamp duty be triggered, whether the Stamp Duty Exemption applies.

Further information on this is available here.

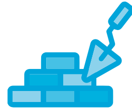
New law to enhance protection of individuals involved in real estate credit agreements

The Spanish Parliament has approved the Spanish Act 5/2019 on real estate credit agreements (*Ley 5/2019, de 15 de marzo, reguladora de los contratos de crédito inmob*iliario) ("LRECA") in order to comply with the transposition of the 2014/17/UE Directive of the European Parliament and the Council of 4 February 2014 on credit agreements for consumers. The LRECA seeks to reinforce the transparency, security and comprehension of certain facilities agreements entered into by individuals (i.e., not to legal entities) that are not acting within the framework of their professional or commercial activity.

In particular, the LRECA applies to credit agreements under which facilities are extended by lenders (either individuals or entities) engaged in the financial services market to borrowers or guarantors that are individuals (not necessarily consumers).

According to article 4 of the LRECA, the expression "credit agreements" refers to agreements relating to loans, credits or any other payment facility that meet the requirements provided therein. The credit agreements shall consist of agreements instrumenting either: (a) a loan with a mortgage or any other in rem guarantee over a residential property; or (b) a credit to acquire or retain property rights over land, existing buildings or buildings to be constructed, provided that in this case, the borrower or guarantor is a consumer. The LRECA also applies to intermediation services for the execution of "credit agreements".

The LRECA introduces the following main changes in the Spanish legal system: (a) minimum requirements that must be met in order to offer advisory services in relation to the real estate credit agreements (i.e., advisory provided by lenders, brokers or their representatives shall be contained in a specific agreement in accordance with the provisions of the LRECA); (b) creation of a registry where lenders under real estate credit agreements must register; (c) requirements on the information that the lender must deliver to the borrower during the term of the agreement; (d) restrictions in the power of lenders to declare the early maturity of loan or credit; (e) a more rigid system to determine the applicable default interest based on the remunerative interest plus three percentage points; and (f) the obligation for intermediaries in connection with real estate credit agreements to have a professional liability insurance or bank guarantee in order to cover potential liabilities arising from the failure to comply with the disclosure obligations provided in the LRECA.



58,000 sq m

SWEDEN

At the time of issuance of its report, CBRE noted that only 58,000 square metres of new space was currently under construction for retail, with a planned 2020 opening date

Source: CBRE Research Report

£43 billion

(€49.46 billion)

UNITED KINGDOM

Plenty of debt will need to be refinanced – to the tune of £43 billion (€49.46 billion) in 2020 – 21

Source: Cass UK Commercial Real Estate Lending Report

Sweden

Temporary discount for fixed rental costs in vulnerable sectors

As a way of mitigating the financial consequences of COVID-19, the Swedish Government has adopted an ordinance providing for a discount on fixed rental costs in vulnerable sectors. This covers, for example, retailers, logistical activities, restaurants as well as the organisation of congresses/fairs; and consumer services such as dentists, physiotherapist practices and hair and beauty salons.

Under this initiative, landlords who reduce fixed rents for tenants in these vulnerable sectors during the period of 1 April 2020 to 30 June 2020 will be able to apply for aid to compensate part of the reduction in rent. The compensation provided will be at most 50% of the reduction in fixed rent (i.e., at most 25% of the original fixed rent); and the aggregate compensation for rent reduction in relation to a specific tenant may not exceed €800,000.

Landlords can apply online for the compensation retrospectively; and the county administrative boards will accept applications from 1 July 2020 until 31 August 2020.

United Kingdom

Impact of the Budget – SDLT Surcharge and Corporation Tax for non-residents and business rates

Leaving aside state aid measures in response to COVID-19 (see above), it was confirmed during this year's budget that a stamp duty land tax (SDLT) surcharge will apply to the purchase of UK residential property by corporate and individual non-residents. The SDLT surcharge will not come into effect until 1 April 2021; and will be set at 2% (although earlier indications had suggested that rates would be 3%). For contracts exchanged before 11 March 2020 but completed or substantially performed after 1 April 2021, transitional rules are expected to apply. The Finance Bill will eventually set out the full details; setting out exceptions and taking into effect the results of its consultation from last year.

Additionally, it was announced that for non-UK resident companies carrying on UK property businesses or obtaining income from UK properties, corporation tax (rather than income tax) will apply from 6 April 2020. They will be required to notify HMRC of their liability to corporation tax, should tax deductions to rental income that they receive be insufficient to meet their liabilities.

Although a more detailed review of the business rates regime is also expected, the government also announced that the current 50% business rates retail discount will be increased to 100% for the next financial year. The discount was initially intended to apply to shops, restaurants, cinemas and live music venues with a rateable value of less than £51,000, but has been extended to include all retail, hospitality, nursey and leisure businesses in England, as part of the government's response to COVID-19.

Some of the other key considerations from the budget are set out here.

Prescribed part and Crown preference – impact of floating charges

Effective from 6 April 2020, the prescribed part, payable to unsecured creditors from floating charge recovering on the insolvency of the company, was to be increased from £600,000 to £800,000.

The Government had vetted this idea during an earlier consultation; and had expressed its support for the idea. Grandfathering provisions are in place, such that the increase will not impact floating charges created before 6 April 2020, but could still apply if a floating charge is created after this dated, but which ranks *pari passu* or in priority to the pre-6 April 2020 floating charge.

Effective 1 December 2020, the government is also reintroducing its status as a preferential creditor, on the insolvency of the company, in respect of unpaid VAT, PAYE, national insurance contributions and Construction Industry Scheme levies, due to HMRC. As previously the case, it will rank ahead of floating charge holders and unsecured creditors, but behind holders of fixed charges. The new regime will apply in respect of insolvency proceedings commencing after 1 December 2020. It was initially intended to apply from 6 April 2020, but has been delayed as part of the budget. This means it also takes priority over floating charges created before this date, being another cause for concern for floating charge holders.

Code of Practice for Commercial Landlord and Tenants

In response to COVID-19, this month, the UK government has published a new, temporary, code of conduct to encourage good practice amongst commercial landlords and their tenants in the UK dealing with the economic ramifications of COVID-19. The Code acknowledges the hardship caused to businesses by COVID-19 and therefore encourages landlords and tenants to enter into discussions, to ensure that otherwise viable businesses can continue occupation through the period of recovery. The Code is intended to apply on a voluntary basis (although there have been suggestions that it could be made mandatory, if the circumstances require it).

Overall, the Code encourages an open dialogue between landlord and tenant, so that temporary agreements can be reached, if required, for those tenants struggling to pay their rent, whilst encouraging those companies that can pay, to continue to do so. Tenants are asked to set out the reasons for the concessions they need; and landlords are requested to take into account the impact of COVID-19 on the tenant and themselves, when considering the request.

£800,000

UNITED KINGDOM

The prescribed part, payable to unsecured creditors from floating charge recovering on the insolvency of the company, was to be increased from £600,000 to £800,000

UNITED KINGDOM

The date from which the government is also reintroducing its status as a preferential creditor

The Code even sets out some suggestion options – such as a deferral of rent, rent-free periods for a set number of periods, rent variations or rent reductions. Overall however, the Code acknowledges that every situation is different and the parties are free to reach an agreement that suits them, having acted in good faith (taking into account the overarching principles of transparency and collaboration, taking a unified approach, government support and a need to act reasonably, set out in the Code) when making the decision.

Land Registry adapts to meet COVID-19 challenge

From 4 May 2020, HM Land Registry introduced temporary changes for signing deeds, as it adapted its policies and procedures to allow users to continue functioning during the COVID-19 pandemic.

Historically, the Land Registry would only accept wet-ink signature pages in respect of documents that were to be registered. However, from 4 May, the Land Registry have confirmed that they will accept deeds that have been signed using the 'Mercury signing approach' (using option 1). This means that, for land registration purposes, a signature page will need to be signed in pen, before the signature is captured, with a scanner or a camera, to produce a PDF, JPEG or other suitable copy of the signed signature page. In following the guidance from the Law Commission the Land Registry have made clear that the physical presence of that witness is still required (i.e., "virtual" or "remote" witnessing is not sufficient). However, it did add that there is no reason why the witness and signatory cannot be separated by glass, so a signature could be witnessed by someone looking through a car or house window – if, of course, they were then able to see clearly the signatory signing.

The Land Registry have made clear that the changes have been introduced on a temporary basis and may be modified or withdrawn at Land Registry's discretion, but undoubtedly provide a helpful change during these difficult times in the meantime.

UK Corporate Insolvency and Governance Bill

In May, the UK Corporate Insolvency and Governance Bill was published, which was updated to include provisions relevant to dealing with the impact of COVID-19. A few of the key amendments of relevance to our readers are as follows:

- a new statutory moratorium process: lasting for an initial period of 20 business days with an ability to extend for a further period of 20 business days without consent (and with the possibility of further extensions), the moratorium would provide the borrowing group time to formulate a rescue plan. Whilst the moratorium applies, creditors would be prevented from enforcing any security they had or commencing insolvency proceedings against the company. In respect of certain pre-moratorium debts, the company is expected to pay those debts whilst the moratorium is in force including the cost of goods and services, employees and rent incurred during the moratorium period, together with all amounts falling due under loan agreements and other financial services contracts;
- a new reorganisation measure: similar to a scheme of arrangement, but creating a new restructuring tool, that allows classes of creditors to vote on a rescue plan. The plan will become binding on creditors in all classes if sanctioned by the court. A company does not need to be insolvent to propose the plan but must be experiencing "financial difficulty". The new restructuring plan permits cross class cram down (i.e., plan may be sanctioned even if one or more classes do not vote in favour); and
- suspension on wrongful trading: in making decision on wrongful trading, the Bill assumes that the director is not responsible for any worsening of the financial position of the company or its creditors between 1 March 2020 and the period that is 30 days after the Bill comes into force.

A full copy of the Bill can be accessed here.

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