



October 2020

## Code of Conduct between Landlords and Tenants for Commercial Rents

On 1 October 2020 the Department of Business, Enterprise and Innovation published the “*Code of Conduct between Landlords and Tenants for Commercial Rents*” (the Code). This voluntary Code was produced with input from various Government Departments, State agencies and key stakeholders representing both commercial landlords and tenants. The Code is modelled on situations and codes from other jurisdictions including the United Kingdom’s “*Code of Practice for Commercial Property Relationships during the COVID-19 Pandemic*” (the UK Code). The Code applies until 31 July 2021 and is subject to ongoing review and may be extended or replaced, if necessary, after this date.

### Purpose

The Code aims to facilitate discussions between landlords and tenants in trying to overcome financial shocks to their businesses encountered as a result of the COVID-19 pandemic. The Code encourages both parties to work together in an open, honest and transparent manner with the aim (where reasonably possible) of reaching an amicable arrangement for the payment of commercial rents where tenants may be in difficulties at this time. It recognises that landlords also have financial duties and commitments and encourages landlords to engage with their lenders and finance providers to seek accommodation from them, where needed. In so doing, the Code seeks to underscore that closed businesses will also negatively impact landlords who will have the added difficulty of sourcing replacement tenants in a challenging market. Critically, the Code encourages the sharing of information between the parties, including financial information about the tenant’s business, with the parties encouraged to take appropriate steps to protect commercially sensitive information as part of working together at this time.

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## Potential Concessions

The Code sets out some suggestions for temporary rent arrangements that landlords and tenants may wish to consider at present including:-

- ▣ rent-free periods for a set period of time, perhaps in return for the tenant extending the term of the lease to cover the rent-free period or waiving a break option in favour of the tenant;
- ▣ rent deferrals or rent variations to reduce ongoing payments to a current market rate and/or to provide for all or part of the rent to be paid as a proportion of turnover (sliding scale);
- ▣ the payment of rent over shorter periods for a set time (e.g. monthly rather than quarterly);
- ▣ waiver of interest by landlords on rent arrears or drawing from rent deposits without requiring such deposits to be “topped up” by the tenant before it is realistic and reasonable to do so; or
- ▣ tenants and landlords agreeing to split the cost of the rent for any unoccupied period between them.

The Code reflects what many landlords and tenants are already doing in practice and it does not alter in any way, arrangements that parties may already have reached.

The Code also encourages parties to consider mediation or some other form of alternative dispute resolution if they are unable to reach an agreement themselves, where appropriate.

## Service Charges

Similar to the UK Code, the Code highlights the importance of ensuring that buildings are maintained during the pandemic and that insurance cover is continued. As service charges (if any) and insurance payable under leases are non-profit making, the Code emphasises that these expenses must be paid in full unless agreed otherwise. The Code also recognises the effect this may have on some tenants and provides some suggestions including:-

- ▣ where possible, spreading the frequency of tenant service charge payments over shorter periods;
- ▣ that all management fees levied by landlords reflect the actual work carried out in providing the services and managing the service charge during the COVID-19 crisis; and
- ▣ passing on to tenants, any reduction in statutory charges e.g. local authority rates, or insurance in the appropriate proportion applicable under the terms of the lease.

## Voluntary Code

Importantly, the Code is a voluntary code of good practice and has no statutory basis and it does not change the underlying legal relationship between a landlord and its tenant and any guarantor.

However, it is important to note that any arrangements that are reached between landlords and tenants at the present time should be properly documented and legal advice taken so that the parties are clear as to the nature of any concession agreed, its duration and its impact on existing legal relations, including on third parties (such as tenant guarantors or the landlord's lender). The tax consequences of any arrangements agreed may also need to be considered. We are aware from the last recession that disputes can arise where concessions are agreed but are not reduced to writing in clear and unambiguous terms.

## Accountability

An interesting element to the Code is that it is also seeking to encourage accountability. If a landlord cannot reach an accommodation with a tenant, it is not enough for the landlord to simply say no. Under the Code, the landlord has to provide a reasonable explanation as to why it has refused the concession sought, taking into account the information the tenant has provided and the landlord's own financial responsibilities.

## Impact

The Code has recently been welcomed by Retail Ireland and while the Code encourages landlords and tenants to act swiftly, transparently, reasonably and in good faith, it remains to be seen what impact the Code will have on the behaviour of landlords and tenants in Ireland going forward.

We do however anticipate that the Code may have an impact on landlord and tenant disputes that end up before the courts, where courts may take into consideration the extent to which parties have or have not followed the Code in such disputes.

You can access a copy of the Code at: <https://dbej.gov.ie/en/Publications/Publication-files/Code-of-Conduct-between-landlords-tenants-for-commercial-rents.pdf> and a copy of the responses to the FAQ's at: <https://dbej.gov.ie/en/Publications/Publication-files/Code-of-Conduct-between-landlords-tenants-commercial-rents-FAQs.pdf>

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