



UDC 342.7+347.77

DOI: 10.31548/law/4.2024.31

Protection of the rights of commercial property lessees amidst economic instability

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Article's History:

Received: 25.07.2024

Revised: 27.10.2024

Accepted: 27.11.2024

Abstract

The purpose of this study was to identify the problematic aspects of protecting the rights of commercial real estate lessees in the context of crisis phenomena that lead to economic instability. The study confirmed that the situation in the field of commercial real estate lease in Ukraine has deteriorated substantially due to the effects of such phenomena as the pandemic and the war, which led to economic instability. The review of the Ukrainian legislative framework revealed that, since the beginning of the pandemic, adequate mechanisms have been introduced to protect lessees' rights (deferred lease payments, eviction moratoriums, etc.). However, an analysis of Ukrainian judicial practice showed that these mechanisms do not always adequately protect lessees' rights in practice. The analysis of international practices in protecting lessees' rights during the pandemic identified a series of effective protection mechanisms that have been used in individual countries. These mechanisms can be adapted to Ukrainian realities to improve the effectiveness of lessee protection. At the same time, the study noted that in virtually any legislation, the lessee must prove that the deterioration of its financial situation was caused by extraordinary circumstances, which will help to maintain a balance in the rights and

Suggested Citation:

Kukoba, Ya. (2024). Protection of the rights of commercial property lessees amidst economic instability. *Law. Human. Environment*, 15(4), 31-46. doi: 10.31548/law/4.2024.31.



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obligations of lessees and lessors based on the principles of reasonableness and fairness. Accordingly, it is essential to address the development of effective mechanisms for proving this fact on the part of lessees, with adequate regulation in the legislative framework

Keywords: contractual relations; deferred payment; moratorium on eviction; early termination of the contract; force majeure; extraordinary circumstances

Introduction

In the context of economic instability caused, among other things, by various local and global crises, along with the protection of individuals, business support matters are of particular significance. Business development directly contributes to economic growth by creating new jobs, providing the population with necessary goods and services, and increasing the share of tax revenues to the state budget. Measures to protect business support in an unstable environment contribute, on the one hand, to ensuring economic stability at the state level, and, on the other hand, to maintaining the financial stability of individual business entities and the exercise of entrepreneurs' rights. Among these rights, it is worth highlighting the right to property and freedom to conduct business, which are fundamental human rights. Optimisation of the legal framework in the area of commercial real estate lease can prevent violations of the above rights guaranteed by national and international standards.

The global crisis associated with the spread of the COVID-19 virus has prompted governments around the world to take measures to prevent mass gatherings of people. Among such measures was the closure of a series of business units of shops, restaurants, cafes, etc. P.J. Ricotta and K.R. Walsh (2023) investigated how these measures affected commercial property lessees who lost access to leased premises and, consequently, the ability to conduct their business. The researchers noted that commercial real estate lessees faced severe losses, which sparked a debate

between lessees and lessors about who should withstand the worst of the major risks in the current environment. R. Allan *et al.* (2021) found that during the pandemic, a significant decline in lease rates occurred and capital began to flow to the residential and industrial sectors, indicating a drop in demand for commercial property lease due to emerging risks. Thus, the need has arisen to introduce measures that not only protect people's health but also support businesses in a crisis.

Apart from the COVID-19 pandemic, the full-scale war that began in 2022 was another catastrophic event for Ukraine. D. Ciuriak (2022) and M. Izzeldin *et al.* (2023) demonstrated the devastating consequences of this war for the global economic system and financial markets. I. Hanechko (2023) noted that Ukraine's real estate market suffered devastating losses due to the destruction caused by the war. In contrast, B. Będowska-Sójka *et al.* (2022) noted that in the context of the Russian-Ukrainian war, the global real estate market has shown resilience to geopolitical risks. However, in the context of the impact on contractual relations, according to R. Januarita and Y. Sumiyati (2021), such crises can become factors that destroy the very foundation on which contractual agreements are based. Such discrepancies in conclusions indicate the need for further research for broader conceptualisations.

During the pandemic, courts in many jurisdictions have been flooded with claims regarding who should bear the economic risks of the pandemic, and for Ukraine, the military actions.

M. Manville *et al.* (2023) identified the key aspects around which lessees and lessors most often disagreed. These disagreements concerned such aspects as the reduction or termination of lease due to the inability of lessees to use the leased premises, unilateral decisions to terminate the contract prematurely, imposition of penalties for failure to perform contractual obligations, eviction of lessees, etc. Therewith, the views of theoreticians and practitioners on these issues differ. Thus, in the opinion of M.A. Wolf (2020), the legislation should protect the rights of the parties to the contract and hold them liable for failure to perform their obligations. D.K. Hart (2021), in contrast to the previously mentioned study, suggested that unprecedented force majeure circumstances may be considered as a reason to change, at least temporarily, the established approaches to performance of obligations. Therefore, it is vital to investigate what substantiates the changes made due to the introduction of emergency legislative acts and how this affects the rights and obligations of the parties to lease agreements. Particular attention should be paid to the protection of the rights of commercial property lessees, as they are largely dependent on lease terms and conditions and risk losing their primary source of income in case of a deterioration in the economic situation. S. Schindler and K. Zale (2020) reflected this position concluding that existing legal remedies protect property owners much more than lessees.

The purpose of the present study was to investigate the problematic aspects of ensuring the rights of commercial real estate lessees in the context of economic instability and to characterise the international practices of protecting their rights and interests.

Materials and Methods

The regulatory framework of the study was based on the legislation of Ukraine and other European countries. Furthermore, the study was based on a

series of court precedents. The formal legal method was employed to analyse the Ukrainian legislation relating to the protection of lessees' rights in case of an emergency. This method helped to characterise the effects of legislative innovations on the legal system and relations in the field of commercial real estate lease. Within the application of this method, the following regulations were analysed: the Civil Code of Ukraine (2003), the Law of Ukraine No. 530-IX "On Amendments to Certain Legislative Acts of Ukraine Aimed at Preventing the Occurrence and Spread of Coronavirus Disease (COVID-19)" (2020), and the Law of Ukraine No. 540-IX "On Amendments to Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guarantees in Connection with the Spread of Coronavirus Disease (COVID-19)" (2020).

The historical legal method helped to note how legal provisions have changed over time and in connection with the events such as the spread of the COVID-19 pandemic and the full-scale invasion of Russia in Ukraine. Specifically, this method helped to observe that Ukrainian legislation contained a suitable response to these events, expressed in the adoption of new legislative acts that improved the existing legal relations in the field of commercial real estate lease. These legislative acts include, first of all, the Law of Ukraine No. 1071-IX (2020) and the Tax Code of Ukraine (2010).

A valuable method in the context of the present study was the comparative legal method. This method helped to describe and compare legislative changes in the field of commercial real estate lease introduced in Ukraine and a series of European countries (Austria, France, Germany, Italy, Portugal, Spain, Sweden, the Netherlands, England, and Wales) in response to the large-scale crisis. The method of precedent analysis helped to characterise the court precedents of Ukraine regarding the protection of lessees'

rights in the context of economic instability and to identify the imperfections in the existing legislation. The following court precedents were included in the analysis: No. 911/3067/20 (2021), No. 922/2531/15 (2016), No. 910/7679/22 (2023), No. 914/675/22 (2023). These precedents were chosen because they demonstrate that the provisions consolidated in the legislation do not always contribute to the proper protection of commercial property lessees in practice.

Results

Protection of the rights of commercial real estate lessees in Ukraine. Commercial property leasing is an indispensable tool for meeting key business needs. Recently, Ukrainian businesses have faced substantial challenges due to the spread of the COVID-19 pandemic and the outbreak of a full-scale war, which, among other things, has adversely affected the commercial property market (Fig. 1).

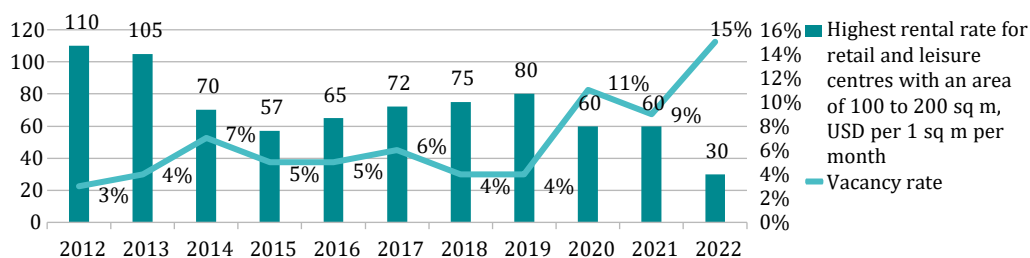


Figure 1. Highest lease rates and vacancy rates in commercial property

Source: N. Aleynik (2023)

As illustrated in Figure 1, the pandemic has severely affected the commercial property market in Ukraine. The highest lease rates for retail and shopping centres with a take-up area of 100 to 200 m² fell by USD 20 per 1 m² per month (in 2020 compared to 2019). At the same time, in 2020, the vacancy rate for commercial property increased considerably, by 7% year-on-year.

However, a particularly negative impact on these indicators was recorded after the outbreak of a full-scale war in 2022, when the highest lease rate was halved compared to the year of the pandemic, while the vacancy rate for commercial property reached 15%. However, the commercial property market has subsequently begun to recover gradually (Fig. 2).

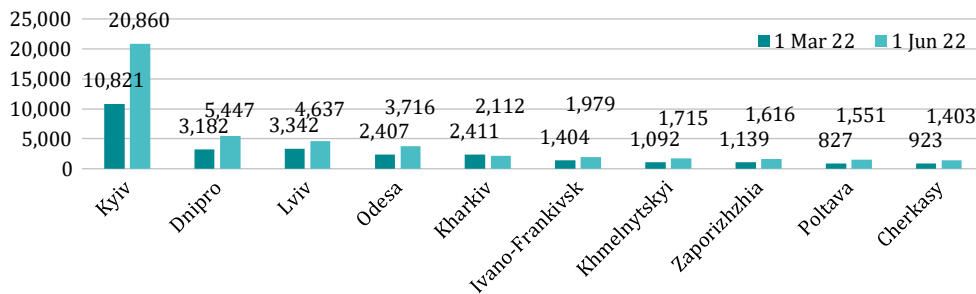


Figure 2. Regions of Ukraine with the highest number of commercial property lease ads at the beginning of the large-scale invasion

Source: Commercial property lease market starts to revive (2022)

Figure 2 demonstrates that the number of commercial property advertisements started to grow as early as June 2022. As of 2024, demand for commercial property is expected to increase. However, in the context of economic instability and crises of various origins, approaches to lease agreements should be very balanced and contain clear discussion of the lease terms in case of various risks. The main such terms include the procedure for determining and changing the lease payment, the procedure for early termination of contracts, consideration of the possibility of force majeure, and the procedure for vacating and returning leased commercial property. The essential terms of a lease agreement are set out in Part 1 of Article 284 of the Commercial Code of Ukraine (2003).

The procedure for determining and changing the lease payment relates to the amount of payments, the procedure for their payment, and the possibility of revising payments. The imperfection of the mechanisms for determining and changing lease payment in Ukraine became most evident after the outbreak of the COVID-19 pandemic and, subsequently, with the outbreak of a full-scale war, when many business entities lost the ability to make full use of their leased premises.

At the beginning of the pandemic, Ukrainian legislation was supplemented by the Laws of Ukraine No. 530-IX (2020) and No. 540-IX (2020), which contained provisions on business support, limitation of penalties, specifically for non-payment of lease for business entities that could not operate due to quarantine, and a moratorium on eviction of lessees for non-payment of lease.

The procedure for determining and changing the lease payment is regulated by Article 762 of the Civil Code of Ukraine (2003), namely, parts 4 and 6. Part 4 prescribes the lessee's right to demand a reduction in lease payment in cases where its ability to use the leased property has significantly decreased due to circumstances for which the lessee not responsible. Part 6 prescribes a

complete exemption of the lessee from the obligation to make lease payments for the period during which they were unable to use the property due to circumstances beyond their control.

However, the analysis of the judicial practice suggests that the above legislative provisions do not provide adequate protection to the lessee. As an example, see certain comments of the Supreme Court in case No. 914/675/22 (2023). It was noted that the fact of military aggression in itself does not indicate that it is categorically impossible to use the leased premises. Another illustrative example is the position of the Supreme Court in Case No. 911/3067/20 (2021). The State Enterprise Boryspil International Airport (IA) applied to the court with a request to recover from Coffee Bar Plus LLC the lease payment for March-July 2020 (i.e., during the quarantine period), in the amount determined by the terms of the lease agreement. For the period of quarantine, the Government's resolution reduced the lease payment for the use of state property, and therefore the defendant was forced to pay a share of the lease payment in the amount of 25% of the accrued amount. In turn, the plaintiff argued that the lease payment reduction could only be applied if the lease agreement was amended accordingly. In contrast, the defendant believed that due to the impossibility of using the leased premises under quarantine, it should have been completely exempted from making the lease payment. However, the Supreme Court's position in this regard contained a note that the imposition of quarantine restrictions does not in itself indicate a complete inability to use the leased premises. As the courts found, the lessee did not prove that its business activities were completely suspended during the quarantine, including due to the impossibility of access to use the premises, as the plaintiff provided the defendant with such access and recorded the defendant's employees entering the premises. These circumstances gave the courts grounds to reject the defendant's

certificate of force majeure. In the end, the cassation appeals of Boryspil International Airport and Coffee Bar Plus LLC were not satisfied.

The above examples demonstrate the imperfection of the mechanisms for protecting commercial property lessees in the context of economic instability and crisis. Lessees could only hope for understanding from lessors, who, recognising the gravity of the lessees' situation, could voluntarily agree to reduce or suspend lease payments. However, this does not solve the problem of the lack of reliable legal mechanisms to protect lessees' rights. In the absence of such mechanisms, it is particularly important for lessees to pay as much attention as possible to all the details and contingencies at the time of entering into the lease agreement.

Notably, if the lessee already knew or could have foreseen certain circumstances that may prevent the use of the leased premises at the time of entering into the lease, the courts may reject the request for reduction or exemption from lease payment due to the occurrence of such circumstances. For example, in case No. 910/7495/16 (2018), the plaintiffs filed a lawsuit to recover the debt from the defendant under the lease agreement. The defendant objected to the claim, arguing that it should not make the lease payment due to the impossibility of using the disputed premises associated with the anti-terrorist operation in Donetsk, where the leased property was located. In this regard, the Supreme Court concluded that the fact of the anti-terrorist operation was not a ground for not making the lease payment, as the defendant was already aware of the emergency in Donetsk at the time of acceptance of the leased premises.

Accordingly, in the force majeure section of the lease agreement, such factors as an ongoing war are not likely to be considered as force majeure. Overall, the fact of such circumstances is most often evidenced by a certificate issued by the Ukrainian Chamber of Commerce and Industry (CCI). However, the parties are not

deprived of the opportunity to prove the fact of such circumstances even in the absence of a certificate issued by the UCCI. For instance, in case No. 910/7679/22 (2023), the force majeure event was the partial destruction of the shopping centre where the leased premises were located. The lessee filed a lawsuit to terminate the lease agreement due to such circumstances, as they rendered the lessee unable to use the leased premises, and to recover the guarantee payment from the lessor. The claim was partially satisfied without the need to present the CCI certificate, and the case was sent for reconsideration.

A significant aspect of lease agreements is the determination of the terms and conditions of early termination. If the agreement makes provision for unilateral termination, it should clearly define the timeframe for notifying the other party of such intention. However, in case of a conflict, it is essential that the agreement also sets out the permissible ways of notifying the other party of the intention to terminate the agreement, such as e-mail, postal mail, etc., the necessary details, deadlines, actions in case of refusal to receive the notification, etc. (Expert opinion..., 2024).

Another vital point is to discuss the terms of return of the leased property. It should be borne in mind that the lessor cannot refuse to accept the leased property even if its condition deteriorates, which can be demonstrated in practice by the example of case No. 922/2531/15 (2016). The High Commercial Court of Ukraine noted that in case of vacating the premises by the lessee, even if the condition of the leased property deteriorates, the lessor must accept the property by signing the relevant act and cannot demand lease payment for the period during which the lessee no longer occupied the premises.

Experience of the European Union countries. One of the most striking examples that demonstrated the ability and readiness of the European Union to respond adequately to economic

instability and crises was the COVID-19 crisis. The measures taken directly affected the areas of contractual relations and litigation related to commercial real estate leases. Consideration and use of the case law of European countries in this regard may be useful for Ukraine, with respective adaptation to local conditions and consideration of the specifics of the problems faced by Ukraine.

Since the beginning of the pandemic, Austria has not adopted any new laws on real estate relations. At the same time, the country applies the provisions of general civil law already in force before the pandemic (Civil Code of Austria, 2017). These provisions contain regulations for early termination and reduction of lease payment for the lessee, while retaining the right to use the leased property. The decrees issued by the Federal Minister of Health in March 2020 contained a series of prohibitions, including a ban on customers entering the area, which effectively rendered commercial premises unusable for the purposes for which they were leased. Such restrictions did not apply to office premises. However, the regulations adopted by the country in relation to COVID-19 (Ordinance of the Federal Minister..., 2020) did not prescribe new rights to terminate agreements or reduce lease payments under commercial real estate lease agreements.

The French government developed a mechanism under which the lessor could not impose fines or demand termination of the lease agreement if the lessee decided to suspend the payment of lease for a specified period (Law of France No. 2020-290, 2020). This applied to the period from 12 March 2020 until the end of the two-month period following the lifting of the public health emergency. Conditions were set for lessees to meet to benefit from the above mechanism, namely: the number of employees should not exceed 10 people and the turnover should not exceed EUR 1 million for the last reporting year, they were prohibited from accepting clients or their

turnover excluding taxes decreased by at least half for the period from 1 to 31 March 2020, etc.

In Germany, a moratorium was introduced on the termination of the lease agreement by the lessor in case of non-payment of lease by the lessee of commercial real estate during the period from 1 April to 30 June 2020 (Act to Mitigate the Consequences..., 2020). The moratorium could be further extended. However, the lessees were not exempted from the obligation to pay the arrears and interest, and the deadline for this was set at 30 June 2022. To take advantage of the government's options, the lessees had to prove that their non-payments were caused by the impact of the pandemic. For example, that their activities were prohibited or significantly restricted according to clearly defined legal requirements.

The Civil Code of Italy (1942) does not contain any provisions for reducing or suspending lease payments or terminating lease agreements related to the spread of the coronavirus (with the exception of sports centres and gyms). However, certain documents contain provisions for certain subsidies and tax benefits. The "Cura Italia" (Decree-Law of Italy No. 18, 2020) introduced tax credits for persons engaged in retail or food and beverage trade, which amount to 60% of the rent paid in March 2020. The said document also contains an article stating that compliance with the restrictions established by it shall be considered for the purpose of excluding the liability of debtors under the terms of lease agreements for non-performance of obligations, including termination of agreements and imposition of fines. Furthermore, the "Rilancio Decree" (Decree-Law of Italy No. 34, 2020) established the right of lessees to a tax credit equal to 60% of the monthly lease payment paid for the spring months of 2020. This right was granted to lessees whose revenue did not exceed EUR 5 million for the previous fiscal year, as well as to representatives of hotel and agritourism businesses, with a mandatory

requirement of a decrease in turnover by at least 50% for the relevant months. The tax credits mentioned in the above documents could not be combined. Separate articles prescribed the right to tax credits for bringing premises into compliance with sanitary requirements aimed at preventing the spread of the virus.

Portugal imposed restrictions on the unilateral termination or cancellation of lease agreements by lessors, who also could not prevent the renewal of such agreements. In addition, if the lessee did not agree to the termination of the lease, the expiry date of the lease was not applied, and other statutory deadlines were postponed. Furthermore, deferrals of lease payments were applied. The deferral applied to retail establishments whose operations were suspended or closed due to legal quarantine restrictions, even if they continued to operate online (using electronic means). In addition, catering establishments could take advantage of the benefits, even if they continue to produce confectionery products that are sold for consumption outside the establishment or through delivery services. However, the relevant regulations did not contain provisions for commercial property lessees providing basic services or selling essential goods. The deferred lease was to be paid in instalments over a specified period without penalty or interest. Additionally, restrictions were imposed on the termination of lease agreements in case of closure of the establishment due to pandemic precautions. In case of termination of the lease by the lessee, the deferred lease payment was to be made in full upon termination of the lease (Law of Portugal No. 1-A/2020, 2020).

In Spain, commercial property lessees who were forced to suspend operations due to the spread of the pandemic were entitled to deferred lease payment if the lease was with a state-owned company or a large property owner. Lessees who did not fall into the above category could request

a temporary moratorium on lease payments, but the decision on whether to accept these terms was left to the lessor's discretion (Royal Decree of Spain No. 463/2020, 2020).

In Sweden, a grant scheme was applied for those lessors who agreed to introduce discounts for their lessees. This scheme made provision for the state financial aid in the amount of half of the discount provided by the lessor if said lessor operates in the hotel, restaurant, or retail sector, or provides certain services (e.g., a hairdresser). Furthermore, conditions were set regarding the timing of lease agreements, the timing of the discount, the submission of applications, etc. Grants were limited to 25% of the initial fixed rent and EUR 800 thsd (Ordinance of Sweden No. 2020:237, 2020).

In the Netherlands, no new real estate regulations have been introduced since the start of the pandemic. As in Austria, the country applied the existing provisions of the Civil Code of the Netherlands (1992). Therewith, the operation of catering establishments was temporarily suspended. At the same time, several new arrangements were introduced that were not directly related to the real estate sector. For example, the Emergency Bridging Measure for Employment (2020) stipulated that in case of a loss of defence by at least 20%, employers are entitled to a subsidy for salary-related costs (up to 90%). Additionally, other measures were introduced, such as the "corona credit" and various tax measures, which did not directly affect lease relations, but contributed to creating a favourable environment for business, giving it more opportunities to make lease payments (The impact of COVID-19..., 2021). Thus, no new legislation was introduced in the Netherlands to improve the situation of lessees or lessors in the crisis, but the government encouraged these parties to engage in a constructive dialogue. This resulted in the Support agreement for lessees and lessors of retail space (2020), according

to which the lease payment for April-June 2020 could be suspended by agreement of the parties if the lessee's turnover fell by at least 25%.

In England and Wales, a moratorium on commercial property confiscation was introduced, which prevents lessors from confiscating leases due to non-payment of lease for a specified period. The moratorium also applied to other payments due from lessees (insurance, utility, interest, etc.). However, this measure did not affect lease payment reductions or deferrals – these decisions had to be agreed between the lessor and lessee. Furthermore, other temporary measures were introduced to protect lessees, such as a ban on filing a petition for liquidation, a ban on the application of the commercial lease debt recovery system under certain conditions, etc. (The impact of COVID-19..., 2020).

As for the case law of the European Union, it is worth noting that most national courts have recognised that the spread of the COVID-19 pandemic can be considered a force majeure event. However, in practice, the courts have not always justified the lessee's failure to pay the lease stipulated in the lease agreement on this basis, being cautious about recognising the pandemic as force majeure. Thus, the example of Italy in relation to the existing case law shows that the mere fact of a pandemic did not relieve lessees from liability under the contractual terms. They had to reasonably prove that the spread of the virus had caused such obstacles that they were effectively unable to perform their contractual obligations. This position is reflected in the Pisa Court Order (2020), which states that a lessee claiming that its difficulties are caused by the spread of the pandemic must prove it – it cannot refer to a general deterioration in its financial condition in abstract terms, but must provide concrete evidence. The courts of the Netherlands and France have mostly issued analogous decisions, noting that if the mere existence of a pandemic does not prevent the per-

formance of contractual obligations, the parties must perform them in any case (The impact of COVID-19..., 2021).

On the other hand, in some cases, courts have recognised the problems caused by the spread of the pandemic as force majeure. Most often, this was associated with the need to follow restrictions imposed legislatively to prevent the spread of the virus. The case law of the Verona Court, for instance, shows that if the defendant is unable to reach the place of performance due to restrictions imposed by the government, performance is declared impossible (ruling of 8 July 2020) (The impact of COVID-19..., 2021). Analogous decisions have been issued by the courts of France, Spain, and others.

As for the possibility of renegotiating the agreement, the EU courts mostly sought to restore the contractual balance that had been disturbed by unforeseen circumstances caused by the pandemic, while rejecting measures that would lead to the termination of the agreement. Referring to the need to observe the principles of fairness and good faith inherent in any contractual relationship, Italian case law demonstrates that the courts have noted the obligation of the parties to revise the contract due to substantial changes in circumstances. Moreover, the courts allowed that in case of failure to perform such an obligation, the aggrieved party could apply to the court to review the contractual terms (The impact of COVID-19..., 2021). Considering the practices of the EU countries, Ukrainian legislators should pay closer attention to developing mechanisms for temporary lease payment reduction and ensuring their practical implementation; developing effective approaches to individual assessment of the circumstances of each case; introducing state support, for instance, in the form of compensation for part of the lessor's discount on the lessee's lease, following the example of the Swedish grant scheme; encouraging the parties to engage in dialogue and cooperation, etc.

Discussion

The study noted that the Ukrainian legal framework at the beginning of the COVID-19 pandemic was adequately supplemented by a series of legislative acts, including restrictions on penalties for commercial property lessees and a moratorium on evictions for non-payment of lease. At the same time, an analysis of Ukrainian judicial practice revealed that the measures taken did not provide lessees with adequate protection, both in a pandemic and in a full-scale war. As business development is often associated with the need to lease commercial premises, this issue requires increased attention, as business efficiency directly affects the financial stability and support of the country's economy in wartime.

To find useful practices for Ukraine in protecting the rights of lessees in times of economic instability, the practices of the European Union were reviewed. The study focused on effective initiatives to develop mechanisms for temporary lease payment reductions for lessees, implementation of state support measures, opportunities to encourage lessees and lessors to cooperate, etc. The above examples of amendments to the legislation of the European Union and the case law of these countries can provide Ukraine with valuable experience in protecting lessees' rights in the context of economic instability, specifically, related to military operations and risks.

The findings of the present study should be compared with conclusions of other researchers on the effectiveness of lessee protection measures in the context of economic instability contained in the research of authors from other countries. For example, E.S. Ti (2022) revealed how the pandemic has affected the relationship between lessees and lessors in the UK. The researcher noted that the government has a long history of adopting laws that differ from conventional ones in the context of emergency situations, which is certainly the spread of a pandemic such as

COVID-19. However, the adoption of any laws, even in an emergency, requires proper substantiation. Factually, the laws adopted in the field of commercial real estate lease during the pandemic prevent lessors from asserting their legal rights, and thus usurp existing contractual rights. However, in the researcher's opinion, this does not apply to the property aspect of commercial leases, i.e., the state is entitled to temporarily restrict the rights of lessors, as this does not violate property. The researcher's position is based on Honoré's theory that property rights imply a duty to prevent harm to others. E.S. Ti believes that this theory rationalises the introduction of restrictions in emergency situations. The reference to Honoré's theory distinguishes the conclusions of E.S. Ti (2022) from the findings of the present study since the researcher substantiates the introduction of restrictions on the rights of lessors mainly by the current economic situation and the need to support business in a crisis. At the same time, E.S. Ti's (2022) position allows explaining the need for such restrictions not only from the economic standpoint, but also from the standpoint of property theory.

According to the findings presented by V. Mak (2022), it can be concluded that, overall, changes in contract legislation in the context of force majeure are justified. Based on the analysis of lessee protection in England and the Netherlands, the researcher concluded that Dutch legislation gives greater opportunities for lessees to receive lease payment discounts. V. Mak's study emphasised the significance of proper valuation of lease payment discounts and noted that long-term changes should include adjustments to the standard rules to address problems with such valuation. These conclusions are also consistent with the findings of the present study, as it noted the need to adjust Ukrainian legislation due to force majeure and the resulting economic instability.

M. A. Wolf (2020) described the experience of the United States of America in introducing new

legislation in the field of commercial real estate lease with the spread of the COVID-19 pandemic. As the primary examples, the researcher noted the government orders issued in the most populous states of the country. For instance, the Governor of New York issued an order prohibiting the eviction of commercial or residential lessees or foreclosure of property for 90 days (the period was subsequently extended). The Governor of California issued an order to suspend evictions of commercial property lessees who have suffered a substantial reduction in business income due to the pandemic. However, this moratorium did not affect the lease payment obligations of lessees who were able to pay in full or in part. These and other examples described in the study allowed the researcher to formulate his position on the justification of introducing such measures in an emergency. The principal idea of the study is that the fact of the existence of an emergency may be the basis for the implementation of respective state decisions but does not create new or cancel existing constitutional provisions. In other words, state measures, even in the context of emergency situations, cannot violate constitutional rights and fundamental freedoms. In this regard, it was noted that judges' opinions on the restriction of contractual terms differ – some consider it justified due to the presence of emergency conditions, while others express fears that these restrictions will ultimately lead to a violation of constitutional provisions. It can be argued that the introduction of restrictions in the context of emergency situations is justified but has its limits. Thus, as noted in the study, a prominent aspect that ensures compliance with the principles of reasonableness and fairness is the need for the lessee to prove that its problems were caused by the emergency.

This opinion is reflected in the decision of the highest court of Germany (Bundesgerichtshof) dated 12 January 2022 (XII ZR 8/21), commented on by M. Zachariasiewicz (2023). Overall, this

decision concerns the issue of whether lessees must make the lease payment in full in the context of the COVID-19 pandemic. The German highest court concluded that a lessee cannot completely waive its contractual obligations. At the same time, the lessee may request a judicial review of the lease payment during the quarantine. Such a review will not always result in an equal distribution of risk between the parties, as such risk should be allocated based on individual circumstances. These circumstances include the amount of financial losses incurred by the lessee due to the inability to use the leased premises, the significance and duration of the closure of the premises, and the actions taken by the lessee to mitigate the losses, including state aid or insurance. P. Ratusznik (2024) reached analogous conclusions, referring to the practices of Germany and Poland. The researcher noted that before the pandemic, European law was based on the *pacta sunt servanda* principle, according to which agreements must be executed. However, the pandemic has disrupted the established order, as the judicial practice has become predominantly based on an assessment of the individual circumstances of the case.

In the studies by S.M. Viljoen (2020) and L. Richardson (2021), encouragement of negotiations between the parties is considered a possible measure to improve the financial stability of both parties in a crisis. However, other studies do not support these assumptions: C. Martin *et al.* (2023) found that lease payment measures based on dialogue between lessees and lessors had limited effect, with only 8-16% of such negotiations leading to changes in lease payments. However, the differences identified in the present study and the findings of other researchers do not change the position expressed in the former, as the recommendations made in the Ukrainian context may have more positive effects, considering the specifics of the war situation and the experience of countries gained during the pandemic.

Conclusions

Commercial property leasing is an essential tool for meeting the needs of many businesses. However, in the context of economic instability caused by various crisis factors, lessees may face major challenges. For instance, during the COVID-19 pandemic and the widespread war in Ukraine, national businesses have faced substantial economic difficulties due to the inability to access leased premises. Considering the significance of business in meeting the needs of the population and making a crucial contribution to the state budget, lessees' rights must be properly protected in the face of the crisis and economic instability.

The study noted that during the pandemic, lease rates have fallen dramatically, and commercial property vacancy has increased. With the outbreak of a large-scale war, these indicators experienced even more negative trends, but later the commercial property market began to recover gradually. The growing supply must be matched by adequate demand, and this is expected to grow gradually in 2024. However, lessees should be extremely cautious about leasing commercial property in an environment of economic uncertainty. Lease agreements should contain a clear discussion of the terms and conditions, including rights and obligations in case of various risks. The key terms that should be set out in detail in lease agreements are the procedure for setting and reviewing lease payments, the possibility of premature termination of agreements, actions in case of force majeure, and the procedure for vacating and returning leased commercial property.

Overall, at the beginning of the pandemic, Ukrainian legislation was supplemented by a series of laws that contained provisions limiting penalties for non-payment of lease, a moratorium on eviction of lessees, etc. The Civil Code of Ukraine also contains provisions stipulating that lessees may demand a reduction in lease payments if, as a result of circumstances for which

they are not responsible, their ability to use the leased property has been significantly reduced. However, the analysis of court practice conducted in this study revealed that in practice, the above legislative provisions do not provide adequate protection to commercial real estate lessees.

To find approaches and mechanisms to improve the legal protection of commercial real estate lessees, the study analysed international practices. This analysis showed that the following mechanisms exist in different countries to protect lessees' rights during a pandemic: provisions in the law for premature termination of agreements and reduction of lease payment for the lessee while retaining the right to use the leased property (Austria); a mechanism that prescribes the non-application of fines and requirements for termination of the lease agreement to the lessee if they decide to suspend the payment of lease for a period specified by law and in case of their compliance with the requirements specified by law (France); a moratorium on termination of the lease agreement due to non-payment of lease, which was in force for a certain period, provided that the lessee proves that the non-payment was caused by the impact of the pandemic (Germany); introduction of tax credits for lessees who meet the requirements set out in the law (Italy); restrictions on unilateral termination or cancellation of lease agreements by lessors, deferred payment of lease for certain categories of lessees (Portugal); deferral of lease payment in cases where the lease agreement was concluded with a state-owned company or a large property owner (Spain); application of grant schemes for lessors who agreed to introduce discounts for their lessees (Sweden); introduction of measures not directly related to the real estate sector, but contributing to the improvement of the situation of businesses in crisis ("corona credit", eligibility for subsidies, various tax measures); call for dialogue between lessees and lessors (the Netherlands); a moratorium on

the confiscation of commercial property, a ban on filing a petition for liquidation, a ban on the application of the system of reimbursement of commercial lease arrears under certain conditions, etc. (England and Wales).

These measures can be a valuable experience for Ukraine in the context of improving the legal framework for the protection of lessees' rights. With adequate adaptation to local conditions and consideration of the specifics of the situation in Ukraine, international practices can improve the

situation of commercial property lessees in crisis conditions. Further research could focus on developing concrete proposals for changes to Ukrainian legislation to improve the protection of lessees' rights during wartime.

Acknowledgements

None.

Conflict of Interest

None.

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Захист прав орендарів комерційної нерухомості в умовах економічної нестабільності

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Анотація

Метою дослідження було визначення проблемних аспектів захисту прав орендарів комерційної нерухомості в умовах дії кризових явищ, що призводять до економічної нестабільності. У результаті проведеного дослідження було підтверджено, що ситуація в сфері оренди комерційної нерухомості в Україні через вплив таких явищ як пандемія та війна, що призвели до економічної нестабільності, суттєво погіршилася. За результатами дослідження української законодавчої бази засвідчено, що із початком пандемії у ній було запроваджено адекватні механізми захисту прав орендарів (відстрочки виплат орендної плати, мораторій на виселення та ін.). Проте, аналіз судової практики України довів, що ці механізми не завжди належним чином захищають права орендаря на практиці. В процесі аналізу міжнародного досвіду щодо захисту прав орендарів в умовах пандемії було виявлено низку ефективних механізмів захисту, що застосовувалися в окремих країнах. Ці механізми можуть бути адаптовані під українські реалії з метою покращення ефективності захисту прав орендарів. Водночас, було відзначено, що фактично у будь-якому законодавстві орендар має довести, що погіршення його фінансового становища було спричинене саме дією надзвичайних обставин, що дозволить зберегти баланс у правах та обов'язках орендарів та орендодавців на засадах принципів розумності та справедливості. Відповідно, важливо приділити увагу розробці ефективних механізмів доведення цього факту з боку орендарів із належним закріпленням у законодавчій базі

Ключові слова: договірні відносини; відстрочка оплати; мораторій на виселення; дострокове припинення договору; форс-мажор; надзвичайні обставини