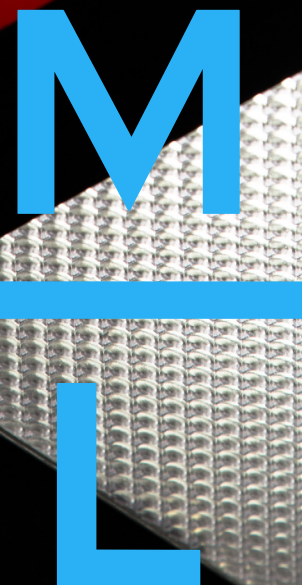


XVIII. Criminal liability

XVIII.A. Background	3
XVIII.B. Criminal liability arising from failure to comply with the restrictions and obligations set forth in Decree 2-A/2020	3
XVIII.C. Criminal liability arising from sailing and buying essential goods and basic necessities	5



Glossary

European Commission Communication (2020/C 86 I/01)

[European Commission Communication \(2020/C 86 I/01\)](#), of 16 March, sets out the guidelines for border management to protect health and ensure the availability of essential goods and services

Decree 2-A/2020

Decree 2-A/2020, of 20 March, implements the state of emergency declared by virtue of Presidential Decree 14-A/2020, of 18 March

Presidential Decree 14-A/2020

Presidential Decree 14-A/2020, of 18 March, declares the state of emergency due to the occurrence of a public disaster

Decree-Law 28/84

Decree-Law 28/84, of 20 January, on economic infractions and public health violations

Law 44/86

Law 44/86, of 30 September, on the state of siege and the state of emergency

XVIII. CRIMINAL LIABILITY

XVIII.A. Background

By virtue of the COVID-19 pandemic and the public health emergency it triggered, several measures and restrictions of an exceptional and temporary nature have been enacted and adopted in order to contain the spread, prevent transmission of the virus and respond, in general, to the needs caused by the pandemic.

A state of emergency was declared in the entire Portuguese territory, by [Presidential Decree 14-A/2020](#), due to the occurrence of a public disaster, lasting 15 days, partially suspending certain constitutional rights and freedoms, namely:

- Freedom of movement and right to settle anywhere in Portuguese territory;
- Right to property and private economic initiative;
- Workers' rights;
- Right to international movement;
- Right of assembly and demonstration;
- Freedom of religion, in terms of collective worship;
- Right of resistance.

The implementation of the declaration of state of emergency is the responsibility of the Government, according to [Law 44/86](#). In this sense, the Government approved [Decree 2-A/2020](#), which applies the partial suspension of certain constitutional rights according to Presidential Decree 14-A/2020.

The violation of the restrictions and obligations contained in Decree 2-A/2020, as well as other behaviours that are adopted or observed, either by natural persons or by legal persons, under the

present circumstances, may assume criminal relevance and, consequently, correspond to the performance of a criminal act.

XVIII.B. Criminal liability arising from failure to comply with the restrictions and obligations set forth in Decree 2-A/2020

According to article 3 of Decree 2-A/2020, mandatory confinement in a medical establishment or at home is determined for (i) Covid-19 patients and those infected with SARS-Cov2, and (ii) citizens regarding whom the health authority or other health workers have ordered their placement under active surveillance.

According to the same Decree, the health authorities inform security forces and services as to the citizen's place of residence and the mandatory confinement order. These security forces and services are responsible for ensuring compliance with the measures applied (article 32(1)(b) and (2) of Decree 2-A/2020).

Violation of mandatory confinement may correspond to a **crime of disobedience**, as established by article 3(2) of Decree 2-A/2020.

The **crime de disobedience of a lawful order** is set forth in Article 348 of the Criminal Code, according to which, anyone who fails to duly obey a lawful order or warrant, duly communicated and issued by a lawful authority or officer, is punished by **up to one year in prison or a fine of up to 120 days**.

The crime in question – under the terms established in the abovementioned article 348 of the Criminal Code – requires that a certain legal provision should expressly state that its disobedience is criminally punishable. That statement is present in article 3(2) and in article 32(1)(b), both of Decree 2-A/2020, (jointly with article 7 of Law 44/86, which states, in general

terms, that any violation of that set forth in the declaration of the state of emergency may correspond to a **crime of disobedience**). In the absence of such a legal provision, there is only a crime of disobedience if the appropriate agency or authority would have to make the corresponding imposition, expressly informing the offender that their disobedience was punishable.

In addition to situations of mandatory confinement, the following persons are subject to a special duty of protection: (i) people over 70 years old; and (ii) those who are immunocompromised or with a chronic disease which, according to the health authority guidelines, is considered a risk factor, in particular, hypertensive, diabetic, cardiovascular patients, patients with chronic respiratory disease and cancer patients (article 4(1) of Decree 2-A/2020).

With regard to these groups of citizens, Decree 2-A/2020 establishes the exceptional circumstances under which they are allowed to travel in public spaces and roads, or in spaces and private roads equivalent to public roads.

As for the remaining citizens (who do not belong to the groups identified in articles 3 and 4 of Decree 2-A/2020), travel in public spaces and roads, or in spaces and private roads equivalent to public roads, is restricted and limited to the activities and/or tasks listed in article 5(1) of the Decree.

In what concerns economic activities, article 7 of Decree 2-A/2020 determines the closure of establishments and facilities identified in the respective Annex I and, additionally, suspends all retail trade activities except for those that provide basic necessities or other goods considered essential under current circumstances, as defined in Annex II to the Decree (article 8). It also determines the suspension of services provided in

establishments open to the public, except for those that provide frontline services or other services considered essential under current circumstances, which are listed in the same Annex II (article 9).

According to article 32(1) of Decree 2-A/2020, the security forces and services are responsible for ensuring compliance with the restrictions applied, by:

- Closing establishments and ending any activities referred to in Annex I of Decree 2-A/2020;
- Issuing lawful orders, pursuant to Decree 2-A/2020, warning and reporting the **crime of disobedience** due to violation of that set forth in articles 7 to 9 as well as violation of mandatory confinement by those subject to it, pursuant to article 3, in addition to conducting them to their home;
- Warning people to avoid assembling in public spaces or roads;
- Recommending that all citizens comply with their general duty to stay at home, under the terms and with the exceptions established in article 5.

In this way, we would draw attention to the fact that, in addition to the people who are required to observe mandatory confinement (analysed above), any natural person (individual) or legal person (companies, associations, etc.) can commit the **crime of disobedience** if they fail to obey lawful orders or warrants, duly communicated and issued by a lawful authority or officer, in order to ensure compliance and the implementation of the exceptional and temporary measures now been adopted and which were summarised above. However, unlike what occurs in situations of mandatory confinement (in which there is a legal provision which, from the outset, determines that disobedience will be punished by criminal law), in other cases, the member of the security force or service, in that specific case, to establish the

corresponding penalty, must inform the person (individual or company) that, by not respecting the lawful order or warrant, they are committing a crime of disobedience.

Without prejudice to that stated above, article 32(3) of Decree 2-A/2020 establishes that the security forces and services should permanently report the population's level of compliance with the provisions of the Decree to the Minister in charge of Internal Administration, allowing the Government to assess the situation at all times. The same provision allows the creation of a new punitive framework (inclusively, administrative infractions and/or criminal offences), depending on an assessment that may eventually be carried out by the Government, due to violation of the special duty of protection or the general duty to stay at home, as established, respectively, in Articles 4 and 5 of Decree 2-A/2020.

In addition to the crime of disobedience, and in relation to situations in which mandatory confinement is determined by the appropriate health authority, the **crime of spreading disease, alteration of medical analysis or prescription**, established in article 283(1) of the Criminal Code, is also relevant.

Article 283(1) of the Criminal Code punishes anyone who spreads a contagious disease (subparagraph *a*)) and thus endangers the life or seriously imperils the physical integrity of another person with a **prison sentence from one up to eight years**.

Under the exceptional circumstances caused by the COVID-19 pandemic, subparagraph *b*) of article 283(1) of the Criminal Code is also relevant, punishing, with the same penalty, anyone who, in their capacity as a doctor or their employee, nurse or laboratory employee, or person lawfully authorised to draft a surgical or medical test diagnosis or report, provides inaccurate data or results and thereby endangers the life or seriously imperils the physical integrity of another person.

Please note that criminal liability arises not only due to intentional conduct but also due to **negligent conduct** both in relation to the danger caused (in which case the maximum penalty is reduced to five years imprisonment) or regarding the conduct objectively adopted, consisting in spreading the disease (in which case the maximum penalty is reduced to three years imprisonment).

The **crime of disobedience of a lawful order** and the **crime of spreading disease, alteration of medical analysis or prescription** can be committed by legal persons and comparable entities, except the State, legal persons in their performance of public authority and public international law organisations, as long as the acts are committed: (i) in the name and in the interest of the legal person, by people who occupy a position of leadership therein; or (ii) by those who act under the authority of persons who occupy a position of leadership, because of the violation of the duties of surveillance or control they are responsible for (Article 11(2) of the Criminal Code).

The bodies and representatives of the legal person and the people who have authority to control their activity are considered as occupying a position of leadership (Article 11(3) of the Criminal Code).

XVIII.C. Criminal liability arising from sailing and buying essential goods and basic necessities

[Decree-Law 28/84](#), which punishes economic infractions and public health violations, enshrines – with regard to the **sale** and to the **seller** of essential goods or basic necessities – the **crime of hoarding** (article 28).

Anyone who, in a situation of well-known scarcity or with prejudice to the regular supply of essential goods or basic necessities, or raw materials used in their production, commits the

crime of hoarding, punishable with a **prison sentence from six months up to three years and a fine of at least 100 days**, if they:

- Hide stocks or store them at locations which have not been communicated to the supervisory authorities, when such communication is required;
- Refuse their sale as usual in the respective activity or make their sale subject to the purchase of other products, by the buyer or by third parties;
- Refuse or delay delivery when the order is placed and the respective supply is accepted;
- Close the establishment or the place of activity in order to prevent their sale;
- Fail to collect consigned goods or raw materials after they have been received at docks, loading bays, storage or collection sites, such as customs houses, among others, within 10 days, if they are products subject to rationing or limited distribution, or whatever term is lawfully determined by the appropriate authority, in any other cases.

However, according to article 28(2), the refusal to sell is considered justified under the following circumstances:

- Satisfaction of the domestic supply needs of the producer or trader;
- Satisfaction of the normal requirements of agricultural, commercial or industrial operation, during the period necessary for stock renewal;
- Satisfaction of previously assumed commitments.

The refusal to sell will also not be considered criminal conduct, according to article 28(4), if the sale relates to:

- Amounts that could prejudice the fair distribution of the product among customers;
- Quantities that are manifestly disproportionate in relation to the usual

needs of the buyer or the usual size of deliveries by the seller;

- The buyer's incapacity, by virtue of the characteristics of the goods in question, to ensure their resale under satisfactory technical conditions or to provide an adequate after-sales service;
- Justified uncertainty, by the seller, that the buyer will comply fully with their payment instalments, in the case of sales on credit.

If the **crime of hoarding** is committed negligently, the perpetrator can be punished with a **prison sentence up to one year's imprisonment and a fine of at least 40 days**.

Finally, according to article 28(5), the court may order the forfeit of the goods in question in the event of intentional hoarding.

Decree-Law 28/84 also enshrines – now from the perspective of the **purchase** and the **buyer** of products – the **crime of hoarding by acquirers** (article 29).

The crime in question punishes anyone who, in a situation of well-known scarcity or with prejudice to the regular supply of the market, acquires essential goods or basic necessities in amounts that are manifestly in excess compared to their needs for supply or the normal renewal of their reserves with **up to six months imprisonment and a fine of between 50 and 100 days**.

Paragraph 2 of that article states that the court may order the forfeit of goods which were manifestly in excess compared to what was needed for supply or for the normal renewal of reserves.

For the purposes of meeting the requirements for the occurrence of the **crimes of hoarding**, pursuant articles 28 and 29 of Decree-Law 28/84, at this point in time, it is important to clarify the **concept of essential goods**. This concept must be interpreted in its strict sense, taking

into account the essential nature of certain goods in the daily life of the community and of each individual and for the normal operation of business activities. In this sense, and because they correspond to the essential core of the concept in question, the following may be classified as *essential goods*: (i) basic foods; and (ii) fuel. Additionally, all products whose maximum prices are defined under special regimes to guarantee their supply are “treated as essential goods” (article 20 of that Decree-Law).

The recent [European Commission Communication \(2020/C 86 I/01\)](#), which offers guidelines for border management to protect health and ensure the availability of essential goods and services, also helps to determine the concept of “essential goods”. According to this European Commission Communication, in point I.2., food supplies (including livestock), vital medication and protective equipment and supplies, at least, are considered “essential goods”.

Finally, we would like to draw attention to article 8 of Decree 2-A/2020, which determines that the activities and establishments listed in Annex II to the Decree are classified as activities that offer “basic necessities” or at the very least “goods considered essential under the current state of affairs”. Therefore, interpreted broadly, the goods sold by the retail business establishments listed in Annex II to Decree 2-A/2020 can be considered “essential goods”, including for the purposes of commission of the crime of hoarding.

Under the current circumstances, the **crime of profiteering**, enshrined in article 35 of Decree-Law 28/84 is also relevant.

A person commits the **crime of profiteering**, punishable with **a prison sentence from six months up to three years and a fine of at least 100 days**, if they:

- Sell goods or provide services for prices higher than those permitted under the legal regimes they are subject to;
- Under any pretext or by any means and with the intention of obtaining illegitimate profit, change the prices that would arise through the normal performance of the activity for the goods or services or, regardless of that intention, those that would result from the legal regulations in force;
- Sell goods or provide services at a price higher than that shown on labels, tags, signs or lists prepared by the selling entity or service provider;
- Sell goods that, per unit, must have a certain weight or measure, if they weigh or measure less than that amount, or goods contained in packages or containers whose quantity is less than that stated on those packages or containers.

Any new intermediary that intervenes, against payment, in the same normal or legal distribution circle, incurs in the same penalty unless their intervention does not result in a price increase in that stage of the circuit, as also if they demand any compensation that cannot be considered an advance payment and that may condition or favour the assignment, use or availability of essential goods or services (article 35(2) of Decree-Law 28/84).

If the **crime of profiteering** is committed negligently, the perpetrator can be punished by **up to one year’s imprisonment and a fine of at least 40 days**.

As is the case with the crime of hoarding, also in the event of the **crime of profiteering**, the court can order the goods to be forfeited or, if this is not possible, the loss of goods equal to those that were the object of the crime and that are found in the agent’s possession.

According to article 3 of Decree-Law 28/84, the crimes set forth therein, including the crimes of

hoarding (articles 28 and 29) and the crime of profiteering (article 35), can be committed by legal persons, companies and mere associations. For this, it is merely necessary that the facts are committed by the bodies or representatives of the legal entity, on its behalf and in the entity's interest.

AUTHORS



João Matos Viana
Partner



**Tiago
Coelho Magalhães**
Associate



Tiago Félix da Costa
Partner

MORAIS LEITÃO

GALVÃO TELES, SOARES DA SILVA & ASSOCIADOS

Supporting clients, anywhere, anytime.



MORAIS LEITÃO, GALVÃO TELES, SOARES DA SILVA & ASSOCIADOS

LISBOA

Rua Castilho, 165
1070-050 Lisboa
T +351 213 817 400
F +351 213 817 499
mlgtslisboa@mlgts.pt

PORTO

Avenida da Boavista, 3265 – 4.2
Edifício Oceanvs
4100-137 Porto
T +351 226 166 950 - 226 052 380
F +351 226 163 810 - 226 052 399
mlgtsporto@mlgts.pt

FUNCHAL

Av. Arriaga, n.º 73, 1.º, Sala 113
Edifício Marina Club
9000-060 Funchal
T +351 291 200 040
F +351 291 200 049
mlgtsmadeira@mlgts.pt

mlgts.pt

ALC ADVOCADOS

LUANDA

Masuika Office Plaza
Edifício MKO A, Piso 5, Escritório A/B
Talatona, Município de Belas
Luanda – Angola
T +244 926 877 476/8/9
T +244 926 877 481
geral@alcadvogados.com

alcadvogados.com

HRA ADVOCADOS

MAPUTO

Avenida Marginal, 141, Torres Rani
Torre de Escritórios, 8.º piso
Maputo – Moçambique
T +258 21 344000
F +258 21 344099
geral@hrlegalcircle.com

hrlegalcircle.com

MdME LAWYERS

MACAU

Avenida da Praia Grande, 409
China Law Building
21/F and 23/F A-B, Macau
T +853 2833 3332
F +853 2833 3331
mdme@mdme.com.mo

HONG KONG

Unit 2503 B
25F Golden Centre
188 Des Voeux Road
Central, Hong Kong
T +852 3619 1180
F +853 2833 3331
mdme@mdme.com.mo

Foreign Law Firm

mdme.com.mo