



WAIVER OF “MINIMUM RENTS” – CONSTITUTIONAL CHALLENGES

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Introduction

In the context of the Portuguese Supplementary Budget Law for 2020 (“PSBL2020”, approved in July 2020), and within the legislative set of measures enacted to face the pandemic and subsequent lockdown, the Portuguese Parliament approved a legal measure with significant impact on the execution of use of shop agreements entered by and between the owners/operators of shopping centres and the shopkeepers.

As a general rule, contracts for the use of shops in shopping centres comprise a fixed and variable rent. The variable rent is applied over the shopkeeper’s turnover, varying from 2% to 10% but following an average of 5/6%, only being due insofar as it exceeds the fixed rent.

The provision enacted by PSBL2020 determined that by reference to contracts for the use of shops in shopping centers, no “*minimum rents*” should be due until December 31, 2020, which was predominately construed as a temporary waiver to the payment of the fixed rent due by the shopkeepers. According to said provision, the owners of the shopping centers were only entitled to charge shopkeepers the variable rent applied, as well as the remaining contractually agreed expenses, including common charges.

Early this year, the Portuguese Parliament has approved an interpretative rule concerning the said legal provision, clarifying that the legal measure granting a waiver to the payment of “*minimum rents*” should be applied retroactively as from the beginning of the pandemic - 13 March 2020.

This legal provision encompassed under the PSBL2020, raised significant doubts regarding its compliance with the Portuguese Constitution due to a potential breach of the constitutional property right in connection

with the principles of proportionality and equal protection. Given the uncertainty created by the approved legal measures, the Portuguese Ombudsman (“*Provedor de Justiça*”) has formally requested to the Portuguese Constitutional Court, to issue a decision regarding the compliance of the provision approved with the Portuguese Constitution.

Despite an analysis over the fairness or justice of these legal measures (both the initial provision and the interpretation rule) that can run in parallel, it is of the utmost importance to have a final decision by the relevant authority regarding their compliance with the Portuguese Constitution.

Proportionality and equality principles

In this context, it is pivotal to signal that any restriction of constitutional rights is subject to a proportionality requirement, meaning inter alia that the enacted measure must be considered necessary. A restrictive legal measure is only necessary if and when no other measures can achieve the same goal with less harmful effects on the constitutional right that is being affected.

Furthermore, the proportionality of a legal measure comprises also three further tests, as the measure must (i) aim to achieve a legitimate result; (ii) be suitable for achieving said purpose; and, (iii) be reasonable, considering the competing interests of different addressees affected by the measure.

On the other hand, one must also bear in mind that no legal measure is admissible in terms of the constitutional principle of equality if it introduces an arbitrary discrimination between different groups or situations.

Within the framework analysis of these principles, one must consider the significant differences arising out of the exceptional measures applicable

to (i) standard retail lease agreements, whereby an exceptional moratorium regime was approved entitling tenants, who have been forced to lockdown their establishments or whose activity has been suspended or restricted, to differ the payment of the rents fall due within a certain period, and (ii) the referred regime foreseen for the contracts for the use of shops in shopping centres, whereby a waiver to the payment of the fixed component was granted (for the first quarter of 2021, extendable until the term of the second quarter, the fixed component or "*minimum rent*" due by the shopkeepers is proportionally reduced to the reduction of the monthly sales, up to a 50% cap).

Interpretation Rule

Usually, interpretation rules are addressed to clarify a legal provision that is controversial and whenever the solution comprised in the interpretative law could also be construed as being within the limits of said dispute.

In this case, the date on which the legal provision approved under the PBSL2020 should come into effect could hardly be interpreted as a controversial legal matter, as there were no exceptional rules nor transitory legal regime regarding the effectiveness of said provision. The interpretation that is now being made is new, in a certain way, and it is important to understand that the retroactive enforcement of a certain rule cannot be unrestrained, as it should not affect all effects that were already produced.

Retroactive Effects

In addition to the aspects raised above, the approval of an interpretation rule has brought to the table the discussion over the retroactive effect of a legal provision.

The general rule sets forth that any new law is only valid for future situations, except if it contains any specific provision determining that the same should be retroactively effective.

Despite different degrees of retroactive effects that may be considered, the solution encompassed under the applicable law sets forth that even when lawmakers give retroactive effects to a certain provision, the effects produced in the past should be excluded.

As mentioned, in this case, the PSBL2020 has not encompassed any retroactive rule for the temporary waiver for the payment of "*minimum rents*".

As a matter of fact, from March 2020 to July 2020, the owners/operators of shopping centres have managed to keep invoicing the remunerations under the terms foreseen in (i) the contractual framework governed by

the relevant contracts for the use of shops in shopping centres; (ii) the exceptional regime for situations of rental payments in arrears in lease agreements (which was initially also applicable to other forms of operation of real estate properties) and (iii) the arrangements and agreements bilateral entered into by and between the owners and the shopkeepers.

This interpretation rule will certainly raise additional challenges in the way the legal provision under analysis should be applied in the past, notably, if it will entail the need of the owners of shopping centres to revise the process of invoicing that was adopted and the consideration already paid by the shopkeepers.

Final Remarks

This particular retail sector (from owners to shopkeepers and all related service providers) is facing a new dark age, being one of the most severely affected by this pandemic and also by the so called e-commerce.

In a scenario where is crucial to approve swift and exceptional measures, one may understand the Portuguese State's involvement, but it is extremely important for lawmakers to see the big picture and the underlying impact of the approved solutions. Otherwise, in addition to the long list of entities that are being smashed by this pandemic crisis, we may also question if the Portuguese State should be liable for any losses arising from the exercise of its legislative powers. ■

