

A GENERAL OVERVIEW OF THE RENT CAPS AND THE NEW PORTUGUESE HOUSING PROGRAMME

by: Manuel Bragança Santos / Miguel Canto e Castro | Lawyers



The Portuguese lease market has been subject to two very different, but relevant, changes. First of all, the new rent update coefficient was recently approved in Portugal through Notice no. 20980-A/2023, published by the Portuguese National Institute of Statistics. The year of 2024 will see rents updating on a historically high percentage of 6,94%.

In addition to this, and the main focus of this article, on the 6th of October, Law no. 56/2023 was published in the Official Gazette (*Diário da República*), approving the measures relating to the *Mais Habitação* Program, which led to a series of profound and controversial changes in the rules governing the housing market in Portugal (hereinafter referred to as the "Law").



One of these changes relates to the introduction of a limitation of the initial rent amounts applicable to new lease agreements entered into for residential purposes. This new rule states that if the property object of the new lease agreement had been subject to a different lease agreement in the five years prior, the new rent is limited to a cap of 2% over the value of the last rent applied to the same premises. Even though these legislative changes represent a radical paradigm shift, the Portuguese lease market is no stranger to rent caps.

The Law also establishes that in situations where the rents under previous lease agreements have not been subject to one or more legally permitted updates, the annual rent

update coefficients may also be applied - to the values of the initial rents - provided that no more than three years have elapsed since the date on which their application would have been initially possible. The rent update coefficient applicable in 2023 is 1.0543.

However, upon analyzing the Law, the question arises as to whether these limits are mandatory for the parties to the new lease, specifically the landlord, or whether they are discretionary, meaning that the parties freely agree on the amount of rent exceeding the one limited to the statutory cap.

Without prejudice to the freedom of the parties to agree on different terms, it is very difficult to argue that it is not mandatory to comply with these rental caps. The Law is clear in its intention to protect new tenants from excessive new rents, mainly due to property speculation, which has seen prices in the rental market skyrocket in the previous years.

One of the key aspects of the Law is the information provided by the landlord to the new potential tenant on the rents due under any past lease agreement of the last 5 years. In fact, the Law does not establish an obligation of the landlord to provide this information. Nevertheless, it can be argued that if the landlord passes on all the information to the new tenant and the new tenant chooses to pay a higher rent other than the one that would have been capped, then both parties wished to move away from the new capped regime.

The one entity that is best equipped to deal with any misinformation problems arising from the issue above is the Portuguese Tax Authorities. All lease agreements are subject to registration with the Tax Authorities. This means that the Tax Authorities are well equipped on information of any past lease agreements.

However, the Law does not clarify how this information process will work in practice. The following questions arise: Who will be entitled to obtain this past information from the Tax Authorities? All "potential" new tenants can request this information? How do you draw the line between a potential new tenant and a simple interested party? Will the Tax Authorities have additional supervisory obligations and control the new capped rents themselves? and, most importantly, how does this situation articulate with data protection rules?

In a nutshell, these new ceilings must be seen as a two-sided coin under the legal microscope: for the landlord, it is obligatory to inform the new tenant of the ceiling in terms of the price of the new rent; on the other hand, it must be conducted without any asymmetry of information.

One relief that landlords have is that in case of properties that have undergone extensive renovation or restoration, the amount of the costs incurred by the landlord may be added to the initial rent, up to the annual limit of 15%, provided that these costs have been duly certified by the relevant municipality. This relief, however, suffers from the same lack of concrete development in the Law in the sense that the Law does not develop on what "duly certified by the relevant municipality" means. This could mean that only works that were duly licensed by the municipality or works that were subject to prior communication to the municipality. What about all other renovation works carried out by landlords that were not subject to any public control?

All in all, the Law is extremely strict and generates a market where the contractual freedom of the parties may be reduced to the described capping. It can be argued that limitation on contractual freedom may lead to the growth of the parallel market, whereby landlords and tenants agree on rents without proper registration of the lease agreements with the Portuguese Tax Authorities in order to avoid the new rental caps.

In the scenario that the current high demand from tenants for lease agreements continues and the supply from landlords of proper housing is limited, the rise of a parallel market will have the opposite effect to the one intended by the Law, since its expansion will have a serious impact not only on the Portuguese economy, but also on the traditional

rental market itself. Ultimately, the parallel market will be the product of consumer choice for different rent control measures.

In addition to this, the Law may potentially also have an indirect impact on the tax collection of the Portuguese State, since (i) the rents will be lower due to the caps that will be applied in the rental market, which means less tax revenue from these amounts and (ii) it is likely that more landlords may choose not to register their lease agreements with the tax authorities in order to avoid the new caps.

Therefore, the Law has its merits in trying to solve the crisis of housing speculation, which has led to an increase in rental prices that could be unaffordable for the Portuguese population. In other words, the rationale behind the law is noble, since there is a real problem with housing prices, not only in Portugal, but throughout Europe.

However, the practical aspects of the Law will have to be further developed. The issue on the information of the last five years of rents available for consultation to any potential tenant and which works would qualify as renovation or restoration for the purpose of offering a higher rent will need concrete practical application. ■