

## LEGAL ALERT

### REAL ESTATE

#### COVID-19: EXCEPCIONAL MEASURES

##### **I. State of Emergency**

By means of Decree no. 14-A/2020, of 18 March 2020, the President of the Portuguese Republic declared an exceptional regime of State of Emergency status quo (“State of Emergency”) due to the COVID-19 pandemic for a period of 15 days counting from 19 March 2020. Later on, the State of Emergency was extended twice for additional periods of 15 days, being currently in force until 2 May 2020.

Under the terms of the aforementioned Presidential Decrees, the partial suspension of the following fundamental rights was determined: (i) Right of movement and settlement in any part of the national territory; (ii) Property and private economic initiative; (iii) Workers' rights; (iv) International movement; (v) Rights of assembly and demonstration; (vi) Freedom of worship, in its collective dimension; (vii) Right of teaching and learn; (viii) Right of personal data protection.

As a result, several measures were approved by the Portuguese Parliament and the Portuguese Government to rule in detail the declaration of the State of Emergency declared by the President of the Portuguese Republic and to contain the economic and social effects of the pandemic originated by COVID-19.

## **II. Legal mandatory lockdown of facilities and establishments and suspension of activities**

The Portuguese Government approved the Decree no. 2-B/2020, of 2 April 2020 setting forth emergency measures, including:

- (i) the legal mandatory lockdown of certain facilities and establishments listed therein (e.g. discotheques, bars, circuses, cinemas, theatres, sports facilities);
- (ii) the suspension of all retail activities and services activities rendered in establishments open to the public, with the exception of those providing basic goods or services or other goods or services considered essential, which are listed therein (e.g., supermarkets, bakeries, markets selling food products, pharmacies, medical centres, banks, insurance companies, touristic establishments, student accommodation).

This suspension of activities does not apply to (i) wholesale trade, (ii) the establishments deciding to maintain their activity for home delivery or selling of the products at the door (being prohibited the access of the clients to the interior of the establishments), (iii) restaurants for take away and home delivery.

Other asset classes (e.g. offices and logistics) are not subject to any legal mandatory lockdown as a result of emergency laws enacted by the Portuguese Government. However, the aforementioned Decree no. 2-B/2020, of 2 April 2020 sets forth that teleworking is mandatory in all cases where the employees are in fact able to perform their activities from home, meaning that in practical terms there are several office buildings currently closed.

According to the same Decree no. 2-B/2020, of 2 April 2020, the legal mandatory lockdown or suspension of the facilities and establishments by a decision of the Portuguese Government (as mentioned above) cannot be invoked as ground for resolution, termination or other form of extinction of commercial leases or other contractual forms of exploitation of properties (e.g., use of shop agreements), nor as grounds for the tenant's eviction.

### **III. Extraordinary and transitory regime of protection of tenants**

Law no. 1-A/2020, of 19 March 2020 (as amended by Law no. 4-A/2020, of 6 April 2020) determines the suspension, until sixty days after the termination of the preventive, containment and mitigation measures concerning COVID-19, of:

- (i) the effects of the termination (*denuncia*) of commercial and non-commercial lease agreements made by the landlords;
- (ii) the effects of the termination of commercial and non-commercial lease agreements due to the expiry of its term (*caducidade*), unless the tenant does not oppose to such termination;
- (iii) the effects of the revocation and opposition to the renewals of the commercial and non-commercial lease agreements by landlords;
- (iv) the long stop date for handover of the leased premises referred to in article 1053 of the Portuguese Civil Code, if the time limit for this term expires while these measures are in force;
- (v) the foreclosures on real estate properties which are the foreclosers' self and permanent residence.

### **IV. Court proceedings**

Additionally, Law no. 1-A/2020, of 19 March 2020 (as amended) sets forth that until the preventive, containment and mitigation measures concerning COVID-19 are terminated, the eviction proceedings, special eviction procedures (*procedimentos especiais de despejo*) and proceedings for delivery of leased property are suspended, when the tenant, by virtue of the final judicial decision to be rendered, may be placed in a situation of fragility due to lack of own home or any other superior social reason.

### **V. Suspension of payment of rents in commercial leases**

The Portuguese Parliament approved the Law no. 4-C/2020, of 6 April 2020 which sets for:

- (i) the suspension of the payment of rents until one month after the end of the State of Emergency for all tenants whose facilities and establishments were mandatorily locked down or suspended by a decision of the Portuguese Government (as mentioned above)

as well as for food and beverage establishments that, according to the same Government decree, have reduced the respective activity to take away and home delivery services only;

- (ii) the payment of the deferred rents over a period of 12 months after the expiry of this exceptional regime State of Emergency status quo;
- (iii) that the lack of payment of rents due during the period of State of Emergency and on the first month after its expiry can neither be used as grounds for termination or resolution or other form of extinction of commercial leases or of other contractual forms of operation of properties (e.g., use of shop agreements) nor as grounds for the tenant's eviction.

This regime applies to any other contractual forms of operation of properties (e.g., use of shop agreements) as well.

## **VI. Suspension of payment of rents in non-commercial leases**

As regards non-commercial lease agreements, Law no. 4-C/2020, of 6 April 2020 sets for a legal regime of suspension of payment of rents to the tenants that fall under the following conditions:

- (i) Tenants that have had a shortfall above 20% of their household income as compared to the income of the previous month or to the income of the similar period of the previous year; and
- (ii) whose household effort rate intended to pay the rent exceeds 35% of the total household income.

This special legal regime entails that the landlords are not entitled to terminate the lease agreements on the basis of non-payment by the tenants of the rents due during the State of Emergency and on the month following the expiry of the latter, provided that the tenants pay said rents during the twelve months period after the end of the State of Emergency. Said payment should be made in monthly instalments equal to or higher than a twelfth of the amount owed to the landlord together with the payment of each monthly rent due.

## **VII. Financial support for non-commercial leases**

As regards the lease of tenants' permanent residence, Law no. 4-C/2020, of 6 April 2020 provides that the tenants that have had a shortfall in their household income as mentioned in the previous section are entitled to request to the Portuguese National Housing Institute (*Instituto da Habitação e da Reabilitação Urbana, I.P. / IHRU*) an interest-free loan to cover the difference between the amount of the monthly rent due and the amount resulting from an effort rate of 35% of their household income. In no event, the remaining available household income can be lower than the amount of the social support index (*Indexante dos Apoios Sociais / IAS*), which is currently € 438.81.

The same Law also establishes that the non-commercial landlords (natural persons only) are entitled to request to IHRU an interest-free loan to offset the amount of the rent due and not paid by the tenants if (i) the remaining available landlord's household income falls below the IAS amount due to aforementioned non-payment of the rents by the tenants, (ii) the tenants have not resorted to a loan from IHRU (as mentioned above), (iii) the landlord have had a shortfall above 20% of their household income as compared to the income of the previous month or to the income of the similar period of the previous year and (ii) such shortfall is due to the non-payment of the rents by the tenants under the provision of this Law.

The Ordinance no. 91/2020, of 14 April 2020 sets forth the terms to be followed by both tenants and landlords to prove their income shortfall and, therefore, be entitled to the aforementioned suspension of payment of rents and financial support from IHRU. In general, such evidence shall be made through the relevant allowance receipts and statements from employers.

## **COVID-19: IMPACT ON REAL ESTATE CONTRACTS**

The impact of the COVID-19 pandemic in commercial contracts and, specifically, in real estate contracts (e.g., promissory sale and purchase agreements, constructions agreements, lease agreements, use of shop agreements) should be assessed on a case-by-case basis having into consideration the terms and conditions of the agreements and the corresponding negotiations. On that analysis, the following legal concepts and regimes should be considered.

## **I. Force majeure**

Despite Portuguese Law does not provide for a definition of force majeure, frequently real estate agreements include force majeure provisions, usually defining a force majeure event as an extraordinary, unpredictable and unavoidable event whose effects occur regardless of the debtor's will or personal circumstances. In those cases, an analysis of the agreements on a case-by-case basis is required.

Given that pandemics are extraordinary, unpredictable and unavoidable events, COVID-19 pandemic may be deemed as a force majeure event provided that it has a significant impact on the performance of any particular obligation foreseen in the relevant agreement.

## **II. Impossibility to perform not caused by the debtor**

The COVID-19 pandemic will only be relevant within the scope of the impossibility to perform legal regime (foreseen in articles 790 et seq. of the Portuguese Civil Code) if, as consequence of such event, it becomes impossible for any of the parties to perform its contractual obligations, which should be differentiated from the situations where the performance of the obligations becomes only more onerous or difficult as result of such event.

In this context, one cannot conclude that, in general, the real estate players have an impossibility to perform the contracts due to the pandemic, but an analysis on a case-by-case basis is required.

## **III. Hardship**

The hardship concept is foreseen in articles 437 to 439 of the Portuguese Civil Code and comprises the situations where an abnormal change of the circumstances on which the parties or one of them grounded their decision to enter into the agreement is not covered by the contractual risk scheme accepted by each party and seriously affects one of the parties in the sense that the fulfilment of said party's obligations would significantly affect the good faith principle, i.e., the fulfilment of said party's obligations would be deemed excessively onerous, unjustified and disproportionate as compared to the interest of the creditor. In this case, the affected part will be given the right to terminate or to amend the agreement.

For instance, the parties' financial capacity to fulfil their obligations and the anticipated development of the parties' activities seem to correspond to usual contractual scheme risks taken by parties in the real estate agreements.

Having said that, given the seriousness of the current situation, one cannot rule out that the doctrine on hardship by the Portuguese Courts. Such analysis requires a deep examination of the agreements and of the corresponding negotiations on a case-by-case basis.

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