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DEBT RECOVERY

Coronavirus: Impact of the exceptional and temporary measures on enforcement proceedings

Following World Health Organization's classification of the public health emergency caused by COVID-19 as an international pandemic, the President of the Republic declared a state of emergency in Portugal on 18 March and renewed it on 2 April. The state of emergency is based on a situation of public calamity and it covers the whole country. Unless it is renewed again, it will end at 23:59 hours on 17 April 2020.

Catarina Guedes
de Carvalho

Eva
Freitas

To implement the state of emergency, the Portuguese authorities have approved a set of exceptional and temporary measures in response to the spread of COVID-19. The measures take into account the existing situation and they are subject to strict criteria of appropriateness and proportionality. Their aim is to protect public health, the functioning of the economy, and access to essential goods for all citizens.

The exceptional and temporary measures applicable to the justice sector are set out in Law 1-A/2020 of 19 March, in conjunction with Decree-Law 10-A/2020 of 13 March, as amended by Law 4-A/2020 of 6 April. These laws establish exceptional arrangements to extend time limits and complete judicial steps. The arrangements take effect as from 9 March 2020 and have the following impacts on enforcement proceedings:

- For non-urgent proceedings – which include enforcement actions – the exceptional rules provide that all time periods to do procedural acts are suspended until the end of the exceptional situation to prevent, contain, mitigate and treat the spread of COVID-19.
- However, the law makes it clear that the suspension of time periods does not preclude:
 - i) **Dealing with processes and doing acts either in person or remotely** when all parties believe they are in a position to deal with these things using the IT platforms that make it possible to do them electronically, or by distance communication, including teleconferencing, video calls or similar.

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Enforcement proceedings are dealt with electronically (the provisions on electronic processing are set out in article 132 ex vi article 712 of the Code of Civil Procedure and Administrative Law 280/2013, in the wording introduced by Decree 267/2018, the latter in the wording introduced by the recent Decree 93/2019 of 28 March). Therefore, provided the applicable conditions can be met, procedural acts can continue to be done, and judges and enforcement agents can go ahead with enforcement actions and associated proceedings. However, this possibility must be seen in light of the other limitations that apply under these exceptional arrangements, which we will address below.

- ii) **When a final decision is handed down** in cases in which the court and other parties believe no further steps are necessary.

Following the logic of the previous point, if the court is already in a position to decide on the merits of a pending issue (for example, a decision on an opposition to an attachment or on defence pleas by a debtor) the court could (should?) issue a decision. This is because, as a rule, the decision will be brought to the attention of the parties by electronic notification.

- o Specifically regarding enforcement actions, the exceptional arrangements also provide for the suspension of any acts to be done in enforcement actions, except for those that cause serious injury to the livelihood of the creditor or, if they are not done, will cause irreparable harm, harm that depends on a prior judicial decision. In other words, for the exception to apply and for certain acts to be done (e.g., service of documents or attachments of assets), it is not enough to consider the possibility of irreparable harm (harm invoked by the creditor). It is necessary to have a prior judicial decision that confirms the actual risk/harm and allows the act in question to be done.

The enforcement agent is responsible for taking the steps in enforcement proceedings (article 719 of the Code of Civil Procedure), therefore, we believe that the general suspension is primarily intended to apply this agent's acts. These acts include service of process, notifications, publications, consultation of databases, attachments and their registration, and liquidations and payments. The parties, that is the creditor and the debtor, can also do certain procedural acts if they so wish, for example, submit applications.

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In fact, the legislature sets out examples of some of the acts that fall under this general provision of suspension of the acts to be done in enforcement actions, and these acts are essentially within the power of the enforcement agent. They are acts relating to:

- i) **Sales.** Therefore, notifications cannot be sent to the parties to state their cases on the method of sale and the reserve price. Moreover, judicial sales cannot be carried out in any of the permitted forms (electronic auction, sealed bids, private negotiation, etc.), whether of personal or real property. All acts taking place or due to take place from 9 March have to be suspended or cancelled.
- ii) **Ranking of creditors.** This includes notifications to public creditors (the Tax Authority and the Social Security) and creditors with real guarantee, to submit their claims;
- iii) **Judicial handover of real property;** and
- iv) **Attachments/seizures and their preparatory acts**
 - a) **With respect to preparatory acts, database consultations are suspended.** This includes the databases of the Tax Authority, the Social Security, the Land, Commercial, and Motor Vehicle Registry Offices, and other registries and similar archives. Requests for information to Banco de Portugal about institutions in which the debtor holds accounts or bank deposits to find assets that can be attached are also suspended.
 - b) **When it comes to attachments/seizures,** no new attachment or seizure of any nature can be ordered. However, under the letter of the law, it seems that the legislature is not suspending (or cancelling) any prior attachments/seizures, including registered processes that were already underway.

As a result, registered attachments of both real and personal property will remain in place. However, no further steps may be taken, including any judicial sale of the property in question.

Attachments of bank balances that have already been implemented also remain in place. However, they may not be mobilised for the balance to be transferred to the enforcement action account.

The same procedure applies to attachments of credits, salaries and pensions, so it is crucial to determine the date of the attachment. If the attachment notification took effect before 9 March 2020, the discounts/retentions of the amounts attached will be maintained, including for the future. There will be no suspension, because they represent periodic obligations (i.e., obligations that fall due at certain intervals, usually monthly) already subject to attachment. If the attachment notification had not yet taken effect on 9 March 2020 (because the deadline to reply to it had not yet passed), the period to comply with it is currently suspended. As a result, the paying entities (which are required to make the judicial discounts/retentions) do not have to comply with the attachment order immediately and do not have to answer the enforcement agent. This applies for the duration of this exceptional situation of prevention, containment, mitigation and treatment of COVID-19. Nevertheless, we recommend that paying entities take special care to avoid the risk of the possibility of the enforcement being overturned.

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In the current situation, many workers are subject to lay-offs and, as a consequence, their salaries have been reduced. Where such salaries are subject to an attachment order, employers must, of course, inform the enforcement agent of the reduction in the monthly salary (accompanied by the appropriate supporting documents) and adjust the amount to be attached and transferred to the court, while observing the legal limits of the attachment.

Exceptional arrangements have been put into place under Law 4-C/2020 of 6 April for situations of rent arrears under residential and non-residential lease agreements. As a result, it would be wise to allow the deferral of attachments of rent when the requirements in the above law have been met. If the tenant has recourse to these special arrangements, this fact must be communicated to the enforcement agent.

In special enforcement actions for maintenance payments, any existing attachments and direct allocations of salary will be maintained. In turn, we accept that new notifications for attachment/allocation of salary in special enforcement actions for maintenance payments, received from 9 March 2020, may have to be complied with immediately if they affect the livelihood of the creditor. However, this depends on the prior decision of the judge, under the exceptional arrangements referred to above.

- o Mortgage possession (enforcement) proceedings for any property that is the debtor's own permanent residence are also suspended.

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In the wake of the exceptional measures adopted by the Government in the context of the COVID-19 pandemic, Decree-law 10-F/2020 of 26 March establishes exceptional and temporary arrangements to comply with tax obligations and social security. These arrangements provide, among other things, for the suspension of tax enforcement proceedings brought by the Tax Authority and of enforcement proceedings to recover debts to the Social Security Debts until 30 June 2020, if the arrangements under article 7(1) of Law 1-A/2020 of 19 March come to an end at an earlier date.

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What acts can be done?

Only the handing down of final decisions (when it is not necessary to take any further steps) and the acts done by the parties (creditor and debtor) even though the time limits to do them have been suspended.

As a result, for example, the following acts can be done: enforcement applications (except for mortgage possession actions in respect of the permanent residence of the debtor), oppositions by defence pleas, defences, oppositions to attachment, appeal arguments and various requirements (provided they are not one of the acts expressly suspended). Preliminary hearings and trial hearings can also go ahead when the parties consider it possible to hold them by appropriate means of distance communication and provided they respect the other limitations imposed for reasons of public health and safety.

Any other acts, including notifications and attachments, can only be carried out in order to avoid serious harm to the livelihoods of the creditor or irreparable damage to the creditor. However, these acts always require a prior judicial decision. ■