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DEBT RECOVERY

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

Following the World Health Organization's announcement of a public health emergency caused by COVID-19 and its declaration of an international pandemic, the President of the Republic declared a state of emergency on 18 March and this lasted until 2 May. On 30 April, the Government declared a situation of calamity and this was renewed on 15 May and 29 May. It will end at 11:59 pm on 14 June unless it is extended or modified due to the evolution of the epidemiological situation justifies it.

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To implement the state of emergency and the subsequent situation of calamity, 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.

In this context and with respect to the justice sector, the exceptional and temporary measures are essentially 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 established exceptional arrangements to extend time limits and complete judicial steps. The arrangements took effect as from 9 March 2020.

With the end of the state of emergency, and following the phased ending of the lockdown that began on 30 April, Law 16/2020 was published on May 29. The Law makes changes to the exceptional and temporary measures in response to the COVID-19 pandemic and introduces the fourth amendment to Law 1-A/2020 of 19 March.

This new law repeals article 7 of Law 1-A/2020, which established the exceptional suspension of time limits and deadline to perform judicial steps, and article 7 thus ceases to have effect. The law also adds article 6-A to Law 1-A/2020 and it provides for exceptional transitional arrangements.

Law 16/2020 of 29 May enters into force on 3 June 2020.

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Thus, with regard to the impacts on enforcement actions of the exceptional and temporary measures established in Law 1-A/2020 – together with Decree-Law 10-A/2020, as amended by Law 4-A/2020 and Law 16/2020 – two distinct time periods should be highlighted:

**1<sup>st</sup> period**

With effect from 9 March to 2 June 2020 (application of Law 1-A/2020 in the wording given by Law 4-A/2020)

- For non-urgent proceedings, which include enforcement actions – the exceptional arrangements were in force and all time limits for procedural acts were suspended.
- Specifically with regard to enforcement actions, the exceptional arrangements also provided for the suspension of any acts to be done in enforcement actions, except for those that, if not done, could cause serious harm to the livelihood of the judgment creditor or could them irreparable harm. The confirmation of this harm depends on a prior judicial decision.

**"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."**

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 was 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.

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 could not be sent to the parties to state their cases on the method of sale and the reserve price. Moreover, judicial sales could not 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 had 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.**

- iv) **Attachments/seizures and their preparatory acts:**

- a) **With respect to preparatory acts,** database consultations were 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 were also suspended.

- b) **Regarding attachments/seizures,** no new attachment or seizure of any nature could be ordered. However, under the letter of the law, it seems that the legislature was 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** remained in place. However, no further steps could be taken, including any judicial sale of the property in question.

**Attachments of bank balances** that had already been implemented also remained in place. However, they could not be mobilised for the balance to be transferred to the enforcement action account.

The same procedure applied 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 were maintained, including for the future. There was 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 was suspended. As a result, the paying entities (which are required to make the judicial discounts/retentions) did not have to comply with the attachment order immediately and did not have to answer the enforcement agent. This applied for the duration of this exceptional situation of prevention, containment, mitigation and treatment of COVID-19.

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 any 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.

Regarding attachments of rent, in view of the exceptional arrangements for situations of rent arrears under residential and non-residential lease agreements approved by Law 4-C/2020 of 6 April, it would be wise to allow the deferral of attachments of rent when the requirements in that law (now amended by Law 17/2020 of 29 May. If the tenant has recourse to these special arrangements, this fact must be communicated to the enforcement agent.

**"The same procedure applied to attachments of credits, salaries and pensions, so it is crucial to determine the date of the attachment."**

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

## 2<sup>nd</sup> point in time

With effect from 3 June 2020 (application of Law 1-A/2020 as amended by Law 16/2020)

- **The suspension of the time limits to do procedural acts ends.** This means that the counting of time limits that had already begun before March 9 is resumed and the counting of time limits whose start was suspended (between March 9 and June 2) now begins.
- **The suspension of enforcement acts and steps to be taken by the enforcement agent ceases.** These include service of summonses and notifications, and other attachment steps, except for acts relating to taking judicial possession of the family home.
- **With regard to the steps to be taken in enforcement actions regarding sales and taking judicial possession of real property,** the legislature has established that, when these are likely to cause damage to the livelihood of the debtor, he or she may request the suspension of the act, provided this does not cause serious harm to the livelihood of the creditor or irreparable damage. The court must decide on this within 10 days, after hearing the parties.
- **The foreclosure of a mortgage on a property that is the debtor's own permanent residence** remains suspended, now until 30 September 2020 (see article 8(e) of Law no. 1-A/2020, as amended by Law 16/2020).

The exceptional arrangements provided for a general suspension of periods and of steps in enforcement actions. However, they did not suspend attachments (already made or in progress) or the enforcement action itself, except in the case of mortgage possession actions in respect of the debtor's own permanent residence (suspended until 30 September 2020) and tax enforcement actions (suspended until 30 June – see Decree 10-F/2020 of 26 March).

As a result, as of 3 June 2020, the time limits for procedural acts in enforcement actions are no longer suspended. Enforcement agents also resume their powers to do all the acts and take enforcement steps for which they are responsible. However, there is an exception for those relating to taking judicial possession of the family home, or judicial sales and handing over possession of real property, when the judge decides, at the request of the debtor, that such steps would cause damage to his livelihood. ■

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