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REAL ESTATE AND TOURISM

Coronavirus: Payment of rents and other remunerations – Deferral and new rules

On 11 March 2020, the World Health Organization declared a public health emergency of international concern (PHEIC) following the spread of SARS-CoV2 (Coronavirus) and disease it causes, COVID-19.

In this context, exceptional and temporary measures concerning the global COVID-19 pandemic have been approved.

COVID-19 and the measures to mitigate the disease have had an enormous impact on people's lives and on many sectors of the economy. In response, with regard to lease agreements and other forms of commercial use of real estate premises, the Portuguese legislature decided to introduce exceptional rules for situations of late payment of rent and other payments under said agreements. The legislature also provided financial support in the case of leases for housing purposes and introduced rules that limit the termination of such agreements and the eviction of the tenants. The above rules were set out in Law 4-C/2020 of April 6 (initially amended by Law 17/2020 of May 29) and Law 1-A/2020 of March 19 (as successively amended)¹.

These rules were subsequently strengthened, in particular with regard to lease agreements for non-housing purposes, by the introduction (through Law 27-A/2020 of 24 July) of article 168-A in Law 2/2020 approving the State Budget (the "State Budget Law") and by Law 45/2020, of 20 August, which further amended Law 4-C/2020 of 6 April.

Article 168-A of the State Budget Law

Under article 168-A (5) of the State Budget Law, no amounts will be payable as minimum rent until 31 December 2020 in the case of specific forms of agreements to operate commercial and services properties in shopping centres. Until this date, only the variable component of the rent, calculated based on sales made by the tenants is due. Tenants must also pay the contractually agreed expenses, including the common expenses and charges.

Articles 168-A and 168-B of the State Budget Law also include a set of rules on support for the payment of rents due under lease agreements non-housing purposes. These rules address, in particular, moratoriums and the loans granted by the Housing and Urban Rehabilitation Institute, I.P.

Amendment to Law 4-C/2020 of 6 April, which approved the exceptional rules on situations of late payment of rent due under lease agreements and other forms of contractual operation of real estate premises for non-housing purposes

1. Scope of application

Law 4-C/2020 of 6 April – regarding non-housing lease agreements – applies to agreements for the following establishments:

- o **Establishments open to the public for retail trade and the provision of services that are closed or have their activities suspended** (i) under Decree 2-A/2020 of 20 March, (ii) by legislative or administrative decision under Decree-10-A/2020 of 13 March, as amended, (iii) under the Basic Law of Civil Protection, approved by Law 27/2006 of 3 July, as amended, (iv) under the Basic Law of Health, approved by Law 95/2019 of 4 September, or (v) under other provisions to implement the state of emergency and after its termination, (vi) under a legal provision or administrative measure approved in the context of the COVID-19 pandemic, that determines the closure of facilities or suspension of activities. This includes cases where the business continues to trade using e-commerce, or to provide services at a distance or through an electronic platform;

¹ See [Informative Note – Coronavirus: Rent moratoriums and suspension of agreement](#).

- o **Restaurants and similar establishments closed** under the above provisions, including in cases where they continue to operate exclusively to prepare food intended for consumption outside the establishment or for home delivery, under Decree 2-A/2020 of 20 March, or any other provision that allows this.

"The legislative amendment now approved extends the deferral period to cover the rent due until the third month after the month of the lifting of the imposed closure of the facilities or suspension of the activity occurred."

2. Period of deferment

Law 45/2020 of 20 August extended the period during which the rent due under agreements for establishments in the situations described in 1 above may be deferred.

The previous rules already allowed the deferment of the payment of rent due between 1 April 2020 and the first month following the lifting of the restrictive measures, with the maximum limit being 1 September 2020.

The legislative amendment now approved extends the deferral period to cover the rent due until the third month after the month of the lifting of the imposed closure of the facilities or suspension of the activity occurred. However, it does establish that the deferral will not apply to any rent due after 31 December 2020.

Landlords whose tenants cease to pay rents under these arrangements can now ask for a line of credit with reduced costs. This facility is still to be regulated and its purpose is to cover the difference between the monthly rent due and the amount that results from applying to the landlord's monthly income / monthly billing (or equivalent) of a maximum effort rate of 35%. This amount will have to be demonstrated under the terms of a ministerial order to be approved.

3. Settlement period

The period to settle the debts resulting from the deferral of rents has been increased.

Under the previous rules, deferred rents were to be paid from 1 September 2020 or, if earlier, after the end of the first month following the month in which the above restrictions were lifted, and the settlement was to be completed by June 2021.

With this new amendment to Law 4-C/2020 of 6 April, the period to settle outstanding rent has also been extended to 24 months. The period now begins on 1 January 2021 and extends until 31 December 2022.

The payment of the deferred amounts is to be made in 24 successive instalments, in the amount corresponding to 1/24 of the deferred amount, paid together with the monthly rent or remuneration. In cases where the payment is not monthly, it must be paid by the 8th day of each month.

The amendment now published also clarifies that the total amount owed excludes the rents due and already paid, which are considered, for all purposes, settled.

4. Procedures and negotiation

Communication

Contrary to what happened previously, the law now expressly provides that any tenant wishing to benefit from these arrangements must communicate that intention to the landlord. This communication must be made by registered letter with recorded delivery, up to 5 days before the due date for the first rent for which the tenant wishes to benefit from these arrangements. The legislature has made it clear that this duty of communication applies only to rents due between 1 July 2020 and 31 December 2020. It establishes a period of 20 days for rents due in the month of July 2020. Considering the date of publication of Law 45/2020 20 August, the deadline to be considered for informing the landlord of the intention to benefit from these arrangements in respect of the rents due in July and August 2020 is not entirely clear.

Possibility of negotiation

As an alternative to the communication that the tenant intends to benefit from the moratorium, the tenant can submit a proposal to the landlord for an agreement to pay the rent due and falling due that is different to the solution established in Law 4-C/2020.

The landlord must communicate the acceptance or refusal of the tenant's proposal within 10 days of receiving it, or the landlord will be deemed to have accepted it.

Within the same period, the landlord can submit a counterproposal. If so, the tenant also has 10 days to state whether or not it accepts that proposal.

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If the tenant rejects the landlord's counterproposal or does not respond to it within 10 days, the rules on deferment of payment of the rent in Law 4-C/2020 of April 6 (as amended) will apply. These rules are described in sections 2 and 3 above.

5. Bank guarantees

During the exceptional situation of prevention, containment, mitigation and treatment of SARS-CoV-2 and COVID-19, landlords may not execute any bank guarantees for failure to pay non-housing rents.

6. More favourable arrangements

Any arrangements resulting from the law or from an agreement made between the parties – including debt forgiveness agreements or agreements for rent payment deferral that are more beneficial to the tenant – prevail over the rules established by Law 4-C/2020 of 6 April (as amended), which also applies to leases for housing purposes. The same applies to agreements to be made between the parties. These agreements are, therefore, valid as long as they are more beneficial to the tenant compared with the law in force.

Furthermore, in the case of leases for non-housing purposes, if there is a prior agreement establishing conditions less favourable to the tenant, it will be voided by means of a communication to be sent by the tenant within 30 days of the entry into force of Law 45/2020 of 20 August, which occurred on 21 August 2020. By this communication, the tenant must state their intention to apply the rules in Law 4-C/2020 of 6 April (as amended). However, the amounts already paid are not returned to the tenant and they must be taken into account when calculating the total amount due.

The law also expressly provides that clauses are null and void if their effect is (i) to renounce rights attributed by Law 4-C/2020 of 6 April (as amended) or to renounce the right of recourse to the courts, or (ii) to accept increases in rent or in the duration of the lease, when such clauses are inserted into the agreements mentioned in the preceding paragraph.

7. Of further note...

The arrangements described above also apply to forms of operation of real estate premises other than lease agreements for non-housing purposes. Therefore, the references to landlord, tenant and rent are also intended to include the corresponding figures resulting from other forms of commercial operation of real estate premises.

However, the legislature has expressly made it clear that the arrangements described in sections 2 to 4 above do not apply to establishments located in shopping centres that benefit from the provisions of article 168-A (5) of the State Budget Law. ■

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