



#SRSAdvogadosTaskForce

LEGAL GUIDE: COVID-19

WHAT YOU NEED TO KNOW

● REAL ESTATE

ARE THERE ANY SPECIFIC MEASURES IN THE CONTEXT OF THE STATE OF EMERGENCY FOR THE REAL ESTATE SEGMENT AND IN PARTICULAR FOR RENTALS?

On 18 March 2020, by way of Presidential Decree no. 14-A/2020 in the context of the Covid-19 pandemic, a State of Emergency was declared in Portugal, as renewed by Presidential Decree no. 17-A/2020 of 2 April.

As a result of this declaration, a number of legislative measures were adopted in various sectors of the economy, including the real estate sector, in particular as regards leases.

1. TERMINATION OF LEASES

IF A LEASE TERMINATION PERIOD IS IN PROGRESS, ON WHAT DATE WILL THE LEASE END?

Law 1-A/2020 of 19 March 2020, as amended by Law 4-C/2020 of 6 April, provides that during the term of the measures for prevention, containment, mitigation and treatment of the epidemiological infection of Covid-19, as determined by the public health authority and up to 60 days after the termination of these measures, terminations made by landlords in relation to residential and commercial leases are suspended.

WHAT HAPPENS TO EVICTION PROCEEDINGS THAT ARE IN PROGRESS DURING THIS PERIOD?

Law 1-A/2020 establishes that all eviction proceedings, special eviction proceedings and proceedings for handing over of leased property are suspended when, as a result of that judicial proceeding, the tenant may be placed in a hazardous situation due to lack of housing or other compelling social reason.

It should be noted that all time limits in the context of courts, arbitration courts and alternative dispute resolution bodies are suspended until the exceptional situation of prevention, containment, mitigation and treatment of Covid-19 is over.

CAN LEASE AGREEMENTS BE TERMINATED OR CAN LANDLORDS OPPOSE RENEWAL DURING THIS PERIOD?

On 6 April 2020 Law 1-A/2020 was amended, and it is now provided that during the period of measures for prevention, containment, mitigation and treatment of the epidemiological infection of Covid-19, as determined by the public health authority and up to 60 days after the termination of these measures, the term date for residential and commercial leases is suspended, unless the tenant does not oppose the termination.

This decree also provides for the suspension of the effects of revocation and opposition to the renewal of residential leases or commercial leases effected by the landlord.

The period of 180 days foreseen in Article 1053 of the Civil Code (concerning the obligation to deliver leased premises when a lease has expired) is also suspended if the end of that period falls during the period in which the measures are still in force.

2. OBLIGATION TO EFFECT RENTAL PAYMENTS

DO TENANTS HAVE THE OBLIGATION TO PAY RENT DURING THIS PERIOD?

On 6 April, Law 4-C/2020 was approved, establishing an exceptional regime that allows the deferment of rental payments due under urban lease agreements.

This law is applicable to both residential and commercial leases and applies to rent due as of 1 April 2020.

RESIDENTIAL LEASES

■ Requirements

The regime applies to residential leases, provided that the following conditions are met:

- ▶ **(i)** a decrease of more than 20% in the income of the tenant's household compared with the income of the previous month or the same period of the previous year; and
- ▶ **(ii)** tenant's household effort rate - calculated as a percentage of all household members' income allocated to rental payments - i.e. being over 35% of income.

or

- ▶ **(iii)** the income of the landlord's household decreases by more than 20% compared with the income of the previous month or the same period in the previous year; and
- ▶ **(iv)** that percentage of the landlord's loss of income is caused by the non-payment of rent by tenants in this context.

It should be noted that what is meant by a decrease in income and how it will be evidenced is regulated by separate ordinance.

■ Deferral of Rental Payments

Tenants who are in the situation referred to in points (i) and (ii) above may defer payment of rent for the duration of the State of Emergency and for the first month following the termination of the State of Emergency.

At the end of this period, the amount of unpaid rent shall be paid within 12 months in monthly instalments of not less than 1/12 of the total amount due, payable together with the rent due for each month.

During the deferment period, the compensation of 20% due in the event of delay in the payment of rent as provided for in no. 1 of art. 1041 of the Civil Code is not applicable nor can the landlord refuse the payment of rent in this context.

■ **IHRU Loan**

Residential tenants, students with no work income (living in a location for the purpose of studying which is more than 50km away from their family house) as well as their guarantors, who meet the requirements set out in (i) and (ii) above and are unable to pay the rent for their permanent home, can apply to the Institute of Housing and Urban Rehabilitation (IHRU) for an interest free loan. This loan will cover the difference between the monthly rent due and the amount resulting from the application of a maximum effort rate of 35% to the household's income; and the available amount cannot be less EUR 438.81 (Social Support Index).

Also landlords who are in the situation set out in (iii) and (iv) above may apply to the IHRU for an interest-free loan to compensate the non-payment of rent due, provided that (a) their tenants do not make use of the IHRU loan; and (b) the remaining disposable income of the household falls, for that reason, below EUR 438.81.

■ **Procedure**

Tenants that meet the above mentioned requirements must inform the landlord, in writing up to 5 days prior to the due date of the rent, that they intend to benefit from the regime foreseen in this legal diploma and must provide documents evidencing they met the above mentioned requirements, upon terms established by ordinance.

The provisions of the preceding paragraph are not applicable to rent due in April 2020, in which case the notification to the landlord may be made within 20 days of the date of entry into force of this Law, i.e., from 7 April 2020.

■ **Early Payment**

If tenants intend to terminate the lease before the 12-month period foreseen for payment of the deferred rent, they must immediately pay to the landlord rent due and not paid.

COMMERCIAL LEASES

■ **Requirements**

The regime applies to commercial leases, provided that the business carried out at the leased premises are:

- ▶ establishments open to the public intended for retail trade activities and the provision of services that have been closed down or have had their activities suspended under Decree 2-B/2020 of 2 March, or under the Basic Law on Civil Protection, as well as the Basic Law on Health, or other provisions for the implementation of the State of Emergency (including cases where they maintain the provision of e-commerce activities, or the provision of services at a distance or through an electronic platform); and
- ▶ catering and similar establishments, including take away and home delivery businesses.

■ **Deferral of Rent**

Tenants who are in the situation referred to in points (i) and (ii) (see page 3) may defer rental payments for the duration of the State of Emergency and for the first month following its termination.

At the end of this period the amount of unpaid rent must be paid to the landlord within 12 months in monthly instalments of not less than 1/12 of the total amount due together with the rent due in each month.

■ **Early Payment**

If tenants intend to terminate the lease before the 12-month period foreseen for payment of the deferred rent, they must immediately pay to the landlord rent due and not paid.

■ **Scope**

It should be noted that the above provision for commercial leases also applies to other forms of real estate contracts, including atypical tenants' contracts, provision of service contracts or assignment of use contracts.

WHAT IS THE SITUATION FOR COMMERCIAL LEASES WHERE THE LEASED PREMISES ARE NOT ESTABLISHMENTS OPEN TO THE PUBLIC (AND AS SUCH ARE NOT COVERED BY THE APPROVED LEGAL MEASURES)?

It is understood that the above legal provisions apply only when the leased premises is an establishment open to the public under the terms identified above.

The question remains whether, in relation to commercial leases where the leased premises are not open to the public, there is an applicable regime in terms of the obligation to pay rent (and the possibility of deferment, suspension or reduction of that obligation).

It is noted that, in this context and without prejudice to the analysis of each specific case, tenants may follow one of the following routes:

- ▶ apply by analogy the legal regime (which can be challenging considering that it is an exceptional regime); or
- ▶ invoke the right to suspension or reduction of the rental payment invoking the abnormal change of circumstances (as provided for in Article 437 of the Civil Code), since such change is not caused and is not attributable to the tenant, nor is it included in the risks covered by the lease (provided that there is a causal link between the consequences of the State of Emergency and the inability of payment of the rent); or

- ▶ claim that there is a situation of force majeure (an unforeseeable and unavoidable situation), which is not attributable to the tenant and which makes it impossible to comply with rental payment under the contract.

The application of these regimes has no real precedent in Portugal, in particular with regard to leases (and as a rule this application is not generally accepted by Portuguese courts) and it is not possible to anticipate what their position will be in this context, especially since the situation under analysis and the current pandemic context have never previously occurred.

Additionally, the application of the above mentioned regimes will depend on the particular situation of each lease, including: (i) the provisions of the contract; (ii) the situation of each tenant and the type of activity exercised at the leased premises; (iii) the status of the agreement in force before the State of Emergency; (iv) the terms of use of the leased premises; and (v) the existence of a causal link between the situation in question and the impossibility of payment of rent.

The degree of uncertainty and the importance of existing contingencies in this context, including:

- ▶ compensation to the landlord for the delay in receiving rental payments;
- ▶ termination of the contract by the landlord for non-payment of rent; or
- ▶ enforcement of guarantees provided by the lessee to ensure fulfilment of its obligations

makes it clear that it is likely that the best solution will be for the tenant to reach an agreement (in writing) with the landlord on the terms of any deferment, suspension or reduction of the obligation to pay rent during this period.

WHICH REGIME APPLIES WHEN LANDLORDS ARE PUBLIC ENTITIES?

The possibility is foreseen for public entities that act as landlords to reduce the amount of rent due from tenants that prove that they have a decrease in income of more than 20% in relation to the income of the previous month or the same period of the previous year, when it results in an effort rate of more than 35% in relation to the rent. This reduction of the amount of rent due does not apply if tenants already benefit from a special rental regime, such as the supported rental or social rental regime.

Public entities with leases or otherwise contracted properties may (i) exempt from rental payments tenants who can prove that they no longer earn any income after 1 March 2020; and (ii) grant moratorium to their tenants.

CAN LANDLORDS TERMINATE THEIR LEASES AND APPLY PENALTIES DURING THIS PERIOD?

No. In the situations foreseen above of deferment of rental payments, the landlord may only terminate the lease for non-payment of rent if the tenant does not pay the deferred rent within 12 months from the end of that period.

The landlord in this context cannot demand that the tenant vacates the property or demand the payment of any penalties resulting from the delay (namely the 20% compensation applicable in this case and delay in the payment of rent in accordance with paragraph 1 of art. 1041 of the Civil Code) and also cannot refuse to accept the rent.

CONTACTS

