

Exceptional and temporary regime of financial re-balancing of long-term contracts in the context of the covid-19 pandemic (decree-law no. 19-a/2020, of 30 april)

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On May 1, 2020, Decree-Law no. 19-A/2020, of 30 April, (the "**Decree-Law**") was published, establishing an exceptional and temporary regime applicable in the context of the COVID-19 pandemic:

- a) To long-term contracts to which the State or other public entity is a party;
- b) To compensation for the sacrifice resulting from an act carried out by the State or another public entity in the context of preventing and combating the pandemic.

Grounded in the exceptional situation that Portugal is undergoing as a result of the COVID-19 disease, the Decree-Law includes measures that limit the right of private contractors enshrined in the aforementioned long-term contracts to claim compensation for losses suffered as a result of events occurring during the state of emergency.

As stated in the Preamble to the Decree-Law, these are *"extraordinary and temporary measures aimed at limiting the negative effects that would result for the State from simultaneously triggering the exercise of any compensatory rights by private contractors without any restriction"*.

Accordingly, the following measures have been decreed by the Decree-Law:

1. **(a)** It determines the suspension, from 3 April 2020 until the end of the state of emergency, of contractual clauses and legal provisions providing for the right to financial recovery or compensation for a lower use than expected in any long-term contract, in particular in public-private partnerships, to which the State (or other public entity) is a party. Private contractors cannot invoke such clauses or provisions on the basis of facts verified during the above-mentioned period (Article 3(1));
1. **(b)** For facts occurring after the period referred to in the previous paragraph (3 April 2020 until the end of the state of emergency), in long-term contracts which expressly provide for the right of the private contractor to compensation for loss of use or where the occurrence of a pandemic constitutes grounds for a claim to financial adjustment, compensation or rebalancing can only be achieved by extending the term of the contract or the period of performance of the services, excluding the possibility of revision of prices or the assumption by the public contractor of the obligation to provide to the private contractor, such as the payment of financial compensation (Article 3(2));

The enforcement of these measures may raise doubts about their legality or constitutional compliance at various levels.

2. **(a)** In concession or sub-concession contracts in the road sector, in addition to the above, the public contractor must, as a matter of urgency, identify the obligations of the private contractor which should be temporarily reduced or suspended, taking into account, in particular, updated traffic levels consistent with reality and the minimum services to be ensured to adequately safeguard road safety (Article 4(1));
2. **(b)** Furthermore, when the remuneration of the private contractor, under the terms of the concession contract or sub-concession contract, derives from payments by the public contractor, the latter should unilaterally determine the reduction of the payments due, to the extent of the reduction or suspension of the obligations to be performed by the private contractor. (Art. 4(2));
3. It waives the unilateral modification acts to be carried out by the public contractor under the referred long-term contracts in respect of the procedural requirements provided in Article 20 of the Legal Regime of Public-Private Partnerships (Article 5);
4. It determines that, in the public-private partnerships contracts, the regime enshrined in the Decree-Law is exceptional in relation to the Legal Regime of Public-Private Partnerships, which shall apply in a suppletory manner to these contracts in everything that does not contradict the Decree-Law (Article 6);

5. It determines the application of paragraph 3 of Article 185-A of the Procedural Code of the Administrative Courts to disputes arising from the enforcement of the provisions of the Decree-Law (Article 7).

This means that the arbitral awards in such disputes are, in certain situations, subject to appeal, with merely devolutive effect, to the Supreme Administrative Court

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6. It determines that no compensation shall be paid for losses resulting from acts regularly carried out by the State (or other public entity) within the framework of the powers conferred by public health or civil protection legislation or within the framework of the state of emergency, for the purpose of preventing and combating the COVID-19 pandemic, *"which constitutes for this purpose a cause of force majeure"* (Article 8).

The enforcement of these measures may raise doubts about their legality or constitutional compliance at various levels.

The Decree-Law came into force on 2 May 2020, with the exception of Article 5, and will apply until the date on which the World Health Organization determines that the epidemiological situation of the SARS-COV-2 virus and the COVID -19 disease do not constitute a pandemic, without prejudice to the effects that, by their nature, should be produced or come into effect after the Decree-Law expires.