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# URÍA MENÉNDEZ PROENÇA DE CARVALHO

State of Calamity - Extraordinary Measures

Main aspects of the Resolution of the  
Council of Ministers no. 40-A/2020

3 June 2020

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# 1. Introduction

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On 30 April 2020, the Portuguese Government approved the Resolution of the Council of Ministers no. 33-A/2020 (“**RCM 33-A/2020**”), declaring the **state of calamity** throughout the national territory. RCM 33-A/2020 provided for a number of containment and confinement measures that are more limited in scope than those in force during the state of emergency.

Given that the state of calamity would end at 23:59 hrs on 17 May 2020 (as per RCM 33-A/2020), the Government approved Resolution of the Council of Ministers no. 38/2020 of 17 May (“**RCM 38/2020**”), extending the state of calamity.

Finally, since RCM 38/2020 established that the state of calamity would end at 23:59 hrs on 31 May 2020, the Government extended it once again with Resolution of the Council of Ministers no. 40-A/2020 of 29 May (the “**Resolution**”).

The Resolution significantly reduced the containment and confinement measures that had been in force until then. Indeed, with the entry into force of the Resolution, the following measures ceased to be in force:

- i. Civic duty of home confinement;
- ii. Suspension of retail and service activities to the public;
- iii. Remote working obligations;
- iv. Prohibition of events.

Additionally, the list of establishments and facilities that are to remain closed was significantly reduced. The following establishments can therefore reopen:

- i. Auditoriums, cinemas, theatres and concert halls;
- ii. Shopping centres;
- iii. Several buildings, facilities and indoor and outdoor venues for sports purposes.

Considering the recent outbreaks of COVID-19 located in the Lisbon Metropolitan Area, some exceptional measures were maintained in that territory.

Despite the progressive lifting of the containment and confinement measures, since some of the measures in force affect several fundamental rights (e.g. compulsory confinement), we cannot ignore the fact that their constitutionality and legality are questionable.

The scope of the Resolution is the following:

- i. Territorial scope: the entire national territory.
- ii. Temporal scope:
  - a. Entry into force:
    - Measures for religious ceremonies at 00:00 hrs on 30 May 2020;
    - The remaining measures at 00:00 hrs on 1 June 2020;
  - b. Termination of effects: at 23:59 hrs on 14 June 2020, notwithstanding any necessary extensions or modifications in view of the epidemic's evolution.

The Resolution implements the following measures:

## 2. Measures affecting the freedom of movement

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### 2.1. COMPULSORY CONFINEMENT

Confinement is mandatory for COVID-19 patients and citizens under active surveillance by health authorities or other healthcare professionals in a healthcare establishment, at home, or in another location to be defined by the health authorities under the threat of prosecution for the crime of disobedience. To this end, health authorities must report to security forces and services on the implementation of the mandatory confinement measures.

### 2.2. VISITING RESIDENTS AT CARE FACILITIES

Visiting residents of care homes, long-term care homes and other facilities dedicated to the elderly, as well as care facilities for infants, children, young people and those with disabilities are permitted, provided that the rules defined by the Directorate General for Health (“DGS”) are complied with.

Upon assessing the specific epidemiological situation, the DGS, in coordination with the local health authority and the Minister for Health, may suspend visits to any the aforementioned facilities for a limited time.

### 2.3. PHYSICAL ACTIVITY AND SPORTS

Individual physical activity and individual sports are allowed in a non-competitive context (i.e. all sports other than handball, basketball, korfbal, football, hockey, skating, rugby or volleyball).

In a competitive context, (i) individual sport competitions without physical contact and (ii) the 1<sup>st</sup> Division Professional Football League (*1ª Liga de Futebol Profissional*) are allowed, provided that:

- i. They are held outdoors;
- ii. Behind closed doors; and
- iii. In compliance with the DGS specific guidelines.

Collective sports by federated athletes is also allowed, provided that the DGS specific guidelines are complied with.

Physical activity and outdoor sports or in gyms and fitness centres is only permitted when the DGS guidelines are complied with. The sports facilities in operation must comply with the rules set out in section 3.3.

## 3. Measures affecting establishments and activities

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### 3.1. CLOSURE OF ESTABLISHMENTS AND SUSPENSION OF ACTIVITIES

The establishments and facilities in which the following activities take place are closed:

- i. Recreational, leisure and entertainment activities: party or dancing halls, recreational or amusement parks for children, water parks and other similar premises or facilities;
- ii. Cultural and artistic activities: national, regional and municipal caves, public or private and bullrings;
- iii. Sports activities (except for federated athletes' training):
  - (a) Indoor venues or arenas (except for individual sports with no physical contact), indoor sports halls or venues for futsal, basketball, handball, volleyball, roller hockey and similar venues, indoor venues for ice skating, ice hockey, and similar premises, as well as indoor athletics tracks;
  - (b) Enclosures for contact sports (e.g. boxing rings, martial arts establishments and similar premises);
- iv. Activities in open spaces and public streets: parades, popular festivities, folklore shows and similar events;
- v. Gambling and betting activities: arcades and recreation halls;
- vi. Beverage serving activities: beverage establishments, with or without dancefloors (e.g. bars, discos), unless they are part of tourist or accommodation establishments, to provide an exclusive service for their guests;
- vii. Thermal baths, spas, solariums and similar establishments; and
- viii. Language schools (except to sit tests and exams) and tutoring centres.

Failure to close the establishments listed above, as set out in the Resolution, may lead to prosecution for the crime of disobedience.

### 3.2. ESTABLISHMENTS OPEN TO THE PUBLIC AND ACTIVITIES ALLOWED

Establishments, services and activities not included in section 3.1 may open and operate.

However, a number of restrictions and limitations remain in place as regards the establishments, services and activities mentioned below:

#### **A) Restaurants**

Restaurants and similar establishments may operate provided that:

- i. The DGS guidelines are complied with;
- ii. Occupancy levels:
  - a. Do not exceed 50% of the maximum capacity; or
  - b. Waterproof physical barriers are used to separate customers facing each other and a 1.5 metres' distance is kept between tables;
- iii. No new clients are allowed in after 23:00 hrs; and
- iv. A table-booking system is used.

Restaurants may open their terraces to customers provided that the DGS guidelines are adhered to.

Food courts must follow the DGS guidelines for the restaurant sector, with the necessary adaptations, and avoid crowds.

Establishments that intend to offer on a permanent or part-time basis, take-away or home-deliveries, are exempt from having to obtain take-away or home-delivery licences.

#### **B) Fairs and markets**

Fairs and markets are permitted, provided that a contingency plan for COVID-19 has been prepared or approved by the competent local authority. The contingency plan must comply with the rules in force for retail establishments (see section 3.3), as well as the DGS guidelines, and establish procedures to prevent and control spreading.

#### **C) Museums, monuments, palaces, archaeological sites and similar**

Museums, monuments, palaces, archaeological sites and other similar locations may remain open provided they comply with the rules set out in article 17 of the Resolution, among which the following are worth noting:

- i. Compliance with the DGS guidelines; and
- ii. A guarantee that each visitor has at least a 20 m<sup>2</sup> grid around them and that members of different households keep a safe distance (2 m) from other visitors;

#### **D) Cultural events**

The operation of concert halls, theatres, cinemas and similar venues, as well as cultural events to be held outdoors are permitted, provided that the following rules are observed:

- i. Those set out in sections 3.3 A) and 3.3 B) below;
- ii. In concert halls, theatres and cinemas:
  - a. A vacant seat must be kept between spectators that do not live together and the seats must be mismatched in relation to the next row;
  - b. If there is a stage, a minimum distance of two meters must be kept between the stage and the front row;
- iii. In outdoor venues:
  - a. Seats must be identified in advance, with a physical distance between spectators of one and a half meters;
  - b. If there is a stage, a minimum distance of two meters must be kept between the stage and the front row;
- iv. Service stations should preferably be equipped with protective barriers;
- v. Advance purchase of tickets by electronic means and payments by contactless means, bank card or similar methods are preferred;
- vi. Whenever applicable, ventilation systems should be maintained and operate without recirculating air;
- vii. Wherever possible, live scenes and performances should be adapted to minimise physical contact between those involved and to maintain the recommended safety distance;
- viii. In the areas of food and beverage services in these cultural events, the guidelines of the DGS for the restaurant sector should be respected.

#### **E) Gambling establishments, casinos, bingos or similar establishments**

Gambling establishments, casinos, bingos or the like are allowed to operate as long as they:

- i. Comply with the guidelines and instructions laid down specifically for that purpose by the DGS;
- ii. Have a specific protocol for cleaning and sanitising gambling areas;
- iii. Privilege the execution of transactions by TPA;
- iv. Do not allow people who do not intend to gamble, eat or drink inside the establishments.

#### **F) Personal care and aesthetics**

Hairdressing salons, barbershops, beauty parlours, tattoo and body piercing establishments or studios are allowed to operate by appointment.

Massages are also permitted in beauty parlours, gyms or similar establishments.

These establishments must comply with the DGS guidelines.

### **3.3. RULES FOR ESTABLISHMENTS OPEN TO THE PUBLIC**

In all establishments, facilities and premises open to the public, the rules set out in articles 6 to 11 of the Resolution must be observed. The following is a summary of the main rules:

#### **A) Physical distancing**

- i. Maximum limit of 0.05 customers per m<sup>2</sup> of area for the public (e.g. 5 people per 100 m<sup>2</sup>). This rule is not applicable to services establishments;
- ii. Measures must be adopted to ensure that:
  - (a) Persons remain inside the establishment only for the amount of time strictly necessary to purchase the required products; and
  - (b) A minimum distance of two metres is kept between persons, unless otherwise specifically provided for or directed by the DGS;
- iii. Waiting for assistance inside service establishments is prohibited and an appointment system must be preferably provided;
- iv. Identify, whenever possible, entry and exit mechanisms through separate doors.

#### **B) Hygiene**

Economic operators must:

- i. Carry out cleaning and disinfection:
  - (a) On a daily and periodic basis in spaces, equipment, objects and surfaces with which there is an intensive contact;
  - (b) After each use as regards equipment, objects, surfaces products and utensils in direct contact with clients (e.g. automatic payment terminals, scales in supermarkets); and

- (c) As regards products that are exchanged and returned, before they are made available for sale again, except when this is not possible or compromises the quality of the products;
- ii. Limit direct contact as much as possible of workers and customers with products, equipment and unpackaged items;
- iii. Control access to fitting rooms – in clothing and similar retail establishments – ensuring that displays, clothing supports and hangers are disinfected after each use; and
- iv. Ensure appropriate disinfection solutions are available for workers and customers, inside the establishments and in all the entrance and exit doors.

#### **C) Hours of service**

- i. The opening hours of the establishments may be adjusted by the economic operators or by the Minister of State, Economy and Digital Transition;
- ii. Establishments that only resumed their activity after RCM 33-A/2020 or RCM 38/2020 entered into force or that only resume their activity after the Resolution comes into force may not open before 10h.;
- iii. Establishments for which normal opening hours have changed as a result of the preceding paragraph may postpone their closing hours for an equivalent period;
- iv. Establishments may close during certain periods of the day to carry out cleaning operations and for the disinfection of workers, products or areas open to the public.

The provisions set out in paragraphs ii. and iii. above do not apply to hairdressing salons, barbershops, beauty parlours, restaurants and similar establishments, cafeterias, tea rooms and similar premises, driving schools and technical inspection centres of vehicles.

#### **D) Priority service**

Retail or service establishments must give priority to health professionals, members of the security services and forces, protection and rescue personnel, armed forces personnel and social support services.

#### **E) Duty to provide information**

Establishments in operation must clearly and visibly inform customers about the new rules of operation, maximum capacity, access, priority, care, hygiene, safety and other relevant rules applicable to each establishment.

**F) Other rules**

Establishments in operation must also comply with:

- i. The rules defined by the DGS;
- ii. The rules set out in codes of conduct approved for certain business sectors or establishments, as long as they do not contradict the provisions of the Resolution.

## 4. Public services

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Public services will resume face-to-face services by appointment, maintaining the provision of services through digital media and contact centres with citizens and companies

The rules set out in section 3.3 above apply to public services offering face-to-face services.

## 5. Labour measures

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### 5.1. REMOTE WORKING

The employer must provide the worker with adequate safety and health conditions for the prevention of infection risks arising from the COVID-19 pandemic, and may in particular adopt the remote working regime, under the terms of the Labour Code.

When the remote working regime is not adopted, measures for the prevention and mitigation of risks arising from the pandemic may also be implemented, within the maximum limits of the normal working periods and respecting the right to daily and weekly rest provided for in the law or in the applicable collective bargaining instrument, namely:

- i. Implement daily or weekly schedules between remote workers and workers attending the work place;
- ii. Different entry and exit times;
- iii. Different breaks and meal times.

To this end, the employer may change the working times under the relevant management team, provided that the procedure set out in the applicable legislation is followed.

The remote working regime is mandatory in the following situations, regardless of the employment relationship and whenever the functions in question allow it:

- i. When the worker so requests and:
  - (a) The worker is covered by the exceptional protection regime for immunosuppressed and chronically ill people, under the terms of article 25-A of Decree-Law no. 10-A/2020, of March 10 and provides a medical certificate as evidence;
  - (b) The worker is a disabled worker, with a recognised disability of 60% or more;
  - (c) The worker has one or more children or other dependants under the age of 12, or, regardless of age, dependants with a disability or chronic illness and for as long as the suspension of teaching and non-teaching activities in schools or social equipment to support early childhood or disability is maintained, outside of the school year breaks. The obligation only applies to one of the parents, regardless of the number of children or other dependants.
- ii. Where the physical spaces and the work organisation do not permit compliance with the guidelines of the DGS and of the Authority for Working Conditions on the matter.

## **5.2. CATERING ESTABLISHMENTS**

Catering establishments (e.g. restaurants) may require their workers, with their consent, to carry out activities necessary for the operation of take-away or home-delivery services, even if these activities are not stipulated in their employment contracts.

## 6. Religious celebrations and funerals

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Celebrations and other events involving a crowd of more than 20 people are not allowed. Only in the event that that the Minister of the Interior and the Minister of Health jointly authorise celebrations and events with a larger number of people can these take place.

The DGS defines the specific guidelines for the following events:

- i. Religious ceremonies, including community celebrations;
- ii. Family events, including weddings and baptisms, both for civil and religious ceremonies and for other commemorative events;
- iii. Corporate events held in appropriate venues (e.g. congress halls, tourist establishments, venues suitable for trade fairs and outdoor spaces).

In the absence of these guidelines, the organisers of the events must observe the rules mentioned in A) and B) of section 3.3 above, as well as the rules mentioned in B) of section 3.2 above regarding catering establishments, and participants must wear a mask or visor in the enclosed spaces.

The holding of funerals is subject to the organisational measures that may be implemented by the local authority that manages the respective cemetery. The rules imposed may not restrict the presence at the funeral of a spouse or de facto cohabitant, ascendants, descendants or other relatives.

## 7. Lisbon Metropolitan Area

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Specific limitations are set out for the Lisbon Metropolitan Area ("LMA"), notably:

- i. The access, movement or presence of people in spaces frequented by the public, as well as the gatherings of people on the public streets, are limited to 10 people (unless they belong to the same household);
- ii. Activities in retail and service establishments open to the public shall remain suspended if they:
  - a. Have a sales or service area of more than 400 m<sup>2</sup>;
  - b. Are located in commercial centres (e.g. shopping centres), unless they have separate street access;
- iii. Food-courts in commercial centres are to remain closed;
- iv. Citizen's bureaus (*Lojas do Cidadão*) will remain closed to the general public, but can take appointments from 1 June 2020. Face-to-face services may continue to be provided in Citizen's bureaus by appointment only, in locations where there are no decentralised offices.
- v. Vehicles with a capacity of more than five people, other than public transport, may only circulate, unless all occupants are part of the same household, with two thirds of their capacity, and occupants must wear a mask or visor, with the exceptions provided for in Article 13-B of Decree-Law No. 10-A/2020 of March 13, in its current wording.

The following establishments are excluded from the suspension listed above under point ii.:

- i. Retail establishments as provided for in Annex II to RMC 38/2020, of which the following stand out:
  - a. Minimarkets, supermarkets, hypermarkets, greengrocers, butchers, fishmongers, fish markets, bakeries, markets (where food is sold) and fairs;
  - b. Stationery shops; tobacconists and shops that sell games (e.g. board games);
  - c. Establishments selling cosmetics, hygiene products, pharmaceuticals, medical, orthopaedic, optical, natural and dietetic products, including pharmacies;
  - d. Pet shops or shops that sell pet food or pet pharmaceuticals;
  - e. Shops selling flowers, plants, seeds and fertiliser, as well as products to protect plants and biocides;
  - f. Hardware stores and DIY stores;
  - g. Establishments selling vehicles (e.g. bicycles, cars, boats), tractors and agricultural machinery, as well as parts, accessories or fuel for these vehicles and equipment;

- h. Establishments selling household appliances, computer and communication equipment; and
      - i. Bookshops and music shops.
  - ii. Establishments providing services to the public as referred to in Annex II to RCM 38/2020, a summary of which includes:
    - a. Facilities providing banking, financial and insurance services;
    - b. Establishments providing medical, veterinary and social-support services;
    - c. Establishments that provide maintenance and repair services for vehicles (e.g. bicycles, cars, boats), tractors, agricultural machinery, domestic appliances, IT and communications equipment;
    - d. Establishments that carry out funerary and related activities;
    - e. Tourist establishments and local lodgings;
    - f. Student housing facilities;
    - g. Hairdressing salons, barbershops and beauty parlours, by appointment only;
    - h. Real estate service-providers;
    - i. Washing and dry cleaning services for textiles and leather;
    - j. Restaurants and similar food establishments, cafeterias, tea rooms and similar premises.
  - iii. Other retail establishments may also operate, provided that they only offer home delivery services or provide the goods at the door; the public and consumers are not allowed to enter the premises;
  - iv. Establishments that have a sales or service area of more than 400 m<sup>2</sup> when they have an authorisation from the competent municipality to operate and as long as they comply with the remaining rules and demands set out;
  - v. Establishments that have a sales or service area of more than 400 m<sup>2</sup>, if they limit their sales or service area to 400 m<sup>2</sup>;

The competent municipalities in the LMA will reassess the operation of establishments with an area exceeding 400 m<sup>2</sup> which they have authorised under RCM 38/2020 and will also reassess the running of fairs which have resumed operation under the same resolution.

## 8. Monitoring of the Resolution

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It is the responsibility of the security forces and services to:

- i. Monitor compliance with the Resolution;
- ii. Order the closure of establishments and prevent the operation of activities provided for in annex I of the Resolution;
- iii. Issue orders (namely to return home) and report the crimes of disobedience set out in the Resolution;
- iv. Recommend that people do not gather in public streets and disperse gatherings of more than 20<sup>1</sup> people, unless they live in the same household.

Disobedience and resistance to the legitimate orders of competent authorities, when issued under the Resolution, are sanctioned under criminal law and the respective minimum and maximum limits of the penalties are increased by one-third, pursuant to paragraph 4 of article 6 of Law no. 27/2006 of 3 July 2006.

The security forces and services must report the level of public compliance with the Resolution, so that the Portuguese Government may assess the situation and the need to approve a sanctioning framework for breaches of the general duty of home confinement.

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<sup>1</sup> Without prejudice to the LMA, according to which gatherings of 10 or more people should disperse.

## 9. Additional effects of the state of calamity

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Under the Basic Law of Civil Protection, the declaration of the state of calamity also entails the following:

### **9.1. FREE ACCESS TO PROPERTY AND USE OF PRIVATE NATURAL OR ENERGY RESOURCES BY CIVIL PROTECTION AGENTS**

Civil protection agents are permitted to access private property, as well as to use private natural or energy resources, to the extent strictly necessary to restore normal living conditions.

### **9.2. CIVIL REQUISITION**

Goods or services may be requisitioned on a temporary basis, in particular because of the urgency and public and national interest at stake that justify the requisition.

The requisition of goods or services is determined by order of the Ministers of Internal Administration and Finance, which establishes the object of the requisition, the foreseeable duration, the beneficiary and the entity responsible for paying compensation for losses resulting from the requisition.

In relation to the compensation due for the requisition, the rules regarding the compensation for the temporary requisition of real estate contained in the Expropriations Code will apply, with the necessary adaptations.

### **9.3. MUNICIPALITIES' PRE-EMPTION RIGHTS**

Municipalities are granted pre-emption rights regarding onerous transactions/transfers of land and buildings between private parties, for a period of two years.

Private individuals wishing to sell real estate must notify the mayor of the respective municipality of the intended transaction/transfer in order to allow the municipality to exercise the pre-emption right.

#### 9.4. PUBLIC PROCUREMENT

The contracting of public works contracts and the supply of goods and acquisition of services with a view to urgently preventing or responding to situations arising from the events that led to the declaration of the state of calamity:

- i. May be carried out by direct award procedure, according to the list of entities authorised to adopt this procedure, approved by order of the Minister of Internal Administration and Finance;
- ii. Are exempt from the prior approval of the Court of Auditors.

## Contact lawyers

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