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Decree Law 6/2020 of 5 June expanding public housing in the Autonomous Region of Valencia by means of prospective and retrospective rights of first refusal

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1. Introduction

- On 5 June 2020, the regional government of the Autonomous Region of Valencia (*Consell*) approved a Decree Law (*decreto ley*) for the exercise of prospective and retrospective rights of first refusal (*derechos de tanteo y retracto*) by public bodies in the autonomous region (the “**Decree Law**”).
- The Decree Law was published in the *Diari Oficial de la Generalitat Valenciana* on 11 June 2020 and entered into force the next day.
- Even though the Decree Law has been in full effect since its entry in force, it must be ratified by the autonomous region’s parliament (*Les Corts*), which will be able to take one of the following decisions: ratify the Decree Law, abolish it or, even after its ratification, process it as a bill through the urgent procedure. In this last case, amendments can be introduced to its current content.
- In addition to reinforcing rights of first refusal in cases of public-housing transfers, the Decree Law establishes the following transfers of private housing as also affected by rights of first refusal:
 - Prospective and retrospective rights of first refusal (*tanteo y retracto*) in transfers of housing acquired by means of **settling mortgage debts** (*dación en pago*).
 - Retrospective right of first refusal (only after the transaction; *derecho de retracto*) of housing transferred in a **judicial mortgage foreclosure proceeding** or an **out-of-court notarial sale**.
 - Prospective and retrospective rights of first refusal (*tanteo y retracto*) in the following transactions:
 - In transfers of **buildings containing a minimum of five dwellings** the main purpose of which is residential, when the transfer affects at least 80% of the building and even when the transfer is performed through the sale and purchase of shares of companies whose corporate object is linked to real estate.
 - In transfers of **ten or more dwellings**, even when the transfer is performed through sale and purchase of shares of companies whose corporate object is linked to real estate.
- The Decree Law modifies the following regulations:

- Law 8/2004 of 20 October on housing in the Autonomous Region of Valencia (the “**Housing Law**”).
- Law 2/2017 of 3 February on the social function of housing in the Autonomous Region of Valencia.
- Decree 75/2007 of 18 May of the *Consell* of Valencia approving the Regulation on Public Housing Protection.
- The main characteristics of the Decree Law are set out below.

2. Rights of first refusal by public bodies: scenarios

Background

As regards public housing, prospective and retrospective rights of first refusal were already established in favour of the *Generalitat* in cases of *inter vivos* voluntary transfers or transfers arising from judicial proceedings, with some exceptions (by means of articles 50 to 53 of the Housing Law, which have been abolished and replaced by the regulations of the Decree Law).

Scenarios where there are prospective and retrospective rights of first refusal in public housing

The Decree Law recognises the right of first refusal of public authorities in cases of second and subsequent *inter vivos* transfers of public housing and public housing's annexes, including transfers that are for free or for consideration, and those that are voluntary or arise from a judicial or notarial award, for as long as the qualification as public housing remains valid.¹

Legal awards in cases of dissolution of jointly owned property and dissolution of condominiums are excluded.

Scenarios where there are rights of first refusal and redemption in private housing

The Decree Law extends the prospective and retrospective rights of first refusal to transfers of private housing (first and subsequent) performed after its entry in force (12 June 2020) in the following scenarios:

- To transferred housing (and annexes) acquired after 21 May 2005, by means of **settling mortgage debts** (*dación en pago*).

¹ According to the Second Transitory Disposition of the Decree Law and since 12 June 2020, the rights of first refusal apply to the second and subsequent transfers of public housing: (i) if it was privately developed, when the definitive qualification was subsequent to 21 April 2005 (the entry in force of the Housing Law); and (ii) if it was publically developed, throughout the entire term of the protection regime, provided that the rights of first refusal were established in such regime (even if the definitive qualification was prior to 21 April 2005).

- To transferred housing (and annexes) acquired after 21 May 2005, by means of **judicial mortgage foreclosure proceedings** or an **out-of-court notarial sale** (in these cases only the retrospective right of first refusal, which is exercised afterwards, exists²).
- To transferred **buildings containing a minimum of five dwellings** the main purpose of which is residential use, **when at least 80% is transferred** (whether as an asset deal or as a share deal).
- In transactions relating to **ten or more dwellings and their annexes** (whether as an asset deal or as a share deal).

For these rights of first refusal to exist in cases of private housing three additional conditions must be satisfied:

- **The housing must be located in areas of housing need as declared by the *Generalitat*.**

The Decree Law foresees the drafting of a catalogue of areas of housing need within a term of six months. Up until that moment, the rights of first refusal will apply to the areas established in the Annexes of the Decree Law, which include the three province capitals (Castellón, Valencia and

² In our opinion, the Decree Law generates some important doubts as to interpretation due to the drafting of certain articles and its general approach. A first example: the recognition of solely a retrospective right of first refusal in the case of housing that has been subject to judicial or out-of-court notarial proceedings could lead us to think that, in such cases, only the retrospective right of first refusal (*retracto*) can be exercised and only when the judicial or notarial execution takes place. This understanding could tie in with another article in which it seems that the Decree Law does not link the judicial or notarial legal award to the need to have previously exercised the prospective right of first refusal (*tanteo*) beforehand (but rather only the subsequent retrospective right of first refusal).

However, this understanding seems completely inconsistent with the fact that the Decree Law attaches the right of first refusal, in all cases of private housing, to both the first and subsequent transfers. Furthermore, from the first transitory disposition it seems rather that the rights of first refusal apply provided that there is a transfer (of any type) in which the seller has acquired the property by means of a judicial or notarial legal award (or through the settling of a mortgage debt) subsequent to 21 April 2005. Therefore, it is hard to understand the logic behind why only the retrospective right of first refusal is applied in the section on judicial and notarial legal awards . The grammatical error of using the incorrect verb tense (the Spanish future subjunctive *hubieren sido adquiridas*) also does not aid understanding.

Alicante), along with their metropolitan areas and the main cities and municipalities of the Autonomous Region of Valencia.

- The housing or building should have been **acquired by the transferor after the entry in force of the Housing Law**, that is, subsequent to 21 April 2005.³
- **The prospective and retrospective rights of first refusal are subsidiary to other pre-emptive acquisition rights.** In cases of private housing, the right of first refusal of the public authorities of Valencia yields in favour of another legal right of first refusal (e.g. the right of co-proprietors or tenants), except if the beneficiary of the right of first refusal waives its right to exercise it.

³ This is another example of the confusing wording and approach of the Decree Law. From the literalism of the first transitory disposition it would seem that this condition (the transfer being after 21 April 2005) applies to all the cases of *singular transfers* (i.e. transfers of private housing listed in the Decree Law).

However, there are reasons to believe that the *Consell's* intention is that it only applies to housing acquired (after 21 April 2005) by means of the settling of mortgage debts (*dación en pago*), mortgage foreclosures and notarial auction. One of these reasons is that only letters a) and b) of article 10 paragraph 1 of the Decree Law refer to housing that “would have been acquired” (*hubieren (sic) sido adquiridas*) (by means of settling mortgage debts or judicial or notarial auction, respectively); letters c) and d), referring to the other two cases (transfer of a building or more than ten dwellings), no reference is made to its prior acquisition. Another reason is that the Valencian Decree Law seems to have found clear inspiration in Catalan Decree Law 1/2015 of 24 March, which granted prospective and retrospective rights of first refusal in housing acquired by means of mortgage foreclosure proceedings or compensation or the settling of mortgage debts. On this basis, it could be understood that the first transitory disposition of the Decree Law only applies to letters a) and b) of article 10.1.

3. Regulation and exercise of rights of first refusal

Prospective right of first refusal (*tanteo*)

- To exercise the **prospective right of first refusal** the owner of the housing or building must notify the housing *conselleria* in any way which allows it to take note of the decision to transfer. The notification must include the information and documentation regarding the parties, the housing and the price.
- The prospective right of first refusal of the public authorities **can be exercised within a term of 60 calendar days** counting from the day following that of notification.
 - *Exercise of the right of first refusal:* in the event the public authority exercises the prospective right of first refusal, the public authority will notify the owner and will proceed to pay the price within a term of four months or whatever longer term is established in the transfer conditions.
 - *Non-exercise of the right of first refusal:* in the event the 60 calendar days pass (or earlier if *Generalitat* notifies that it is waiving its right), the owner can transfer the property.
- The **notification's effects expire after six months**. If the transfer is performed once the term has expired, it is considered to have not been notified and the public authority can exercise the retrospective right of first refusal.

Retrospective right of first refusal (*retracto*)

- The retrospective right of first refusal (*retracto*) is recognised in the following circumstances
 - When the notification required for the purpose of the prospective right of first refusal is not performed or, if it was made, it failed to satisfy the established requirements.
 - When, even if the public authority notifies its intention to exercise the prospective right of first refusal, the transfer to a third party is performed.
 - When the transfer is performed after the effects of the notification have expired.

- When the transfer is performed with conditions that differ from those included in the notification.
- In cases of transfers due to a legal award in a judicial or notarial auction.
- For the exercise of the **retrospective right of first refusal**:
 - *in the case of private transfers*, the acquirers must notify the transaction to the housing *conselleria* within a term of **15 calendar days**; and
 - *in the case of legal awards in a judicial or notarial auction*, the public body performing the transaction must notify the decree establishing the legal award or the property-transfer document within a term of three days to the same *conselleria*.⁴
- The term for exercising the retrospective right of first refusal is also **60 calendar days from the notification**.
 - *Exercise of the right of refusal*: in the event the public authority exercises the retrospective right of first refusal, the public authority will notify the owner and will proceed to pay the price within a term of four months (two months in the case of a legal award by judicial or notarial auction) or whatever longer term for payment was established for the transaction.
 - *Non-exercise of the right of refusal*: in the event the 60 calendar days pass, it is considered that the public authority has waived its right.

Provisions common to both the prospective and retrospective right of first refusal (*tanteo* and *retracto*)

- The term of 60 calendar days can be extended or suspended in certain circumstances.

⁴ It is not specified whether these are calendar or working days. A systematic understanding would lead to the conclusion that these are three calendar days, like the rest of the terms established by the Decree Law. However, the lack of specification should lead to the general administrative regulations being applied, in which case these three days should be considered as three working days (article 30 paragraph 2 of Law 39/2015 of 1 October on the Common Administrative Procedure of Public Authorities). The result would be the same if the litigation regulations (in cases of judicial execution) were applied.

- The acquisition **price** will be the price established for the transfer. However, in the case of public housing this cannot exceed the legally established maximum (according to the applicable regulations).
- The housing (and annexes) acquired by means of the right of first refusal will be qualified as **permanent public housing**.
- Failure to perform the required notification to the housing *conselleria* regarding a transfer and acquisition of housing or a building subject to rights of first refusal, a transfer without authorisation, or a transfer made after the effects of the notification have expired or made with different conditions, is considered a serious infringement under the Housing Law, with sanctions of up to EUR 3,000. This amount can be increased up to the relevant profit obtained and additional sanctions can also be imposed, such as temporary disqualification from building public housing.

4. Other noteworthy provisions

- In transfers of housing subject to rights of first refusal, the **notaries public and registrars will require certification of the notification** to the corresponding *conselleria*. Additionally, the notary public must notify the transfer within a term of 20 calendar days (although this notification is independent and does not exclude the notification that must be performed by the interested parties).
- **The rights of first refusal can be exercised by the *Generalitat* in favour of other public entities or even third parties** (non-profit entities, a person in possession of the housing so as to satisfy their vital needs, or public-housing applicants). Furthermore, the *Generalitat* can waive its rights in favour of the municipalities, with the possibility of signing agreements to that effect.
- The financial report of the draft Decree Law stated that in the 2020 general budget of the *Generalitat* there is an overall budget of EUR 26,020,000 for the purposes of carrying out housing acquisitions for inclusion in the public-housing system by means of, amongst other procedures, the exercise of rights of first refusal.
- The Decree Law introduces **a system for acquisition and offering of private housing so that it may be leased out** that is qualified as “*voluntary*”. However, it will necessarily include housing registered in the Uninhabited Housing Registry, housing acquired as a consequence of rights of first refusal (provided that they are not assigned to other social purposes) and housing acquired by means of other acts directed towards guaranteeing social use of housing.

5. A final thought

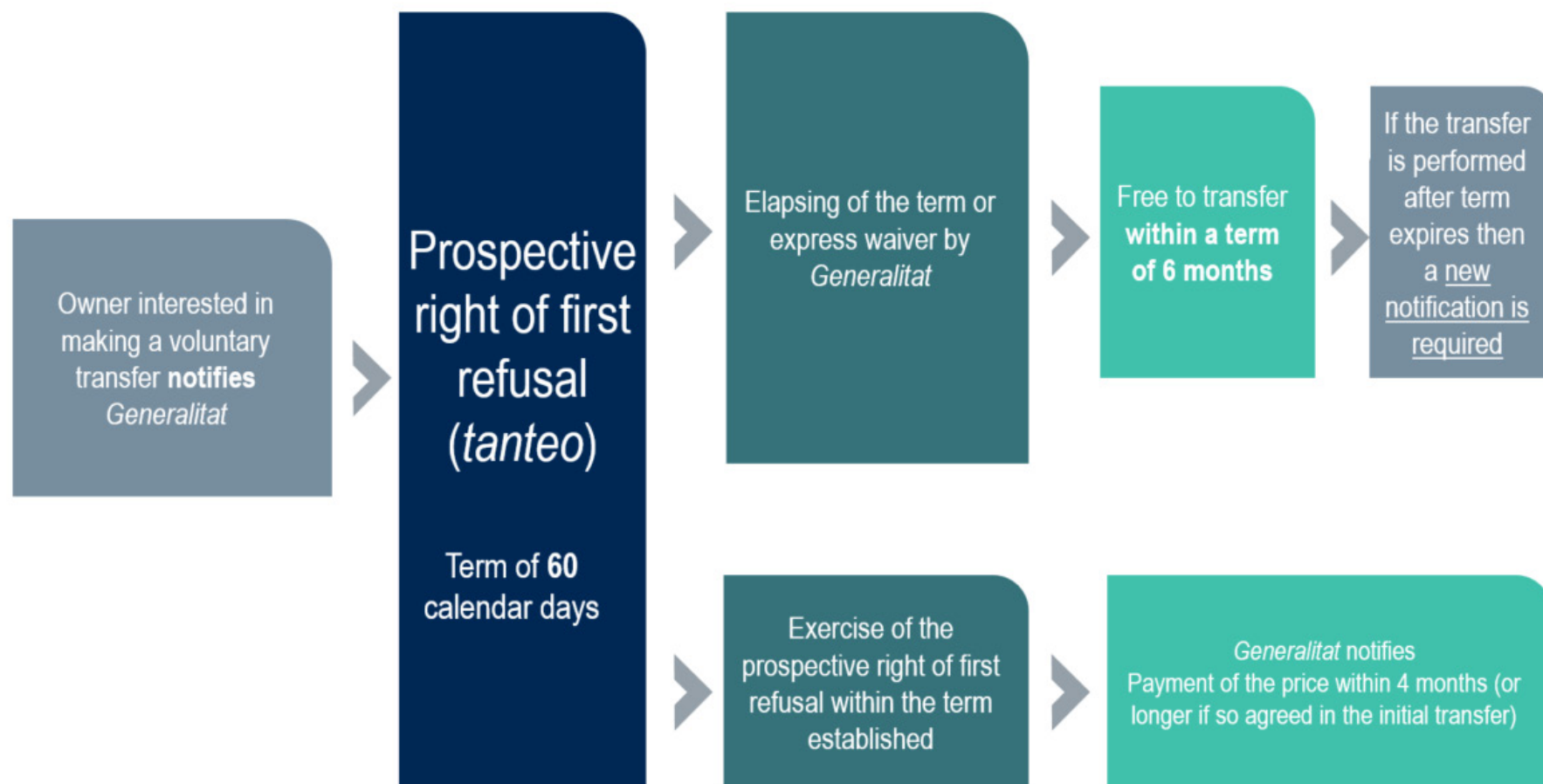
In our opinion, there are doubts regarding the constitutionality of certain provisions of the Decree Law (in view of, for example, article 33 of the Spanish Constitution concerning the right to property, or the distribution of powers between the State and the Autonomous Regions), or even regarding their compliance with article 1 of Protocol no. 1 of the European Convention on Human Rights (concerning the right to property).

Annex: schemes

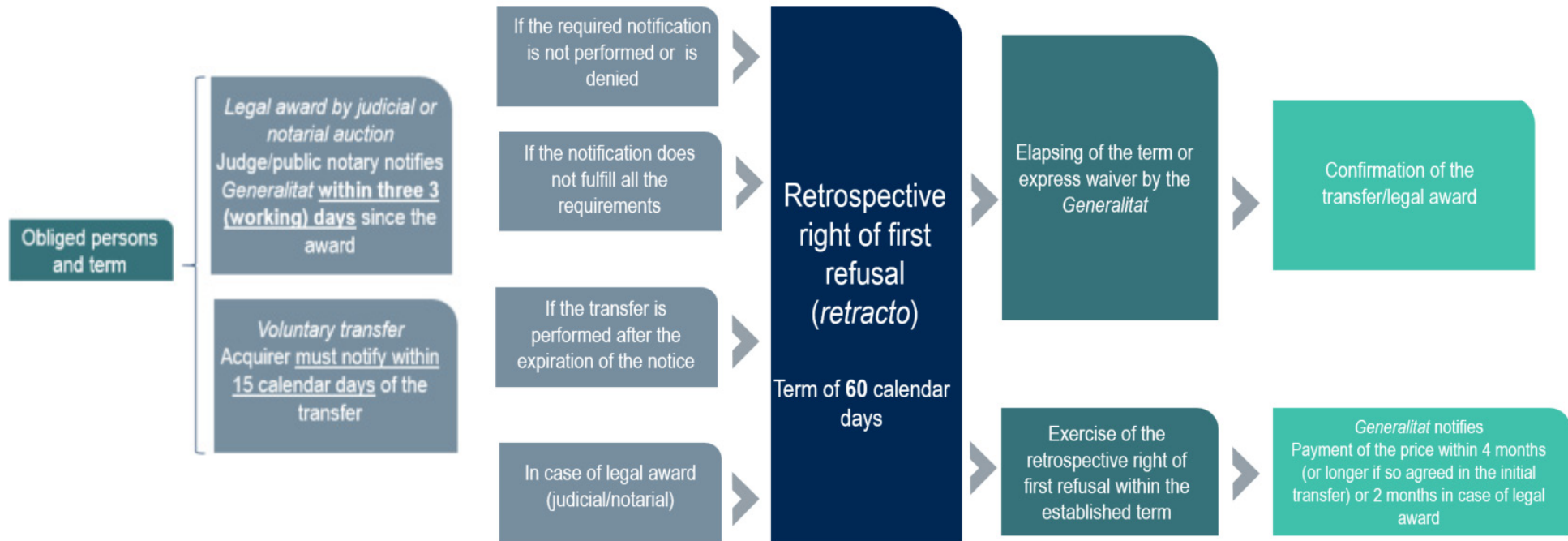
Scenarios where there are rights of first refusal

Public housing	Private housing		
Any type of transaction, auction or transfer in settlement of mortgage debts (<i>dación en pago</i>)	Legal award by means of an auction (judicial or notarial) or a transfer in settlement of mortgage debts	Sale and purchase of at least 80% of a building (that contains 5 or more dwellings)	Sale and purchase of 10 or more dwellings

Framework for exercising the prospective right of first refusal



Framework for exercising the retrospective right of first refusal



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