



## COVID-19

### Legal Insights

#### State Of Emergency in Portugal

With the spreading of COVID-19, Portugal faces, for the first time, the eminent hypothesis of having to enact National State of Emergency, for reasons of public calamity.

In this specific case, and as it has been advanced, it would be determined by sanitary emergency reasons, in which case the measures that will take part of the declaration of the State of Emergency, will in all probability consist in the imposition of restrictions to the citizens mobility, such as quarantine or forced isolation, the interdiction of the circulation of vehicles, the suspension of social activities, as well as of the publishing activities, radio and television broadcasts, cinematographic or theatre shows. Regarding companies, these measures may include the suspension of the freedom of economic initiative.

*"it becomes necessary to reinforce constitutional coverage to more comprehensive measures, which prove necessary to combat this public calamity, which is why the President of the Republic believes that the declaration of a state of emergency is indispensable"*

Draft Decree of the President of the Republic

## PRELIMINARY NOTES

The State of Emergency is set forth in the Portuguese Republic Constitution since 1976 and in Law no. 44/86, of the 30th September, that establishes the State of Emergency regimen (hereinafter "RESEM"). However, and since then, it was never used as a tool to respond to situations of public calamity for the suspension of fundamental rights. Therefore, there is no jurisprudence (Case Law) on the subject and even doctrine has focused very little on this issue.

In the present Legal Alert, in a very summarized way, we intend to answer and clarify the main questions and issues to be aware of in relation to the State of Emergency:

### **What is the State of Emergency and what does it consist in?**

Briefly, the State of Emergency, as well as the State of Siege, are exceptional states that may only be declared in cases of effective or imminent assault by foreign forces, serious threat or disturb of the democratic and constitutional order, or in the case of public calamity (Article no. 19, paragraph 2 of the Portuguese Republic Constitution and Article no. 1, paragraph 1 of RESEM), allowing the suspension and restriction of certain citizens' rights, freedoms and guarantees, to the necessary extent in order to contain the threat.

The State of Emergency is declared prior to the State of Siege declaration, with which it must not, however, be confused with, every time that the aforementioned requirements are less serious (at this respect, note Article no. 19, paragraph 3 of the Portuguese Republic Constitution). This means that, the State of Siege may only be declared if the seriousness of the situation (such as acts of imminent force or insurrection that would put at risk the sovereignty, the territorial independence or the constitutional and democratic order) would not be sufficiently covered and addressed by the State of Emergency declaration, which would not suffice to contain the situation of danger.

Portugal's Fundamental Law establishes, in the first paragraph of the supra mentioned provision that, in case one of those situations occurs, the sovereignty bodies may suspend the exercise of a few rights, freedoms and guarantees. This suspension must always be read and applied in light of Article no. 2, paragraph 2 of Law no. 44/86, from 30 September that enforces the principle of equal treatment and non-discrimination.

This provision does not apply to all the rights – it is expressly stated that in no event the rights to life, personal integrity, personal identity, civil capacity and citizenship, as well as the principle of the non-retroactivity of criminal law, the right of defendants' defence and the freedom of conscience and religion may be suspended.

The declaration and execution of the State of Emergency shall also respect the principle of proportionality and be limited, namely, in what concerns to its extension, length and means, to the adoption of the measures that are strictly necessary to the re-establishment of constitutional normality. (cfr. Article no. 19, paragraph number 4 of the Portuguese Republic Constitution and Article no. 3, paragraph number 1 RESEM).

Regarding to its extension, State of Emergency may be declared regarding the totality or just a fraction of the national territory, depending on the geographical scope of the originating causes and may only cover the areas to which its application is strictly necessary (Article no. 19, paragraph number 2 of the Portuguese Republic Constitution and Article no. 4 of RESEM).

The Declaration of the State of Emergency confers to authorities competence to take all the necessary and adequate measures in order to re-establish constitutional normality (Article no. 19, paragraph number 8 of the Portuguese Republic Constitution) and shall specify, if necessary, the degree of reinforcement of civil administrative powers and the respective support to the armed forces (Article no. 9, paragraph 2 of RESEM).

### **Who can decree the State of Emergency and who is responsible for its execution?**

The declaration of the State of Emergency is a competence of the President of the Portuguese Republic that may only declare it after hearing the Government and after requiring authorization to the Parliament or to the respective Permanent Commission (when the Parliament is not reunited and its reunion is not possible immediately), for that effect. In that case, the authorization of the Permanent Commission shall be, as soon as possible, confirmed by the Plenary.

The Government is the legal entity responsible for the execution of the undertaken measures (article no. 17 of RESEM) given that in the Autonomous Regions of the Azores and of the Madeira the execution of the aforementioned measures is ensured by the Republic representative, along with the Regional Government (article no. 20, paragraph 2 of RESEM).

As stated above, the Republic Representative's decree - which will then need to be approved by the Governments - will always be limited by the principle of proportionality in terms of its extension, length or duration and the means that may be used to address the problem that originated the State of Emergency. This means that the President of the Portuguese Republic, although having some degree of discretion over the scope of the declaration of the State

of Emergency, deciding on the contents and extension of the measures to be adopted, he is also confined to what is strictly necessary to ensure the prompt restoration of constitutional normality.

### **What should the State of Emergency declaration set forth and what measures can be adopted?**

The law foresees only the limits of the measures to be implemented, providing a wide margin regarding its specific and concrete definitions (article no. 2, paragraph number 2 of RESEM). In any event, this declaration shall define, at least, in a clear and precise way, the following elements:

- Characterization and reasoning of the declared state;
- Territorial scope - the measures' scope might cover to the totality or just a fraction of the national territory. Regarding the Autonomous Regions, the execution is assured by the Republic's representative, along with the regional government;
- Time Length or duration - the time length of the State of Emergency is of, at most, up to 15 days, with the possibility of its renewal for one or more periods of equal length or duration, as long as its reasons persist. The concrete days and time for the beginning and end of the State of Emergency shall also be defined.
- Specification of which rights, freedoms and guarantees are suspended or restricted.
- Establishment of the level of strengthening of the power of the administrative civil authorities and respective support by the Armed Forces.

As aforementioned, being a sanitary emergency, the measures to be adopted will very likely be of the following nature:

- Measures restricting the mobility and freedom of the citizens, possibly forcing a quarantine and isolation.
- Measures conditioning or prohibiting the circulation of people and vehicles, in which case, the authorities shall ensure the necessary means to fulfill the declaration's statements, especially in what concerns to transportation, housing and maintenance of the affected citizens (article no.2, paragraph number 2, item c) of RESEM).
- Measures suspending any form of publications, radio and television broadcast and cinematographic or theatre shows, as well as apprehending any form of publications. Such measures shall not encompass any form of previous censorship (article no.21 of RESEM).
- Measures nominating commissioners by the government, at its free will, in order to ensure the operation of public institutions, public and nationalized companies and other companies which operation is crucial regarding the circumstances (article no.21 of RESEM).

### **What are the consequences to those who do not comply with the measures stated in the declaration of the State of Emergency?**

The breach of the measures that take part of the Declaration of the State of Emergency will constitute a crime of disobedience, set forth in article no. 348 of the Portuguese Criminal Code, punishable with an imprisonment sentence that may last up to 1 year or a fine sanction that may last until 120 days (under Article no. 7 of RESEM). In cases of qualified disobedience, the sanctions will duplicate - the imprisonment sentence may last up to 2 years and the fine sanction may last up to 240 days.

### **How long can the State of Emergency last?**

The Declaration of the State of Emergency may last, at most, 15 days, with the possibility of its renewal, for one or more periods of equal duration (Articles nos. 19, paragraph number 5 of the Portuguese Republic Constitution and Article no. 5 of RESEM). The maximum duration defined in concrete (of up to 15 days) shall be limited to the time duration strictly necessary to safeguard the rights and interests in cause in view of the prompt restoration of constitutional normality.

The renewal of the Declaration of the State of Emergency, as well as its amendment in order to extend the adopted measures, shall follow the procedures envisaged by the initial declaration.

To access the full version of Law no. 44/86, dated from 30th September please go to the following link: [http://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?nid=1712&tabela=leis&so\\_miolo=](http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1712&tabela=leis&so_miolo=)

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