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### **New Regulation no. 7/2020 (the “Regulation”) issued by the Financial Supervisory Authority (“FSA”) on the authorisation and functioning of alternative investment funds**

The Regulation entered into force on April 24, 2020 and establishes conditions for the authorisation and functioning of alternative investment funds (“AIFs”) and was issued for the application of Law no. 243/2019 on alternative investment funds (“AIF Law”).

### **Payment moratorium under EGO 37/2020 and the related implementation rules: key procedural steps, conditions, matters still open to debate and practical issues**

Through Emergency Government Ordinance no. 37/2020 on granting of certain facilities for the loans made available by credit institutions and non-banking financial institutions to certain types of debtors (the “**Moratorium Ordinance**”), the Romanian Government adopted certain measures aimed at supporting Romanian borrowers that are experiencing financial difficulties due to the COVID-19 pandemic.

Starting 30 March 2020, eligible debtors can request the postponement of due payment obligations for a period ranging between 1 and 9 months (but not beyond 31 December 2020).

The implementation rules to the Moratorium Ordinance (the “**Implementation Rules**”), in force since 6 April 2020, regulate the procedural steps for granting a payment moratorium. Although the Romanian Government sought to provide a simple and fast procedure, there are still many issues left uncovered or which raise interpretative challenges under the Implementation Rules.

## The new Regulation no. 7/2020 issued by the Financial Supervisory Authority covering the authorisation and functioning of alternative investment funds

The Regulation was issued to implement the AIF Law and provides further clarifications regarding the: organization and operation of AIFs; authorisation procedure for contractual AIFs (“CAIFs”) and investment company AIFs (“ICAIFs”); rules on asset calculation and valuation of AIFs for retail investors (“RAIFs”) and AIFs for professional investors (“PAIFs”); permitted investments applicable to RAIFs; transparency, information and reporting obligations applicable to RAIFs and PAIFs; and specific requirements for the deposit of AIF assets.

### Which are the key aspects provided by the new regulation?

#### Organization and operation of AIFs

An AIF’s assets may be secured if:

- The AIF provides a guarantee to the unitholders regarding the recovery of the initial investment or of the initial investment increased by a certain percentage;
- The guarantee may be granted to the AIF (internal guarantee) or individually to the unitholders or to the shareholders of the AIF (external guarantee) by a credit institution based in Romania or in another Member State;
- The guarantee must be valid for the period specified in the offering document, the prospectus or the articles of incorporation of the applicable AIF.

The granting and payment method of the guarantee, the identification details of the entity offering the guarantee, the value and the period for which the guarantee is offered and any other relevant information must be mentioned in the AIF's documentation.

The FSA may decide to limit temporarily the issuance and/or the redemption of units of an AIF in the following situations:

- there are difficulties in the fair valuation of an AIF’s assets due to the existence of a limited number of counterparties at a price level considered reasonable;
- there are significant exposures of the AIF's net assets to financial instruments suspended from trading by a decision of the FSA, ESMA or another competent authority in another Member State;
- there are discrepancies in the valuation of the AIF’s assets between the manager of the AIF (“AIFM”) and the depository of AIF’s assets that could lead to the refusal of the depository to certify the AIF’s net asset value;
- other situations related to the protection of the public interest and investors.

#### The authorisation of CAIFs and ICAIFs

The new regulation details the authorization procedure and the list of documents to be submitted in the authorization file for both CAIFs and ICAIFs, including the minimum content of the articles of incorporation and the AIF’s rules, as well as the specific rules on the authorization of sub-funds and AIFs admitted to trading.

In the case of CAIFs, the company contract is a membership contract to which the investor becomes a party by signing it and subscribing fund units. The period of the initial subscription of the fund units is of maximum 365 days from the date of the CAIF’s authorisation by the FSA.

In the case of ICAIFs, the subscribed and paid-in share capital must represent at least the RON equivalent of EURO 125,000, or a higher value depending on the type of specialized ICAIF.

### **RAIF's permitted investments**

Contractual RAIFs may not hold a total exposure of more than 50% of its net assets in financial instruments issued by legal entities that are part of the same group of companies (i.e., legal entities that have at least one common shareholder holding at least 33% of the share capital of each company part of the group or which have at least one common member of the board of directors or directorship) with the AIFM.

RAIFs may invest in corporate bonds not admitted to trading only if the conditions provided by the Regulation and detailed in the RAIF's prospectuses or offering documents are met.

### **The calculation of assets and valuation of an AIF**

The Regulation requires different calculation methods and valuation rules depending on the type of fund, namely RAIFs and PAIFs (including those specialized AIFs), as well as the type of assets in which the AIF invests.

### **Transparency, informing and reporting obligation**

The new regulation details in its annexes the minimum content of the reports that must be prepared by RAIFs and PAIFs and published on the AIF's website (in order to inform investors) or submitted to the FSA. The investor disclosures and reporting to the FSA must be done much more frequently in the case of RAIFs than in the case of PAIFs.

### **The main transitional measures**

- (i) An AIFM, both for itself and for the managed collective investment undertakings other than collective investment undertakings in securities ("OCIU"), self-managed OCIU and the depositories of OCIUs operating or which are in the process of authorisation/registration at the date of the entry into force of the Regulation must by July 24:
  - adapt their incorporation and functioning documents, as well as their activity, in accordance with the provisions of the AIF Law and the Regulation;
  - request authorization as an CAIF or ICAIF and submit the applications and documentation in this regard.
- (ii) AIFMs for managed OCIUs, as well as internally managed OCIUs, have the obligation to amend the investment portfolio depending on the type of AIF, according to the provisions of the AIF Law and Regulation, no later than 6 months from their authorisation date based on the Regulation;
- (iii) The certification granted by the FSA, prior to April 24, 2020, to Romanian credit institutions and branches of credit institutions from other Member States for carrying out the activity of depositing OCIU assets, remains valid provided that these entities send to the FSA by July 24:
  - an updated deposit contract, having at least the content provided in Article 83 para. (1) of Regulation (EU) no. 231/2013;
  - an updated working policies and procedures taking into account the provisions of the AIF Law and the Regulation.
- (iv) Until the date of issuance by the FSA of a CAIF's or ICAIF's functioning authorisation:
  - An AIFM, both for itself and for managed OCIUs, as well as a self-managed OCIU, must continue to send to the FSA reports with the content settled in annexes no. 10, 11, 16 and 17 of the CNVM Regulation no. 15/2004, as well as the applicable reports with the content set forth in FSA Regulation no. 9/2014 or in the annexes no. 4-6 of the CNVM Regulation no. 4/2010, as the case may be;
  - The individual documents for the authorization/registration of AIFMs and OCIUs issued prior to the entry into force of the AIF Law remain valid;

- Obligations under the law applicable before the entry into force of the Regulation will continue to apply.
- (v) AIFMs and AIF depositories that do not comply with the obligations set forth above will no longer be allowed to operate.

## Payment moratorium under EGO 37/2020 and the related implementation rules: key procedural steps, conditions, matters still open to debate and practical issues

### I. GENERAL PROCEDURE

#### 1. Types of agreements

The general procedure applies to all types of agreements falling under the scope of the Moratorium Ordinance (for details in this respect please see Section 3.1. of our [previous Alert](#)) concluded between:

- (i) natural persons,
- (ii) authorized individuals carrying out professional activities (in Romanian, “*persoane fizice autorizate*”), family or individual enterprises,
- (iii) professionals carrying out their activity based on special laws, regardless of the form in which such professions are exercised,
- (iv) legal entities (except for credit institutions),

and the following types of creditors:

- (i) credit institutions,
- (ii) non-banking financial institutions,
- (iii) branches of foreign credit institutions or foreign NBFIs carrying out activities on the Romanian territory,

except for mortgage loans contracted by natural persons, to which the procedure described in Section II below applies. Thus, for example, creditors should follow this general procedure in the case of payment moratoria related to unsecured consumer loans granted to natural persons.

#### 2. Conditions to be met

##### 2.1 Conditions regarding the agreement:

- a) it was concluded prior to 30 March 2020 (inclusively);
- b) the loan has not matured prior to 30 March 2020;
- c) the loan has not been declared due and payable (accelerated) prior to 30 March 2020 (inclusively); and
- d) there were no payments due and payable but unpaid as at 16 March 2020 or, if such payments were the unpaid, they have been discharged in full by the debtor prior to submitting the moratorium request.

Thus, in order for a credit to qualify for the moratorium, it seems that the debtor does not necessarily have to discharge, before submitting the moratorium request, the payments which had become due and payable after 16 March 2020 and up to the submission of the application (i.e., the submission may take place at any point between 30 March – 15 May 2020). The treatment of such overdue payments must be clarified on a case-by-case basis.

## 2.2 Eligibility conditions regarding the debtor

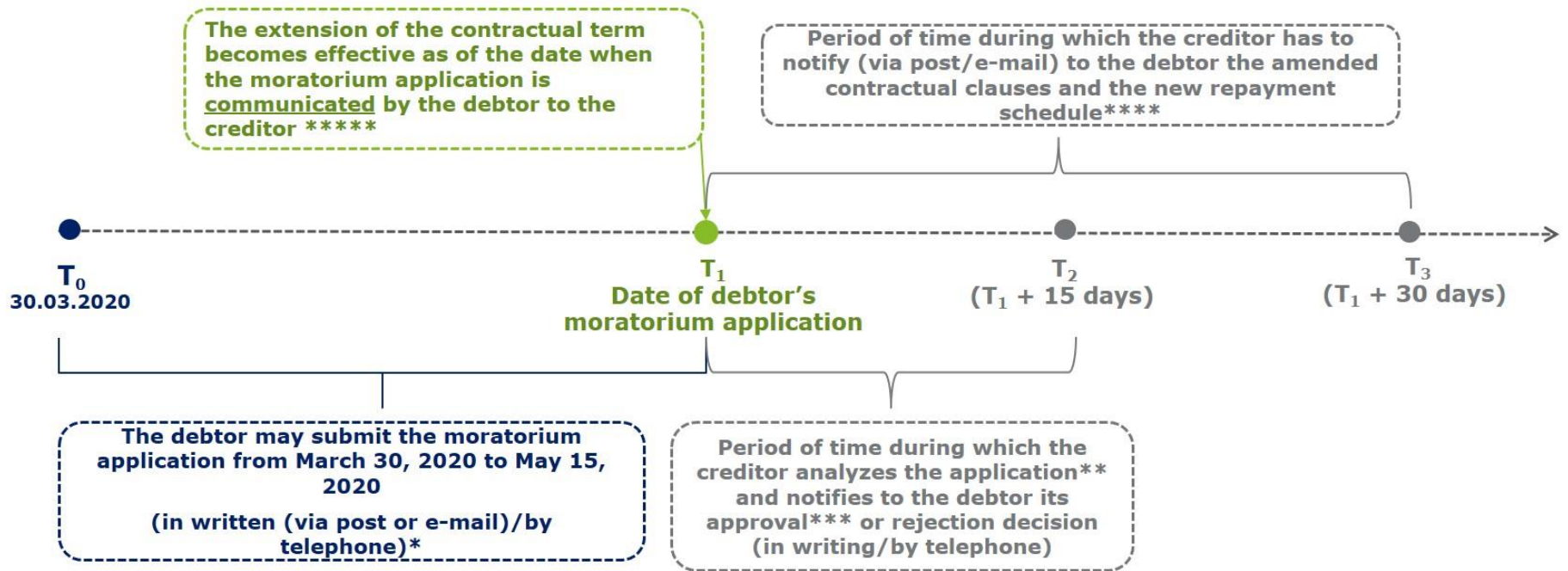
All debtors have to fulfill certain general eligibility criteria, as follows:

- the serious situation generated by COVID-19 pandemic affected either (i) their revenues, or (ii) the revenues of their families (applicable only to natural persons), directly or indirectly, as compared to the level experienced prior to March 16, 2020 (the date the state of emergency was declared in Romania); **and**
- a debtor is unable to meet its payment obligations under the loan agreement.

Each debtor must give an affidavit that it meets the abovementioned general eligibility criteria. Additionally, depending on the category of debtors to which the applicant belongs, the affidavit must mention the fulfillment of the following special circumstances:

Debtor type	Special circumstances
Natural persons	<p>The cause that led to the fulfillment of the general eligibility conditions, for example:</p> <ul style="list-style-type: none"> <li>• the debtor/family members have experienced unemployment due to their employer's business closure/slowdown,</li> <li>• layoff of the debtor/family members,</li> <li>• reduction of debtor's/family members' salary,</li> <li>• the debtor is placed in institutional quarantine or self-isolation,</li> <li>• the debtor becomes sick with COVID-19, etc.</li> </ul>
Authorized individuals carrying out professional activities, family or individual enterprises, professionals carrying out their activity based on special laws	<ul style="list-style-type: none"> <li>• their business has been interrupted in full or in part as an effect of the decisions issued by the competent public authorities under the law, during the state of emergency, with the following consequences: declining sales market, lower number of employees, smaller number of suppliers, etc.; and</li> <li>• <i>applicable only to debtors who can become subject to insolvency proceedings</i>: they are not in insolvency when they apply for the suspension of the loan repayment, as per the information available on the website of the National Office of the Trade Registry.</li> </ul>
Legal entities	<ul style="list-style-type: none"> <li>• holds one of the two forms of certificates for emergency situations issued by the Ministry of Economy, Energy and Business Environment attesting to: a reduction of income or cash balances of at least 25% in March 2020 compared to the average of the months January and February 2020; or the partial or total interruption of activity, as a result of the decisions issued by the competent public authorities during the decreed state of emergency, causing the following: a decrease of its retail market, reduction of the number of employees, reduction of the number of suppliers, etc.;</li> <li>• not undergoing insolvency at the time of application for the suspension of the loan repayment, as per the information available on the website of the National Office of the Trade Registry.</li> </ul>

3. Step plan



\* The moratorium application is made by the legal representative of the legal entities.  
 \*\* The creditor approves the moratorium, for the period of time requested by the debtor, in case the application fulfils the conditions set in Articles 15 and 16 of the Implementation Rules (described in Section I1.2. above).  
 \*\*\* The approval decision mentions the number of postponed installments.  
 \*\*\*\* No addenda to the agreement need to be executed for the amendment of the contractual provisions.  
 \*\*\*\*\* For implications on security providers please see Section I.4.

**4. When does the creditor have to notify guarantors of the contemplated amendment of the security arrangements?**

- Pursuant to Article 16 paragraph (9) of the Implementation Rules, in the case of secured loans, the creditors notify the guarantors, within the term set in Article 16 paragraph (6), of the prolongation of the security arrangements and on the amendment of its clauses for the purpose of granting the payment moratorium.
- The reference to paragraph (6) of Article 16 is a clerical error, as this paragraph does not stipulate any term. However:
  - (i). in paragraph (5), the creditor must inform the debtor on its decision to approve or reject the payment moratorium within 15 calendar days as of the receipt of the debtor's moratorium application, same as regulated in the procedure applicable to mortgage loans contracted by natural persons, as per Article 5 paragraph (8) of the Implementation Rules. For consistency reasons, the creditors may observe the same term; and
  - (ii). in paragraph (7), the creditor must provide the debtor with the amended contractual terms within 30 calendar days as of the receipt of the debtor's moratorium application.
- In any case, in our view, irrespective of the moment when the creditor notifies the guarantors, the creditor shall take the decision on the approval or rejection of the debtor's moratorium application independently of the fact that the guarantors consented or not to the amendment of the security arrangements (i.e. extension of contractual term and increase of secured amount).

**5. Rules regarding guarantee/security**

- Any guarantee/security originally given continues. The effects of the loan agreement amendment extend automatically to any co-debtors, guarantors, including surety, and any other party to the loan agreement; however, such effects are binding on these categories of persons only with their prior consent (see Article 16 paragraph (7) of the Implementation Rules).
- The maximum validity period of guarantees established under governmental guarantee programs may be extended for a period equal to the duration of the payment moratorium approved under the Moratorium Ordinance.

**6. Deferred payment of the interest due for the moratorium period. Interest capitalization**

- At the end of the moratorium period, accrued interest on the outstanding amounts whose payment was postponed for the moratorium period will be added to the loan balance and thereafter be subject to interest.
- The increased loan balance must be paid in instalments, commencing the month after the expiry of the moratorium period and until the new maturity of the loan (established by the moratorium) or the initial maturity (in the cases where the loan is restructured maintaining the initial maturity).

**7. Extension of the initial loan term and of the validity period of certain guarantees**

- The initial term of the loan can be extended for a period equal to the moratorium period, subject to the observance of the creditor's loan granting regulations, including those on the age limit of natural persons at the expiry of the extended contract.
- For debtors for which the extension of the loan maturity exceeds the age limit as provided in such regulations, creditors must restructure the loans so that the debtors would not exceed the age limit.
- The maximum validity period of the guarantees set in the laws regulating governmental guarantee programs may be extended for a period equal to the moratorium period without consideration to such things as the age of the debtor.

## II. PROCEDURE APPLICABLE TO MORTGAGE LOANS GRANTED TO NATURAL PERSONS

### 1. Which loan agreements fall under this procedure?

This special procedure applies to mortgage loans, which, under the Moratorium Ordinance, are loans granted by creditors to natural persons, which (i) are secured with a real estate mortgage or (ii) involve a right related to a real estate asset, both to the extent regulated by EGO 52/2016, as well as (iii) "Prima casă" loans (part of a governmental program partially guarantying loans for first time home buyers).

### 2. What are the conditions to the granting of the moratorium?

The conditions regarding the loan, as well as the eligibility criteria applicable to debtors who are natural persons, are the same as those described in Section I.2 above.

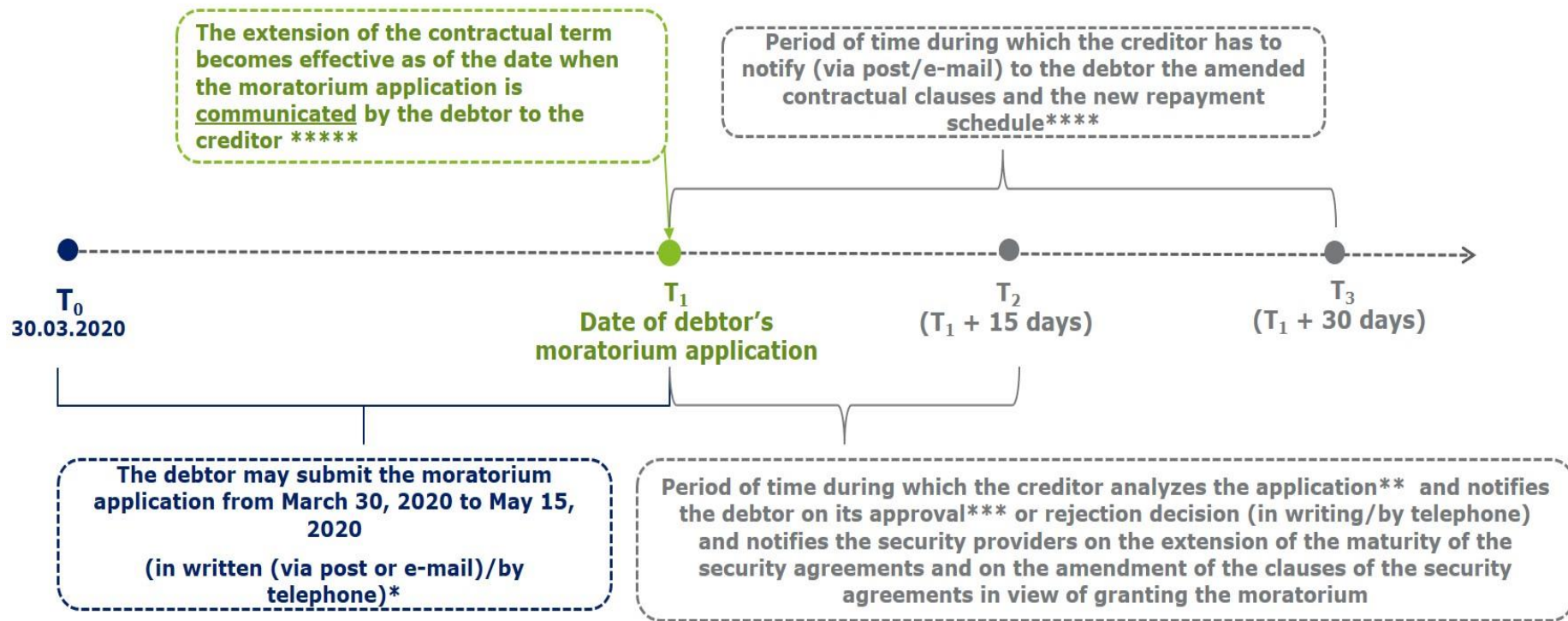
The Implementation Rules clarify that the "debtor's family members" are deemed to be the spouse, parents and children who are living and sharing the same household with the debtor.

### 3. For what period may the debtor request the payment moratorium?

- Under both procedures (general and mortgage loans), debtors may request the moratorium for any period ranging between 1 and 9 months (but no longer than December 31, 2020). As opposed to the general procedure, in the case of moratorium applications regarding mortgage loans granted to natural persons, the Implementation Rules stipulate that the due date of the last instalment included in the moratorium period must be 31 December 2020 at the latest. Neither the general procedure nor the mortgage procedure stipulate the due date of the first instalment which can be included in the moratorium period. Consequently, one may reasonably conclude that a debtor should be able to request the postponement of installments which became due and payable after 16 March and before the submission date of the application.
- For mortgage loans granted to natural persons, debtors may only opt for suspension once.



4. Step plan



\* The moratorium application is made by the legal representative of the legal entities.

\*\* We described in Section II.5 below the matters analysed by the creditor.

\*\*\* The approval decision mentions the number of postponed installments.

\*\*\*\* No addenda to the agreement need to be executed for the amendment of the contractual provisions.

**5. Analysis of the moratorium request - what should the creditors verify?**

- The creditor analyses the debtor's application, verifies if the conditions applicable to the mortgage loan mentioned in Section II.2 above are met, and informs the debtor of its decision to approve or reject the moratorium application (as per Article 5 paragraph (5) of the Implementation Rules).
- The creditor approves the application of the debtor who transmitted the affidavit mentioned in Section I.2.2. above (please refer to Article 5 paragraph (5) of the Implementation Rules, which has mandatory language). Thus, it seems that if the debtor has submitted the affidavit, the Implementation Rules consider the eligibility criteria regarding the debtor fulfilled.

**6. Formalities regarding guarantors**

- For secured mortgage loans, including those secured by state guarantees, the creditor notifies the guarantor of the extension of the validity of the guarantee arrangement and on the amendment of the contractual terms for the purpose of granting the payment moratorium, within a maximum of 15 days of the receipt of the debtor's moratorium application, the extension becoming effective if (and when) the guarantor expresses its consent.

**7. Extension of the initial contractual term in the case of mortgage loans contracted by natural persons**

- The initial term of the loan can be extended for a period equal to the moratorium period, subject to the observance of a creditor's loan granting regulations, including those on the age limit of natural persons at the expiry of the extended contract.
- For debtors for which the extension of the loan maturity exceeds the age limit as provided in such regulations, creditors must restructure the loans so that the debtors would not exceed the age limit.
- In the case of "Prima casă" loans, the maximum 30-year credit term can be extended for a period equal to the moratorium period, subject to the observance of a creditor's loan granting regulations on the age limit of natural persons at the expiry of the extended contract.

**8. Deferred payment of the interest due for the moratorium period in the case of mortgage loans contracted by natural persons. State guarantee granted in favour of creditors**

- In the repayment schedule revised after granting the payment moratorium the interest rate is maintained at the level provided in the initial loan agreement.
- The interest accruing during the moratorium period (the "**Deferred Mortgage Interest**") is computed as per the provisions in the loan agreement and represents a distinct and independent claim to be paid by the debtor. As the manner in which this claim must be registered in the internal records of banks/non-banking financial institutions and reported to the regulator is rather unclear, the National Bank of Romania might issue guidance on this matter.
- The debtor will reimburse the Deferred Mortgage Interest, commencing the month after the end of the moratorium period, in 60 equal monthly instalments for which no interest is owed.
- The Romanian State, through the Ministry of Public Finance, guarantees to creditors the payment in full of the Deferred Mortgage Interest.
- The granting of the state guarantees will be made based on a guarantee convention between the National Credit Guarantee Fund for Small and Medium Enterprises (in Romanian, *Fondul National de Garantare a Creditelor pentru Intreprinderile Mici si Mijlocii*, the "**F.N.G.C.I.M.M.**") and creditors. The template convention was approved by

the Ministry of Public Finances on 14 April 2020, the approving Order no. 1861/2020 entering into force on 16 April 2020.

- Creditors must file the request for issuance of the letters of guarantee within 30 days of 15 May 2020. The letters of guarantee are valid from their issuance date until discharge of F.N.G.C.I.M.M.'s obligations undertaken in the name and on behalf of the Romanian State, as follows:
  - a) upon the expiry of the repayment period indicated in the repayment schedules;
  - b) upon the date when MFP paid the execution value of the guarantee for the last debtor referred in the summarizing statement transmitted by the relevant creditor on its own liability;
  - c) upon the date when the creditor's waiver with respect to the letter of guarantee is registered with the F.N.G.C.I.M.M.;
  - d) upon date when the debtor fully repays the Deferred Mortgage Interest, but no more than 5 years.
- The amounts paid to the creditors based on the letters of guarantee issued by the F.N.G.C.I.M.M. (valid for maximum 5 years) represent budgetary receivables and will be recovered from the debtors by the competent fiscal bodies of the National Agency for Fiscal Administration, according to the provisions of the Fiscal Procedure Code.

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