VEIRANO ADVOGADOS

COVID-19
Renegotiating Terms of Consent Decrees (TAC)

RELEVANCE OF RENEGOTIATING DEADLINES TO COMPLY WITH OBLIGATION UNDERTAKEN IN A CONSENT DECREE (TAC):

- Avoid the immediate enforcement of the TAC
- Avoid fines (usually applied on a daily basis)

CASE LAW:

- Case by case analysis
- Force Majeure is usually accepted as reason to renegotiate a TAC **if** the party is able to prove that the unforeseeable and unavoidable event was the reason why it failed to comply with its obligation undertaken in the TAC
- Expectation: greater flexibility on granting the renegotiation due to COVID-19 pandemic

IMPORTANT!

1 **Individualized analysis of each obligation undertaken in the TAC**

In principle it is not possible to renegotiate the entire set of obligations

Company must comply with all the obligations that are still feasible

2 **Company should only renegotiate obligations whose implementation is impossible**

3 **Burden of proof about the impossibility to comply rests with the Company**

Organize and file every document related to the effects of COVID-19 pandemic to the TAC, in order to present to the public authority(ies) (and/or Court) and demonstrate Force Majeure

ANALYSIS ON WHETHER TO RENEGOTIATE DEADLINES SET FORTH IN A TAC:

1st STEP

Analysis of TACs executed by the Company: **are there current obligations or whose term for compliance ends during COVID-19 pandemic?**

2nd STEP

Has COVID-19 pandemic made it difficult or impossible to comply with this specific obligation?

3rd STEP

Has the public authority responsible for the TAC (e.g. Public Prosecutors' Office, Consume Protection Agency, environmental protection agency etc.) formally addressed its position on deadlines during COVID-19 pandemic?

IF IT IS NECESSARY TO RENEGOTIATE THE TAC:

4th STEP

Organize all documentation / technical grounds that prove it was impossible to comply with the TAC's obligation

5th STEP

Company's technical and legal teams to coordinate and align their speeches on the impossibility of meeting the deadline

6th STEP

Draft a written submission informing the impossibility to comply with the obligation, indicating:

- → Clear and detailed technical reasons
- → Supporting documentation
- → A proposal of reasonable revised deadlines

INTERACTION WITH THE PUBLIC AUTHORITY(IES) INVOLVED IN THE TAC

7th STEP

Submit the written communication and contact with the public authority(ies) involved in the TAC

- → Some public authority(ies) are holding virtual meetings

All communication must contain specific information related to the effects of COVID-19, in order to demonstrate the impossibility of complying with the obligation and the Company's good-faith, both essential elements in possible future disputes

8th STEP

Following the renegotiation, execute an amendment to the TAC that stipulates the new deadlines and terms

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Veirano has set a multidisciplinary team focused on COVID-19. Contact us!

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