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RESTRUCTURING AND FINANCIAL LITIGATION

CHANGES TO THE 'SIREVE' AND 'PER'

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In compliance with what was agreed with the European Commission, the European Central Bank and the International Monetary Fund under the 11th Regular Revision of the Programme of Economic and Financial Assistance to Portugal, Decree-Law no. 26/2015 was published on 6 February of this year. Under this new law, the Government has implemented a set of long-awaited measures which have two principle objectives. The first is to create an environment more favourable to the approval of corporate recovery plans by introducing changes to the Sistema de *Recuperação de Empresas por Via Extrajudicial* ("SIREVE"), the Out-of-court System for Recovery of Companies, and to the *Processo Especial de Revitalização* ("PER"), the Special Revitalisation Process. The second is to create alternatives to bank financing, particularly by extending the options for financing through hybrid capital instruments and by revising the rules on issuing bonds.

This newsletter will address the first set of innovations and the others will be addressed in a separate newsletter [1].

We will look first at the main changes introduced to the SIREVE and, after that, to the PER.

Firstly, to bring greater efficiency to the system, the legislature has "narrowed" the access to the SIREVE, to establish definitively that it does not apply to companies in a situation of actual insolvency. For this purpose, the legislature creates a set of indicators for companies in a difficult economic situation or a situation of impending insolvency. Using these indicators, companies must obtain an positive overall evaluation with reference to the three full financial years prior to any application to the SIREVE (or two financial years, for companies in existence for fewer than three full financial years).

These indicators are: (i) financial autonomy, measured by the relationship between the value of the equity of the company and the value of its total net assets, (ii) the relationship between the results before depreciations, financing expenses and taxes and the value of interest and similar expenses, and (iii) the relationship between the results before depreciations, financing expenses and taxes and financial debt.

1 Newsletter about "Changes to the Commercial Companies" available here.

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As a result of the introduction of the indicators mentioned above, the concept of company for the purposes of recourse to the SIREVE is no longer the broad concept of article 5 of the *Código da Insolvência e da Recuperação de Empresas* ("CIRE") – the Insolvency and Corporate Recovery Code. Article 5 covered any type of organisation of capital and work carrying on any economic activity, but the concept now covers only commercial companies and self-employed persons who have organised accounting.

Once it overcomes the new barriers restricting access to the SIREVE, a company whose application to use this recovery mechanism is accepted can, however, rely on a number of tools to help it reach an agreement with its creditors to secure its recovery.

First of all, when it comes to the majorities needed to make the agreement reached in the SIREVE viable, an effort has been made to bring them closer to the legal rules in place for approval of recovery plans under the PER.

The reference to the need for the agreement to be made with creditors representing at least 50% of the total debts of the company disappears.

The recovery plan is now deemed approved whenever:

(i) It obtains a vote in favour of more than 2/3 of the total votes (of which more than 50% must correspond to non-subordinated debts), issued by voting creditors whose credits represent at least 1/3 of the total of the ascertained debts of the company (not taking into account any abstentions); or

(ii) It obtains a vote in favour of creditors whose credits represent more than 50% of the total debts ascertained, as long as more than half of those votes correspond to non-subordinated debts (again, without taking into account any abstentions).

In other words, in the extreme, it is possible for a recovery plan under the SIREVE to be approved by creditors who **represent 2/3 of only 1/3 of the total ascertained debts of the company**, as opposed to the previous 50% minimum.

Equally important is the fact that, in line with what currently happens in the PER, additional protection is given to financing provided to the company by its creditors and to any guarantees agreed between the company and its creditors in the course of the recovery process. If the company is later declared insolvent, any financing granted in this way now enjoys general moveable credit privilege that ranks above the same privilege attributed to the employees of the insolvent. As to any guarantees provided, these are now covered by the protection which, until now, only applied to financing. As such, they are no longer subject to termination in favour of the insolvent estate under the provisions of the CIRE that govern this matter.

Another important change is the extension to guarantees of the prohibition on bringing enforcement or similar proceedings from the date of the order accepting the application to use the SIREVE up to the end of the procedure, as well as the automatic suspension for the same period of any enforcement proceedings that are on-going at the date the application is accepted.

The period in which no new application to use the SIREVE may be made, as a result of the failure to reach an agreement, or of breach of the conditions of an agreement made, is extended to two years.

Finally, a mechanism for prior diagnosis of the company's economic situation is introduced that is mandatory for companies that intend to use the SIREVE. The diagnosis is carried out on an electronic platform made available by IAPMEI for this purpose. As a side issue, this mechanism can be used free of charge by any company that wants to carry out a diagnosis of its economic and financial situation.

As for the PER, the new legislation introduces just one change, although it is quite a significant one. With the aim of bringing uniformity to the two mechanisms in terms of the approval of recovery plans, the law provides for quorums to hold meetings and pass resolutions that are identical to those under the SIREVE. In other words, it introduces the new possibility of approval by a vote in favour by creditors whose credits represent more than 50% of the credits related to voting rights, as long as more than half of these votes correspond to non-subordinated debts (any abstentions are not taken into account for this purpose).

These changes come into force on 2 March 2015.

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Iberian Law Firm of the Year
The Lawyer European Awards, 2012

Top 50 - Most Innovative Law Firms in Continental Europe
Financial Times – Innovative Lawyers Awards, 2011-2014