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20 MAY 2021 • Professor N. Bermejo



# Public Creditors in Preventive Restructuring Frameworks: Considerations in the Light of the Pandemic Crisis

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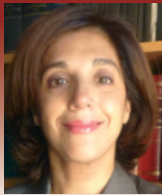


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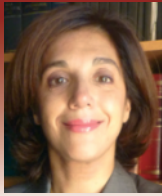
## OUTLINE

- I. PUBLIC CLAIMS AND FINANCIAL DISTRESS
- II. PUBLIC CLAIMS AND DIRECTIVE ON RESTRUCTURING AND INSOLVENCY
- III. INVOLVING PUBLIC CLAIMS IN THE RESTRUCTURING PROCESS
- IV. CONCLUSIONS



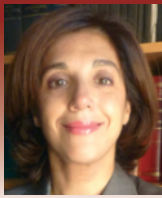
## I. PUBLIC CLAIMS AND FINANCIAL DISTRESS

- Preferences for public claims are not justified
- Public claims can diversify
  - *Risk neutrality*
- Public authorities can spread the risk over population and over the time
  - *Tax system*



## I. PUBLIC CLAIMS AND FINANCIAL DISTRESS

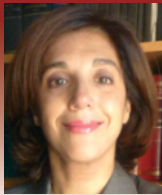
- **Position that public claims should have in preventive restructuring frameworks**
- **Pandemic Crisis**
  - *Governments = Lenders of last resort*
  - *Loss absorbers of last resort?*
- **Restructuring at risk?**
- **Resources wasted?**



## II. PUBLIC CLAIMS AND DIRECTIVE ON RESTRUCTURING AND INSOLVENCY

*Are public claims excluded from preventive insolvency frameworks?*





## II. PUBLIC CLAIMS AND DIRECTIVE ON RESTRUCTURING AND INSOLVENCY

- Portugal Statement on Public Claims (20 June 2019)

*“[...] there is sufficient flexibility within the text of the [...] Directive [...] to allow Member States to exclude specific categories of debt from discharge of debt, [...] where such exclusions or restrictions [...] are duly justified.”*

*“[...] Member States may maintain or introduce provisions excluding or restricting access to discharge of tax debts.”*

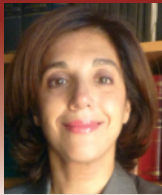


## II. PUBLIC CLAIMS AND DIRECTIVE ON RESTRUCTURING AND INSOLVENCY

- Portugal Statement on Public Claims (20 June 2019)

2 reasons:

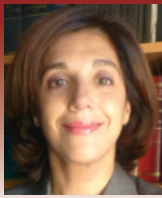
- Special nature of tax debts*
- “[...] because the adoption of EU legislation with an impact on the payment of turnover taxes [...] and other forms of taxation would require a different specific legal basis, subject to special legislative procedures, as prescribed by the TFEU”*



## II. PUBLIC CLAIMS AND DIRECTIVE ON RESTRUCTURING AND INSOLVENCY

- Portugal Statement on Public Claims (20 June 2019)
  - *Unilateral statements do not have legal effectiveness*
  - *Including public claims in restructuring plans is far less intrusive in the payment of taxes than discharge on public claims*

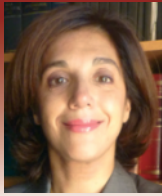




## II. PUBLIC CLAIMS AND DIRECTIVE ON RESTRUCTURING AND INSOLVENCY

➤ *Public claims are not excluded from the scope of preventive restructuring frameworks*

➤ *4 reasons*



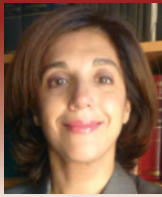
## II. PUBLIC CLAIMS AND DIRECTIVE ON RESTRUCTURING AND INSOLVENCY

- 1) Public claims have not been excluded by the EU legislator from the scope of restructuring***
  - a) Not mentioned in Article 1(5)*
  - b) Not mentioned in Article 1(6)*
  - c) Not mentioned in Article 13 (Workers)*



## II. PUBLIC CLAIMS AND DIRECTIVE ON RESTRUCTURING AND INSOLVENCY

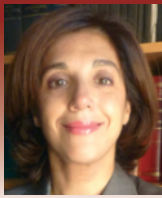
- 2) *Public claims are affected by the temporary stay of individual enforcement actions*
  - *Article 6(2)*
  
- 3) *Tax claims or Social Security claims are mentioned as an example of claims lacking “a sufficient commonality of interest”*
  - *Recital 44*



## II. PUBLIC CLAIMS AND DIRECTIVE ON RESTRUCTURING AND INSOLVENCY

***4) No full or partial cancellation of public claims where they have a privileged status***

➤ *Recital 52*

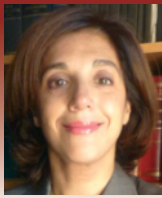


## III. INVOLVING PUBLIC CLAIMS IN THE RESTRUCTURING PROCESS

### Problems

#### 1) *Absence of appropriate skills to assess...*

- *Restructuring plan*
- *Viability of the business*

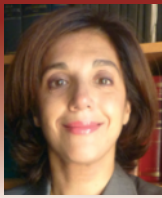


## III. INVOLVING PUBLIC CLAIMS IN THE RESTRUCTURING PROCESS

### Problems

#### 2) *High risk of ex post “review” when restructuring fails*

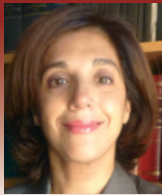
- *Excessive sacrifice*
- *Sanctions*



## III. INVOLVING PUBLIC CLAIMS IN THE RESTRUCTURING PROCESS

### Problems

- 3) Access to sensitive information about the fulfilment of tax obligations by the debtor*
- 4) Risk of arbitrary decisions on whether to support the restructuring of a particular undertaking*

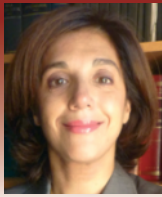


## III. INVOLVING PUBLIC CLAIMS IN THE RESTRUCTURING PROCESS

### Solutions

- **Market for public distressed debt**
  - *Only a market for private distressed debt is available!*
  
- **Specialized Public Fund**
  
- **Fairness Control: State Aid Regime**
  - *“Private Creditor Test” in market conditions*
  - *C-73/11 P, Frucona, par. 71-73*





### III. INVOLVING PUBLIC CLAIMS IN THE RESTRUCTURING PROCESS

*“[...] whether the recipient company would manifestly not have obtained comparable facilities from [...] a private creditor”.*

*“Such payment facilities constitute State aid for the purposes of Article 107(1) TFEU where, taking account of the significance of the economic advantage thereby granted, the recipient undertaking would manifestly not have obtained comparable facilities from a private creditor in a situation as close as possible to that of the public creditor and seeking to recover sums due to it by a debtor in financial difficulty”.*

*C-73/11 P, Frucona, par. 71-73*



## IV. CONCLUSIONS

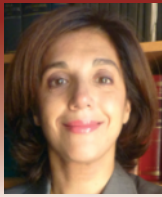
- 1) Public claims are not excluded from Preventive Restructuring Frameworks.
- 2) Preferential status does not affect their inclusion in the plan, but might affect the measures imposed to them.
- 3) “Rational involvement” of public claims in restructuring process requires developing new strategies.
- 4) New strategies are crucial to handle the significant volume of public claims in restructuring processes that may occur as a result of the pandemic crisis



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**Many thanks!**

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