

# The goal of harmonisation from the Portuguese example

Catarina Serra reports on the progress so far of the transposition of the Directive on Restructuring and Insolvency in Portugal



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**T**he transposition of the Directive on Restructuring and Insolvency (“Directive”) in Portugal was carried out by Law No 9/2022, of 9 January, in force since 9 April. It is no secret that the transposition was made with little time, hence without much reflection. The COVID-19 reason may be invoked, but the fact remains that the main lines of the Directive have been known since the Commission Recommendation of 12 March 2014.

Some of the measures in the Directive present a considerable degree of novelty and of complexity and even some syncretism (aggravated, the latter, by a poor translation of the Portuguese version). Inevitably, there are discrepancies or non-conformities with regard to what the Directive required. A general consequence may be drawn just from the Portuguese example: it is doubtful that the Directive will achieve the much-coveted harmonisation of insolvency law.

## The scope of Law No. 9/2022

The scope of Law No. 9/2022 roughly corresponds to the scope of the Directive on restructuring and insolvency which is reflected in its title – “*preventive restructuring frameworks*” and “*discharge of debt and disqualifications*”. The amendments with the greatest impact are relating to, therefore, the Special Revitalisation Proceedings (“PER”)<sup>1</sup> and the discharge.



As mentioned, at several points, the regime presents discrepancies, non-conformities or deviations from the provisions of the Directive. This assertion may be illustrated with only two (emblematic) examples: the rule on the formation of separate classes and the rule on ipso facto clauses.

## The formation of separate classes

The possibility of treating affected parties in separate classes has two well-known virtues. In the first place, it converts the adoption of the plan into an operation that certifies the ability of the plan to satisfy a diversified majority of interests, rather than perpetuating it as a mere quantitative operation.

In the second place, it facilitates preventive restructuring. It is easier, in principle, to take the conditions of cross-class cram-down for granted when it is not necessary to compare the treatment of each individual with

the treatment of the whole of the individuals and it suffices to compare it with the treatment of the individuals of the same class or of classes of the same ranking. Pursuant to the Insolvency Act (hereinafter IA), as amended by Law No. 9/2022, there are two classifications of the affected parties: one in basic classes (secured, privileged, unsecured, and subordinated creditors), and the other in ulterior classes.

The second classification presents several discrepancies regarding the Directive.

Firstly, ignoring the necessity of general and objective criteria being made available in national law<sup>2</sup>, the Portuguese legislator provides just for an exemplary cast of five classes (employees; equity holders; banking entities; suppliers; and public creditors).

Then, and more importantly, in the Directive, there is a separate provision on the adoption of the plan. More precisely, the Directive requires that a majority in the amount of their claims or interests



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is obtained in each class (Article 9 (6)). It follows that cross-class cram-down is an instrument designed to overcome the situations where the plan “*is not approved by affected parties, as provided for in Article 9(6), in every voting class*” (Article 11 (1)).

The preference for unanimity is noticeable: the plan should be approved, primarily, by all classes and, only subsidiarily, as a condition for cross-class cram-down, by a majority or by part of the classes. In addition, the Directive requires that majority of the claims / interests in each class is in favour of the plan.

In contrast, the Portuguese law regulates the different modalities of approval of the plan all together (Article 17-F (5) a), i), ii), iii) and iv), IA), as equivalents for the purpose of cross-class cram-down (Article 17-F (7), IA). To make it worse, pursuant to Article 17-F (5), a), IA, for the plan to be considered adopted in each class, it is sufficient for it to obtain “*more than two-thirds of the total votes cast*”, which does not correspond to a majority of the claims or interests represented in that each class.

The absence of a provision on the adoption of the plan separately from the conditions for cross-class cram-down has yet another harmful consequence. According to the Directive, cross-class cram-down may only take place “*upon the proposal of a debtor or with the debtor’s agreement*” (Article 11 (1)), but Member States may limit this requirement to cases where debtors are SMEs (Article 11 (1), 2nd paragraph). This means that, at least in the case of SMEs, the debtor must give his agreement so that the plan proceeds to the cross-class cram-down stage<sup>3</sup>.

The Portuguese legislator did not accommodate this opt-out scheme. Under the Portuguese law, the approval of the plan, involving the approval by all the classes or not, is inevitably followed by the assessment of conditions for the cross-class cram-down. Against this background, it is likely that

Portuguese entrepreneurs will refrain from forming classes, which will dictate the practical uselessness of a system that would be very important in facilitating preventive restructuring.

### Ipsa facto clauses

It is well known that the expression *ipso facto* (literally: for that fact) clauses traditionally designates those clauses which give one of the parties the right to terminate the contract when a certain fact occurs. That is to say: the effect is produced by force of the mere occurrence of the fact (*ipso facto*), even if the debtor has not failed to fulfil any obligation.<sup>4</sup>

The regulation of *ipso facto* clauses in the context of insolvency and pre-insolvency is noteworthy: by removing the risk of the company being penalized for the mere fact of adopting preventive restructuring measures, it works as a mechanism to promote timely action.

Article 17-E (13), IA lays down: “*A contractual clause that attributes to the request for the opening a special revitalisation process, the opening of a special revitalisation process, the request for an extension of the stay of individual enforcement actions or the granting of the extension of the stay of individual enforcement actions the value of a resolutive condition of the contract, or, in that case, confers to the counterparty a right to compensation or termination of the contract is null and void*”.

From the outset, the differences between this provision and Article 7 (5) of the Directive are visible.

The most striking difference is that the Portuguese regime of *ipso facto* clauses was conceived as if the only restructuring instrument that existed was the PER and the measures taking place in the framework of the PER. It does not cover situations where it is not possible or appropriate for the debtor to file for these proceedings and the negotiation of the plan is carried out through out-of-court regimes or mere informal workouts. Yet, any of these forms

constitutes a legitimate course of action and consequently should be protected in the light of the purpose of promoting timely action. Timely action is the first step towards the success in any preventive restructuring.

This constitutes a significant shortcoming – and a deviation from the Directive, considering recital 40, which, as a complement to Article 7 (5), clarifies that: “*it is necessary to provide that creditors are not allowed to invoke ipso facto clauses which make reference to negotiations of a restructuring plan or a stay or any similar event connected to the stay*”.<sup>5,6</sup>

### Final remarks (from the future backwards)

Going back to the beginning, the Portuguese case illustrates the difficulties of the transposition procedure and, consequently, shows how far we still are from convergence in this domain.

Looking at what has been done, and, most of all, what remains to be done, knowing what is already planned for the future (the imminence of a Directive), it will be necessary to think carefully before acting. Harmonisation has more limits than those imagined, relating to the “accidents” of the transposition itself. ■

#### Footnotes:

- 1 On the PER and the remaining preventive restructuring instruments of Portuguese law, see C. Serra, “Reforms in Adverse Economic Climates: How Reforms Take Place in the Eurozone – Part I: Portugal”, in P. Omar and J. Gant (eds), *Research Handbook on Corporate Restructuring* (Edward Elgar Publishing, 2021), 87 ff.
- 2 See R. Dammann, in C. Paulus and R. Dammann, *European Restructuring Directive – Article-by-Article Commentary* (Beck/Hart/Nomos, 2021), 158.
- 3 In Recital 58 of the Directive, this safeguard is reiterated.
- 4 According to T. Richter, in Paulus and Dammann (above note 2), 135-136, the purpose of such a regime in insolvency proceedings is to prevent the creditor from resolving his situation outside the proceedings simply because the debtor resorts to the proceedings – hence its name “*ipso facto*”.
- 5 Recitals help to clarify the purpose of normative instruments, consequently performing, themselves, a normative function, though complementary – a *supplementary normative role*. See R. Baratta, “Complexity of EU Law in the Domestic Implementing Process” (2014) 2(3) *The Theory and Practice of Legislation* 293, 296-298, available at: <https://pdfslide.net/documents/the-theory-and-practice-of-legislation-unimcit-theory-and-practice-of-legislation.html>.
- 6 In contrast, Richter, 136, submits that Member States can opt for the narrower terms of Article 7(5) of the Directive.



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