Portugal: Recent amendments to the Portuguese pre-insolvency framework in the light of the European Commission's Recommendation on a new approach to business failure and insolvency

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The Decree-law No. 26/2015 of 6 February, 2015 entered into force on 3 March 2015. The new legislation is of great relevance to the Portuguese insolvency law, or rather to the Portuguese pre-insolvency framework.

It amends one provision of the Portuguese Insolvency Act concerning the special revitalisation proceedings (*processo especial de revitalização*, best known as PER), and a number of provisions of the Decree-law No. 178/2012 of 3 August 2012, which regulates the out-of-court restructuring proceedings (*sistema de recuperação por via extrajudicial*, also known as SIREVE). Both kinds of proceedings were designed to enable companies in difficulty to restructure at an early stage with a view to preventing their insolvency, the core distinction between them being that the PER are hybrid proceedings, hence involving a certain degree of judicial intervention, while the SIREVE are strictly out-of-court.

The amendments laid down by the Decree-law No. 26/2015 can be summed up under six main chapters;

1. the scope of applicability of the SIREVE (which has ceased to cover actual insolvency and is now exclusively reduced to pre-insolvency);
2. the assessment of the company's economic and financial situation (introduced as a mandatory requirement for the opening of the SIREVE);
3. the majority of creditors required for the adoption of the restructuring plan (which was facilitated both in the PER and the SIREVE);
4. the protection of new financing in the SIREVE (which was strengthened and harmonised with the corresponding provisions of the PER);
5. the rights of secured creditors against the debtors' guarantors in the SIREVE (which were limited due to a certain alignment of the guarantors and the debtor at the procedural level); and
6. the qualification of the SIREVE as confidential proceedings (which is at the origin of their exclusion from the scope of the Regulation on cross-border insolvency).

Notwithstanding the comments (rather, criticisms) that these amendments would certainly be subjected to, what should be underpinned is indeed what the legislator has left out, particularly considering the European Commission's Recommendation of 12 March 2014, that is, the minimum standards concerning preventive restructuring frameworks. Although, on the overall, it is arguable that the Portuguese pre-insolvency framework is not significantly distant from the model of pre-insolvency tools fostered in the recommendation, there is actually a number of "forgotten items" that demand attention. A couple of them are, so to speak, unforgivable, if we bear in mind that the regulating process implies considerable efforts and expenses, therefore should not be dealt with lightly (for example disregarding the European landscape on the subject matter at stake).

In the first place, failing to comply with recommendation no. 17, neither of the Portuguese pre-insolvency proceedings apply a division of creditors into separate classes, not even in its minimum form, that is, separate classes for secured and unsecured creditors. While this omission persists there is no possibility to have a rule allowing the restructuring plan to be adopted by the creditors' majority taken into account by the amount of claims in each class, as suggested in recommendation no.18.

In the second place, one cannot see in either of the Portuguese pre-insolvency proceedings any provisions expressly requiring the plan to contain detailed information on its potential to prevent the debtor's insolvency and ensure the viability of the business. Also, no provisions are to be found allowing the court to reject the restructuring plan whenever it is clear that it has no prospect of preventing the insolvency or ensure the viability of the business, in disregard of recommendations no.15 (e) and no.23, respectively.

One can also detect a third significant omission with regard to the second objective of the Recommendation related to natural persons, which is giving honest insolvent entrepreneurs a second chance (cfr. Recommendations no. 30 to 33). The Portuguese Insolvency Act (still) provides for a five year discharge period, whereas the Recommendation suggests that entrepreneurs should be fully discharged after at most three years, starting from the date of the opening of the insolvency proceedings or the date on which the implementation of the repayment plan started, depending on the type of ongoing proceedings.

As previously said, it is regrettable that the Portuguese legislator has not dealt with these issues in the Decree-law No. 26/2015. A good opportunity to modernise the national pre-insolvency framework to the full extent and to put it in line with the Recommendation and foreseeable sequels (most probably a Directive) was missed. Taking into account that, pursuant to recommendation no.34, the Commission expected that by March 2015 all Member States would have implemented the principles set out in the Recommendation, we may still rely on further legislative interventions in the near future.

NEITHER OF THE PORTUGUESE PRE-INSOLVENCY PROCEEDINGS APPLY A DIVISION OF CREDITORS INTO SEPARATE CLASSES