Inside story: Portugal

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As it happens in other Western European Countries, Portuguese Insolvency Law - dated March 2004 (CIRE) -, focuses on companies' liquidation and has been construed based on the assumption that as far as an insolvency procedure starts, the company in the end will be liquidated.

One of the master keys coming out from the Memorandum signed between Portugal, the European Commission, the European Central Bank and the International Monetary Fund, based on which the bailout was granted to Portugal in 2011, was to reshape the grounds of CIRE and to shift its cornerstones to the real needs of national companies, emphasising reorganisation in detriment of liquidation.

In light of that principle, CIRE was amended in 2012 and a new procedure (PER) was created. It essentially works as a "last chance" granted to companies that are facing economic difficulties or are in a situation of imminent insolvency; through the filing of a PER, instead of waiting for a long, expensive and time consuming insolvency procedure, which, in the end, would most probably end with the liquidation, companies have a last possibility to survive.

PER procedure is inspired in the US Chapter 11 and aims to be a way out for companies that are still economically viable. As the insolvency procedure, it has the nature of an urgent procedure (meaning that judicial terms are nonstop and all terms during the PER procedure are very short) and has the maximum duration of four months, after which it shall be homologated or denied by the judge (although experience shows they may last for more than four months).

The PER procedure grants the creditors the decision to let the company recover under the conditions approved by them (which often imply the write-off of debts and moratoriums), which must then be meticulously respected upon its approval and homologation.

The different nature of credits (secured and preferential, subordinated and regular) shall be listed within a period of 20 days counting from the appointment of the provisory insolvency administrator and such difference is dully reflected within the PER.

Numbers speak for themselves: since 2012 a comprehensive number of companies filed for PER and, during the second quarter of 2013, more than 400 PER proceedings were filed; at this stage, almost more than 50% have already ended.

However and irrespective of the "Principle of equal treatment of insolvency creditors", which is a mandatory norm arising from CIRE that shall be conscientiously applicable to PER, Portuguese Tax Authorities – an on-going constant presence in most part of PER procedures - has been arguing that imperative rules arising from General Tax Law (Lei Geral Tributária) do not bind Portuguese Tax Authorities to the decisions taken by the majority of the votes foreseen in the law, within a PER procedure, unless approved by them.

This exception works as a "golden position" of Portuguese Tax Authorities which deeply misrepresents the principles, policies and ideology subjacent to the inventiveness of PER but, so far, has been well received by courts.

We take the view that some alterations to CIRE will have to be made and are about to come, and that, shortly, such prerogative of the Portuguese Tax Authorities will be vanished, as, at the end of the day, Portuguese Tax Authorities are the most interested parties in the success of recovered companies as it represents economic improvement, job creation and increasing of tax revenues.