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Amendments to "SIREVE" and "PER" and to the regime of preference shares and bonds

On February, 6th, Decree-Law no. 26/2015, amending the Extrajudicial Company Recovery System (SIREVE), the Insolvency and Corporate Recovery Code (CIRE) (in what concerns the Special Revitalization Procedure – PER), and the Commercial Companies Code (as regards rules on preference shares and bond issue), was published.

The goal of this decree-law is to create a more favourable legal framework for (i) the approval of companies' recovery plans, (ii) long-term financing of the productive activity and (iii) the issuance of hybrid capitalization instruments aimed at encouraging the entry of new investors that bring additional capital and competences.

MAIN AMENDMENTS TO THE SYSTEM OF EXTRAJUDICIAL COMPANY RECOVERY SYSTEM (SIREVE)

1. LEGITIMACY

Only commercial companies and individual entrepreneurs with an organised accounting system (hereby "Companies") may make use of SIREVE.

The possibility for Companies in a situation of insolvency to resort to SIREVE is ruled out. In the same way, not only Companies that went through a PER without achieving the approval of a recovery plan, but now also Companies that, in the two years before the request to open SIREVE's procedure have breached the terms of the recovery plan approved in the context of PER, will be prevented from using this regime.

2. DIAGNOSIS MECHANISM

Companies that wish to make use of SIREVE procedure must, prior to start this procedure, conduct a diagnosis of their economic and financial status, through a cost-free digital platform made available by the Portuguese Agency for Competitiveness and Innovation (IAPMEI).

This diagnosis is based on some economic and financial indicators and only Companies that comply with the minimum legal requirements for those indicators are legitimate to make use of SIREVE.

Such diagnosis mechanism will be available to all companies even to those not intending to make use of SIREVE, and also seeks to facilitate the timely detection of Companies' financial difficulties.

3. RECOVERY PLAN

For the purposes of the agreement to be entered into between the company and its creditors, under the new legal framework (i) the recovery plan must be voted by creditors whose claims represent not less than 1/3 of the total company's established debt, have the vote in favour of more than 2/3 of the total casted votes and that more than half of the casted votes corresponds to claims ranked as non-subordinated under the CIRE (abstentions shall not be considered), or (ii) the plan must have the vote in favour of creditors whose claims represent more than half the total company's established debt, provided that more than half of such votes correspond to claims ranked as non-subordinated under the terms of CIRE (abstentions shall not be considered).

4. EFFECTS ON LAWSUITS

Similarly to what happens with Companies, so do guarantors, in collateralized operations, benefit from the following effects resulting from the decision accepting the opening of the procedure under SIREVE: (a) creditors cannot file any enforcement proceedings for the payment of a fixed amount or other lawsuits to demand fulfilment of monetary obligations while the SIREVE procedure is pending and (b) automatic suspension of any executive actions for payment of a fixed amount or of any other lawsuits to demand fulfilment of monetary obligations, that may be pending on the date of said decision also while the SIREVE proceedings are pending.

5. GENERAL PRIVILEGE OVER MOVABLE ASSETS AND MAINTENANCE OF GUARANTEES

Moreover, it has been established that creditors which provide capital to finance the debtor's activity during the procedure will benefit from a general privilege over movable assets, whereby their claims shall rank with priority over any employees' claims.

On the same lines, guarantees agreed during the procedure between the debtor and its creditors with a view to granting financial means for the development of the debtors' activity, shall be maintained for two years, even if the company's insolvency proceedings are opened upon the closure of SIREVE procedure, or if a new restructuring procedure is initiated.

6. TAX BENEFITS

The tax and administrative charges' benefits set forth in CIRE also apply to any measures resulting from the agreement entered under SIREVE.

7. AGREEMENT'S EFFECTS

This diploma introduces a very relevant amendment to the existent legal framework, differently from the one provided by the CIRE and applying to insolvency proceedings and to the PER. It has been determined that also guarantors in respect of guaranteed obligations benefit from the effects of the agreement approved under SIREVE on enforcement proceedings and pending lawsuits. However it shall be noted that these effects only apply to those creditors which have signed the agreement reached under the SIREVE.

Thus, as a consequence of the approval of an agreement under SIREVE, also guarantors in respect of guaranteed obligations benefit from the automatic extinction of enforcement actions for payment of a fixed amount and, unless there is a judicial transaction, the suspension due to overlap of lawsuits to demand the fulfilment of pecuniary obligations brought against them.

8. PROCEDURE EXTINCTION AND NEW REQUIREMENT FOR RECOURSE TO SIREVE

The possibility to withdraw from the SIREVE procedure has now been expressly admitted. Nevertheless, in such an event the withdrawing company shall be prevented from opening a SIREVE procedure for a two year period.

9. CONFIDENTIALITY

The confidentiality of the SIREVE procedure has been established by the new Decree-Law, as well as the confidentiality of information shared in the platform mentioned above in point 11.

AMENDMENT TO CIRE

Article 17-F of the CIRE has been amended in order to clarify the required majorities for approving the recovery plans in the context of a PER. Thus, a recovery plan will be deemed approved when, if voted by creditors whose claims represent at least 1/3 of the total claims entitled with voting rights included in the list of accepted claims referred to in article 17-D (3) and (4) of the CIRE, casts the votes in favour of more than 2/3 of the total votes casted and if more than half of the votes casted corresponds to non-subordinated claims (abstentions shall not be considered). Also a recovery plan will be deemed approved when it has the vote in favour of creditors whose claims represent more than half of the total claims included in the list of included in the list of accepted claims referred to in article 17-D (3) and (4) of the CIRE and if more than half of these votes correspond to non-subordinated claims (abstentions shall not be considered).

KEY AMENDMENTS TO THE COMMERCIAL COMPANIES CODE

1. PREFERENCE SHARES WITHOUT VOTING RIGHTS

1.1. CLARIFICATION AND INTRODUCTION OF FLEXIBILITY TO THE LEGAL FRAMEWORK

> **Reduction of the minimum limit** of the priority dividend to be distributed to the holders of preference shares without voting rights, which is reduced from 5% to 1% of its respective nominal value, or, in the absence of nominal value, of its issue value, deducted of any prospective issue premium.

> It has been clarified that, as a general rule, holders of preference shares without voting rights are given the right to be paid with priority over the remaining shareholders. However, the new legal framework also introduces the possibility of expressly foreseeing in the articles of association that the right to a priority dividend confers holders of preference shares without voting rights the **right to an additional dividend** which, besides being paid with priority in relation to the remaining shareholders, **adds to each shareholder's dividends**.

> The possibility to establish in the articles of association a number of fiscal years superior to three for the payment of priority dividends in arrears has been introduced.

1.2. NEW CATEGORIES OF PREFERENCE SHARES

Article 344-A has been added to the Commercial Companies Code. This new article confers the companies autonomy to create categories of preference shares, pursuant to articles 24 and 302, thereby allowing the issuance of shares which ordinarily confer voting rights while, at the same time, confer the right to priority dividends or other special rights expressly foreseen in the articles of association.

1.3. INVESTORS' PROTECTION

A specific regime for preference shares without voting rights which have been subscribed **exclusively by qualified investors and which have not been admitted to trading on a regulated market** has been included.

Said regime protects qualified investors, not only because it establishes that when distributable profits exist the company ought to pay priority dividends, and that the obligation to pay priority dividends shall be subject to specific performance, but also because it confers shareholders greater contractual autonomy and flexibility. In fact, shareholders are now allowed to lay down in the articles of association a set of rules applicable to preference shares without voting rights held by qualified investors, namely:

(i) Establishing that qualified investors are entitled to priority dividends, but do not participate in the remainder of the dividends to be attributed to all shares;

(ii) Possibility to cast aside, or to set out (differently from the regime legally provided) the rules applicable in the event of failure to pay priority dividends in a given financial year;

(iii) Establishing that priority dividends corresponding to financial years in which no distributable profits have been generated shall be considered lost;

(iv) Possibility of converting preference shares into ordinary shares, in certain circumstances further specified in the issuance conditions;

(v) Setting a number of fiscal years, not exceeding five, for the purposes of attributing voting rights to preference shares when the full or partial payment of priority dividends is in arrears.

2. REDEEMABLE PREFERENCE SHARES

It is clarified that the redemption regime is equally applicable to shares **without voting rights**.

3. BOND ISSUE: PARTIAL ELIMINATION OF OWN CAPITAL LIMITS

We would highlight as the most significant changes the amendments introduced to the bond issue capital limit, particularly the new exceptions thereto for bond issues with a nominal or subscription amount equal to or higher than € 100,000.00 (one hundred thousand euros) and for placements with qualified investors, and to the common representative regime, as follows:

3.1. Elimination of quantitative limits to bond issues with a **nominal or subscription amount equal to or higher than € 100,000.00 (one hundred thousand euros) or subscribed by qualified investors (and without subsequent placement to non-qualified investors) – article 349 (4) (d) (e)**.

3.2. **Additional exception to the capacity for bond issue in companies registered for less than one year**, if financial information concerning the issuer, with reference to a date not later than three months prior to the issue date, audited by an independent auditor, registered with the Portuguese Securities Market Commission, and prepared in accordance with the applicable accounting rules, is made available to investors.

3.3. **Extension of the entities with capacity to be common representatives** – article 357

The common representative of the bondholders may now be a law firm, a statutory auditor, a financial intermediary, an entity authorised to perform investor representation services in any European Union Member-State or any natural person with full legal capacity, even if not a bondholder. Additionally, the respective independence criteria have been strengthened and it is now expressly possible to initially appoint the common representative in the terms & conditions of the bonds, while a possible regime of limitation of liability is now also foreseen.

3.4. Other amendments

Amongst other amendments, the illustrative list of bonds has been increased, the possibility and the regime applicable to perpetual debt securities and convertibles at the option of the issuer or with automatic conversion, has been clarified. In addition, several adjustments have been introduced to the legal framework applicable to participating bonds and to convertible bonds, as well as to bonds with warrants.

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