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Frederico Gonçalves Pereira | fgp@vda.pt

Pedro Simões Coelho | psc@vda.pt

Cláudia Cruz Almeida | cca@vda.pt

Teresa Pitorra | tlp@vda.pt

## LITIGATION & ARBITRATION

### PROGRAMA CAPITALIZAR (CAPITALIZE PROGRAM) – EXTRAJUDICIAL FRAMEWORK FOR BUSINESS RECOVERY

Law no 8/2018, of 2 March 2018 was published last Friday, establishing the *Regime Extrajudicial de Recuperação de Empresas* (Extrajudicial Framework for Business Recovery) (“RERE”), which is effective as of 3 March 2018.

The RERE, which must be read together with the other instruments making up *Programa Capitalizar*, enacts a material change of the national business recovery framework.

It affords debtors, in a **difficult economic situation or imminent insolvency**, a possibility to negotiate, an agreement capable of recovering its situation, with all or some of their creditors. Agreements executed under the RERE, which differs from the Special Revitalization Procedure (“PER”) in that it is an **extrajudicial, voluntary, free content and generally confidential process**, will have the same effects as agreements executed under the PER.

#### The Negotiation Protocol – creating a favorable negotiation environment

The negotiation of a protocol and its subsequent registration with the Commercial Registry Office has an impact on the company’s business and on its relationship with the creditors executing the protocol in order to create an environment favorable to successful negotiations.

For instance, after the registration of the negotiation protocol, the company maintains its usual business but its administration is barred from performing any acts of relevance (save if provided for in the protocol or authorized by the creditors); key suppliers cannot suspend their supplies; the creditors executing the protocol cannot release themselves from their commitments therein; without prejudice to any other agreed effects, insolvency proceedings filed by any creditor(s) executing or later adhering to the protocol are immediately suspended; and in the event of supervening insolvency, the period to file the proceedings will only start to run after the negotiations are closed.

### **The Restructuring Agreement and its effects**

If the negotiations are successful, the parties will execute a restructuring agreement, which after being filed with the Commercial Registry Office and if compliant with legal provisions, **will have effects on the guarantees, on the business recovery, procedural effects and fiscal effects.**

Please note that a restructuring agreement that covers at least 30% of the total non-subordinated liabilities of the debtor and that balances the company's economic situation by increasing the proportion of the assets over the liabilities, where debtor's equity is greater than its share capital (which must be certified by a Chartered Accountant), entitles parties to the income tax, stamp duty and real estate sales tax benefits foreseen in the *Código da Insolvência e da Recuperação de Empresas* (Insolvency and Business Recovery Code).

Without prejudice to the general rule, if the restructuring agreement is subscribed by creditors representing the applicable legal majorities, the debtor may initiate a PER for the judicial homologation of the restructuring agreement.

The procedures to be promoted by and before the Commercial Registry Offices in the implementation of RERE remain undefined.

### **Transitional provisions – applicability to insolvent debtors**

The foreseen transitional provisions are particularly important as they allow **already insolvent debtors to initiate a RERE for a period of 18 months as from the effective date of the Act.**

Lastly, Act 8/2018 repeals the *Sistema de Recuperação de Empresas por Via Extrajudicial* (Extrajudicial Business Recovery System) ("**SIREVE**"), enacted by Act 178/2012, of 3 August 2012, on the basis of its marginal use and the effects and potential of the RERE.