Transnational Dispute Management
www.transnational-dispute-management.com

ISSN : 1875-4120
Issue : Vol. 14, issue 4
Published : November 2017

Mediation as A Path to Business Restructuring - Contributions to the Portuguese Insolvency Framework

by A.F. Ferreira Colaço da Conceição
and C.F. Marques Cebola

This paper is part of the TDM Special Issue on *"Comparative and International Perspectives on Mediation in Insolvency Matters"* prepared by:

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Mediation as A Path to Business Restructuring - Contributions to the Portuguese Insolvency Framework

Ana Filipa Conceição, Cátia Marques Cebola

Abstract

A more recent reform to insolvency law in Portugal is in progress after ongoing disputes in the area. The focus of the reform is the reduction of the legal impediments to business restructuring, creating incentives to voluntary restructuring by the debtors, establishing ground rules on fiscal incentives regarding public creditors, and more importantly the reinforcement of the insolvency practitioners' powers. In this paper, we analyze a new legal instrument, named Business Restructuring Extrajudicial Regime - RERE. Based on the recovery of the debtor, the aim is to approve a settlement between debtor and creditor(s), under the intervention of a business restructuring mediator. We will study the most important features regarding this professional and the pros and cons of this new procedure, as well as the similarities differences of a general conflict mediation procedure.

1. Introduction

The current Portuguese Insolvency framework entered into force with the approval of the Insolvency and Company Recovery Code (CIRE),[1] dated 2004. On the contrary to the previous Code,[2] the CIRE seemed to adopt a liquidation paradigm,[3] with its introduction stating that "the will of the creditors shall command the process at all time".[4] Article 1 of the CIRE established that the insolvency process had the purpose of satisfying the creditors' claims through liquidation of the debtor's assets or, alternatively, with the approval of an insolvency plan (which could be a recovery plan). The choice was in the hands of the creditors, who could vote for the liquidation of a viable company (article 156 of the CIRE).[5] The most prominent feature of negotiation[6] in insolvency could then be found in the CIRE, with creditors approving the insolvency plan within the judicial insolvency process.[7]

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[1] Decree-Law 53/2004, of 18 March 2004, approved the *Código da Insolvência e Recuperação de Empresas* (CIRE).

[2] Decree-Law 132/93, of 23 April 1993, last revised in 1998, approved the Insolvency and Company Recovery Special Processes Code (CPEREF - *Código dos Processos Especiais de Recuperação da Empresa e da Falência*). The CPEREF lasted from 1993 until 2004, and privileged the business recovery as the preferential solution. Insolvency should only be declared as a last resort, when the company was considered economically irrecoverable [article 1(2) of the CPEREF].

[3] Opposing to a business recovery model. Menezes Leitão, for instance, said that the name of the Code should simply be Insolvency Code, since the business restructuring was clearly in a second place. See Luís Manuel Menezes Leitão, *Direito da Insolvência,* Almedina, 2015, p. 75. Also see Luís A. Carvalho Fernandes and João Labareda, *Código da Insolvência e Recuperação de Empresas Anotado,* 2.ª ed., Quid Juris, 2013, pp. 68-69 and Catarina Serra, *O Regime Português da Insolvência,* Almedina, 2012, p. 21.

[4] Paragraph 6 of the Preamble of the CIRE.

[5] Paragraph 3 of the Preamble of the CIRE states that the company's liquidation may depend on the sole will of the creditors, disregarding any other private or public interests.

[6] Before the CIRE we could find negotiation mechanisms such as the *concordata* (an agreement between creditors and the debtor), present in the 1961 Civil Procedure Code. After that, in the 70's of the last century, there were legal rules that allowed companies in financial distress to be publicly declared in difficulties and subsequently restructured – the Decree-Law 864/76, of 23 November 1976 and the following Decree-Law 353-H/77, of 29 August 1977. The Insolvency and Company Recovery Special Processes Code (CPEREF) maintained the *concordata* as a solution and introduced new restructuring measures (controlled management, for

However, in light of the worldwide economic crisis, the Portuguese Insolvency framework suffered substantial changes in 2012, in order to accommodate the demands of the 2011 Troika's Memorandum,[8] which deemed the company recovery instruments available to distressed or insolvent companies, namely the insolvency plan, as insufficient. The Troika analyzed the difficulties felt by the companies and entrepreneurs in Portugal before making recommendations. Some of these difficulties could be attributed to the absence or inefficiency of extrajudicial insolvency mechanisms, or even to the insolvency regulation, but primarily to other aspects. For example, the lack of a negotiation culture in Portugal, the companies´ lack of knowledge about the legal regime,[9] the inflexibility of the proposals of the banks and public entities (such as the Tax Authority and the Social Security),[10] or the disbelief of the workers, as creditors, about the ability of restructuring of their insolvent employers. All of these aspects led to the failure of the existent restructuring instruments.[11] Alternatively, fault could be placed on the shortage of specialized courts[12] and the insufficient number of insolvency practitioners.[13]

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instance). At last, the Decree-Law 316/98, of 20 October 1998, introduces the *Procedimento Extrajudicial de Conciliação para viabilização de empresas* (PEC- Extrajudicial Conciliation Procedure), which coexisted with the CIRE until 2012. It was an administrative-type procedure, held by the Portuguese Agency for SME and Innovation (IAPMEI - *Instituto de Apoio às Pequenas e Médias Empresas*) – a public body - and whose purpose was to enable negotiations between distressed companies and their creditors in order to reach a settlement.

[7] As seen in article 192 of the CIRE, the insolvency plan can establish the liquidation, the restructuring of the company or a combined solution between these two elements. The plan could be presented by the debtor, the insolvency practitioner empowered by the creditors or by creditors alone representing at least one fifth of non-subordinated claims and discussed/approved in a creditor's general meeting.

[8] The Memorandum of Understanding on Specific Economic Policy Conditionality, signed between Portugal, the IMF, the ECB and the European Commission in May 2011, available in http://www.imf.org/external/np/loi/2011/prt/051711.pdf (last visited 25 August 2017). One common denominator in all of the Memoranda signed with EU Member States such as Ireland, Greece and Cyprus was the imposition of legal reforms. These reforms would include changes in insolvency law, with special focus on business restructuring instruments.

[9] Even the Memorandum, in its 2.21 paragraph, pointed out the urgency of a national informative campaign about the insolvency framework, since the majority of the Portuguese companies are small enterprises, with administrators typically lacking sufficient management knowledge or skills.

[10] Regarding public entities, the Portuguese General Tax Law (LGT- Decree-Law 398/98, of 12 December 1998), in order to stop the huge number of judicial decisions against the State concerning the extinction of tax credits against the State's will, was changed, and in its article 30(2) the private negotiation of tax credits was forbidden. This obliges the companies to negotiate a separate agreement with the Portuguese State, which hampers the success of many insolvency restructuring agreements. This rule was duly criticized by the Memorandum on paragraph 2.19, but no alteration to the rule was made so far.

[11] In many insolvency processes, the workers were the main creditors and, incapable of waiting to be paid, voted against the restructuring plans, only in order to access the wage guarantee fund, which forbade the compensation for late payment before the judicial declaration of insolvency of the employer. A change in the Fund's Regulation, in 2015, finally allowed the compensation to be paid when extrajudicial restructuring mechanisms have been used.

[12] Only in 2014 the specialized commercial courts reached the majority of the Portuguese territory. Until 2014 only four courts existed, covering just 3 of the 18 administrative jurisdictions. Commercial courts were deemed competent in insolvency matters since 2004.

[13] In 2004, inspired by the German *Insolvenzordnung*, the CIRE introduced the figure of the sole insolvency practitioner, extinguishing the dichotomy that existed until then between judicial liquidators and judicial administrators. The professional statute of the insolvency practitioners, dated 2004, established the need of recruitment in order to enlarge the number of professionals. This offer was only opened in 2014, ten years after the new Insolvency Code, and by that time the number of insolvency practitioners was evidently insufficient in the face of the increasing number of insolvency procedures. On the other hand, the law predicted that the insolvency practitioners should be randomly appointed, but the system was never implemented until recent years, which has led to the concentration of procedures in the hands of a very small number of professionals, with the consequent lack of quality in their performance.

Hence, in paragraphs 2.17 and 2.18 of the 2011 Troikas's Memorandum, Portugal compromised with the introduction, before the end of 2011, and declared substantial alterations to the CIRE to accelerate and facilitate the approval of judicial restructuring agreements and encourage the creation of extrajudicial restructuring mechanisms, following international best practices. Despite the deadline being surpassed, with the alterations only being devised in 2012, the Portuguese Government presented two new business's restructuring instruments within the measures of the *Revitalizar* Program[14] – the Special Revitalization Process (PER), introduced in the CIRE[15], and the Extrajudicial System for Business Restructuring (SIREVE)[16].

The first visible change was the new wording of article 1 of the CIRE.[17] It now states that creditors' claims must be satisfied with the approval of an insolvency plan, preferentially based on the recovery of the company. Liquidation of assets shall only occur when it is not possible to achieve this goal. This seems to shift the compass to a business rescue paradigm.[18] However, since the creditors continue to have the exact power of choosing the fate of the companies, this change may not have wholly practical effects.[19]

More importantly, as mentioned above, the new regulation has brought two new pre-insolvency procedures. Both are applicable to distressed companies not yet insolvent[20] and are still recoverable. Their main difference is the type of procedure, since the PER is a hybrid procedure,[21] with intervention of the court, and the SIREVE is an extrajudicial administrative procedure led by the Portuguese Agency for SME and Innovation (IAPMEI).[22] In the end, it is up to the debtor the choice of the most adequate restructuring procedure, since their goals are the same; the debtor and the creditors would generally negotiate and aim for a settlement. Furthermore, both procedures concur in maintaining the debtor in possession[23] and establish an automatic stay for debt collection judicial processes.[24]

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[14] The full program can be found at http://www.anje.pt/system/files/items/71/original/programa_revitalizar.pdf (last visited 24 July 2017). It included other measures, including public funding to distressed companies.

[15] Law 16/2012, of 20 April.

[16] Decree-Law 178/2012, of 3 August, approved the *Sistema de Recuperação de Empresas por Via Extrajudicial* (SIREVE)

[17] Law 16/2012, of 20 April.

[18] For an extensive analysis of the doctrinal problem, José Manuel Gonçalves Machado, *O Dever de Regenociar no âmbito Pré-Insolvencial,* Almedina, 2017, pp. 64-71.

[19] Catarina Serra, 'Emendas à lei da insolvência portuguesa – primeiras impressões', *Direito das Sociedades em Revista,* Year 4, Volume 7, Almedina, 2012, p. 116.

[20] As stated by article 3(1) of the CIRE, insolvency means the generalized failure to pay overdue debts. This definition is common to all debtors, including companies, entrepreneurs or natural persons. In order to start a PER procedure, the debtor should demonstrate a situation of serious difficulty of paying the debts in time, due to the lack of cash flow or credit, which will likely conduct to an insolvency state [articles 3(4) and 17-B of the CIRE]. As for the SIREVE procedure, article 2 of Decree-Law 178/2012 demanded the exact same situation, as defined by the CIRE, but also covered debtors already insolvent. This last possibility has been changed in 2015, by Decree-Law 26/2015, of 6 February. Article 2 now states that debtors must be pre-insolvent, as defined by article 3(4) and article 17-B of the CIRE, and also demonstrates a positive evaluation of different objective financial ratios.

[21] As said by Catarina Serra, the PER is an example of a scheme of arrangement, and combines an informal workout phase with the judicial approval of the settlement. Catarina Serra, *O Processo Especial de Revitalização na Jurisprudência,* Almedina, 2016, p. 13.

[22] It was designed to be a substitute of the PEC procedure. Catarina Serra, 'Emendas à lei da insolvência portuguesa – primeiras impressões', *Direito das Sociedades em Revista,* Year 4, Volume 7, Almedina, 2012, p. 116.

[23] In the case of the PER, the debtor should refrain from extraordinary management measures, without the authorization of the provisional insolvency practitioner, but still maintains the ordinary administration of the

The introduction of the new negotiation instruments in 2012, although positive, did not achieve the expected results; the number of approved PER agreements and its total fulfilment have been somewhat insufficient, with many of the debtors being declared insolvent,[25] while the SIREVE has never reached the foreseen numbers.[26] Arsénio[27] summarizes the main problems in three broad conclusions; debtors start procedures very late; settlements between debtors and creditors are well-intended but not adequate; and lastly, new funding is, most of the times, not available. The launch in year 2016 of a new program, called *Capitalizar*,[28] demonstrated the need of another insolvency framework reform. This program, among other measures (such as the creation of investment funds managed by the public and private banks), brought alterations to the Insolvency Code. The Decree-Law 79/2017, of 30 June extensively modified the PER procedure, and introduced the special procedure for a payment agreement (PEAP).[29]

More importantly, the *Capitalizar* program presents the mediation as a negotiation instrument for the first time. Consequently, two legislative proposals were presented; one for the creation

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company [article 17-E(2) and article 161 both of the CIRE]. There is no formal loss of powers of the administrators. For more developments, Luís Miguel Pestana de Vasconcelos, *Recuperação de Empresas: o processo especial de revitalização,* Almedina, 2017, p. 21. In the case of the SIREVE, article 11(5) of the Decree-Law 178/2012 forbids the debtor to sell, rent or charge any assets, allowing creditors to challenge as void the contracts concluded by the debtor whenever they are deemed prejudicial for their interests. A definition of debtor in possession can be found in article 2(3) of the European Insolvency Regulation - Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings (EIR).

[24] In the case of the PER, article 17-E(1) of the CIRE; in the case of the SIREVE, article 11(2) of the Decree-Law 178/2012.

[25] As seen in the 2015 numbers, only 50,51% of the PER procedures ended with a settlement, as shown by the Association of Insolvency Practitioners (APAJ) in http://apaj.pt/apaj/wp-content/uploads/2015/02/Estat%C3%ADsticas_PER_n%C2%BA7.pdf (last visited 24 July 2017). Another phenomenon observed among debtors who use the PER procedure is that they do not complete the already initiated PER before starting a new one delaying by this means the opening of formal insolvency procedures, i.e. leading to a succession of PER procedures, even though this possibility is not foreseen by the law, which is leading to a fraudulent avoidance of the insolvency declaration, provoking damages to the creditors. However, courts are accepting this modus operandi what shows some deregulation of the instrument among the judicial actors.

[26] The SIREVE was defended by João Labareda [João Labareda, 'Sobre o sistema de recuperação de empresas por via extrajudicial (SIREVE): apontamentos', *I Congresso de Direito da Insolvência*, Catarina Serra (coord.), Almedina, 2013, p. 84] as the most adequate, complete and the least expensive procedure on the field of business restructuring, but entrepreneurs and companies were put off by the technical complexity of the procedure, which required a business plan, the fulfilment of different financial criteria and the pre-approval by an IAPMEI officer). In five years total, about 600 procedures were opened, with an approval rate of 50%, by the creditors. The numbers can be seen in https://www.iapmei.pt/getattachment/PRODUTOS-E-SERVICOS/Revitalizacao-Transmissao/Revitalizacao-Empresarial/SIREVE-Sistema-de-Recuperacao-de-Empresas-por-Vi/Estatisticas-de-utilizacao/SinteseInformativaSIREVE_marco2017.pdf.aspx (last visited 24 July 2017). In comparison, the PER procedure, in five years, had a lot more applications. The last official numbers can be consulted in http://www.dgpj.mj.pt/sections/siej_pt/destaques4485/estatisticas-trimestrais8885/downloadFile/file/Insolvencias_trimestral_20170427.pdf?nocache=1493386385.1 (last visited 24 July 2017). For more developments, João Labareda, 'Sobre o sistema de recuperação de empresas por via extrajudicial (SIREVE): apontamentos', *I Congresso de Direito da Insolvência*, Catarina Serra (coord.), Almedina, 2013, pp. 63-84.

[27] Manuel Silva Arsénio, 'Recuperação de Empresas por via judicial e extrajudicial – o caso SIREVE', *Revista de Direito da Insolvência,* n.º 0, Almedina, 2016, pp. 192-193.

[28] For the entire program, specifically addressing the insolvency framework reform, see http://www.portugal.gov.pt/media/28355026/20170518-mj-meco-capitalizar.pdf (last visited 24 July 2017).

[29] Similar to the PER procedure, but restricted to natural persons (non entrepreneurs). This occurs because of the intense jurisprudential controversy about the usage of the PER by natural persons, since the law did not forbid that situation, but the courts refused to accept the applications.

of the business restructuring extrajudicial procedure (RERE)[30] and a second one for the business restructuring mediator statute.[31] These two legislative proposals, after public consultation, are in the last stages of approval in the Portuguese Parliament. The importance and novelty of the RERE procedure will deem it the object of our analysis.

2. The Business Restructuring Extrajudicial Regime (RERE)

The RERE procedure intends to replace the SIREVE procedure,[32] and introduces a new intervenient – the business restructuring mediator.[33] The RERE is classified as a fully extrajudicial procedure,[34] based on the sole negotiation between debtor and creditors. Ultimately, it can also be converted into a PER procedure, as will be demonstrated.

Article 2 of the RERE legislative proposal[35] indicates that the main purpose of the RERE is for the parties to reach a settlement. This must be a restructuring settlement, since the legislative proposal indicates that the company should be totally or partially viable and the settlement may include specific features such as partial liquidation and changes in share capital of the company although in general, any debt restructuring measures are acceptable.

As in the PER procedure, the RERE procedure, according to article 3 of the Government's Legislative Proposal 84/XIII, may be started by pre-insolvent debtors,[36] with the exception of consumer natural persons (non-entrepreneurs),[37] and also specific debtors, such as banks, insurance companies and other financial companies, as indicated in article 2(2) of the CIRE.

In a noteworthy and innovative way, the legislative proposal establishes the voluntariness principle, meaning that the creditors must explicitly join the negotiations, as later mentioned, as well as third parties (holders of registered interests against the debtor, partners of the company, among others) whose intervention is essential to obtain the agreement or to execute it.[38]

In order to start the procedure, the debtor and at least 15% of the creditors representing non-subordinate claims must sign a negotiation protocol and deposit it in the Commercial Registration Office,[39] asking for the nomination, if needed, of a business restructuring

[30] Government's Legislative Proposal 84/XIII.
[31] Government's Legislative Proposal 83/XIII.
[32] It will be extinguished as soon as the RERE procedure is approved.
[33] The business restructuring mediator replaces the IAPMEI specialized technicians that intervened in the SIREVE procedure.
[34] As duly noted by Pereira Duarte, there is no intervention of the court, of any administrative body and no supervision whatsoever. It is also stated that the RERE is another example of a scheme of arrangement. Diogo Pereira Duarte, 'Resposta à consulta pública relativa ao projeto de proposta de lei que aprova o Regime Extrajudicial de Recuperação de Empresas', *Revista de Direito das Sociedades*, n.º 1, Almedina, 2017, p. 170.
[35] Government's Legislative Proposal 84/XIII.
[36] See supra footnote 20 for the definition of insolvency and pre-insolvency.
[37] Article 2(1) of the CIRE establishes a list of debtors that can start an insolvency procedure. Consumer natural persons are among those debtors, but they are excluded from some legal features, such as the insolvency plan, since the CIRE defines some specific procedures for them. In the case of the RERE, article 2(1.b) states that consumer natural persons cannot start a RERE procedure, since they do not qualify as business' holders/companies according to article 5 of the CIRE. Article 5 of the CIRE defines a company as a labour and capital organization developing an economic activity.
[38] Article 3 of the Government's Legislative Proposal 84/XIII. The third parties are called whenever the law establishes the need of their permission to amend contracts, including the alterations to the company's by-laws, such as the changes in share capital.
[39] This deposit can be made at any time, by any interested party [article 6(2)].

mediator.[40] This negotiation protocol must be accompanied by a declaration of a certified accountant or a statutory auditor within no more than 30 days in order to verify the percentage of creditors.[41] The debtor must also deliver a set of official documents, such as the commercial registry certificate and certified accounting documents from the past three years.[42] Other mandatory documents, according to the same article, include a full list of claims and a list of every pending lawsuit or arbitration proceedings.[43]

The contents of the negotiation protocol are freely established by the parties, however article 7(1)[44] indicates that it must contain: 1) the full identification of the debtor, the participating creditors and both their legal representatives; 2) the duration of the negotiations, with a maximum duration of three months;[45] 3) total liability of the debtor; 4) the responsibility for the proceedings' fees; 5) an agreement that prevents the participating creditors from starting legal proceedings against the debtor;[46] 6) the date and signature of all involved parties. The debtor must also submit the following documentation: 1) a company's business registration extract; 2) accounting reports from the last three years; 3) a declaration of the debtor that embodies the full list of claims; 4) a list of all the judicial or arbitral actions still pending.[47] The negotiation protocol may also contain other information, such as: 1) an agreement allowing the publicity of the opening of the RERE proceedings;[48] 2) the identification of the leading creditor and the business restructuring mediator, if nominated; 3) identification of the creditors from belonging to the creditors' committee, and their powers; 4) identification of any legal or financial advisers; 5) conditions about new financing ("fresh money"), including registered interests or other guarantees.[49]

As we have seen, the duration of the negotiations is fixed by the parties with a maximum duration of three months. During these negotiations, the parties shall follow the principles of the *Resolução do Conselho de Ministros* 43/2011, of 25 October,[50] and may also establish a Code of Conduct.[51] During the negotiations, the parties must also evaluate the financial situation of the debtor in order to launch the foundations of the restructuring settlement.[52]

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[40] Article 6(1) of the Government's Legislative Proposal 84/XIII.
[41] Article 6(3) of the Government's Legislative Proposal 84/XIII.
[42] Article 7(3) of the Government's Legislative Proposal 84/XIII.
[43] The debtor can also justify the unavailability of any document.
[44] Government's Legislative Proposal 84/XIII.
[45] Article 6(4) of the Government's Legislative Proposal 84/XIII.
[46] Legal proceedings regarding debt collection (to enforce the automatic stay effect), legal actions that may end with the loss of the debtor's powers over the company or insolvency proceedings. According to article 11, if any creditor who has filed for the opening of insolvency proceedings against the debtor joins the negotiation, those proceedings will be suspended by the court.
[47] Article 7(3) of the Government's Legislative Proposal 84/XIII. The debtor can also justify the absence of these documents.
[48] As we will see, the RERE procedure is confidential (article 8).
[49] "Fresh Money" creditors are also protected by article 28 of the Government's Legislative Proposal 84/XIII, since the new contracts are not susceptible of termination if the debtor is judicially declared insolvent (article 120 CIRE).
[50] These principles were the first measure of the *Revitalizar* program and are inspired by the Statement of Principles for a Global Approach to Multi-Creditor Workouts developed by the INSOL International (International Association of Restructuring, Insolvency and Bankruptcy Professionals). They are not binding, but establish important principles such as that of good faith (second principle), of transparency (seventh principle) and of the credibility of the restructuring plan (tenth principle).
[51] Article 5 of the Government's Legislative Proposal 84/XIII.
[52] Article 15 of the Government's Legislative Proposal 84/XIII. This evaluation may be done with the self-diagnosis tool made available by the IAPMEI in https://www.iapmei.pt/PRODUTOS-E-

With the opening of the RERE procedure, the debtor shall refrain from any extraordinary management measures,[53] except if they are allowed by the negotiation protocol or by express authorization of the participating creditors.[54] This means that the debtor maintains control over the company's administration and normal business, but is prevented from taking actions that may harm the creditors or ongoing negotiations. In addition, the debtor must immediately stop the negotiations whenever they become unsuccessful or irrelevant (according to the debtor's unique and essential point of view) and communicate the decision to all parties as well as the Commercial Registration Office.[55]

As far as creditor's duties go, article 10 of the Government's Legislative Proposal 84/XIII establishes that creditors cannot disrespect the clauses of the negotiation protocol during the full length of the negotiations (even when they decide to abandon the procedure) except if they demand the termination of the negotiation protocol due to severe misconduct of the debtor. Public service suppliers can also not suspend the contracts based on arrears that are previous to the deposit of the negotiation protocol, as long as the negotiations are ongoing,[56] except when the debtor fails to pay any debt during the negotiations period. This allows for the company to maintain its normal business, without the risk of being paralyzed and thus affecting the successful outcome of its restructuring.

The RERE procedure may unsuccessfully come to an end with the declaration of insolvency, if the debtor leaves the negotiation or if the deadline ends without an agreement.[57] If the parties reach an agreement, it must be embodied in a sole document with certified signatures of all the subscribers[58] and deposited in the Commercial Registration Office, to fully enter into force.[59] The settlement is accompanied by a declaration of a statutory auditor[60] attesting the debtor is not insolvent and the complete liabilities list. The debtor must also provide a list of any lawsuits still pending.[61] The creditors will only be affected by the settlement if they subscribe it and in the exact measure of its stipulations.[62] This represents a significant difference between the RERE and the PER procedures, since the PER procedure – approved by the judge - may affect creditors who did not even participate in the negotiations or lodged their claims.[63] If the parties deemed the negotiations public, the Commercial Registration Office will publish an announcement about the outcome of the RERE procedure and its closing.[64] At last, if the majority of article 17-I of the CIRE is reached (at the time of the

SERVICOS/Assistencia-Tecnica-e-Formacao/Ferramentas/Autodiagnostico-financeiro-(1).aspx (last visited 27 July of 2017).

[53] As defined by article 161 of the CIRE.

[54] Article 9(1) of the Government's Legislative Proposal 84/XIII.

[55] Article 9(2) of the Government's Legislative Proposal 84/XIII.

[56] Article 12 of the Government's Legislative Proposal 84/XIII.

[57] Article 16(1) and article 16(5) of the Government's Legislative Proposal 84/XIII.

[58] Article 20 of the Government's Legislative Proposal 84/XIII. [article 19(2)].

[59] Article 22 of the Government's Legislative Proposal 84/XIII.

[60] The statutory auditor will be normally chosen by the debtor, since the law does not indicate any form of selection.

[61] Article 19(2) of the Government's Legislative Proposal 84/XIII.

[62] Article 19(5) of the Government's Legislative Proposal 84/XIII.

[63] Article 17-F(10) CIRE. This article states that all creditors are affected by the settlement, even when they do not attend the negotiations or when they do not lodge their claims, if their credits already exist when the court appoints the provisional insolvency practitioner [article 17-C(4) CIRE]. The law establishes a general rule, so secured creditors are virtually included, in order to respect the *par conditio creditorum* principle. As we already said above, only tax and social security claims are not affected by this, since these debts are negotiated in specific agreements.

[64] Article 17(2) of the of the Government's Legislative Proposal 84/XIII.

deposit or afterwards, through a posterior express declaration by the creditors), the agreement may be converted into a PER procedure, and approved by the competent court.[65]

Following the closing of the RERE procedure - with or without a settlement - the debtor may start another one with the same or different creditors.[66] However, the debtor cannot yet be insolvent as it is a limiting condition for starting the procedure.

The settlement may also establish rules in case of a breach. If not, whenever the settlement is breached by any of its subscribers, the other parties may request its termination.[67] In this case, the debtor may start a new RERE procedure or choose from the other instruments, such as the PER or the insolvency process.

3. Business Restructuring Mediator Regime

3.1. Access requirements

In parallel with the creation of the RERE procedure, Government's Legislative Proposal 83/XIII establishes a unique regime to the professionals that appear as a consequence of the new procedure – the business restructuring mediator. The access requirements (especially regarding education), incompatibilities, the organization of an official list of business restructuring mediators and the payment are all aspects covered by the new legislation.

Regarding the main functions of this new professional, the mentioned legislative proposal prescribes that the business restructuring mediator should: analyse the economic and financial situation of the debtor; assess the perspectives for business recovery; assist the debtor on the elaboration of an agreement proposal; and assist the debtor during the negotiation period.[68]

Only accredited professionals can act as business restructuring mediators. In Portugal, the IAPMEI will be the entity responsible for the organization, maintenance and updating of the list of accredited business restructuring mediators. The list is also published in the IAPMEI's website.[69] The registration in this list does not turn mediators into IAPMEI agents,[70] to guarantee their full independence. This registration must be renewed every five years, under penalty of expiration.[71] In order to be accepted on the list, business restructuring mediators must respect the requirements of article 3 of the Government's Legislative Proposal 83/XIII, as following:[72]

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[65] Article 29 of the Government's Legislative Proposal 84/XIII. The majority defined in articles 17-I and 17-F(5) CIRE can be obtained in two ways. First, the settlement is voted by creditors representing 1/3 of the total number of creditors with right to vote (those whose claims are modified by the restructuring agreement, for instance) and 2/3 of those vote in favour, provided that more than half of them represent non-subordinated claims. Second, the settlement is voted by creditors representing half of the total number of creditors with right to vote and more than half of them represent non-subordinated claims.

[66] Article 18(2) of the Government's Legislative Proposal 84/XIII. The debtor, in this case, must not violate the terms of any past RERE settlement. Also, article 18(1) forbids simultaneous RERE procedures.

[67] Article 30(2)(b) of the Government's Legislative Proposal 84/XIII.

[68] Article 18 of the Government's Legislative Proposal 83/XIII.

[69] Article 6 of the Government's Legislative Proposal 83/XIII.

[70] Article 6(4) of the Government's Legislative Proposal 83/XIII.

[71] Article 9(4) of the Government's Legislative Proposal 83/XIII.

[72] We would like to commend the fact that the legislator defined, in this case, the access requirements, which do not occur in the Portuguese Mediation Law 29/2013. The only rule regarding general mediation can be found in article 3 of the Ordinance (*Portaria*) 344/2013, of 27 November, which establishes the registration

i) Academic / Professional Qualifications: the mediator as an expert in insolvency?

The business restructuring mediator must first and foremost be a university graduate and, cumulatively, must have adequate professional experience.[73]

Regarding this last requirement and according to article 3(2) of the Government's Legislative Proposal 83/XIII, at least 10 years of experience as a company administrator, financial auditor or credit recovery professional is required. This rule raises the recurrent question of debating whether or not the mediator must be a specialist in the matters subjected to mediation. Some authors consider that if the mediation is set on a specific area of expertise, then the mediator must dominate that area. In this sense, Folberg and Taylor deem that the mediator "must have a working knowledge of the substantive area and the interpersonal dynamics regarding the dispute in order to help the participants identify the issues, develop options, and recognize the need for consultation with experts or referral to others".[74] Generally speaking, we tend to claim that the mediator need not be a lawyer, a therapist or even an expert. Still, if the object of mediation is completely unknown to the mediators, they will certainly experience difficulties to understand or decipher the interests of the parties, or even to understand the terms used. Thus, it is illustrated that the legislator has restricted the access, in this specific case, to individuals presenting an extensive experience in management and auditing.

Moreover, article 3(3) of the Government's Legislative Proposal 83/XIII also allows other professionals, such as insolvency practitioners or certified public accountants, to become business restructuring mediators after successfully completing specific training, certified by the Portuguese Directorate-General for Justice Policy (DGPJ) - Ministry of Justice.

ii) Training

Apart from the aforementioned requirements, the candidates for becoming a mediator in RERE must have specific training in business restructuring mediation. The requirements or syllabus of the training are yet to be defined, but the legislator intends to regulate the subject as soon as possible, in terms of duration, modules and knowledge assessment methods.[75] We would like to commend this approach of defining the terms of the training, which does not yet take place in the Portuguese Mediation Law 29/2013. In fact, Ordinance (*Portaria*) 345/2013, of 27 November, regarding mediation in general, only refers the requirements for the institutions who want to obtain the certification, but not the minimum requirements for the duration or contents of the training.

The institutions that will provide the training must be certified by the Portuguese Directorate-General for Justice Policy (DGPJ), which corresponds to the general mediation scenario, according to Ordinance (*Portaria*) 345/2013, of 27 November.

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requirements, and indirectly refers to their professional/academic qualifications, but does not explicitly require a graduation as the Government's Legislative Proposal 83/XIII does.

[73] In the public mediation systems already established in Portugal (family, labour and criminal law) only the university degree is a requirement (in the criminal mediation it can be replaced by professional experience in the field, yet the requirements are not cumulative as the regime established for business restructuring mediator).

[74] Jay Folberg and Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation*, 1.ª ed., Jossey-Bass, San Francisco, 1984, pp. 240-241.

[75] Article 3(1)(b) and article 8 of the Government's Legislative Proposal 83/XIII.

Furthermore, the article 13(6) of the Government's Legislative Proposal 83/XIII adds that the business restructuring mediators must attend continuing training, a requirement absent from the general mediation regime, again commended, since it contributes to a better qualification of the mediators.

iii) Incompatibilities

The third essential requirement in becoming a business restructuring mediator is the inexistence of any incompatibility, as defined by article 4 of the Government's Legislative Proposal 83/XIII, in order to ensure complete independence and impartiality from the mediator. For example, the "mediators cannot be nominated to negotiations involving any company where they have been administrators or auditors in the three years before the nomination, or even insolvency practitioners at the same company",[76] as well as "mediators cannot be nominated to negotiations involving any company owned by themselves or spouses, direct or collateral relatives or family members within the second degree or company owned by any company where they have, directly or indirectly, any share".[77]

In addition, according to the legislative proposal, registered mediators cannot, even in the three years following the cancelation of the registration in the official list, work as a negotiator in contracts between the parties in any past business restructuring mediation procedures where they have participated as mediators. This includes contracts between groups of companies related to the relevant debtor or creditor. Additionally, the mediator, for the same period of three years post cancelation, cannot become an advisor to the debtor, creditor or group of companies in the same conditions.[78]

These rules are fundamental to building a strong legal status and the much needed confidence in a new professional and in a new procedure.

iv) Professional reputation/conduct

The last requirement for the business restructuring mediators is the minimum standard for professional reputation, or conduct.[79] The IAPMEI must perform an evaluation that will account for the usual conduct of mediators, both personal and professional, including aspects of their behaviour that reveal the ability to decide in a reasoned and rigorous manner, as well as the punctuality and regularity on the fulfilment of their obligations and their general trustworthiness.[80] The law therefore establishes a detailed list of criteria,[81] supposedly objective[82] but, in fact, many of the evaluations are based on subjective traces, and are of difficult substantiation.

3.2. Liability and fees of the business restructuring mediator

Regarding the duties of the business restructuring mediator,[83] the most important would be the obligation of compulsory civil liability insurance.[84] This will cover the risk of malpractice

[76] Article 4(2) of the Government's Legislative Proposal 83/XIII. Translation made by the authors of this paper.
[77] Article 4(3) of the Government's Legislative Proposal 83/XIII. Translation made by the authors of this paper.
[78] Article 21 of the Government's Legislative Proposal 83/XIII.
[79] Article 3(1)(d) of the Government's Legislative Proposal 83/XIII.
[80] Article 5(2) of the Government's Legislative Proposal 83/XIII.
[81] Article 5(4) of the Government's Legislative Proposal 83/XIII.
[82] Article 5(3) of the Government's Legislative Proposal 83/XIII.
[83] Article 13 of the Government's Legislative Proposal 83/XIII.

and will allow the parties (and eventually third parties) to be compensated for damages originated in the violation of the professional and legal rules. As for disciplinary action, the jurisdiction belongs to IAPMEI and, ultimately, may lead to the provisional removal from de official list of mediators.[85]

As far as the rights go, the fees of the business restructuring mediator will be the highest. According to the legislative proposal, the fee is divided between a base value and a variable value, which depends on successfully reaching a restructuring agreement. We disagree with this last aspect, since it may constitute a kind of reward and as a result compromise the independence of the mediator. In fact, the mediator must always act disinterestedly in the dialogue between the parties, aiming for them to reach the agreement, and not feeling tempted to impose any pact that may never be fulfilled, turning the RERE procedure pointless. Moreover, this variable value can be an economic burden to the debtor's business.

The base value is divided into three instalments and the first one is supported by IAPMEI.[86] The payment of the other two shall be made by the debtor, except if the restructuring settlement specifically establishes otherwise.[87]

4. The RERE and the Mediation Law in Portugal

4.1. Divergence and convergence between both regimes

The first glimpse at the RERE and at the business restructuring regimes may indicate that the legislator wants to create an institutionalised system of mediation in the insolvency field. This can possibility be granted and regulated by the Portuguese Mediation Law 29/2013, of 19 April, which establishes the legal framework for mediation in Portugal.[88] In fact, in specific areas, such as the family, labor, criminal and now the insolvency field, Portuguese public institutions can provide mediation services. In this case, the public entity will, on the one hand, be responsible for the reception and handling of the mediation requests under their specific competence and, on the other hand, for the elaboration, maintenance and supervision of the official lists of accredited mediators in each area.[89] This system opposes the designated private or ad-hoc mediation, also regulated by the Portuguese Mediation Law 29/2013. In the insolvency field, the public system will only be available to the parties who cannot choose any private mediator, and only one of the official register.[90] By looking at the RERE regime,

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[84] The amount of the insurance will be defined by the Ministry of Finance and the Ministry of Economy. Article 13(4) of the Government's Legislative Proposal 83/XIII.

[85] Article 23 and article 24 both of the Government's Legislative Proposal 83/XIII.

[86] Article 22(3) of the Government's Legislative Proposal 83/XIII.

[87] Article 22(4) of the Government's Legislative Proposal 83/XIII.

[88] Besides this general Law, we must mention the Ordinance (*Portaria*) 344/2013, of 27 November, which establishes the private mediators' registry, and the Ordinance (*Portaria*) 345/2013, of 27 November, which regulates the certification of the institutions that provide training in mediation. About the Mediation Law in Portugal, see Dulce Lopes and Afonso Patrão, *Lei de Mediação Comentada*, 2.ª ed., Almedina, 2016; Cátia Marques Cebola, 'Regulamentar a Mediação: um olhar sobre a nova Lei de Mediação em Portugal', *Revista Brasileira de Direito*, 11(2), 2015, pp. 53-65, available in https://seer.imed.edu.br/index.php/revistadedireito/article/view/901; Maria Olinda Garcia, 'Gestão contratual do risco processual – a mediação na resolução de conflitos em Direito Civil e Comercial', *O Contrato na Gestão do Risco e na Garantia da Equidade*, A. Pinto Monteiro (edit.), Instituto Jurídico, 2015, pp. 165-188; Mariana França Gouveia, *Curso de Resolução Alternativa de Litígios*, 3.ª ed., Almedina, 2014.

[89] Articles 30-44 of the Portuguese Mediation Law 29/2013.

[90] In criminal field only the public mediation system is available to parties also. At the contrary, in family and labour areas the parties can choose between a private mediator or a public mediation service.

the IAPMEI appears as the public institution that will be responsible for managing the mediators' official list, their nomination and supervision.[91]

As mentioned above, in article 18 of the Government's Legislative Proposal 83/XIII, the duties of the business restructuring mediator are established as following: (1) analyzing the economic and financial situation of the debtor; (2) assessing, together with the debtor, the perspectives for business recovery; (3) assisting the debtor on the elaboration of an agreement proposal; and (4) assisting the debtor during the negotiation period. In hindsight of these functions, it seems that the business restructuring mediator's only concern is with the debtor since nothing is said about the creditors. In fact, the business restructuring mediator appears to be an advisor of the debtor, and not someone who must promote the dialogue between the parties, as any conflict mediator should do.

The terminology of the legislative proposal does in fact create several doubts about the newly created mediator of business restructuring. More specifically, one may ask if this new regime does indeed establish a conflict mediation model at all, under the sense of the Portuguese Mediation Law 29/2013.

Menezes Cordeiro, for instance, defends that the term "mediator" in the RERE framework is deceiving and should be replaced with the term "business restructuring agent", since "the conflict mediator shall mediate the interests of both parties" and not only those of the debtor.[92] In a similar way, Catarina Serra indicates that "the business restructuring mediator is described as a person in charge of providing assistance to the company in the field of business restructuring", and so "in the end, he is not a mediator, being this definition overtly inadequate".[93]

We completely agree with the above mentioned authors about the role of the mediator in what concerns business restructuring mediator. In reality, the legislator defines this agent as the person in charge of assisting the debtor when the company is pre-insolvent, in order to reach an extrajudicial business restructuring agreement that involves the economic recovery of the debtor.[94] That being said, the main task of this mediator is only to assist the debtor, neglecting the role of promoting the dialogue with both parties, which always constitutes the main and characterizing task of a true conflict mediator. In this regard, it is understandable why Menezes Cordeiro defends the substitution of the term mediator for "business restructuring agent".[95]

It is worth noting that the law would not have to specify (especially in the way that it is done) the tasks of the mediator regarding the debtor, since the role of a true mediator would still

[91] Article 6(3), article 14 and article 12, respectively, of the Government's Legislative Proposal 83/XIII on the legal status of the business restructuring mediator.

[92] António Menezes Cordeiro, 'Resposta à consulta pública relativa ao projeto de proposta de lei que estabelece o Estatuto do Mediador de Recuperação de Empresa', *Revista de Direito das Sociedades*, Year IX, n.º 1, 2017, p. 160. Translation made by the authors of this paper.

[93] Catarina Serra, 'Direito da Insolvência em movimento. A reestruturação de empresas entre as coordenadas da legislação nacional e as perpectivas do Direito europeu', *Revista de Direito Comercial*, 2017, pp. 114-115, available in https://www.revistadedireitocomercial.com/direito-da-insolvencia-em-movimento-a-reestruturacao-de-empresas-entre-as-coordenadas-da-legislacao-nacional-e-as-perpectivas-do-direito-europeu (last visited 8 July 2017). Translation by the authors of this paper.

[94] Article 2 of the Government's Legislative Proposal 83/XIII.

[95] António Menezes Cordeiro, 'Resposta à consulta pública relativa ao projeto de proposta de lei que estabelece o Estatuto do Mediador de Recuperação de Empresa', *Revista de Direito das Sociedades*, Year IX, n.º 1, 2017, p. 161.

have to include a previous analysis of the debtor's economic and financial situation. This is in order to understand the convenience of an agreement with the creditors, despite the fact that accounting reports are delivered with the signature of the negotiation protocol.[96] Also, the promotion of a dialogue between the parties always implicates that the mediator knows the conflict and the interests of the debtor, as the law says, but also the creditors' interests, as the law should have said.

On the other hand, being of assistance to the debtor and equally partaking in negotiations with the creditor, the impartiality and neutrality that must characterize a true conflict mediator are irrevocably compromised. It is true that the legislative proposal indicates that the mediator must act impartially in the relationship established with both parties,[97] but it is not easy to understand how this agent can act impartially and still have as his/her main task to assist the debtor in the negotiations with the creditors.

The major advantage of mediation, or one of its most remarkable characteristics, is the flexibility of the procedure.[98] The mediator has the opportunity of applying different techniques or following different paths, depending on the type of conflict and parties involved. In the insolvency field we deem the existence of a preliminary phase as fundamental, before the negotiation phase even starts. This is to allow the mediator to acknowledge the conflict stakeholders, to understand the financial situation of the debtor, to determine the capacity of the debtor to fulfil the debts and to know the urgency and need of the creditors about collecting their debts. The mediator can also help the parties to draw up the guidelines of a possible restructuring plan.[99] This preliminary phase is also crucial to determine if the pre-insolvent debtor is still a candidate to a mediation procedure, meaning that he/she has real power or ability to negotiate, or if the mediation is useless and consists only as a delay tactic. Another role of the mediator, at this stage of the process, would be the attempt to reduce the level of conflict, and prepare an adequate and fertile field for negotiation. To achieve these goals, the mediator can arrange private meetings (caucus) with both the debtor and the creditors, understanding their different interests and defining their best and worst alternatives of future negotiations.[100]

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[96] We must remember that no previous evaluation of the debtor's situation is formally made, since certified accountants and statutory auditors only intervene, in the beginning of the procedure, to attest the existence of the 15% of claims necessary to start it – article 6(3) of the Government's Legislative Proposal 84/XIII.

[97] Article 20(2) of the Government's Legislative Proposal 83/XIII.

[98] Pointing out other advantages of mediation in the insolvency field see Horst Eidenmüller and David Griffiths, 'Mediation in Cross Border Insolvency Procedures', 2009, available in http://www.gforensics.com/resources/CrossBorderMediation.pdf (last visited 24 July 2017). Analyzing the use of mediation in specific insolvency disputes see Kayjal Dasan and Samuel Seow, 'Seminar Review: Mediation in International Insolvency', *International Arbitration Asia*, 20 September 2015, available in http://www.internationalarbitrationasia.com/mediation_in_international_insolvency_disputes (last visited 24 July 2017).

[99] Cátia Marques Cebola and Ana Filipa Conceição, 'Mediation in bankruptcy: the better model for a reasonable solution?', *GBATA Reading Book*, 2014, pp. 42-49, available in http://gbata.org/wp-content/uploads/2014/08/GBATA2014-Readings-Book.pdf (last visited 10 July 2017).

[100] In mediator' terminology, the best and worst alternatives of each party in the negotiation are known by the acronyms BATNA and WATNA. BATNA (*Best Alternative to a Negotiated Agreement*) constitutes the best result that can be obtained in the negotiation. On the contrary, WATNA (*Worst Alternative to a Negotiated Agreement*) translates the minimum standard of a negotiation and the level below no negotiator will accept to discuss. The definition of both of these parameters will give the mediator the margins where the negotiation will take place. About these definitions, see, among others, Roger Fisher, William L. Ury, Bruce Patton, *Getting to Yes: Negotiating an Agreement Without Giving In*, 2.ª ed., 1991 (reprinted in Random House Business Books in

However important this preliminary intervention may be, it does not mean that the role of the mediator must be the one of an advisor to the debtor. On the contrary, the tasks indicated in article 18 of the Government's Legislative Proposal 83/XIII, specially the assistance in negotiations, should be extended and broadened to all parties involved in the RERE procedure, and the mediator would act as a neutral and impartial manager of the negotiations, being an aide to all stakeholders. Assisting just the debtor is neither necessary nor beneficial, but supporting all the participants in the exact same manner is. Only an equidistant position between all parties will allow the mediator to conduct a fruitful negotiation, leading them to trust in his/her role and consequently increasing the possibilities of a successful negotiation.

From our point of view, if the legislator had no intentions of creating a true mediation system, as established in the Portuguese Mediation Law 29/2013, then the use of this system is counterproductive. Bearing in mind the failure of the SIREVE procedure, we consider that only a true mediation system in insolvency field can have success when talking about extrajudicial procedures. In addition, considering article 3 of the Portuguese Mediation Law 29/2013, which establishes that all its principles must apply to every mediation procedures in Portugal, whichever the nature of the conflict is, a true mediation system is the only way of assuring the coherence of the legal framework in Portugal. That being said, the RERE procedure and the business restructuring mediator legal regimes cannot move away from the pillars established in the Portuguese Mediation Law 29/2013, under penalty of worsening the contradictions and incoherencies of the legal system. In order to achieve this, it would be sufficient to eliminate the pro-debtor role of the mediators, transforming them in a neutral advisor for all parties and a neutral conductor of the negotiation.

Based on the idea that the legal reform has been poorly designed, with legislator intentions of creating a true mediation system, the main aspects of the RERE procedure and the business restructuring mediator legal proposals will be analyzed. All compliments or critiques will as a result be based on the role of a true conflict mediator and the Portuguese Mediation Law 29/2013.

4.2. Main aspects of the RERE procedure in the light of the Portuguese Mediation Law

4.2.1. Voluntariness

The RERE procedure is conceived as a voluntary procedure, since the engaged parties are not obliged to participate in the negotiations or in the construction of the restructuring agreement,[101] which perfectly reflects the voluntariness principle established on article 4 of the Portuguese Mediation Law 29/2013. The will of the parties is embodied in the so-called "negotiation protocol"[102] and any creditor, at any given time, can join the negotiation by an express declaration.[103] From our point of view, the negotiation protocol of the RERE will overwhelmingly correspond with the "mediation protocol" instituted by article 16 of the

1999), pp. 101-111; Henry Brown and Arthur Marriott Brown, *ADR: Principles and Practices*, 2.ª ed., Sweet & Maxwell, 1999, p. 105.

[101] Article 4 of the Government's Legislative Proposal 84/XIII.

[102] Article 6 of the Government's Legislative Proposal 84/XIII. The negotiation protocol must be deposited at the Commercial Registration Office [article 6(1)] and the deposit date is fundamental, since the negotiation deadlines (three months, maximum) start to count from there.

[103] Article 7(5) of the Government's Legislative Proposal 84/XIII. Article 7(6) also establishes that the adherence to the negotiation protocol must be total, being considered non-written the partial or conditional adherences.

Mediation Law 29/2013. This article reinforces our idea about the intentions of the legislator, who would not have wanted to divert the RERE procedure from the general mediation framework.

Voluntariness is only limited in respect to the Tax Authority and the Social Security, since they are obliged to participate in the negotiations, even having not signed negotiation protocol.[104] This is a major novelty since usually the State removes itself from participating through article 30(2) of the General Tax Law, which constitutes one of the major impediments to the success of the restructuring instruments, considering that the debtor must negotiate separate agreements with these creditors[105]. However, the credits remain unavailable for discharge or reduction, according to the mentioned article 30(2), and they may only be made payable by instalments.

According to article 4(2) from the Government's Legislative Proposal 84/XIII, the debtor may summon certain, if not all of the creditors, depending on whichever is considered more appropriate to reach an agreement. If read literally, this rule would mean that only the debtor could decide the participants in the RERE.[106] However, remembering the possibility of voluntary adherence established by article 7(5), it seems that all the creditors may participate, even when not initially chosen by the debtor. Concerning this issue, we think that the powers of the mediators could be reinforced in these matters, since they could analyse the pertinence of the participation of each creditor and, more importantly, reach out to the creditors who showed resistance or totally refused to participate.

Voluntariness can equally be found in the possibility of withdrawal from the negotiations. The debtor may terminate the negotiation by communicating the decision to all participants.[107] Yet, the creditors may leave their active participation in the negotiation but still have to fulfil the other obligations agreed on the negotiation protocol, for its full duration, as demonstrated above.[108]

4.2.2. Confidentiality

The RERE and the business restructuring mediator status legal regimes in discussion present different levels of confidentiality. According to article 8 of the Government's Legislative Proposal 84/XIII, both the negotiation protocol and the negotiations are secret.[109] The restructuring plan born out of the negotiations is also confidential.[110] As a result, the RERE

[104] Article 14(3) of the Government's Legislative Proposal 84/XIII. This happens even when separate settlements are already in place. These settlements are established in article 196(6) of the Portuguese Administrative and Judicial Tax Procedure Code (Decree-Law 433/99, of 26 October 1999) and they allow the tax debts to be paid within 150 months.

[105] Article 14(3) of the Government's Legislative Proposal 84/XIII. For more developments, see footnote 10 and António Fonseca Ramos, 'Os Créditos Tributários e a Homologação do Plano de Recuperação", *Revista de Direito da Insolvência*, n.º 0, Almedina, 2016, pp. 267-288.

[106] As it seems to be the case of the Spanish refinancing agreements, as seen in *Disposición adicional cuarta* of the Spanish Insolvency Law.

[107] Article 9(2) of the Government's Legislative Proposal 84/XIII.

[108] Article 10 of the Government's Legislative Proposal 84/XIII.

[109] The deposit of the protocol in the Commercial Registration Office does not affect the secrecy of its content [article 8(3) of the Government's Legislative Proposal 84/XIII]. The Portuguese Bar Association legal opinion criticizes the confidentiality principle regarding article 8, available in https://portal.oa.pt/media/121483/regime-extrajudicial-de-recuperacao-de-empresas.pdf (last visited 10 July 2017).

[110] Article 21 of the Government's Legislative Proposal 84/XIII.

regime establishes the confidentiality principle, in harmony with the general principles of mediation, as seen in article 5 of the Portuguese Mediation Law 29/2013.

In comparing the RERE with the Portuguese Mediation Law 29/2013, there is a notable difference regarding the exceptions to the principle of confidentiality. According to article 5(3) of the Mediation Law 29/2013, confidentiality "may only cease on grounds of public order violations, namely to assure the protection of the best interest of children, when the physical or mentally integrity of any person are threatened, or when it is necessary to enforce the application or execution of the agreement obtained through mediation, insofar in what is strictly necessary to protect the mentioned interests".[111] On the other hand, in the RERE procedure, confidentiality can be waived by a unanimous decision by the participants,[112] a possibility not foreseen in the general mediation framework. However, we do not oppose this last exception, since it is allowed by article 7 of the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters,[113] and followed by many EU Members States.[114] Moreover, we consider that mediation belongs primarily to its participants and that they should be the first to evaluate the rules of the procedure. Consequently, it does not come as a shock that confidentiality can be abandoned, by unanimous decision, particularly having in mind the party autonomy principle on which mediation is based.[115]

According to article 8(2) of the Government's Legislative Proposal 84/XIII, confidentiality regarding the existence and content of the negotiation protocol shall also cease to the extent necessary for the suspension of other legal proceedings[116] and the judicial enforcement of the obligations arising out of the protocol.[117]

The principle of confidentiality is reinforced in the business restructuring mediator legislative proposal. In accordance with article 19(1) of the Government's Legislative Proposal 83/XIII, the mediator must keep secret all the information provided by the debtor. In regard to creditors, article 19(2) of that Government's Legislative Proposal refers that "the mediator has the duty to ensure that all creditors have an equal access to all information relevant to the negotiation procedure, namely the financial/economic diagnosis and the perspectives of the debtor's recovery".[118] These two rules may be apparently incompatible, since the mediator cannot reveal any information provided by the debtor, but nothing is mentioned about information given by the creditors. The mediator must also ensure equal access to information by the creditors. Conclusively, it is doubtful if the legislator is talking about information expressly authorized by the debtor. In this matter the law should be clarified.

[111] Translation by the authors of the paper.
[112] Article 8(1) for the negotiation protocol and negotiations and article 21(1) for the restructuring agreement, both from the Government's Legislative Proposal 84/XIII.
[113] Official Journal of the European Union L 136, of 24 May 2008.
[114] As an example, article 9 of the Law 5/2012, of 6 July - the Mediation Spanish Law that transposes the Directive 2008/52/CE.
[115] About this matter, see, *inter alia*, Dulce Lopes and Afonso Patrão, *Lei de Mediação Comentada*, 2.ª ed., Almedina, 2016, pp. 51-52.
[116] As prescribed in article 11 of the Government's Legislative Proposal 84/XIII.
[117] As prescribed in article 30(4) of the Government's Legislative Proposal 84/XIII.
[118] Translation by the authors of the paper.

Conclusions

The evolution of the Portuguese Insolvency framework over past thirteen years has demonstrated the intent of the legislator in adjusting the law to the circumstances of the Portuguese economy, whilst also trying to follow the international best practices. The issues that arise within these reformation movements include the proliferation or multiplication of similar restructuring procedures works against the debtors. In reality, the insolvency declaration allows the business restructuring, through the approval of a recovery plan. However, the debtor may indeed want to avoid the insolvency process and its effects (loss of administration powers, an eventual guilty classification of the insolvency, with associated civil sanctions –on a legal level – or damages to the debtor's reputation and business, very long and expensive procedures – on a more practical level). Since the companies' universe in Portugal is mainly constituted by small and medium companies, the level of management knowledge of the administrators is low, and the financial distress prevents them from having access to the specialized advice of business consultants or insolvency lawyers, leaving the debtor completely imbued with procedures, as the choice of the most adequate procedure is not obvious. The reduction of the number of mechanisms would benefit both debtors and creditors, since there would be a higher degree of certainty and trust about the negotiation instruments.

The legislative alterations may bring benefits, such as the reduction of insolvency declarations and the consequent protection of public interests (levels of employment, protection of companies in strategic sectors of the Portuguese economy, economic growth, and reduction of bad loans, among others). However, we cannot forget that this reform may not be finished. In 2016, the EU approved a proposal of a Directive of the European Parliament and Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU.[119]In a brief but concise observation, we can say that the Portuguese legislator has ignored some of the minimum standards proposed: 1) creditors cannot start a preventive restructuring procedure (article 4(3) of the Directive); 2) the stay of individual enforcement actions is generally automatic and cannot be lifted (article 6 of the Directive); 3) there is no model restructuring plan available (article 8(3) of the Directive); 4) in the PER procedure, creditors that do not participate in the negotiation may be affected by the settlement (opposing article 14(2) of the Directive). In general terms, by reading the Directive, one can say that the Portuguese insolvency framework is adequate and sufficient, but the two last identified problems must be addressed quickly.

Regarding RERE, it seems that the Portuguese legislator is trying to create an institutionalized system of mediation managed by IAPMEI, which is responsible for creating a list of business restructuring mediators, as well as for their appointment and inspection of their activity. The underlying intention in the introduction of this system is an attempt to encourage the application of RERE so that it will be more often used than SIREVE.

Although the legislative proposal does assign the function of assisting the debtor to the appointed mediator, it is certain that the general rules of this regime are inspired by the norms of the Portuguese Mediation Law 29/2013, especially regarding public systems. In this

[119] For more developments on the harmonization of insolvency law in Europe, see Federico M. Mucciarelli, 'Not Just Efficiency: Insolvency Law in the EU and its political dimension', *European Business Organization Law Review,* Asser Press, 2013, pp. 176-200.

respect, not only RERE is a voluntary procedure, but also the negotiations and the restructuring agreement are confidential.

With regards to business restructuring mediator, we would like to commend the legislator for laying down a developed set of rules concerning its professional status, in particular the criteria for access to the profession or the requirement for initial and continuing training. Nevertheless, regarding the mediator's professional reputation, or conduct, we consider that the assessment of IAPMEI may be too subjective and difficult to evaluate.

Only time will be able to demonstrate the potential success of RERE. Despite some flaws and necessary adjustments, the regimes in discussion are not too far from the application of a real conflict mediation in the insolvency field. The establishment of a culture of debt restructuring and reduction of the number of insolvencies is after all the wider objective.