



03 DEC. 20

DISPUTE RESOLUTION

Coronavirus: Extraordinary business viability process

A range of business support mechanisms have been introduced to face the crisis caused by the COVID-19 pandemic. Among them, the recent Law 75/2020 of 27 November has created a series of measures in the field of restructuring and insolvency procedures. The stand-out among these new procedures is the **Extraordinary Business Viability Process** (*Processo Extraordinário de Viabilização de Empresas* referred to here by its Portuguese initials, “PEVE”).

João Tiago
Morais Antunes

Catarina Guedes
de Carvalho

Paulo Abreu
Santos

"The PEVE is intended to lead to court approval of a debt restructuring agreement established out of court between the company and its creditors representing at least the majorities provided for in the Special Revitalisation Procedure."

This is a **new extraordinary process aimed exclusively at companies in a difficult economic situation or facing imminent or actual insolvency** (provided it is not yet been declared judicially)¹.

The PEVE is intended to lead to **court approval of a debt restructuring agreement** ("Viability Agreement") **established out of court between the company and its creditors** representing at least the majorities provided for in the Special Revitalisation Procedure ("PER")².

The approval decision binds the company, the creditors signing the Viability Agreement and the creditors on the list submitted by the debtor (which may be contested by any creditor), even if they have not participated in the out-of-court negotiation.

At the time of filing the application in court, the company may not have been subject to any pending PER. Besides this, it must meet and prove it has met the conditions necessary for its viability. In addition, it must also demonstrate that, on 31 December 2019, the company's liabilities did not exceed its assets (determined in accordance with the rules of the "CIRE"). That is, in practice, it must provide evidence that its difficulties stem from the pandemic situation. However, the law does provide for two exceptions: (i) micro and small businesses, where the liabilities may exceed the assets provided certain additional conditions laid down in this law are met; and (ii) businesses which, although not in a positive net position on 31 December 2019, have managed to regularise their financial situation under the transitional provisions allowing the use of the RERE by businesses in a situation of insolvency, provided they have deposited the restructuring agreement in due time.

The judge is responsible for checking that all the preconditions and requirements are met by issuing the order granting or opening the PEVE appointing the interim judicial receiver (*administrador judicial provisório* or "AJP").

To guarantee the **speed** of the process, no provision is made for a credit claim phase. The phase for potential challenges by the creditors (based on undue inclusion or exclusion of credits, or errors in their amounts or their ranking) and for any application for the non-approval of the Viability Agreement begin immediately and simultaneously. Moreover, there are short time limits for the judge's decision and **priority** is given to this extraordinary procedure over other urgent procedures (insolvency and the PER), including in the appeal phases.

¹ The creation of the PEVE is one of the measures envisaged in the Economic and Social Stabilisation Programme, a Portuguese Government plan to respond to the economic and social difficulties caused by COVID-19.

² The PEVE is inspired to a great extent by the abbreviated PER (article 17-I of the Insolvency and Corporate Recovery Code - *Código da Insolvência e Recuperação de Empresas* or "CIRE") and the Out-of-court Business Recovery Scheme ("RERE"). The PEVE process is hybrid in nature and it falls into the set of instruments typically called "fast-track-court-approval-procedures".

The AJP has a very residual role in the PEVE. After being appointed, the AJP essentially has to immediately inform the Tax and Customs Authority, the Social Security Institute, I.P. and the Social Security Financial Management Institute, I.P. that the PEVE is pending. However, in the end, the AJP plays a very important role (and this is not the case in the PER): to give an opinion on whether the agreement offers reasonable prospects of ensuring the viability of the company, and the judge will then use this opinion as a basis for the decision on whether to approve it.

The general principle that tax and social security debts are untouchable, and the general system of instalment payments, are maintained. However, provision is made for the possibility of reducing the rate of interest on arrears and the full forgiveness of interest on arrears, provided those debts are paid within 30 days of the court's approval of the agreement. Other tax benefits identical to those already existing in the PER and the RERE also apply.

The PEVE has the virtue of suspending debt recovery and insolvency proceedings, provided insolvency has not yet been declared. It also prevents the suspension of essential public services. As in the case of the PER, no acts of special importance may be carried out without the prior consent of the AJP.

One of the main virtues of the PEVE is that it promotes both financing and self-financing for the business, especially by means of loans from its shareholders, to achieve true viability. As a result, the PEVE ensures the maintenance of the **guarantees** agreed between the company and its creditors, as long as they are provided for in the Viability Agreement and their purpose is to provide the financial means necessary for the business to continue to operate. Furthermore, the PEVE extends to the shareholders (or other specially related persons) who finance the company's activity (including by shareholder loans) the **general movable credit privilege** (ranked before the general movable credit privilege granted to employees), which was already provided for the financing granted by creditors that are not especially related.

"One of the main virtues of the PEVE is that it promotes both financing and self-financing for the business, especially by means of loans from its shareholders, to achieve true viability."

The PEVE rules also establish that there is **no possibility of any claw back in favour of the insolvent estate** of the legal transactions provided for in the Viability Agreement that actually make new financing available to the company. The rules expressly include the deferment of payment and the constitution of guarantees.

The PEVE may only be used once. When it comes to an end, the company cannot use this procedure again.

The following measures have also been introduced to adapt the already existing judicial recovery instruments to the circumstances of the COVID-19 pandemic:

- In the PER and the PEAP (Special Payment Agreement Process), the judge can grant additional time to conclude the negotiations begun with a view to adopting a recovery plan adapted to the context of COVID-19. The judge can also give time to the proponent of an insolvency plan to adapt the proposal to this same context.

"The PEVE may only be used once. When it comes to an end, the company cannot use this procedure again."

- The application of the RERE to companies that are currently insolvent (even if not judicially declared) due to the COVID-19 pandemic, but which are still likely to become viable and which can demonstrate that on 31 December 2019 their assets exceeded their liabilities (established under the terms of the CIRE), or, although not in a positive net position on 31 December 2019, have managed to regularise their financial situation under the transitional provision allowing the use of the RERE by companies in a situation of insolvency, on condition they have deposited the restructuring agreement in due time.
- In cases where non-compliance with the approved insolvency plan is based on events occurring after 7 April 2020, the 15-day period to regularise the situation – failing which the moratoriums and forgiveness set out in it will be extinguished – will only begin to run after the law now approved ceases to be in force.

There are also two further measures, which are easy to implement – because they involve the distribution to the creditors, as soon as possible, of large sums deposited in processes in the hands of the State – with the sole aim of responding immediately to the problem of the lack of liquidity of companies:

- The obligation to make pro rata payments in all pending insolvency proceedings where the liquidation proceeds deposited exceed EUR 10,000, by implementing a simplified procedure, provided that certain additional requirements laid down by law are met;
- Priority is given to the processing of applications for the release of securities or guarantees provided under insolvency proceedings or PERs.

Law 75/2020 entered into force on 28 November 2020 and it will remain in force until 31 December 2021, with the possibility of extension by government decree. ■