

EXTRAORDINARY VIABILITY PROCESS FOR COMPANIES AFFECTED BY THE PANDEMIC

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LAW 75/2020 OF NOVEMBER 27

A set of exceptional and temporary measures for the recovery of companies in difficult economic situation due to the COVID-19 pandemic has been introduced by Law 75/2020 of November 27.

The said Law:

- a) Establishes an exceptional and temporary regime, extending the deadline to conclude negotiations to approve a recovery plan or a payment agreement, and also adapting the insolvency proposal;
- b) Extends general privileges over movable property provided in the Insolvency and Corporate Recovery Code (CIRE) to partners, shareholders or any other specially related persons who finance the company's activity during the Special Revitalization Procedure ('PER');
- c) Provides for the application of the Extrajudicial Regime for the Recovery of Companies ('RERE') to companies that are currently in a situation of insolvency caused by the pandemic; and
- d) Creates the Extraordinary Viability Process for Companies ('PEVE') affected by the economic crisis resulting from the pandemic.

EXTRAORDINARY VIABILITY PROCESS FOR COMPANIES

PEVE is a process that seeks the judicial homologation of an extrajudicial agreement to ensure the viability of a company, established (out of court) between the company and its creditors.

PEVE is applicable:

- a) To companies in a difficult economic situation or in imminent or current insolvency, provided that: (i) they are still viable, (ii) their assets exceed their liabilities as of December 31, 2019 and (iii) they are not under PER or insolvency proceedings;
- b) To micro or small enterprises that: (i) are not in a pending PER or insolvency proceeding, (ii) have received rescue aid that has not yet been repaid, or are in a restructuring plan under the State aid measures (even if on December 31, 2019 their assets were not in greater number than their liabilities).

- c) To companies that have managed to regularize their insolvency situation through RERE and filed the restructuring agreement in due time, while not having more assets than liabilities on December 31, 2019.

DIFFERENCES BETWEEN PER AND PEVE

In comparison with PER (directed to the judicial homologation of a recovery agreement between a company and its creditors), the distinctive notes of PEVE are essentially two:

- (i) Its application to situations of current insolvency of companies (contrary to PER, which is reserved to companies in a pre-insolvency situation);
- (ii) Its application only to companies in difficult economic situation or imminent or current insolvency caused by the COVID-19 pandemic.

In what concerns the procedure, PEVE has many similarities with PER, with some differences justified by its own purpose - to avoid mass insolvencies caused by the COVID-19 pandemic - and by its exceptional and temporary nature.

PEVE is an urgent proceeding, with priority over other pre-insolvency and insolvency urgent proceedings, including PER and insolvency proceedings.

The proceedings begin with the filing of an application in court to declare the company's insolvency. The application must be accompanied by the viability agreement (signed by the company and by creditors representing at least the majorities of votes provided for in Article 17-F, paragraph 5 of 'CIRE') and by a set of documents that are intended to prove the company's economic situation, including the list of the company's creditors and a declaration by the management body attesting that its situation was caused by the crisis brought by the COVID -19 pandemic and that it meets the necessary conditions for viability.

After filing of the application, the company can request the joinder of other PEVE's filed by companies in a parent-subsiary or group relationship, as long as their proceedings are also at the preliminary stage. This possibility is not contemplated in PER's regime.

EFFECTS

Once the application is received, the judge issues an order appointing the provisional judicial administrator. This order has the following effects as well:

- a) It prevents the filing of judicial actions for debt collection and suspends pending actions with the same purpose. All these actions are extinguished if the viability agreement is homologated by the court;
- b) The company is no longer allowed to perform acts of special relevance without prior authorization of the judicial administrator;
- c) Suspends pending insolvency procedures, which are extinguished with the judicial homologation of the viability agreement;

- d) Suspends all prescription and limitation periods until the judicial homologation or refusal of the viability agreement;
- e) Prevents the suspension of essential public services, such as water, electricity, natural gas, or electronic communications supply.

RELEVANT PROCEEDINGS

PEVE includes a phase to challenge creditors and request the rejection of the viability agreement (within 15 days), on the basis of undue inclusion or exclusion of claims, incorrectness of their amounts or incorrect legal qualification of the recognized claims.

Upon receipt of the oppositions, the judge decides within 10 days: (i) on the objections made; (ii) on the rejection or homologation of the agreement, considering the creditors' statements and the (non-binding) opinion of the provisional administrator.

The agreement must be homologated by the judge only if, cumulatively: (i) it complies with the majorities provided for in CIRE; (ii) presents reasonable prospects of ensuring the viability of the company; (iii) there are no other circumstances that justify a rejection.

The homologation decision is binding for the company, subscribing creditors and creditors included in the definitive list of creditors, even if the latter did not take part in the negotiations, regarding the credits constituted prior to the appointment of the provisional administrator.

Any creditor not included in the definitive list of creditors has 30 days to accede to the homologated agreement. The company is notified and has five days to accept or reject the inclusion of the creditor, the silence corresponding to non-acceptance.

If the court rejects the agreement, PEVE and all its effects are extinguished. This means that all actions against the company may be resumed, including actions that were suspended with the order appointing the provisional administrator. Contrary to what happens in PER, the rejection of the agreement cannot, in any situation, be equivalent to insolvency proceedings application by the company.

Differently from PER, the rejection of the agreement is not subject to appeal.

INCENTIVES TO INVEST IN THE RECOVERY OF COMPANIES

Some of PEVE's incentives to invest in the company's recovery are particularly interesting:

- a) Transactions provided for in the agreement to raise the company's credit availability are not subject to resolution in favor of the insolvent estate, in case the company is declared insolvent after PEVE; and
- b) Creditors, partners, shareholders or any other persons especially related to the debtor who, in the extraordinary viability process, finance the company's activity shall enjoy a general privilege over movable property, ranked before the general privilege over movable property granted to employees.

ENTRY INTO FORCE AND DURATION

Law No. 75/2020 of November 27, 2020 entered into force on November 28, 2020 and will remain in force until December 31, 2021.

Considering the temporary nature of the aforementioned measures, an increase in pre-insolvency and insolvency situations in the Portuguese business sector is expected at the end of 2021 and at the beginning of 2022. When this time approaches, it may be particularly important to extend the duration of PEVE regime.

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