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RESTRUCTURING & INSOLVENCY

EXTRAORDINARY BUSINESS ENABLEMENT PROCEDURE

Last Friday, October 16, the Proposed Law no. 53/XIV was approved. In addition to providing for exceptional and temporary changes to the existing rules on insolvency proceedings, the Special Revitalization Proceedings ("PER"), the Special Proceedings for Payment Agreements ("PEAP") and the Extrajudicial Company Recovery Scheme ("RERE"), this diploma creates the **Extraordinary Company Enablement Procedure ("PEVE")**. According to the approved Proposal, still subject to enactment by the Portuguese President, this new procedure as well as the amendments to the other listed proceedings, will enter into force on the day following its publication and, unless further extended, will remain in force until 31 December 2021.

What is and who can use the PEVE?

The PEVE is a new temporary legal procedure of extraordinary and urgent nature, aimed exclusively at companies who are demonstrably in a difficult economic situation or facing imminent or current insolvency as a result of the COVID-19 pandemic but are still susceptible of recovery. It allows these companies to enter into an extrajudicial recovery agreement with their creditors, subject to court sanctioning.

A company wishing to benefit from the PEVE must demonstrate that, on the 31st December 2019, its assets were higher than its liabilities, that it fulfils the necessary conditions for its recovery and that no PER or special payment agreement procedure is pending¹.

How is the PEVE processed?

The PEVE begins with the company's application to court certifying that its situation has been determined by the COVID-19 pandemic and that it meets the necessary conditions for its recovery, accompanied by the recovery agreement signed by the company and its creditors (representing a certain majority) and a list of all of its creditors, signed by a certified accountant or statutory auditor.

¹

In the case of small or micro-enterprises, recourse to the PEVE may still be possible in circumstances where, on 31 December 2019, they have no assets in excess of their liabilities, provided that none of the above-mentioned proceedings or insolvency proceedings are pending, they received rescue aid in the context of the COVID-19 pandemic which has not yet been reimbursed and are covered by a restructuring plan under the State aid rules.

Once these documents have been filed, the judge then proceeds to appoint a Provisional Judicial Administrator (“PJA”), this appointment Order, alongside the list of creditors and the recovery agreement being published with the Court’s Digital Services. Since the procedure is aimed at being fast-tracked, no credit claim stage is foreseen thereunder although creditors are allowed to challenge the list of credits and/or request the court to refrain from sanctioning the agreement. It then falls to the judge to rule on such challenges as well as decide on whether the pre-requirements for the agreement’s sanctioning are met, bearing the creditors’ positions on same, in mind.

The decision to sanction the relevant agreement is published and it is binding on the company, the creditors signing the agreement, the creditors listed in the list of creditors (even if they have not participated in the underlying negotiations) and those who, after the agreement’s sanctioning, wish to adhere to the agreement, subject to the company’s acceptance.

What are the effects of the PEVE?

It is worth highlighting the following effects flowing from the PEVE, many of which are innovative:

- the appointment of a PJA prevents the opening of debt recovery proceedings and determines the suspension of those already in progress, the same occurring with insolvency proceedings as long as a declaratory insolvency judgment has not yet been handed down therein, all these proceedings, as a rule, being extinguished as soon as the recovery agreement has been sanctioned;
- the guarantees agreed between the company and its creditors to provide the necessary means for its activity, are maintained even if the company is later declared insolvent;
- credits arising out of monies loaned to the company as means to allow for its recovery by its partners, shareholders or by any other person related to the company, benefit from a general credit privilege and rank before that of the employees;
- agreements entered into with the company which encompass actual funding and respective guarantees cannot be set-aside;
- while rules on tax credits and their phased payment remain unchanged, a reduction in interest on arrears is allowed for;
- a recovery agreement which includes the restructuring of claims corresponding to at least 30% of the company's total non-subordinated liabilities and which balances the company's economic situation by increasing the proportion of assets over liabilities, the debtor's equity being greater than its share capital (which will have to be certified by a Chartered Accountant), grants the parties tax benefits relating to income tax, stamp duty and property transfer tax.

Other measures

The same law also approves a number of exceptional measures for companies affected by the pandemic caused by COVID-19: (i) regarding the PER, it extends the general movable credit privilege, graduated before the one granted to employees to partners, shareholders or any other persons related to the company, who finance the relevant company’s activity during the procedure; (ii) as to the RERE, it extends the possibility of resorting to this regime to insolvent companies; (iii) in the PER and in the PEAP, it allows the deadline for negotiations to be extended and (iv) in what refers to insolvency proceedings, a deadline to adapt the insolvency plan proposal is foreseen.