VIEIRA DE ALMEIDA

CORPORATE RESTRUCTURING

Practical Guide Prepare the Future : The essentials of restructuring and insolvency mechanisms

A comparative analysis of the changes arising from Law no. 9/2022 of 11 January

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New Times Ahead

Law no. 9/2022 of 11 January ("Law 9/2022") which "establishes support measures and the streamlining of company restructuring processes and payment arrangements and transposes Directive (EU) 2019/1023 of the European Parliament and the Council of 20 June 2019", notably amending the Portuguese Insolvency and Company Recovery Code ("CIRE"), was published on 11 January.

This new law will enter into force on 11 April 2022, so it is the right moment to highlight the most relevant legislative changes arising therefrom, integrating them in this practical guide on the existing restructuring legal mechanisms, all in view of providing our Clients with the necessary updated information for the new times ahead.

What are the legal mechanisms of corporate restructuring?

Extrajudicial mechanisms:

- RERE (Extrajudicial Company Recovery Scheme (Regime Extrajudicial de Recuperação de Empresas), enacted by Law no. 8/2018 of 2 March).

Judicial mechanisms:

- PER (Special Revitalisation Procedure (Processo Especial de Revitalização), governed by the CIRE);

- PEVE (Extraordinary Company Viability Procedure (Processo Extraordinário de Viabilização de Empresas), approved by Law no. 75/2020 of 27 November);

- Insolvency Proceedings (Processo de Insolvência), governed by the CIRE.

Which mechanism is the most suited to my company's situation?

RERE, PER ou PEVE

- These are mechanisms specifically conceived for companies facing serious difficulties in promptly fulfilling their obligations, namely due to lack of liquidity or failure to obtain credit ("difficult financial situation"); or which, in the near future, will be unable to fulfil their obligations as they fall due ("imminent insolvency situation"); or which, in certain cases, are already effectively unable to fulfil their obligations ("insolvency situation"), but which are nonetheless still capable of recovery and wish to restructure their activity and/or liabilities, thus avoiding the filing of debt recovery proceedings and the worsening of their financial situation and/or insolvency situation.

INSOLVENCY

- This mechanism applies to companies already effectively unable to meet their fallen due obligations or whose liabilities significantly exceed their assets, assessed according to the applicable accounting rules.

[1] *The changes introduced by Law no. 9/2022 are inserted in italics and underlined.*

Extrajudicial Company Recovery Scheme

RERE

What is its goal/purpose?

The RERE is not a procedure but rather an extrajudicial legal regime aimed at facilitating the restructuring and recovery of companies. It regulates the terms and effects of negotiations between a company and its creditors, as well as the terms and effects of the restructuring agreement allowing for the continuity of the company's activity and avoiding its insolvency.

Who can benefit from this regime?

The RERE applies to negotiations and restructuring agreements involving debtors that are companies [as defined under paragraphs a) to h) of article 2(1) of the CIRE], excluding natural persons who are not owners of companies, which are in a "difficult financial situation" or an "imminent insolvency situation" but are still eligible for recovery. This situation must be attested by a statutory auditor.

The RERE is not available to public legal entities, public corporate entities (entidades públicas empresariais), insurance companies, credit institutions, finance companies and collective investment entities.

Please note that companies in an insolvency situation due to the Covid-19 pandemic, but which are still potentially viable and can demonstrate that their assets exceeded their liabilities on 31 December 2019, may submit their negotiations and restructuring agreements with creditors to a RERE (under Law 75/2020 of 27 November).

When is the RERE an appropriate option?

Essentially in cases where a company's debts can be restructured without the intervention of all its creditors.

This regime is also appropriate in cases where a company intends to restructure its economic activity, assets, legal structure, loans and/or guarantees.

The goal is always to guarantee that the company becomes economically viable, avoiding any further deterioration of its financial situation and/or any insolvency requests or the filing of formal insolvency proceedings by its creditors.

How is it started?

Subjection to the RERE regime is voluntary. Parties are free to submit their negotiations, as well as the effects of any agreement that is achieved through same, to the RERE. Participation in these negotiations and any agreement, is also voluntary.
The debtor can convene all or just a few of its creditors.
If the tax and/or the social security authorities, employees and employee representation organisations are creditors of the company, they will mandatorily participate in the negotiations, even if they do not subscribe the negotiation protocol.

What is a restructuring agreement pursuant to the RERE?

Any agreement with a view to changing the composition, conditions or structure of a debtor's assets or liabilities, or any element of its capital structure, including its share capital, with the aim of preserving the company.

How are negotiations carried out under RERE?

If the parties choose to submit negotiations to the RERE regime, the debtor, along with creditors representing at least 15% of its total unsubordinated liabilities (pursuant to an accounting statement issued by a statutory auditor in the last 30 days), must sign a negotiation protocol and file it with the Commercial Registry Office.

The negotiation protocol establishes the terms and conditions applicable to the negotiations.

While negotiations are ongoing, any creditor may at any time adhere to the negotiation protocol by way of an adherence statement; however, only full adherence to the negotiation protocol is allowed.

How long is the negotiation phase under RERE?

Negotiations, including any extensions, cannot last more than 3 months.

What are the effects of the negotiation stage?

The aim is to promote an environment conducive to the success of the negotiations.

Debtor's obligations:

- the debtor must maintain its normal business activity and, unless otherwise foreseen in the negotiation protocol, is expressly forbidden from performing any relevant acts (notably, sell the company, dispose of assets

or shareholdings in other companies, execute new long-term contracts, take on third party obligations or set up guarantees).

Creditors' obligations:

- creditors who are party to the negotiation protocol (as well as any acquirers of the relevant debt) cannot release themselves from the commitments undertaken thereunder;

- creditors who are not party to the negotiation protocol may, at any time during the negotiations, adhere to the protocol, thus becoming bound by it.

Rendering of essential services:

- providers of essential services are inhibited from interrupting their services due to debts existing prior to the filing of the negotiation protocol. This inhibition is only lifted if the relevant service provider is a party to the negotiation protocol and agrees to an extended payment deadline, or if the debtor fails to promptly pay the cost of these essential services during the RERE.

Legal Proceedings:

- immediate suspension of any pending insolvency proceedings (when insolvency has not yet been declared) launched against the debtor by an entity participating in the negotiations.

Intervention by a Company Recovery Mediator:

- the negotiations may benefit from the help of a mediator who is tasked with assessing the debtor's economic and financial situation, mediating the negotiations and contributing to the drafting of the restructuring agreement.

Supervening insolvency situation:

- if, following the filing of the negotiation protocol, the debtor finds itself in an insolvency situation, the legal deadline to file for insolvency will only start to be computed after negotiations have ended.

What are the main features of the restructuring agreement?

It is an extrajudicial voluntary agreement, the contents of which are confidential (except if otherwise agreed) and freely determined by the parties.

The agreement is made in writing, signed by the parties and filed with the Commercial Registry Office.

It may apply to all or part of the credits held by the participating creditors and consists of one single document which must be accepted in full, even if by term of acceptance, by all participating creditors.

Who is bound by and what are the effects of the RERE restructuring agreement?

The restructuring agreement only takes effect in relation to the future and only binds those who participate in it. It does not affect third-party rights or pre-existing guarantees.

It shall have the effects agreed by the parties to the agreement, in addition to the following:

- effects on legal proceedings;
- tax benefits;
- special protection granted to any financing carried out under the RERE and its associated guarantees (not susceptible of becoming subject to resolution to the benefit of the insolvent estate in any possible future insolvency proceedings);
- possibility of articulation with the PER.

What are the RERE's effects on legal proceedings?

Without prejudice to other effects that may be freely agreed between the parties in the scope of the restructuring agreement, its filing with the Commercial Registry Office entails:

- immediate termination of any precautionary, declaratory and enforcement proceedings pertaining to claims included in the agreement or to a participating entity;
- immediate termination of any pending insolvency proceedings (when insolvency has not yet been declared) launched against the debtor by a party to the agreement.

The registrar of the Commercial Registry Office is responsible for notifying the Courts of the filing of the restructuring agreement.

What tax benefits does a company receive under RERE?

If, by way of the restructuring agreement, the debtor is able to (i) restructure at least 30% of its unsubordinated liabilities, (ii) achieve a better financial situation, where its equity exceeds its share capital (as attested by a statutory auditor) and (iii) file the agreement with the Commercial Registry Office, the debtor will have the tax benefits set out in the CIRE, namely in respect of income tax (IRC), stamp duty and property transfer tax (IMT).

Does financing granted to a company under RERE benefit from any protection?

If the restructuring agreement is filed with the Commercial Registry Office, any financing granted to the debtor under RERE will benefit from protection, as will any associated guarantees.

These deals will not be susceptible of becoming subject to claw back in a future insolvency of the debtor.

Can the restructuring agreement be linked to a PER?

If the restructuring agreement is signed by creditors representing the majority foreseen in article 17-I of CIRE or it is subsequently adhered to by enough creditors to make up such majority, then a PER procedure may be launched in view of securing the court's sanctioning of the restructuring agreement (provided that it fulfils the conditions and requirements for court approval of an agreement under the PER). In this case, the agreement will become binding on all creditors.

What happens in case of breach of the obligations foreseen in the restructuring agreement?

The affected party but does not determine the invalidity of the remaining obligations arising thereunder or of the corporate acts existing therein.

Termination of the agreement does not have retroactive effects and does not entail the restoration of the obligation altered in the restructuring agreement.

The agreement constitutes an enforceable title with respect to the payment obligations foreseen therein and assumed by the debtor and, as such, enforcement proceedings can be launched based on same.

Special Revitalisation Procedure
PER

What is its goal/purpose?

The PER is an urgent legal procedure aimed at allowing debtors facing a difficult financial situation or imminent insolvency (but still capable of recovery) to promote the recovery of their business through negotiations with their creditors.

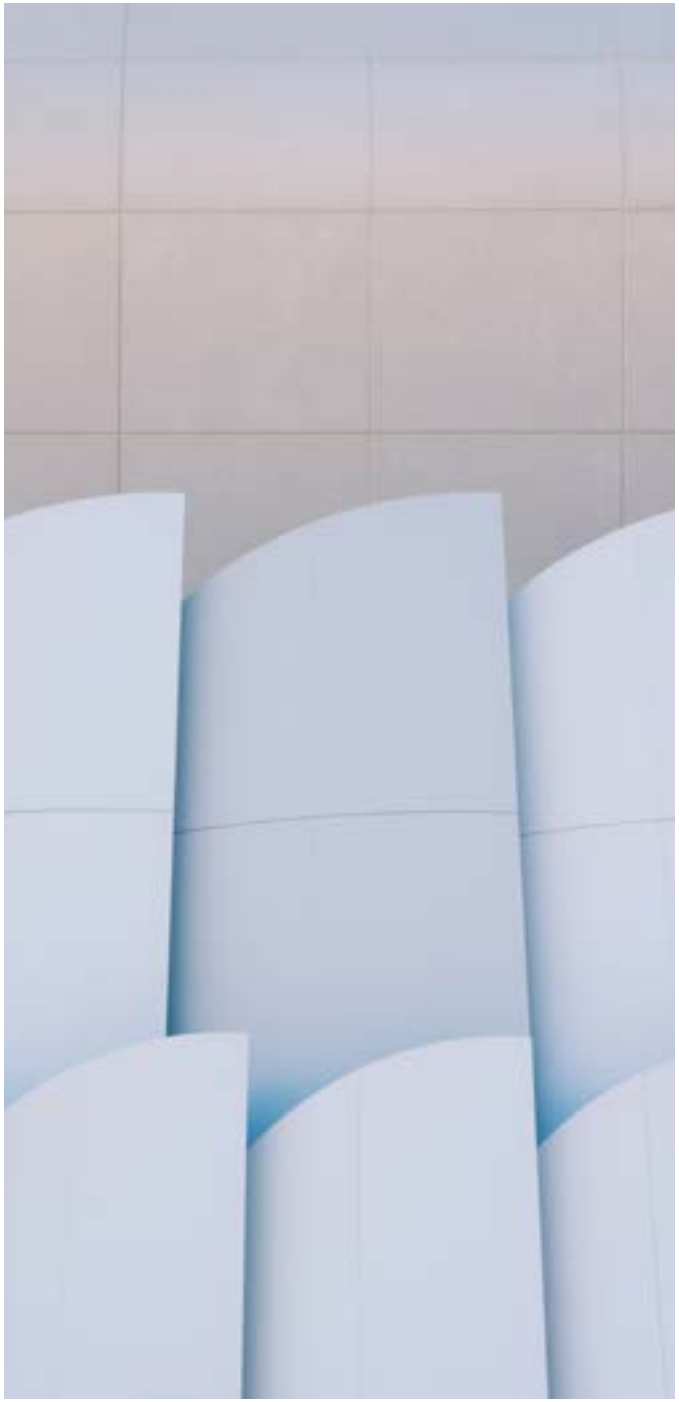
Who can benefit from PER and in what situations?

The PER is available to any company, as defined in article 5 of CIRE ("any capital and work organisation aimed at developing an economic activity"), which is in a difficult financial situation or facing imminent insolvency.

How is this procedure started?

The PER begins with a joint statement signed by the debtor and at least one of its creditors (holding at least 10% of its unsubordinated claims - a percentage which may be lower under certain conditions, if the courts accept it) and addressed to the court of the debtor's registered office jurisdiction, expressing their intent to launch negotiations aimed at the debtor establishing a recovery plan (other creditors may adhere at any time to the negotiations while they are ongoing).

The abovementioned joint statement shall attest that the debtor fulfils the conditions necessary for its recovery and must be filed alongside a statement issued by a statutory auditor, with a validity of 30 days, confirming that the company is not yet insolvent.



Law 9/2022 – Although its application is optional to micro, small and medium-sized enterprises, the debtor is now required to present a proposal for the classification of creditors whose legal position will be altered by the recovery plan, in accordance with the nature of their claims (secured, privileged, common and subordinated) and may reflect the universe of creditors based on the existence of relevant shared interests, notably: employees, shareholders, banking entities who financed the debtor, suppliers of goods and service providers, and public creditors

The PER may also be launched by filing an extrajudicial recovery agreement signed by the debtor and creditors representing the necessary legal majority for its approval. In this case, the process is simplified.

How does the PER process unfold?

The court will review the application and, if it finds that the relevant legal prerequisites are fulfilled, the court will declare the PER process initiated and immediately appoint a Provisional Judicial Administrator ("PJA"). The PJA's role is to supervise and control the debtor's assets while negotiations are ongoing and assist the parties with the negotiations.

How are negotiations carried out under PER?

Once the deadlines for (i) filing any credit claims (i.e. 20 days following the publication of the court ruling declaring the PER process initiated); (ii) the PJA to draw-up a provisional list of creditors (within 5 business days of the deadline specified in (i) above); and (iii) publication of the list of creditors and any objections to it (5 days) have passed, the debtor and its creditors will have 2 months to conclude the negotiations aimed at preparing the debtor's recovery plan. This 2-month deadline may be extended once for an additional month.

What are the effects of the negotiation phase under the PER?

Regarding the debtor:

- the debtor's management shall remain in office during the PER, but will be inhibited from performing any relevant acts (notably, sell the company, dispose of assets or shareholdings in other companies, execute new long-term contracts, take on third party obligations or set-up guarantees) without the PJA's prior consent.

Effects on legal proceedings:

- whilste negotiations are ongoing, no new debt recovery proceedings can be brought against the debtor and any pending proceedings shall be suspended (and terminated as soon as the recovery plan is approved and sanctioned by the court, unless otherwise expressly foreseen in the plan);

  Law 9/2022 – The limitation on the filing of legal actions and suspension of proceedings is only applicable to enforcement proceedings and these do not include those brought for the collection of debts arising from an employment contract, or its breach or termination, and is limited to the maximum period of four months (with the possibility of extension for one additional month, under certain circumstances).

- any pending insolvency proceedings brought against the debtor (where insolvency has not yet been declared) will also be immediately suspended (and terminated as soon as the recovery plan is approved and sanctioned by the court).

Rendering of essential services:

- providers of essential public services are inhibited from interrupting these services and the price of any services rendered during the negotiations which is left unpaid by the debtor will be classified as debt of the insolvent estate in any future insolvency of the debtor launched in the 2 years following the end of the negotiations.

Law 9/2022 – Establishes that any creditors who have entered into continuous execution contracts with the debtor necessary for the development of its activity are inhibited from refusing their performance, terminating or anticipating these contracts or unilaterally amending their terms based on non-payment. If legal proceedings are launched in the following 2 years, the price of any unpaid goods or services rendered will also be considered as debt of the insolvent estate.

What happens at the end of the negotiations?

At the end of the negotiation deadline, the debtor must submit the recovery plan to the court to enable its creditors to review and vote on the plan. If approved, the plan will then be sanctioned by the court.

If no plan is submitted or, if submitted, is not approved by the creditors or sanctioned by the court:

- the PER will be closed, all its effects being terminated;

- the debtor may continue its activity but is prevented from applying for a new PER in the next 2 years (save where otherwise foreseen in the law);
- if, in the PJA's opinion, the debtor is already insolvent at this stage, the PER's closure may result in the debtor's insolvency adjudication.

Law 9/2022 – Even if the PJA concludes that the company is insolvent, if the company objects this, the PER will be closed and archived, all its effects being extinguished.

What is the recovery plan's content?

The recovery plan should start with a description of the company's economic and financial situation and the measures necessary for its recovery, which should be based on a viable and credible business plan detailing the steps that must be taken to overcome the financial problems faced, thus allowing its creditors to make an informed assessment of the plan. For this purpose, the plan should clearly indicate any changes to the creditors' legal position arising from it.

Regarding the debtor's liabilities, the plan must indicate the specific measures to be adopted, e.g. waiver or reduction of the value of the claims and/or interest; change in maturity dates or interest rates; the setting up of guarantees; or new financings.

The plan can also foresee changes to the debtor itself, e.g. via a share capital increase or decrease; changes in its governing bodies; conversion of credits into capital; or amendments to the by-laws.

Law 9/2022 – Now identifies the specific elements the recovery plan is required to include (no longer making reference to the insolvency plan), including in addition to those referred above: (i) identification of the parties affected by the recovery plan (divided by classes and, if applicable, by categories of shared interests in which they are grouped) and those not affected (with the respective justification); (ii) arrangements for information and consultation with employee representatives, their position within the company and, if applicable, the general consequences for employment, notably, any dismissals, temporary reduction in work hours or suspension of employment contracts; (iii) any potential new financings and their importance for the implementation of the plan; and (iv) explanatory statement outlining the causes and extent of the debtor's difficulties and explaining why the plan is likely to avoid insolvency and ensure the company's viability, including the prerequisites necessary for the plan's success.

How is the recovery plan voted on?

Votes are cast by the creditors in writing (€1 = 1 vote) and sent to the PJA, who then informs the court of the voting results.

When is the recovery plan deemed to be approved?

The plan is considered approved in the following situations:

- If the plan is voted on by 1/3 of the creditors (with reference to the value of the credit claims) and receives the favourable vote of more than 2/3 of the total issued votes and more than half of these correspond to unsubordinated claims;
- If more than half of the creditors vote favourably (with reference to the value of the credit claims) and more than half of these votes correspond to unsubordinated claims.

Abstentions are not computed.

Law 9/2022 – In cases where the creditors were classified in different categories according to their claims, this differentiation becomes relevant when computing the votes cast.

When is the recovery plan sanctioned by the court?

Once the court has received the results of the vote, the judge will then decide whether the plan should be sanctioned or rejected, the latter happening notably in cases where the plan breaches procedural rules or any rules applicable to its content, e.g. the principle of equality among creditors.

Law 9/2022 – When sending the results of the vote to the court, the PJA will include its report on whether the plan offers reasonable prospects of avoiding the company's insolvency or ensuring its viability.
If any creditor requests that the court not sanction the plan, on the grounds that its situation under the plan is less favourable than it would be in an insolvency scenario or that approval rules were not respected, the judge may require that the company undergo expert assessment.

Who is bound by the court's sanctioning of the recovery plan?

The court's ruling binds the debtor and all its creditors, including those who did not claim their credits or participate in the PER negotiations.

What are the effects of the court's sanctioning of the recovery plan?

- the PER is closed;
- the debtor continues its activity;
- the recovery plan is implemented, and the creditors are paid as foreseen therein;
- any debt recovery proceedings pending against the debtor will be terminated, unless otherwise expressly foreseen in the plan;
- any insolvency proceedings brought against the debtor (where insolvency has not yet been declared) will also be terminated.

Law 9/2022 – Is silent on the end of the suspension of enforcement and insolvency proceedings. Regarding the first ones, , this question should be governed by the recovery plan; as regards suspended insolvency proceedings, the sanctioning of the recovery plan should determine their termination.

Does the PER imply tax benefits?

The sanctioning of the recovery plan implies tax benefits in respect of income tax (IRC), stamp duty and property transfer tax (IMT).

Do the guarantees and financing granted under the PER benefit from any protection?

Guarantees and financing agreed on during the PER, as means to provide the debtor with the financial means necessary to pursue its activity, benefit from special protection, even if the debtor is declared insolvent in the 2 years following the end of the PER. Creditors who, during the PER, finance the debtor's activity by providing

capital for its recovery enjoy a general preferential claim with prior ranking over the general preferential claim granted to employees.

Law 9/2022 – Establishes that both financings granted during the procedure (interim financing) as well as financings granted in implementation of the recovery plan (new financing) can neither be subject to avoidance actions, nor declared null or nullable, and that the grantors of financings cannot incur any liability on the grounds that they are detrimental to the group of creditors.

If the company is declared insolvent within 2 years from the date the sanctioning of the recovery plan transited in rem , any creditors who granted interim or new financings will hold a credit over the insolvent estate up to an amount corresponding to 25% of the debtor's unsubordinated liabilities. Any credits above this amount will enjoy a general preferential claim with prior ranking over the general preferential claim granted to employees. This preferential claim is also granted if the financings are provided by partners or other persons directly related to the company.

My company has already resorted to a PER but current circumstances prevent compliance with the approved recovery plan; what can I do?

- If the plan was sanctioned by the court less than 2 years ago, the company is generally prevented from resorting to a new PER. However, if the company fulfilled all its obligations arising from the plan until the emergence of the exceptional circumstances resulting from the Covid-19 pandemic, its recourse to a new PER is possible bearing in mind the impossibility of foreseeing these exceptional circumstances when the plan was submitted.
- If the plan was sanctioned by the court more than 2 years ago, the possibility of recourse to a new PER is unequivocal, provided that the plan is still being complied with or that failure to comply therewith is due to the abovementioned exceptional circumstances. If the company was already failing to fulfil the obligations arising from the plan, it may be deemed insolvent and, therefore, should first consider filing for insolvency.

Extraordinary Company Viability Procedure

PEVE

What is its goal/purpose?

PEVE is a new legal procedure, of **an extraordinary and urgent nature**, created in response to the Covid-19 pandemic. It is directed at debtors in a difficult financial situation or in imminent or actual insolvency due to the pandemic, but which are still capable of recovery and in a position to negotiate with their creditors in view of promoting the company's viability through an extrajudicial agreement.

Who can benefit from PEVE and in which situations?

PEVE applies exclusively to companies in a proven difficult financial situation or in imminent or actual insolvency due to the Covid-19 pandemic. Any company wishing to apply for PEVE must show that it has no PER or special payment agreement process pending, that it meets the conditions for business viability, and that its assets exceeded its liabilities on 31 December 2019.

Any micro or small-sized enterprise whose assets did not exceed its liabilities on 31 December 2019, is also eligible for PEVE, provided that it has no PER or special payment agreement process pending and it received Covid-19 related emergency state aid which was not repaid as provided by law, or is included in a restructuring plan falling within the framework of state aid measures.

PEVE is currently in force and is open to companies in any of the situations detailed above, until 30 de June 2023 (as per Decree-Law no. 92/2021 of 08.11).

How is this procedure started?

PEVE starts with the filing by the company, with the court of the jurisdiction of its registered office, of the relevant application, together with its list of creditors and a viability plan signed by the company and by creditors representing the majorities currently established for the approval of a recovery plan in the context of a PER and that were referenced above.

The applicant company may request that its procedure be joined with a PEVE filed by any company with which it is in a control or group relationship, pursuant to the Portuguese Commercial Companies Code.

What are the next steps?

The court will analyse the application and, having verified that all legal requirements are met, will appoint a PJA tasked with supervising and controlling the debtor's assets, who will order the publication of the company's viability plan and list of creditors.

Following this publication, creditors have 15 days to challenge the list of creditors and/or to request the court's non-approval of the viability plan. The PJA must, also within 15 days, issue an opinion on whether the plan offers reasonable prospects of ensuring the company's viability. In the following 10 days, the judge will rule on any objections filed with the court and assess the viability plan, subsequently sanctioning it or not.

What are the effects of the PJA appointment order?

As regards the debtor:

- the company is forbidden from performing any relevant acts (notably, sell the company, dispose of assets or shareholdings in other companies, execute new long-term contracts, take on third party obligations or setting up guarantees) without the PJA's prior consent.

Effects on legal proceedings:

- no new debt recovery proceedings may be brought against the company and, until the court's decision on the viability plan has transited in rem, any pending proceedings shall be suspended (and terminated as soon as the viability plan is sanctioned by the court, unless otherwise expressly foreseen in the plan or if the claims under litigation are not included in the plan).

- any insolvency proceedings will also be suspended (whether filed before or after the publication of the viability plan) and will be terminated if the court sanctions the plan.

Rendering of essential services:

- following the publication of the viability plan and until the court has issued its decision, providers of essential public services are inhibited from interrupting their services.

Who is bound by the court's decision to sanction PEVE?

The court's decision binds the company, the creditors who signed the viability plan, the creditors named in the list of creditors (including those who did not participate in the negotiations) and those who, following this decision, wish to adhere to the plan.

What are the consequences of non-sanctioning?

The PEVE will be closed and its effects extinguished.

What are the effects of the court's decision to sanction PEVE?

- the PEVE will be closed;
- the debtor will continue its activity;
- the viability plan will be implemented;
- any pending debt recovery proceedings will be terminated in relation to the debtor;
- any insolvency proceedings (where insolvency has not yet been declared) brought against the debtor will be terminated;
- tax benefits.

Does the PEVE imply tax benefits?

The same tax benefits set out in the RERE are applicable to the PEVE. Besides this, the reduction of interest tax rate in arrears in tax credits and social security credits is expressly allowed under the scope of the approved restructuring agreement leading to financial consolidation of the company.

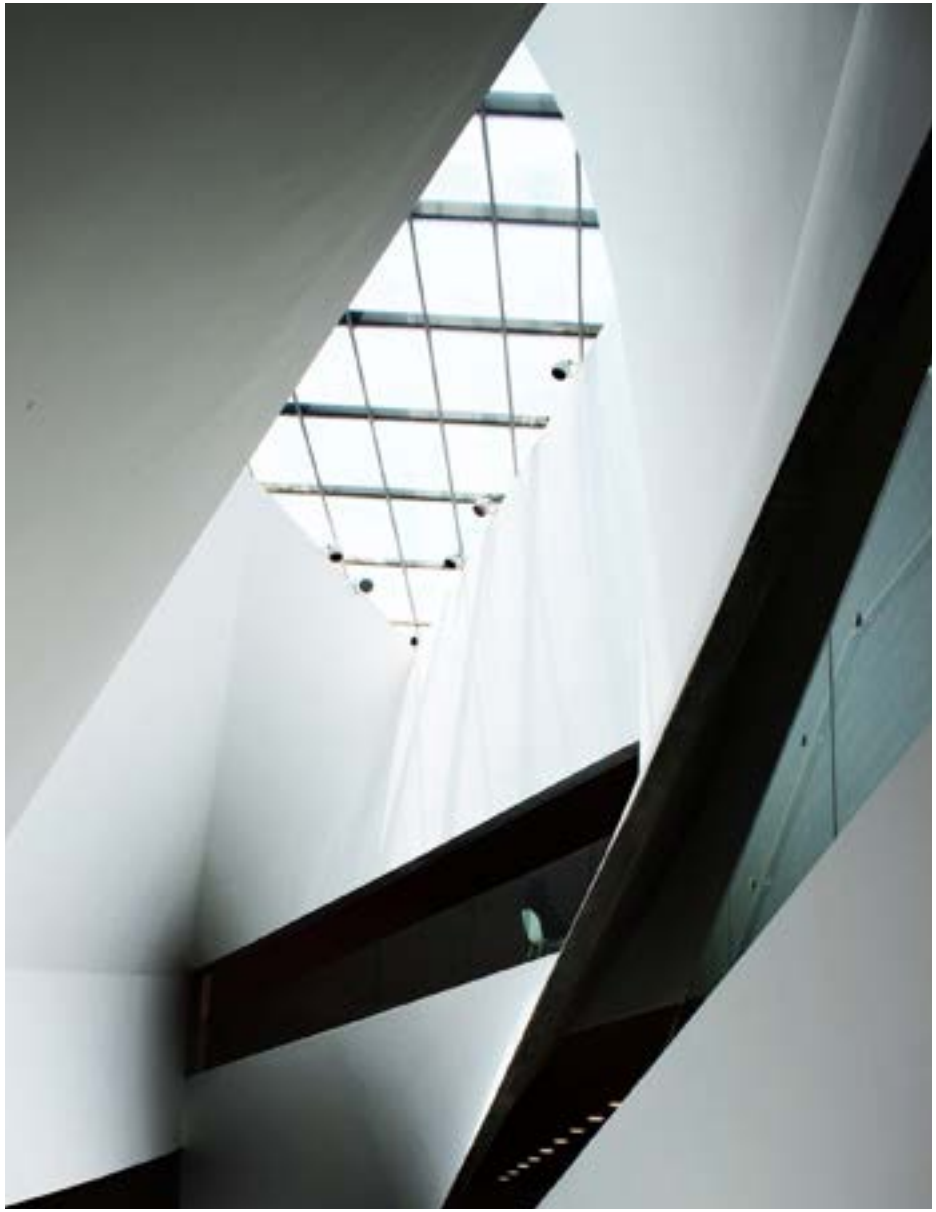
Do the guarantees and financing granted under the PEVE negotiations benefit from any protection?

Any guarantees agreed between the company and its creditors with a view to providing it with the means necessary to develop its activity will be maintained even if the company is declared insolvent.

Creditors, shareholders or any other persons directly related to the company who, in the context of PEVE, finance the company's activity by providing capital to it, will enjoy a general preferential claim with prior ranking over the general preferential claim granted to employees (only with respect to the capital provided).

Can my company apply for PEVE more than once?

No, companies can only resort to this extraordinary company viability procedure once, regardless of their viability plan having been sanctioned by the court or not.



Insolvency Proceedings

What is the goal/purpose of insolvency proceedings?

These are urgent and of universal enforcement proceedings principally aimed at satisfying creditors' rights in the most efficient way possible, whether as foreseen in an insolvency plan, based on the debtor's recovery, or through the liquidation of the debtor's assets and subsequent distribution of the sale proceeds among its creditors.

How is this process started?

By filing a request for insolvency adjudication with the court of the jurisdiction of the debtor's registered offices.

Who can launch insolvency proceedings?

- the debtor, via its management corporate body or any of its directors, as applicable;
- the person/entity liable for the debtor's debts;
- any creditor;
- the Public Prosecutor, representing the entities whose interests are legally entrusted to it.

Law 9/2022 – If the debtor decides to launch insolvency proceedings, its application is now required to include a document identifying the companies in a control or group relationship with it (pursuant to the Portuguese Commercial Companies Code) or which are considered associated companies (pursuant to the annex to Decree-Law no. 372/2007 of 6 November) and, if applicable, the proceedings in which its insolvency was requested or declared.

Under which circumstances can an insolvency request be filed?

- general suspension of payment by the debtor of its fallen due obligations;
- failure to comply with one or more obligations which, given the amount in question or the circumstances of the relevant non-compliance, indicates that the debtor is unable to promptly fulfil most of its obligations;
- failure to comply with the obligations foreseen in any insolvency plan or payment plan;
- general default, in the last 6 months, on debts of a certain type (e.g. tax debts, social security debts, rent, etc.).

Is there a duty for the debtor to file for insolvency?

The debtor's management bodies are bound by the duty to file for insolvency within 30 days of the date on which they became aware or should have become aware of the situation of insolvency. In the case of legal persons, it is presumed that this knowledge exists after 3 months of failure to fulfil the obligations foreseen in article 20(1)(g) of CIRE (e.g. tax debts, rents).

This deadline is currently suspended as a result of the Covid-19 related measures.

If the company decides to file for insolvency, its management may remain in office provided that an insolvency plan foreseeing the company's business continuity has been submitted - or will be submitted within 30 days of the insolvency adjudication by the court -, and this does not result in any delays in the proceedings or disadvantages for the creditors.

What are the consequences of breach of the duty to file for insolvency?

Breach of the duty to file for insolvency may lead to the insolvency being qualified as culpable. This, in turn, may result in civil liability for the company's managers or directors and/or different types of shorter- or longer-term disqualifications.

What is foreseen in the court's insolvency adjudication?

In the decision declaring insolvency, the judge will, among other things:

- appoint an Insolvency Administrator ("IA") selected from an official list; when making this selection the judge may consider any suggestions made by the insolvent debtor;
- establish a deadline for the filing of credit claims by creditors;
- determine the transfer, to the IA, of the insolvent estate's management powers and of those to carry out the company's business activity;
- order the seizure and delivery to the IA of all the debtor's assets and accounting elements.

In cases where the company has filed or has undertaken to file, within 30 days of the insolvency adjudication, an insolvency plan foreseeing its continued operation of the insolvent estate, it may request that the debtor maintain management of the insolvent estate. In such situations, points c) and d) above will not be ordered, although the IA will remain responsible for supervising the debtor's actions, the IA's prior consent only being required for extraordinary administrative acts.

What are the effects of the of the insolvency adjudication?

Regarding the debtor:

- the loss of management powers over the assets comprising the insolvent estate;
- the debtor's corporate bodies will remain in office following the declaration of insolvency; however, their members lose the right to remuneration.

Effects on legal proceedings:

- any enforcement proceedings launched against the debtor will be suspended;
- any legal actions concerning assets comprising the insolvent estate are, as a rule, attached to the insolvency proceedings, provided that this is expressly requested for by the IA;

- any arbitration agreements to which the insolvent entity is a party will be suspended.

Effects on claims:

- the insolvency adjudication renders all the debtor's obligations immediately due and payable;

- creditors may only exercise their rights in the context of the insolvency proceedings.

Effects on contracts:

- as a rule, and unless otherwise foreseen, compliance with any existing contracts is suspended until the IA decides on whether they will be fulfilled;

- the IA may terminate certain acts performed or omitted by the insolvent debtor in the two years preceding the filing for insolvency which limit, frustrate, hinder, delay or endanger satisfaction of the creditors' rights and which, with the exception of certain acts identified under law, depend on the bad faith of third parties.

What happens if the debtor's assets are insufficient?

If at the time of the insolvency adjudication, the debtor's assets are found to be insufficient to pay the costs of the proceedings and the estimated debts of the insolvent estate, the insolvency proceedings will most likely be terminated on the grounds of inability to reimburse the creditors.

How and when is it decided whether an insolvency plan will be submitted, or the debtor will instead be liquidated?

It is up to the creditors to resolve - at a creditors' meeting and by simple majority of the votes cast (€1 = 1 vote) - on whether to recover the debtor – via an insolvency plan – or liquidate it.

What is an insolvency plan?

If the creditors decide that promoting the company's viability is the best solution to safeguard their claims, they may approve an insolvency plan, in which case the insolvent debtor will continue to pursue its activity.

The insolvency plan can be designed in different ways; however, it must contain a business plan regulating the insolvent debtor's future activity and may also deal with existing claims over the debtor (foreseeing a partial waiver of claims and the terms of repayment to the creditors) and/or modify the debtor's corporate structure (by way of capital increase or decrease, changes to its corporate bodies, the conversion of credits into capital, and the amendment of the by-laws).

Law 9/2022 – If the insolvency plan foresees the company's continued activity and creditors being paid from the company's income, it must include evidence demonstrating the likelihood of this (notably, an investment plan and projected operating account).
The creditors not affected by the insolvency plan should be identified (with the respective justification).

The plan must additionally specify the arrangements for information and consultation with employee representatives, their position within the company and, if applicable, the general consequences for employment, notably, any dismissals, temporary reduction in work hours or suspension of employment contracts.

Any new financings and their importance for the implementation of the insolvency plan should also be included.

Is there only one insolvency plan? And who can submit it?

During the insolvency proceedings various insolvency plan proposals can be submitted by the debtor's management, by the IA or by any creditor or group of creditors representing at least 1/5 of the debtor's total unsubordinated claims.

How is the insolvency plan voted on?

The plan is discussed and voted on in a meeting of creditors (€1 = 1 vote).

When is the insolvency plan deemed to be approved?

For the plan to be approved, creditors representing at least 1/3 of the claims with voting rights over the insolvent debtor must be present at the meeting and at least 2/3 of the votes cast, more than half of which corresponding to unsubordinated claims, must be in favour of the plan.
Abstentions are not computed to this effect.

Law 9/2022 – The insolvency plan is deemed approved if creditors representing at least 1/3 of the claims with voting rights are present at the meeting of creditors and more than half of the votes cast (more than half of which correspond to unsubordinated claims), are in favour of the plan's approval. Abstentions are not computed to this effect.

Is the insolvency plan subject to court sanctioning?

If the plan is approved by the creditors, it will then be subject to sanctioning by the court. The court may refuse to sanction the plan, notably when it breaches procedural rules or rules applicable to its content. If the plan is sanctioned and no appeal is lodged, all measures foreseen therein will come into effect, thus allowing the company to continue its activity. The measures foreseen in the plan must be strictly complied with. In case of non-compliance, any creditor injured as a result may legitimately request insolvency again.

And what if the creditors resolve to liquidate the debtor?

If the creditors opt for liquidation, all assets seized and belonging to the insolvent estate will be sold (either jointly or separately), the sale proceeds being paid to the creditors, in accordance with recognised claims and their respective ranks.

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