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Restructuring across borders

Portugal

Corporate restructuring and insolvency procedures | January 2024

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Contents

Introduction

The Portuguese insolvency and restructuring regime is governed by the Insolvency and Company Recovery Code (*Código da Insolvência e Recuperação de Empresas unitalicise*), as approved by Decree-Law no.53/2004 of 18 March 2004 (as amended).This regime came into force on 15 September 2004. It replaced the Portuguese Bankruptcy and Company Recovery Code of 1993 with a new single form of insolvency proceedings.

Following the coming into force of the CIRE, Portugal operates a "gateway" style insolvency regime. Primarily, there is only one type of corporate insolvency proceedings (*processo de insolvência*) available, under which the company can be liquidated (either in accordance with the statutory regime or through an insolvency plan) or rescued pursuant to an insolvency plan. Therefore, corporate insolvency proceedings can lead either to statutory liquidation proceedings or to the approval of an insolvency plan.

The three principal restructuring and insolvency regimes for companies under Portuguese law are:

– insolvency proceedings (*processo de insolvência*), under which a company may be rescued or liquidated;

– special recovery proceedings (*processo especial de revitalização*); and

– extrajudicial framework for business recovery (*regime extrajudicial de recuperação de empresas*).

Law no. 9/2022 of 11 January transposed Directive (EU) 2019/1023 of the European Parliament and the Council of 20 June 2019 (the European Restructuring Directive) and created several measures to support and speed up company restructuring processes and payment agreements.

For information on the PEVE, please see schedule to this fact sheet on pages 14-15.

Insolvency proceedings (processo de insolvência)

Corporate insolvency proceedings are classed as an urgent judicial proceeding and so any application to open corporate insolvency proceedings (or any application within the insolvency proceedings) must be dealt with by the court as a matter of priority. Corporate insolvency proceedings are commenced by filing a written application with the court, typically by the debtor itself or by any creditor. A judge will then decide whether or not to declare the debtor insolvent.

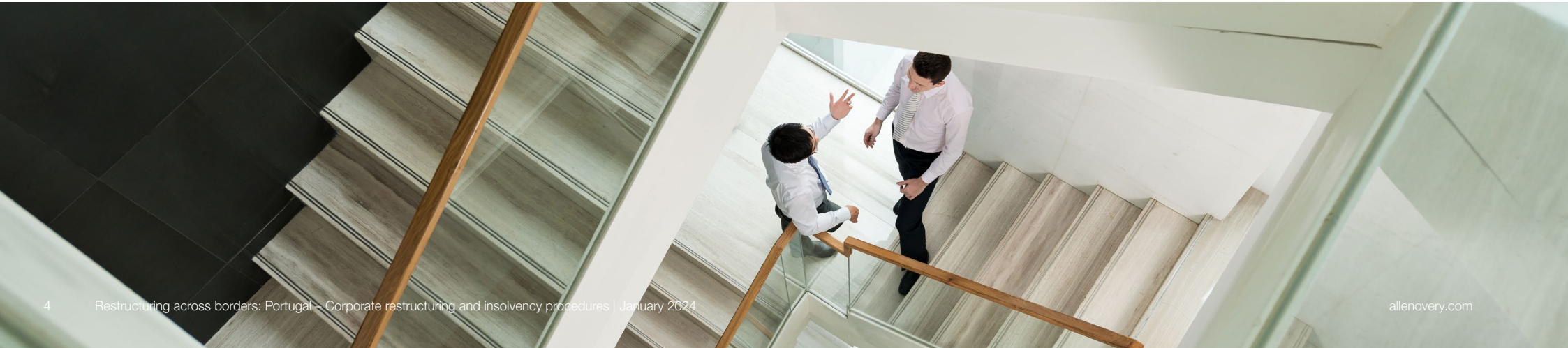
If the judge declares the debtor insolvent, the judge will appoint an insolvency administrator to manage the company and the insolvent estate. The appointment of an insolvency administrator divests the debtor's management of their management powers (unless the court accepts an application for the management to retain their powers, in which case, the management are not divested of their powers of management, but the insolvency administrator must approve specified actions). The judge will, in principle, schedule a first creditors' meeting at which the insolvency administrator's first report will be discussed and voted on. If the judge decides that a creditors' meeting would serve no purpose (for example, where the company has already ceased its activity and has no chance of rehabilitation) the judge may decide not to schedule a creditors' meeting[1] and instead proceed directly with the liquidation of the debtor's estate.

After being appointed, the insolvency administrator will conduct a preliminary analysis of the debtor's financial position and must prepare a report on the debtor's situation.[2] The report will contain proposals as to whether it is recommended that the debtor ceases or continues with its business activity, as well as stating whether it is the insolvency administrator's intention to prepare an insolvency plan (rather than liquidate the company in accordance with the statutory regime).

Upon the opening of insolvency proceedings a moratorium applies. This prevents any party enforcing its security or from commencing legal proceedings in relation to the assets which form part of the insolvent estate. The moratorium lasts for the duration of the insolvency proceedings.

The main purpose of the proceedings is the reimbursement of creditors, preferably through the debtor's recovery by way of an insolvency plan, or, if this is not possible, by the liquidation of the debtor's estate. Technically, once corporate insolvency proceedings are commenced, the company goes automatically into liquidation. However, while an insolvency plan is being prepared, the statutory liquidation of the company is suspended and will only recommence should it not be possible to agree an insolvency plan or the insolvency plan fails.

1 Note that according to the law, this meeting must be held within the first 45 to 60 days from the insolvency decision.
2 Note that the CIRE states that the report must be submitted in the insolvency proceedings eight days prior the date of the meeting.



Insolvency plan (plano de insolvência)

The settlement of creditors' claims, the liquidation of the insolvent estate and its distribution among the creditors, as well as the status of the debtor's liabilities after the closure of the insolvency proceedings, may be determined by an insolvency plan. The insolvency plan may provide for different solutions than provided for under the statutory liquidation regime. In addition, an insolvency plan may be used to reach a compromise with creditors so that the company can be rescued and continue in business.

An insolvency plan may be prepared by any party to the insolvency proceedings (the insolvency administrator, the company or a creditor or a group of creditors that represent at least one fifth of the total non-subordinated credits). While the insolvency plan is being prepared the liquidation of the company is suspended. The insolvency plan must include all existing creditors and specify the purpose of the plan and how it will be implemented. The insolvency plan must also contain a payment plan, which will include all claims submitted by creditors that have been approved by the insolvency administrator.

The insolvency plan must provide for creditors to be treated equally (unless differences are justified by objective circumstances or creditors agree to be treated differently) and the content of the insolvency plan may be freely proposed by the party preparing the plan. However, the insolvency plan may supersede most of the rules set out in the CIRE (all non-mandatory rules may be set aside by the insolvency plan).

The insolvency plan may govern:

– the payment of the creditors' claims;

– the sale of the debtor's assets and the distribution of the proceeds among the creditors; and/or

– the debtor's liability after the implementation of the insolvency plan.

In the absence of any provision to the contrary in the insolvency plan:

– rights secured by rights *in rem* or preferred claims are not affected by the insolvency plan;

– subordinated claims are totally written-off; and

– the performance in full of the insolvency plan releases the company from its remaining debts.

The insolvency plan may also affect the company's constitutional documents and increase or decrease the company's share capital. Provided it is likely that after the liquidation of the company's assets, no assets will be available to distribute among the company's shareholders, the insolvency plan may consider a reduction of the debtor's share capital to zero, followed by the increase of the company's share capital. This will result in the company's prior shareholders being excluded and being replaced by new shareholders.

Any agreement by which the administrator, the company or any third person grants any advantage to a creditor that is not set out in the insolvency plan is null and void.

The insolvency plan cannot affect rights *in rem* and preferred claims which are ancillary to claims held by the European Central Bank, by central banks of any EU Member State or by an entity that participates in a "system", as defined in paragraph (a) of article 2 of Directive 98/26/EC on settlement finality in payment and securities settlement systems.

The insolvency plan will be debated and approved at a creditors' meeting. In order for a creditors' meeting to be quorate, it must be attended in person or by proxy by creditors holding at least one-third by value of the total number of claims with voting rights. The insolvency plan is binding on all creditors once it has been approved in accordance with the majorities stated in the CIRE (votes in favour of the plan of creditors representing more than half of the issued votes (one euro of claim corresponds to one vote) and more than half of the issued votes must correspond to non-subordinated claims). Creditors whose rights are not affected by the plan and creditors with subordinated claims below a certain level do not have voting rights.

After the corporate insolvency proceedings are opened and until the proceedings are closed, any secured party may only enforce its rights against the insolvent debtor by filing a claim within the insolvency proceedings. Once an insolvency plan has been approved it will not be possible for any party to enforce its security (unless such enforcement is contemplated by the plan).

Liquidation

At the first creditors' meeting a decision must be made on whether the debtor's activities (including establishments forming part of the assets of the insolvent estate) should be continued or should be closed down. No specific quorum requirements apply to this meeting and a simple majority is required for the approval of the decisions.

If the creditors decide that the debtor should be closed down and that it is not appropriate to propose an insolvency plan to deal with the debtor's liquidation or the rescue of the debtor, then the company will be liquidated in accordance with the statutory regime in the CIRE. If an insolvency plan is proposed and then not approved, the liquidation procedure in the CIRE will also be followed. The aim of liquidation proceedings is for the liquidator to collect in and sell all the assets of the company in order for distributions to be made to the company's creditors.

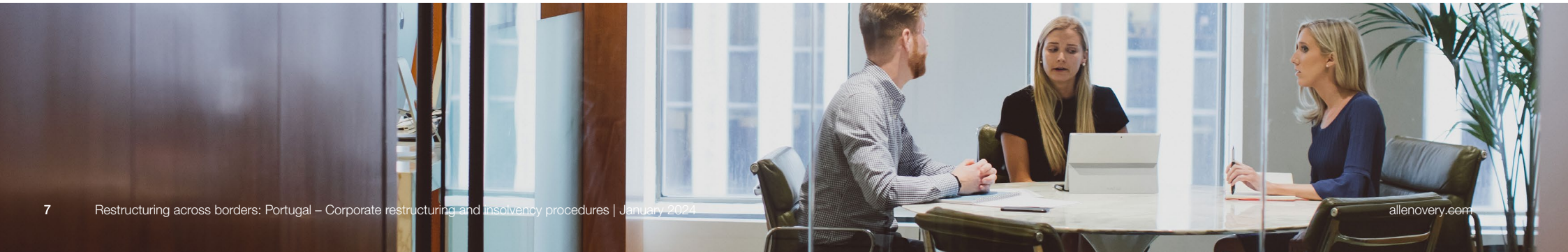
Special recovery proceeding (processo especial de revitalização – PER)

The special recovery proceeding is a judicial proceeding which aims to promote a rehabilitation of debtors facing financial difficulties (*processo especial de revitalização* or **PER**) and was introduced in the CIRE by Law no. 16/2012, dated 20 April 2012. The special recovery proceeding is a stand-alone procedure outside of the scope of corporate insolvency proceedings. The special recovery proceeding can be used by any company/legal entity that is economically viable but which finds itself in a difficult economic situation or in a situation of imminent insolvency (in essence it is available to a debtor which finds itself in a distressed financial situation but where its insolvency has not been declared by a court). A debtor that has already been declared insolvent cannot use the special recovery procedure. Special recovery proceedings are designed to provide a moratorium on enforcement proceedings while a recovery plan is prepared and agreed.

The special recovery proceeding commences with the joint declaration of the debtor and creditors who represent at least 10% of non-subordinated credits (addressed to the court that is competent to open insolvency proceedings in respect of the debtor) expressing the intention to start negotiations towards a recovery plan. Once the formal requirements for opening the proceedings are verified the court will automatically open the proceedings and other creditors may, at any time during the negotiations, declare that they intend to participate in the proceedings by informing the judicial administrator of their intention to participate in the negotiations. Not all creditors will necessarily take part in the negotiations. However, once the plan has been approved and confirmed by the court, it will bind all creditors. In practice the debtor will have canvassed significant creditors before applying to the court to commence the proceedings.

If special recovery proceedings are commenced, the judge will immediately appoint a judicial administrator who will supervise and control the management of the debtor's estate during the negotiations between the debtor and the creditors. The fees of the judicial administrator will be paid by the debtor. The debtor's directors remain in office and do not lose their powers of management. The court will decide which specific powers the judicial administrator will have on a case-by-case basis. However, in general, the judicial administrator will be entrusted with the duty of supervising and providing guidance on the negotiations concerning the recovery plan and making sure the debtor does not cause any delay to its rehabilitation or carry out acts which serve no purpose to its rehabilitation. The debtor (acting through its directors if it is a legal entity) and the judicial administrator will negotiate the recovery plan with creditors that decide to take part in the negotiations. Administration is barred from performing any acts of relevance without the written authorization of the judicial administrator.

The debtor's creditors must submit to the judicial administrator a formal, written claim referred to as a "proof of debt". The judicial administrator will then review the claims and a list of all accepted claims will be published on the website *Citius* (the Portuguese judiciary online platform which includes an online section for insolvency notifications).



Special recovery proceeding (processo especial de revitalização – PER) (cont.)

If the parties involved in the negotiations agree on the content of the recovery plan, the recovery plan is considered approved if: should the creditors be classified in different subcategories according to their claims at least two thirds of creditors in each category vote in favour. This being the case, the recovery plan is then considered approved if, (i) the affirmative vote of all categories formed is obtained; (ii) the affirmative vote of the majority of the categories formed is obtained, provided that at least one of these categories is of secured creditors; (iii) if there are no categories of secured creditors, the favourable vote of most of the groups formed is obtained, provided that at least one of the categories is of non-subordinated creditors; and (iv) if there is a tie, the favourable vote of at least one category of non-subordinated creditors is obtained.

In other cases, the recovery plan is considered approved if voted for by creditors whose claims represent at least one third by value of those creditors with voting rights provided that (i) the favourable vote of more than two thirds of the claims is obtained and (ii) the favourable vote of creditors whose claims represent at least 50% of the total non-subordinated claims with voting rights (as published on the website *Citius*) is obtained.

Finally, the plan is also considered approved if (i) the affirmative vote of more than 50% of the total claims with voting rights is obtained and (ii) of those voting in favour, more than half correspond to non-subordinated claims (in each case, abstentions not included in calculations). There is no creditors' meeting to vote on the recovery plan and so the votes of creditors are made in writing by post. The quorum is calculated according to the value of creditors' debts, which is calculated based on the list of claims published on the website *Citius*. Once approved by creditors, the plan must be validated by the court and, once approved by the court, it will bind all the creditors, even those that have not participated in the negotiations. The court will only validate the plan if the rules applying to an insolvency plan implemented through insolvency proceedings have been observed. Once the plan is approved by the court, the "special recovery proceeding end", the company will continue with its business, the recovery plan will be implemented and any discharge of debts will be governed by the recovery plan. While negotiations are taking place in relation to the agreement of a recovery plan, no enforcement proceedings for the payment of a debt can be commenced for a four-month period and pending actions with the same purpose will be suspended. If the recovery plan is approved and validated by the judge, those actions will be considered terminated, and the payment of claims existing prior to the proceedings will be made according to the plan.

The negotiation period lasts for a period of two months, which can be extended by a further month provided the judicial administrator and the debtor agree to the extension.

If the recovery plan is not approved by all creditors, or no agreement can be reached on the recovery plan before it is put to the creditors' vote, the special recovery proceedings will be closed.
If the debtor is not insolvent, the closing of the proceedings leads to the extinction of all effects of the special recovery proceedings. In such cases, the debtor may proceed with its activity but it will be prevented from using the special recovery proceedings for a two-year period from the date that the first special recovery proceedings were closed. If the judicial administrator considers that the debtor is in an insolvency situation, the debtor will be awarded a five-day period to dispute the judicial administrator's finding and avoid the opening of insolvency proceedings.

Insolvency set-off rules do not apply to special recovery proceedings. Set-off will be governed by the general law.

Security provided by the debtor to a creditor with the goal of enabling the debtor to continue in business in a state of solvency under the recovery plan may not be challenged even if, within a period of two years, the debtor is declared insolvent.

Funds provided to a debtor by a creditor in the special recovery proceedings (ie pursuant to the recovery plan) are ranked as prior ranking claims up to an amount corresponding to 25% of the debtor's non-subordinated liabilities on the date of the declaration of insolvency if the insolvency is declared within two years from the date the decision approving the recovery plan becomes final.

Funds provided above said amount are ranked as general preferential claims over the debtor's movable assets with prior ranking over the general preferential claim granted to employees. This preferential claim is also granted if the financings are provided by shareholders or other persons directly related to the debtor.

The relevant decisions and notices within this proceeding are published on the website *Citius*. This will include the decision to open and close special recovery proceedings and the list of creditors' claims.

Extrajudicial framework for business recovery (regime extrajudicial de recuperação de empresas – RERE)

The extrajudicial framework for business recovery (**RERE**) was introduced by Law no. 8/2018, of 2 March 2018 and repealed the out-of-court companies recovery system (*Sistema de recuperação de empresas por via extrajudicial – SIREVE*).

The RERE is a recovery mechanism that allows for debtors that are in a difficult economic situation or imminent insolvency a possibility to negotiate an agreement capable of recovering their situation with all or some of their creditors. Agreements executed under the RERE, which differs from the PER in that it is extrajudicial, voluntary, more flexible and generally confidential process, will have the same effects as agreements executed under the PER in relation to the creditors that have agreed to be involved in the RERE.

The debtor and one or more of its creditors, who represent(s) at least 15% of non-subordinated credits, may negotiate and provide for the registration with the Commercial Registry Office of a negotiations protocol. After the registration of the protocol:

– the debtors maintain their usual business but their administration is barred from performing any acts of relevance (save if provided for in the protocol or authorised by the creditors);

– key suppliers cannot suspend their supplies;

– the creditors executing the protocol cannot release themselves from their commitments therein;

– without prejudice to any other agreed effects, insolvency proceedings filed by any creditor(s) executing or later adhering to the protocol are immediately suspended; and

– in the event of supervening insolvency, the legal period to file the proceedings will only start to run after the negotiations are closed.

In case the negotiations are successful, the parties will execute a restructuring agreement, which, after being filed with the Commercial Registry Office, and if compliant with legal provisions, will have effects on the guarantees, on the business recovery, procedural effects and fiscal effects.

A restructuring agreement that covers at least 30% of the total non-subordinated liabilities of the debtor and that balances the company's economic situation by increasing the proportion of the assets over the liabilities, where the debtor's equity is greater than its share capital (which must be certified by a Chartered Accountant), entitles parties to the income tax, stamp duty and real estate sales tax benefits foreseen in the CIRE.

In case the restructuring agreement is subscribed by creditors representing the applicable legal majorities foreseen for PER, the debtor may request for the judicial homologation of the restructuring agreement.

European Insolvency Regulation

The EU Regulation on Insolvency Proceedings 2015 (Regulation (EU) 2015/848) (the **Recast Regulation**) applies to all proceedings opened on or after 26 June 2017. Its predecessor, the EC Regulation on Insolvency Proceedings 2000 (Regulation (EC) 1346/2000) (the **Original Regulation**) continues to apply to all proceedings opened before 26 June 2017. One of the key changes in the Recast Regulation is that it brings into scope certain pre-insolvency "rescue" proceedings and these are now listed alongside the traditional insolvency procedures in Annex A to the Recast Regulation. The Recast Regulation retains the split between main and secondary/territorial proceedings but secondary proceedings are no longer restricted to a separate list of winding-up proceedings – secondary proceedings can now be any of those listed in Annex A. By contrast, the Original Regulation listed main proceedings in Annex A and secondary proceedings (which were confined to terminal proceedings) in Annex B.

Of the above restructuring and insolvency regimes, corporate insolvency proceedings (*processo de insolvência*) were available as a main proceeding under the Original Regulation.

Corporate insolvency proceedings (*processo de insolvência secundário*) were also available as secondary proceedings under the Original Regulation.

Under the Recast Regulation, both corporate insolvency proceedings (*processo de insolvência*) and special recovery proceedings (*processo especial de revitalização*) are listed in Annex A.

Key contacts

If you require advice on any of the matters raised in this document, please contact any of our partners or your usual contact at Allen & Overy, or email **rab@allenovery.com.**

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Further information

Developed by Allen & Overy's market-leading Restructuring group, "**Restructuring Across Borders**" is an easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe, Asia, the Middle East and the U.S.

To access this resource, please **click here**.

Schedule

Last Friday, October 16, 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 Revitalisation 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, this new procedure as well as the amendments to the other listed proceedings, will enter into force on the day following its publication and will remain in force until 30 July 2023.

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 31 December 2019, its assets were higher than its liabilities, that it fulfils the necessary conditions for its recovery and that no PER[4] or special payment agreement procedure is pending.

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.

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.

4 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.

Schedule (cont.)

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 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.

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