

# Update

## Restructuring and Insolvency

📌 COVID-19

### The Extraordinary Procedure for Company Viability

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Given the current pandemic context, the Council of Ministers approved [Resolution no. 41/2020](#), which, among other measures, established the goal of creating a new extraordinary procedure for company viability (*processo extraordinário de viabilização de empresas*, in short “**PEVE**”).

On 27 November 2020, [Law no. 75/2020](#) was published, establishing PEVE, an ad hoc procedure of an urgent nature, aimed at companies that have provenly found themselves to be in a difficult economic situation or in an imminent or current state of insolvency **as a result of the COVID-19 pandemic**, but that are still susceptible of viability.

The primary aim of the new institute is the judicial approval of a viability agreement reached out of court between the company and its creditors.

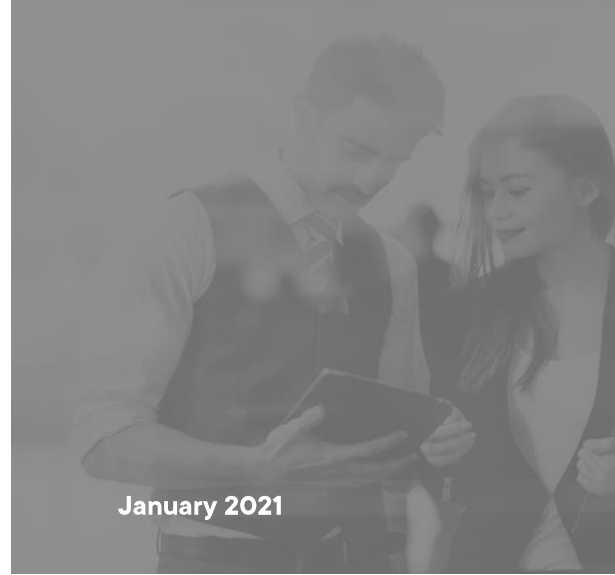
Concerning this procedure, the main aspects are as follows:

#### **1. Conditions for access to the PEVE**

- Susceptibility of viability of the company;
- Superiority of company assets over liabilities as of December 31st of 2019, which demonstrates the causal link between the pandemic and the company’s situation;
- No special procedure for company recovery (PER) or special procedure for payment agreement (PEAP) pending at the date of application for the PEVE.

Regarding the superiority of company assets over liabilities, the law accepts the following **exceptions**:

- **Any micro or small company may resort to PEVE if:**
  - There is no pending insolvency procedure, special procedure for company recovery, or special procedure for payment agreement at the date of application;
  - Having received an emergency aid within the temporary framework for state aid measures supporting the economy in the current context of the COVID-19 pandemic, it has not been reimbursed according to the legal terms; **or**
  - Covered by a restructuring plan within the framework of state aid measures;



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- The procedure may also be resorted to by companies that, despite not having superiority of assets over liabilities as of December 31st 2019, have managed to regularise their situation through the Extrajudicial Regime for Company Recovery (RERE), within 18 months of the entry into force of the law establishing RERE, in the case of debtors who are in an insolvency situation.

## **2. Required Documentation**

The PEVE is initiated by the lodging of an application by the company, with the competent court to declare insolvency, accompanied by the following elements:

- Written declaration signed by the company's board of directors, that proves that the situation in which the company finds itself is a result of the COVID-19 pandemic and that the company meets the necessary conditions for viability;
- Copy of the documents that must also instruct an insolvency proceeding or a PER, namely a document explaining the activity or activities the company has engaged in in the last three years and the establishments it owns, as well as what the company understands to be the causes of the situation it is in;
- List, in alphabetical order, of all creditors, including conditional ones, indicating their respective domiciles, the amount of their claims and its due dates, nature and guarantees from which they benefit, and possible existence of special relations. The list must be signed and dated, with no more than 30 days, by the company's board of directors and by a certified accountant or statutory auditor, whenever an audit is legally required;
- Viability agreement, signed by the company and creditors that represent, at least, the following voting majorities:
  - Approval by creditors whose claims represent at least one third of the total credits relating to voting rights, obtaining the favourable vote of more than two thirds of the votes casted if more than half of the votes casted corresponds to non-subordinated credits, not considering abstentions as such;
  - Favourable vote of creditors whose claims represent more than half of the total credits relating to voting rights, if more than half of the votes corresponds to non-subordinated credits, not considering abstentions as such;

## **3. Proceedings**

This is followed by the judicial appointment, by order, of the provisional judicial administrator.

This appointment sets the dies a quo of the 15-day period for creditors to **challenge the list of creditors**. Thus, there is no claim stage within PEVE, which differentiates it from the insolvency procedure and from PER.

Additionally, creditors may **request the non-approval of the viability agreement** on the grounds of, namely, non-negligible violation of the law and of unjustified sacrifice or benefit to any person as a result of the plan.

Within this 15-day period, the **provisional judicial administrator must issue an opinion concerning the presented viability agreement.**

In this stage, two scenarios ought to be differentiated:

- **If the creditors list has not been challenged**, it immediately becomes definitive and, within ten days, the judge must analyse the agreement and decide whether to approve it.
- **If the creditors list has been challenged**, the judge has ten days to rule on the challenges, as well as to analyse the agreement and decide whether to approve it.

The **approval decision is binding for the company, the subscribing creditors of the agreement and the creditors on the creditors list**, even if they did not take part on the extrajudicial negotiations, with respect to the credits constituted up to the date of the decision of appointment of the provisional judicial administrator.

The decision of non-approval determines the closure of the viability procedure and the extinction of all its effects. However, the reverse cannot be stated, since the approval does not extinguish the procedure, as an adherence phase may still arise.

In this stage, **any creditor that does not appear in the definitive creditors list** is given 30 days, starting from the publication in the Digital Services of Courts Area (reachable through the link <https://tribunais.org.pt>) of the approval of the viability agreement, to, by simple declaration, **manifest in the procedure their intention to adhere to the approved agreement.**

This phase is based on a successor to the claims stage. The company will have to accept the adherence for it to take effect.

## **4. Effects**

### **4.1. Procedural:**

- *The order appointing the provisional judicial administrator **prevents the initiation** of any procedures for collection of debts against the company and, until the decision of approval or non-approval becomes final, **suspends**, regarding the company, the procedures underway with similar purpose;*
- The insolvency procedures where the insolvency of the company was previously requested **are suspended** at the date of publication of the above-mentioned order, as long as no declaratory decision of insolvency was issued, and are **extinct** as soon as the viability agreement is approved.

### **4.2. Substantive:**

- The order appointing the provisional judicial administrator determines the **suspension of prescription and limitation periods** enforceable by the company until the judgment on approval or non-approval has been delivered;

- The same order prevents the company from practicing any acts of special relevance, defined as such by law, without being previously authorised to such ends by the provisional judicial administrator;
- From the date of the mentioned order until the judgment on approval or non-approval has been delivered, the suspension of the provision of certain essential public services (such as water, electricity, gas, communications) is prohibited.

#### **4.3. Lastly, some relevant aspects are also highlighted, in particular regarding:**

##### **Warranties**

- The guarantees agreed between the company and its creditors within the extraordinary viability procedure, aiming to provide the company with the necessary financial resources to carry out its activity, will be maintained even if, at the end of the procedure, the insolvency is declared within two years.
- The creditors, partners, shareholders or any other persons especially related to the debtor who finance the company's activity, by making capital available for its viability, are granted prior ranking over employees.

##### **Clawback to the benefit of the insolvent estate**

- If the company is subsequently declared insolvent, the legal transactions which have entailed the effective availability to the company of new pecuniary claims (even if under the form of deferment of payment) and the provision by the company of guarantees in respect of such claims, may not be subject to clawback to the benefit of the insolvent estate, provided those transactions have been expressly provided for in the viability agreement.

##### **Tax and Social Security credits:**

- To the Tax Authority and Social Security credits the rules concerning instalment payments are applicable.
- Tax and Social Security credits are unavailable and there may only be interest rate reductions within the framework of an approved agreement leading to the financial consolidation of the company and only in certain cases (certain reduction percentages are admissible according to a certain instalment plan, but cannot be combined with other reductions provided for in different instruments).

##### **Tax benefits:**

- The subscribing parties to the viability agreement enjoy certain tax benefits, namely exemption of certain types of income and gains from the personal income tax (IRS) and from the corporate income tax (IRC), as well as exemption of certain transfers of immovable property from the Municipal Real Estate Transfer Tax (IMT).

The PEVE regime entered into force on the 28th of November 2020 and will be applicable until the 31st of December 2021, with the possibility of extension.