

# Portugal: The urgency of a company's recovery after the COVID-19 crisis



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**The COVID-19 pandemic and the economic slump have a particularly severe impact on hundreds of Portuguese companies that are subject to recovery and insolvency plans.**

Therefore, a legislative response that is both sensitive to the current context, and at the same time simple and quick to implement, is urgently needed.

In a first phase (coinciding with the decree on the State of Emergency and with the decision on the compulsory confinement of citizens), although there was no “winter sleep” mechanism implemented for micro and small enterprises (allowing them to disappear during this period and to return later, at a time when the market is operating under normal or more favourable conditions), the Portuguese government implemented protectionist measures to address the cash flow difficulties of companies, with the aim of avoiding their immediate insolvency.

With special attention placed on the recovery of companies, the following measures were taken:

- (a) the suspension of the directors' duty to file for insolvency within a certain deadline (30 days after taking notice of the insolvency situation);
- (b) a moratorium (until 30 September 2020) for the payment of debts (principal and interest) of micro, small and medium enterprises with the financial system institutions (mainly banks), through Decree Law no. 10-J/2020 of 26 March 2020.

Although these are worthy measures, they are not enough for companies to cope with the COVID-19-related economic and financial crisis.

As such, in a second phase, (coinciding with the decree on the State of Emergency and with the decision on the compulsory

confinement of citizens), we consider the following groups of measures to be necessary:

- (i) To promote restructuring depending on the companies' insolvency situation;
- (ii) To facilitate self-financing at the expense of hetero-financing;
- (iii) To ease insolvency and pre-insolvency procedures (Special Process of Revitalisation [PER] and Extrajudicial Recovery Procedure [RERE]); and
- (iv) To strengthen the logistics of commercial courts.

Regarding the first group of measures, it should be noted that the aforementioned suspension of the director' duty to file for insolvency within a certain deadline should be applied in broader terms. As to the scope of application, it should not concern only the trustees, but also the creditors, on the basis of the assumption that the insolvency is a consequence of the pandemic. The deadline should also be extended till the end of 2020).

As for the second group, we stress that the measures taken to make bank financing more flexible (such as the reduction of interest rates and the increase of grace periods), are not sufficient; instead it is necessary to encourage financing by shareholders for the rescue of their own companies. As such, we suggest that shareholders' loans should be considered as general security preferential rights (rather than subordinated claims), being paid after secured creditors and before ordinary and subordinated creditors, and not subject to clawback, provided they are made with the sole purpose of preventing the company's insolvency in the context of the COVID-19-related crisis.

Concerning the third group, it is pertinent to create a legal solution that allows companies to

request, within the Revitalisation Plans and insolvency proceedings themselves, the adjustment of the approved/in execution plans, in the light of the “abnormal modification of the circumstances in which the parties founded the decision to contract”, thereby taking advantage of all the procedures that have already been developed (e.g. ruling on the verification and ranking of claims, information regarding the plan's approval). This would avoid many disputes between debtors and creditors regarding non-compliance with obligations and the (im)possibility of modifying such plans.<sup>1</sup>

Lastly, regarding the logistics of the courts, the pandemic should be the basis for the definitive implementation of digital tools (Webex, Zoom) which allow for reconciling the complexity of major insolvency proceedings with the urgent nature of the procedure and the preparation of all the involved parties, thus avoiding the excessive delays in resolving this type of proceedings/negotiations.

These normative suggestions seek to ensure liquidity for companies in order to gain time with a view to understanding the economy emerging from the post-COVID-19 economic and financial crisis. This is a different economy, the “*new normal economy*”, in which the conservative and sanitary measures imposed in the behaviour of citizens competes with the companies' policies to encourage consumption. ■

#### Footnote:

- 1 Following the presentation of the Economic and Social Stabilization Program (presented on 9 June 2020), the Government foresaw the creation of a new extraordinary process for the viability of companies (PEVE), of exceptional and temporary character, which can be used by any company in a difficult economic situation or insolvent due to the economic crisis caused by the COVID-19 pandemic, as long as the company demonstrates that it is still susceptible to viability.



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