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RESTRUCTURING REVIEW 2023

As well as daily news, Global Restructuring Review curates a series of comprehensive regional reviews. This volume, the *Europe, Middle East and Africa Restructuring Review 2023*, contains insight and thought leadership from 15 pre-eminent practitioners. Inside you will find chapters on England and Wales, France, Greece, and Switzerland, lucidly explaining changes in key legislation and related practice, and an overview on what to expect more broadly in terms of distressed opportunities in 2023.

Edited by Céline Domenget-Morin

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Preface

Welcome to the *Europe, Middle East and Africa Restructuring Review 2023* – a Global Restructuring Review special report.

Global Restructuring Review is the online home for all those who specialise in cross-border restructuring and insolvency, telling them all they need to know about everything that matters.

Throughout the year, the GRR editorial team delivers daily news, surveys and features; organises the liveliest events ('GRR Lives'); and provides our readers with innovative tools and know-how products. In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that delve deeper into developments than the exigencies of journalism allow.

The *Europe, Middle East and Africa Restructuring Review 2023*, which you are reading, is part of that series. It contains insight and thought leadership from 15 pre-eminent practitioners from those regions.

This edition comprises six exceptionally well-written contributions and provides an invaluable retrospective and primer on restructuring options in different markets, with a little crystal ball gazing thrown in. All contributors are vetted for their standing and knowledge before being invited to take part. Contributions are supported by footnotes and relevant statistics.

This edition covers England and Wales, France, Greece and Switzerland, and has an overview on what to expect in terms of distressed opportunities in 2023.

A close read of these reviews always yields many nuggets. For this reader, on this occasion, they included the following:

- 10 EU states are officially in default for failing to enact the EU's restructuring directive (EU 2019/1023) properly. The list includes Poland and the Netherlands.
- Germany's new StaRUG procedure has yet to be tested, but that's almost certainly about to change.
- A lucid explanation of how the UK's new restructuring plan can differ from Chapter 11 when it comes to priority of claims.
- Greece has opted to retain a version of the Dendias law - which allows creditors to request an enforced sale - in its new insolvency law. And
- France's new accelerated safeguard proceedings tool has already been used four times.

We are indebted to our wonderful contributors, including the review's editor, GRR editorial board member Céline Domenget Morin, for their efforts. If you have any suggestions for future editions or want to take part – the review is put out annually – my colleagues and I would love to hear from you.

Please write to insight@globalrestructuringreview.com.

David Samuels

Publisher, Global Restructuring Review
February 2023

Greek insolvency law: significant reform

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In summary

This article provides an overview of the latest noteworthy developments in the restructuring and insolvency legal regime in Greece emerging from the newly enacted Law 4738/2020. Considering that this law was basically in force as of the second half of 2021, exiguous jurisprudence is available so far. Thus, this article aims to highlight the most significant reforms introduced by the new legislation and pinpoint the issues that are expected to have an impact on the legal and business landscape in Greece.

Discussion points

- Main features of the new insolvency regime
- New out-of-court workout
- Tackling shareholders' hold-out
- The role of the expert
- Bankruptcy reform and small-scale bankruptcies
- Going-concern sale

Referenced in this article

- Law 4738/2020 – new Insolvency Code
- Directive (EU) 2019/1023 – EU Restructuring Directive
- Greek Electronic Solvency Registry statistics
- Enhanced Surveillance Report – Greece, European Commission
- Ministerial decision of March 2021 on the expert's report and procedures
- Law 4307/2014 – Dendias Law

New Insolvency Code

The new Insolvency Law, Law 4738/2020 as amended (the Insolvency Code or the Code),[1] came into effect on 1 June 2021, though a part of it had already come into force on 1 March 2021. The Insolvency Code abolished the former Law 3588/2007 (the Bankruptcy Code) and integrated into the Greek legal system Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency, and discharge of debt (the EU Restructuring Directive).

Admittedly, the title of the Insolvency Code – 'Debt settlement and giving a second chance and other provisions' – is not entirely congruous with its contents considering that a major part of the Code concerns bankruptcy proceedings, while a much smaller part deals with debt settlement and 'giving a second chance' provisions.[2]

The objective of this new legislation is to fundamentally reform the framework of tackling debtors' financial inability, creditors' collective payment and the debt discharge of any person, natural or legal, who is engaged in an economic activity, regardless of whether this activity is business-related or not.

In Greece, total private debt in 2019 stood at €234 billion, according to official data from the Bank of Greece, the tax authorities and social security institutions. This debt derives from the 10-year financial crisis and includes €91.7 billion (39.3 per cent) in non-performing loans (NPLs) belonging to banks and servicers, €105.6 billion (45.2 per cent) towards the tax authorities and €36.3 billion (15.5 per cent) towards the social security institutions. Businesses take up about two-thirds of the total debt, while the other third belongs to households. The financial crisis in Greece was aggravated by the covid-19 pandemic, which has resulted in an increase in private debt, with adverse economic and social impacts. After the pandemic, private debt is expected to rise at a global level. In Greece, NPLs are expected to rise by up to 10 per cent, according to Bank of Greece estimates.[3]

The Insolvency Code comprises five main sections. The first concerns the out-of-court workout; the second refers to pre-insolvency proceedings; the third concerns bankruptcy; the fourth concerns vulnerable distressed debtors; and the fifth regulates general issues (eg, procedural provisions, publication, penalties). Of these, this article highlights the most important matters for the reader.

1 Government Gazette 207 A'/27 October 2020.
2 Evanghelos Emm Perakis, *Insolvency Law*, 4th ed, The new Law 4738/2020 on insolvency as amended by Law 4818/2021, 2021, pages 25–26.
3 https://www.ekathimerini.com/economy/1163276/debt-restructuring-only-for-viable-firms/.

As the Insolvency Code has been in force since June 2021, insufficient jurisprudence is available so far. Nevertheless, the following statistics, obtained from the Greek Electronic Solvency Registry, show how many times the basic tools of the new Code were used from 31 March 2021 until 31 December 2022:

- applications for ratification of rehabilitation agreement: 72;
- judgments on ratification of rehabilitation agreement: 26;
- applications for precautionary measures prior to the filing of applications for ratification of rehabilitation agreement: 100;
- bankruptcy petitions: 1,301; and
- declaration of bankruptcy judgments: 504.

New out-of-court workout

A new out-of-court workout (OCW) has been incorporated into the Insolvency Code, replacing the previous one regulated by Law 4469/2017, which expired on 30 April 2020. This new version modified the rationale and the function of the pre-existing out-of-court debt settlement mechanism, whose track record was poor. According to data provided by the Greek Special Secretariat for Private Debt Management for the course of 2022,[4] 45,800 applications have been submitted, while 6,400 applications have reached a settlement. The total requests are for a total amount of €25.3 billion, of which €19.5 billion is in the initial stage, €3.7 billion is in final submission and negotiation stage, while €2.1 billion is settled. For the first quarter of 2023, it is estimated that settlements of €1.8 billion are to be concluded.

The scope of the new OCW is to provide participating creditors with a functional environment to formulate proposals for the settlement of a debtor's debts through a haircut or debt restructuring (thereby avoiding the risk of insolvency), either following the debtor's request or on the creditors' initiative. The significant novelties of the new OCW scheme are as follows:

- it is a wholly out-of-court mechanism, unlike the former mechanism, by virtue of which the restructuring agreement should be ratified by the competent court to be enforced against all creditors;
- debts exclusively owed to financial institutions, the state and social security funds can be subject to the new OCW;
- the new OCW does not have an expiration date;
- the appointment of a coordinator is optional;
- the terms of the restructuring agreement may be determined by an algorithm whose practical matters are specified by a joint ministerial decision; and
- any breach of the restructuring agreement does not entail its termination but the loss of the settlement towards the bound creditor.

4 http://www.keyd.gov.gr/wp-content/uploads/2023/01/OCW-Presentation_Dec22_GR.pdf

The main benefits of the new OCW for the debtors are summarised below:

- long-term settlements (term up to 35 years);
- no-cost application - free of court fees;
- up to 240 instalments' debt settlements to the state and Social Security Institutions, and up to 420 instalments' settlements to the banks and loan servicers;
- significant 'haircuts'; write-off to the state of up to 75 per cent of the principal debt plus up to 95 per cent of the surcharges, to banks and loan services of up to 80 per cent of the principal debt plus up to 100 per cent of the interest;
- out-of-court settlement of loans guaranteed by the Greek state;
- suspension of all enforcement measures (including auction procedures);
- grant to vulnerable debtors of a five-year monthly state subsidy for the loan instalment, depending on the members of the household; and
- enabling Swiss franc borrowers to obtain – upon request– a debt adjustment.

In practice, the average term of the settlements for debts to the state is 18 years and 15 years for debts to banks, while 33 per cent of the debts were settled with a term of more than 20 years. The average write-off rate for debts to the state is 20.4 per cent and 30.8 per cent for debts to banks, while 39 per cent (ie, €320 million) of the settlements have reached a write-off rate of more than 30 per cent.

Reform of pre-insolvency proceedings

Enhancement of creditors' involvement

First, it is worth noting that the Insolvency Code introduced changes for the requisite majority of creditors, which needs to consent to the conclusion of a rehabilitation agreement to ensure the consent of each class of creditors. In accordance with the former law, a rehabilitation agreement needed to be concluded by the debtor and creditors representing 60 per cent of total claims against the debtor, including 40 per cent of secured claims; however, pursuant to the Code (article 34, paragraph 1), for a rehabilitation agreement to be ratified, consent should be provided by the debtor as well as by the creditors representing, on the one hand, more than 50 per cent of the claims of special privilege and, on the other, more than 50 per cent of the rest of the claims of those affected by the rehabilitation agreement. The result is that two new classes have been formed: creditors of special privilege and all other creditors (eg, the state, the social security funds, employees, unsecured creditors). The objective of this division, as set out in Recital 44 of the EU Restructuring Directive, is:

> *To ensure that rights which are substantially similar are treated equitably and that restructuring plans can be adopted without unfairly prejudicing the rights of affected parties, affected parties should be treated in separate classes which correspond to*

> *the class formation criteria under national law. 'Class formation' means the grouping of affected parties for the purposes of adopting a plan in such a way as to reflect their rights and the seniority of their claims and interests. As a minimum, secured and unsecured creditors should always be treated in separate classes.*

This minimum requirement seems to have been adopted by the Greek law, as described above.

Cross-class cramdown mechanism

A cross-class cramdown mechanism has been introduced to address any collective action problems. Specifically, if the aforementioned requisite majority of creditors cannot be reached, the rehabilitation agreement can be confirmed by means of a cross-class cramdown. In other words, when a rehabilitation agreement has not been approved by more than 50 per cent of claims of special privilege, as well as more than 50 per cent of the rest of the claims, it may be ratified by the court and bind the dissenting class, provided that (as per article 54, paragraph 2 of the Code):

- it has been approved by creditors representing more than 60 per cent of total claims against the debtor and more than 50 per cent of claims of special privilege;
- no dissenting creditor is worse off;
- no class of affected parties receives a higher value by virtue of the rehabilitation agreement than its total claim towards the debtor; and
- with respect to microenterprises under Law 4308/2014, the agreement has been proposed by the debtor or has obtained the debtor's consent.

While the Greek legislature enhanced creditors' involvement in pre-insolvency proceedings, at the same time – having been influenced by the EU Restructuring Directive – it attempted to eliminate the risk of class hold-outs.[5] This mechanism was inspired by the cross-class cramdown mechanism that is available in respect of reorganisation plans under Chapter 11 of the US Bankruptcy Code. Under US bankruptcy law, a non-consensual plan (ie, a plan that has not been accepted by all classes) can only be confirmed if, in addition to the general requirements for confirmation of reorganisation plans, certain additional requirements are met.[6]

The intention described in the previous paragraph was clearly reflected in the Insolvency Code, prior to its amendment in July 2021, where it was initially stipulated that a rehabilitation agreement concluded only by creditors representing more than 50 per cent of the claims of special privilege as well

5 Veder in Paulus/Dammann, *European Preventive Restructuring*, article 11, paragraph 4, page 178.
6 ibid., paragraph 5, page 178.

as more than 50 per cent of the rest of claims, could be ratified if one of the following conditions were met:

- the debtor was in suspension of payments at the time of the conclusion of the rehabilitation agreement;
- the debtor's equity was lower than one-tenth of the share capital and no measures have been taken;
- the debtor had not submitted their financial statements for two consecutive financial years; or
- in the case of a limited liability company, the debtor's equity was less than half of the share capital.

However, pursuant to the amendment of July 2021, the above-mentioned clause (article 34, paragraph 2 of the Code) was modified – hence a rehabilitation agreement concluded only by the aforementioned majority of creditors can be ratified exclusively on the condition that the debtor is under suspension of payments at the time of the conclusion of the agreement. It seems that the previous inadequate requirements, which enabled creditors to set aside the debtor owing to reversible facts (eg, if two consecutive years of financial statements were not submitted), were promptly redressed by the Greek legislature. However, the practical application of this has not been tested yet.

Tackling shareholders' hold-out

While shareholders' or other equity holders' legitimate interests should be protected, it should also be ensured that they cannot unreasonably prevent and create obstacles to the adoption and confirmation of a rehabilitation agreement that would make the debtor viable.[7] In this respect, by derogation from the abolished Bankruptcy Code, under which it was provided that the rehabilitation agreement should be approved by the shareholders' meeting of the debtor, either following the submission of the application for the ratification of the rehabilitation agreement or as a condition precedent for the execution of the rehabilitation agreement, the new Insolvency Code demands that the rehabilitation agreement be approved by the management body of the debtor (if the debtor is a legal entity), unless the approval of the shareholders' meeting is explicitly required under any corporate law.

In light of the foregoing, if the debtor is a legal entity and the expert appointed by the debtor or the creditors determines that the residual claim of the shareholders towards the company is not affected by the implementation of the rehabilitation agreement, in particular with regard to the transfer of company's

7 EU Restructuring Directive, Preamble 57.

property or business, the adoption and the implementation of the agreement does not require consent of the shareholders' meeting, even by way of derogation from any contrary provision of the debtor's articles of association. Furthermore, no shareholders' meeting resolution is required, even regarding actions that, according to the corporate legislation require such resolution, and in cases that, pursuant to article 34 of the Code, no debtor's consent is needed (ie, when a rehabilitation agreement is concluded only by the creditors without debtor's involvement).

In practice, the management board's approval may enhance the flexibility and simplify the process; however, it may also give rise to conflicts between the management board and the (minority) shareholders, with the latter arguing that a rehabilitation agreement exceeds the limits of the ordinary management agenda. Additionally, it has been alleged that putting shareholders aside in relation to such a critical company matter could be deemed as non-compliance with the legal provisions of the Greek Constitution, particularly due to breach of the right of shareholding ownership.[8]

Finally, the option to appoint a special agent with the power to convene a shareholders' meeting and exercise the right of the shareholders of the debtor, who do not cooperate, to attend and vote, remains an applicable solution under the new Insolvency Code.

Presumed consent of the state and other public bodies

One of the most noticeable reforms introduced to the Greek pre-insolvency landscape is the presumed consent of the state, public entities, public services and enterprises, and social security funds (together, public bodies) to the conclusion of a rehabilitation agreement, even if they do not sign it.

It was quite often the case that public bodies were reluctant to enter into a rehabilitation agreement and participate in the relevant proceedings regardless of whether their position would be deteriorated or not. In view of that, the Code adopted the said presumption. In this respect, according to article 37, paragraph 2 of the Code, public bodies shall be deemed to consent to a rehabilitation agreement in any case where the following conditions are cumulatively met:

- the main debt of the debtor towards the applicable public body at the time of signing the rehabilitation agreement does not exceed €15 million;
- according to the expert's report, the public body should not, due to the implementation of the rehabilitation agreement, be worse off in comparison with the position it would be in the case of bankruptcy; and

8 Evanghelos Emm Perakis, *Insolvency Law*, 4th ed, The new Law 4738/2020 on insolvency as amended by Law 4818/2021, 2021, pages 101–102.

- according to the expert's report, the certified claims of all the public bodies at the time of signing the rehabilitation agreement amount to less than the total sum of claims of the private creditors.

In view of the above, the Greek legislature ensured that, provided the above-mentioned conditions are cumulatively met, the officers of the public bodies shall bear no civil, criminal or disciplinary liability for signing the rehabilitation agreement or voting in favour of it by electronic voting or for their presumed consent.

Limitations on the overall duration of the stay of precautionary measures

According to the Insolvency Code (article 52, paragraph 1), the total duration of the stay of precautionary measures granted upon filing of the application for the ratification of the rehabilitation agreement, including all extensions and renewals, must not exceed 12 months. It seems that the rationale behind this provision, which was adopted by the EU Restructuring Directive, is that it should be ensured somehow that the debtor shall not abuse the granted stay. In reality, even halfway through the 12-month period, most restructuring exercises usually succeed or fail – the half-year mark being roughly the maximum period of uncertainty regarding the debtor's fate that financiers and trading partners are able to withstand.[9]

Moreover, regarding the stay of precautionary measures applying prior to filing the application for the ratification of the rehabilitation agreement, certain restrictions have been legislated by the Code (article 53, paragraph 2). In particular, it is provided that an extension of the stay or a new stay of individual enforcement actions may be granted, subject to a duly justified occasion, such as: (1) when progress in negotiations has been made; (2) the continuation of the stay does not unjustly affect the rights of any affected party and no bankruptcy petition against the debtor has been heard; and (3) the total duration, including all extensions and renewals, does not exceed six months.

Expert's role

One of the most important people in pre-insolvency proceedings is the expert appointed by the debtor or the creditors, depending on the case, who is delegated to draft the report accompanying the application for the ratification of the rehabilitation agreement. The expert shall carry out their duties conscientiously,

9 Richter in Paulus/Dammann, *European Preventive Restructuring*, article 6, paragraph 47, page 119.

objectively and impartially. Also, the expert shall be liable to the creditors and the debtor for fraud and gross negligence.

As the role and duties of the expert are not included exhaustively in the Insolvency Code, a ministerial decision was issued in March 2021[10] specifying the minimum content of the expert's report and defining the procedures to be followed. Some of the most noteworthy points of this decision are outlined below.

First, the expert shall take into account the following three assumptions when drawing up the liquidation scenario of the debtor's assets in the event of bankruptcy: (1) a maximum five-year period is required for the liquidation of certain assets under bankruptcy; (2) the enterprise value must be determined in terms of net present value; and (3) the costs required to complete the distribution of the liquidation proceeds to the creditors may not exceed 5 per cent of the liquidation proceeds.

Furthermore, the expert's report shall include a scenario of a forced liquidation of the debtor's assets in the event of bankruptcy, based on debtor's provisional financial statements with a reference date up to three months prior to the date of submission of the application for ratification of the rehabilitation agreement to the court, which shall be reviewed by the expert. Additionally, the report shall include a list of the debtor's assets determining their market value and their value if they were to be forcibly liquidated. The assessment of the market value and the value of the forcible liquidation value of the debtor's assets shall be carried out in accordance with specific valuation standards depending on the type of the asset. To determine the liquidation value of real estate, the market value of real estate is used as the basis of assessment in accordance with European Valuation Standards (eg, EVS 8th Edition 2016), while specific valuation methods are applicable depending on the type of the real estate, such as the method of discounting cash flows, and the method of comparative data.

The expert's report must also contain the expert's opinion regarding, inter alia, full compliance with European debt settlement legislation, the European Banking Authority Guidelines and the relevant national debt settlement legislation.

One final point to note about the ministerial decision concerns related party transactions.[11] The expert must pass judgement on the impact of any related party transactions on the debtor's financial statements (if any) or on the debtor's economic situation. For this purpose, the expert is entitled to request any necessary information from the debtor (eg, accounting books, balances, information on transfer pricing, financial statements of the related parties).

10 Decision of the Minister of Finance under No. 26400 EX 2021 – Government Gazette 865/B/5-3-2021.
11 Kristin Van Zwieten, Related Party Transactions in Insolvency, *The Law and Finance of Related Party Transactions*, Cambridge University Press, 2019, page 260 et seq.

Bankruptcy reform

Modification of bankruptcy scope

One of the main novelties of the new Code is the adjustment of the bankruptcy scope. Pursuant to the former bankruptcy legislation, the fundamental scope of bankruptcy was creditors' payment through the debtor's rescue; however, according to the new law, the bankruptcy scope focuses on the creditors' payment by means of rapid realisation of the debtor's property and a swift restoration of productive means to potentially productive uses.

According to the former Bankruptcy Code (articles 107 to 131), either the debtor or the creditors were entitled to file a reorganisation plan along with a bankruptcy petition. That tool (the reorganisation plan) was primarily used to rescue, maintain and rehabilitate the debtor's business during the bankruptcy proceedings. Nevertheless, due to a lack of practical application, the Insolvency Code repealed the reorganisation plan and concentrated on the creditors' payment either through a going concern or a piecemeal sale, as further described below.

Bankruptcy of non-merchant persons

The right of non-merchant persons, natural or legal, to apply to be declared bankrupt is undoubtedly a major step forward made by the Code. Under the new provisions, the trading capacity of a person is not included in the subjective conditions of article 76 of the Code. It is the first time in Greek history that a unified framework under the same legislation has been adopted for the debt settlement of consumers (ie, non-merchant individuals) and enterprises. However, from a practical point of view, this unified legal framework raises the question of how successfully insolvency will be handled for all these persons under the same provisions.[12]

According to the pre-existing legislation, non-merchant individuals were subject to the provisions of Law 3869/2010, known as the Katseli Law. The force of the said law has expired, except for any cases that were pending when the Insolvency Code entered into force. Those cases will continue to be governed by the provisions of the Katseli Law.

The law on the General Electronic Commercial Registry (Law 4635/2019, in force) is similar, in that it legislates that any natural person with an economic activity is obliged to be registered with the General Electronic Commercial

12 G Michalopoulos, *The New Bankruptcy Law*, 2021, page 15; Katsas, The new bankruptcy code as a reformative challenge and chance, *Synigoros*, issue 141/2020, page 18; Psychomanis, *Bankruptcy Law*, 2021, page 22.

Registry, but registration does not entail the acquisition of a trading capacity for the registered person.

Provisions for vulnerable distressed debtors

A creative mechanism for protecting the primary residence of vulnerable distressed debtors was introduced by the Insolvency Code. A vulnerable debtor is a debtor whose annual income is up to €21,000, whose immovable property is worth up to €180,000 or whose movable assets are worth up to €21,000 (dependent on the size of their household). Vulnerable distressed debtors' protection seems to be more like a social protection measure rather than a bankruptcy or collective proceedings tool.[13] That being said, the missing link between both cases is the debtor's insolvency, hence the Greek legislature opted to incorporate such provisions into the Insolvency Code.

In more detail, according to the new provisions, vulnerable debtors who have either been declared bankrupt or are subject to enforcement proceedings against their main residence by a secured creditor have the possibility to sale and leaseback, upon request, their main residence to an acquisition and leasing agency.

The term of the lease is set at 12 years and can be terminated if three rent payments are due. Termination of the lease will result in the loss of repurchase rights.

As long as the tenant (or their legal successors) pays all the rents, they can exercise the repurchase right and acquire ownership of their primary residence against a certain consideration. If this right is exercised before the expiration of the lease, then the tenant shall pay the agency the current value of the rent due up to the end of the lease (12 years) plus the consideration of the repurchase.

Small-scale bankruptcies

Inspired by foreign legislation,[14] the new insolvency law introduced a simplified bankruptcy regime for microenterprises covered by article 2 of Law 4308/2014, known as small-scale bankruptcies (articles 172 to 188). The Code clarifies that in the case of legal entities, if the entity's net turnover exceeds €2 million, it is not considered a microenterprise. In the case of natural persons, the assets criterion applies to the person's property.

13 Evanghelos Emm Perakis, *Insolvency Law*, 4th ed, The new Law 4738/2020 on insolvency as amended by Law 4818/2021, 2021, page 533.

14 For example: the German Insolvency Statute, section 311 et seq; the French Commercial Code, article L. 644-1 et seq; and the Spanish Insolvency Law 2020, article 522 et seq.

The competent court for small-scale bankruptcies is the Court of Peace. In addition, in such bankruptcies, a going-concern sale of the debtor's property cannot be requested by creditors. Thus, the creditors' payment can only be fulfilled through a piecemeal sale.

This mechanism is likely to be very useful, considering that in Greece the number of microenterprises significantly outweighs the number of small and medium-sized enterprises (SMEs). According to recent statistics, microenterprises in Greece represent 95.4 per cent of the total number of Greek enterprises and SMEs represent the remaining 4.6 per cent.

Microenterprises are looking for fast and simple debt forgiveness, debt restructuring and debt repayment options, or liquidation and discharge. In reality, most Greek enterprises were discouraged by the pre-existing legal regime to proceed with bankruptcy due to the complexity, costs and bureaucracy of the procedure. Nevertheless, the new Code has introduced the aforementioned regime to encourage, facilitate and incentivise early access by those enterprises to the small-scale bankruptcy procedure, and has established favourable conditions for early discharge and a fresh start for the debtor.[15]

Going-concern sale upon creditors' request

Another novelty of the new Insolvency Code is the creditors' option to request the sale of the debtor's business as a going concern prior to the commencement of bankruptcy proceedings. Specifically, when a bankruptcy petition is filed by creditors representing at least 30 per cent of the total claims against the debtor, including secured creditors representing at least 20 per cent of the total secured claims, the petition can contain a request for the sale of the debtor's business or part of the business as a going concern as provided for in articles 158 to 161, on condition that the debtor is an enterprise and the bankruptcy is not small-scale. Moreover, if this request is not included in the bankruptcy petition, the requisite creditors' majority may lodge a third-party intervention submitting the request.

The concept of a going-concern sale of the debtor's property is not unfamiliar to the Greek bankruptcy regime. Pursuant to the previous code, the creditors' assembly was entitled to decide on a going-concern sale at a later stage of the bankruptcy (following the completion of claims verification); however, now, creditors are granted the right to file such a request at a very early stage of the bankruptcy procedure (ie, along with their bankruptcy petition), inviting the bankruptcy court to judge on a going-concern or a piecemeal sale.

15 A/CN.9/WG.V/WP.166, United Nations Commission on International Trade Law, Insolvency of micro, small and medium-sized enterprises, https://undocs.org/en/A/CN.9/WG.V/WP.166.

In particular, as mentioned above, the requisite creditors' majority is eligible for requesting the sale of the debtor's property as a going concern along with the bankruptcy petition. In such a case, the court is competent to decide whether a going-concern sale is beneficial to the creditors and will improve their recovery. This decision regarding a going-concern or piecemeal sale is included in the judgment declaring the debtor's bankruptcy.

The rationale behind a going-concern sale is summarised as follows: under special conditions, the debtor's business can be up and running until its realisation. For instance, the business can be financed during bankruptcy for the purposes of its maintenance, executory contracts are not terminated and administrative licences are maintained until the transfer. Under those circumstances, business goodwill is maintained, resulting in a higher consideration for the acquisition and a better recovery for the creditors.

The inclusion of a new provision on a going-concern sale was inspired by the special administration procedure of Law 4307/2014, as further amended, known as the Dendias Law. Under this law, provided that the debtor was under suspension of payments and the application was supported by creditors holding a minimum of 40 per cent of total claims against the debtor, including at least one financial institution, a swift sale of the business or parts of the business of the debtor as a going concern was taking place. If the debtor was a public limited company, it could be also subject to special administration, if grounds for its termination applied. The Dendias Law is no longer in force, although any cases that were pending when the Insolvency Code entered into force are still governed by it. In accordance with the Dendias Law, the special administration procedure was a pre-insolvency collective procedure structured for the going-concern sale of the debtor's assets.

According to unofficial statistical data, it appears that around 20 Greek enterprises – some of which are of great social and economic standing – were subject to special administration during 2016 to 2020. For instance, in 2018, the Greek company Hellenic Shipyards SA, which is the largest shipyard in Greece and the largest in the entire region of the eastern Mediterranean, was placed in special administration.

Despite the fact that some businesses managed to be rescued by investors in the short term, the special administration scheme stopped being used, probably due to interpretation and ambiguity problems (eg, regarding whether the debtor is under suspension of payments or not) and certain impracticalities arose from its implementation. Therefore, the Greek legislature introduced a similar procedure in the new Code.

It is of great interest whether a going-concern sale of debtor's property can be requested by creditors, without debtor's consent, in the context of pre-insolvency proceedings (ie, through a rehabilitation agreement). Although the requisite majority of creditors is entitled to conclude a rehabilitation agreement providing for a going concern sale of debtor's business without debtor's being a counterparty in that agreement (provided that the debtor is in suspension of payments), debtor's consent is a post-conclusion *sine qua non* for the ratification of the agreement and shall be obtained until the hearing of the ratification application. In the latter case, debtor's consent may be disregarded only if the ratification application and in particular the expert's report prove that the rehabilitation agreement determining a going concern sale will not deteriorate debtor's legal and economic status than it would have been without the agreement.

Debtor's discharge

The EU Restructuring Directive shed light on the inefficiency of the process for insolvent but honest entrepreneurs being discharged from their debts and making a fresh start. The old framework resulted in entrepreneurs having to relocate to other jurisdictions to benefit from a fresh start in a reasonable period of time, at considerable additional cost to both their creditors and the entrepreneurs themselves.[16]

In line with the EU Restructuring Directive, the Greek legislature introduced certain provisions (articles 192 to 196) regarding the debtor's discharge (eg, discharge of every debtor who is a natural person three years after bankruptcy or from the date of registration of the judgment rejecting the bankruptcy petition due to lack of assets in the Greek Electronic Solvency Registry), whose ultimate aim is to enable the proper functioning of the internal market and remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment.

Alexandros Kontogeorgiou
Kontogeorgiou Bakopanou & Associates Law Firm

Alexandros Kontogeorgiou is a managing partner and head of the firm's corporate, insolvency and restructuring practice. Alexandros has developed expertise in debt restructurings having successfully handled projects of more than €500 million in the past few years. His work covers all legal actions related to the finalisation of a debt restructuring project in accordance with the Greek Insolvency Code and the out-of-court debt settlement mechanism for businesses.

16 EU Restructuring Directive, Preamble 5.

Alexandros advises Greek and multinational companies and investment funds on domestic and cross-border M&A transactions, with a particular emphasis on the hospitality industry. He also advises clients on corporate restructurings, buyouts, private equity and venture capital transactions, as well as general corporate issues. He works closely with clients engaged in the hotels and tourism industry.

Alexandros has also acquired broad experience in the field of capital markets and financial markets regulations. He has a thorough knowledge of financial regulatory topics, covering the entire regulatory spectrum, from operational requirements to investor protection. He is also active in advising on financial markets transactions, including debt and equity capital markets transactions, corporate finance transactions and loan finance transactions.

Alexandros is a member of the Piraeus Bar Association and is authorised to practise before the Supreme Court.

Georgia Papathanasiou

Kontogeorgiou Bakopanou & Associates Law Firm

Georgia Papathanasiou is a partner at KBA Law Firm. She specialises in acting on financial restructurings, distressed M&A transactions and insolvency-related matters. She has broad experience in advising creditors, debtors, investors and other stakeholders in both in- and out-of-court debt restructurings, distressed financings and bankruptcy proceedings.

Georgia's experience also encompasses advising both international and domestic corporates on a broad range of corporate transactions, including cross-border M&A and corporate financings, as well as general corporate matters, including company formation, corporate governance and regulatory compliance.

Georgia also advises clients on IP matters. She has experience in negotiating IP-related aspects of commercial contracts, as well as representing clients in in-court proceedings involving IP disputes.

Georgia is a member of the Athens Bar Association.

KONTOGEORGIOU BAKOPANOU & ASSOCIATES LAW FIRM

Our law firm is specialised in business law, dealing with complex cases on a local and cross-border level. We share our clients' vision and aim to provide them with a customised service to meet and exceed their expectations. We build close business relationships with our clients, who range from individuals to local and multinational companies, banking institutions and public authorities.

We believe that the value of a law firm is measured by the results accomplished even under the hardest conditions where the impossible must be challenged. And this can only be achieved by strong, dedicated teams that understand the significance of knowing the client's needs in depth and the market where they operate.

Our team consists of lawyers with expertise in all sectors of business law, committed to offering high-quality services. We also cooperate closely with top-tier law firms and financial consultants on cross-border transactions to help us provide legal advice covering all aspects of multifaceted transactions.

KBA Law Firm is a member of the Athens Bar Association and the Hellenic Association of Law Firms.

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