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ARTICLE

Pushing Towards Efficiency: New Changes in Greek Restructuring and Insolvency Law

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Introduction

Greece recently introduced Law 4446/2016,[1] which includes important changes to domestic restructuring and insolvency law. The aim was to have in place key principles on preventive restructuring and 'fresh start' frameworks, as well as on all types of insolvency proceedings, in order to improve their quality and to efficiently tackle the accumulation of non-performing loans of ailing debtors. These amendments are to a large extent in line with the 'Restructuring Recommendation' of the European Commission issued in 2014 ('RR'),[2] pushing towards harmonisation with respect to Member States' restructuring regimes. The most remarkable amendments introduced are the following:

Changes in Greek restructuring law

Providing for an efficient out-of-court restructuring (pre-pack)

Pursuant to Article 99 par. 1 of the Greek Bankruptcy Code (hereinafter 'GBC'),[3] as amended, the initiation of rehabilitation proceedings to negotiate an agreement with creditors following a formal court order is no longer an option. From now, on the debtor must commence restructuring negotiations at an early stage and without obtaining a relevant court order, with a view to reaching an out-of-court agreement with the requested majority of its creditors. Once the above majority has been reached, the agreement may be submitted to the Insolvency Court ('Court') for ratification. This principle has been designed to reduce the direct costs associated with using the proceedings since every petition and appearance is costly and also to avoid delays and risk of abuse of the proceedings by debtors who merely intend to gain protection from their creditors without having prospects of viability.[4] Furthermore, such an opportunity for the debtor, e.g. commencing the negotiations without the creditors' permission and without publicising it to all of them, enhances the success prospects of the restructuring by keeping it secret and, thus, preserving the going concern value of the business.[5]

Staying third-party enforcement actions

To promote efficiency of the rehabilitation proceedings an automatic stay of four months has been introduced on all individual and collective enforcement actions of creditors pursuant to Article 106 GBC, subject to extension until the end of the proceedings. Such stay enables the debtor to resist the piecemeal dismemberment of its business while the ratification of the rehabilitation agreement by the Court is pending. Pursuant to Article 106a GBC, a stay suspending the right of the creditors to enforce claims against the debtor shall also be granted in the out-of-court 'negotiation period', that is, prior to the submission of the agreement to the Court for ratification, on condition that creditors representing at least 20% of the total value of the outstanding claims will issue a written statement that they participate in the negotiations for the conclusion of a rehabilitation agreement. This is to ensure that creditors finding themselves in a 'prisoners' dilemma' situation do not proceed to enforcement actions that might dissipate the firm's value and hamper the restructuring prospects of the

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1 Law 4446/2016 (Government Gazette Issue n. 240/Bulletin A'/22.12.2016.

2 C (2014) 1500 final, Brussels 12.3.2014.

3 For an overview in English see E. Perakis, 'The new Greek Bankruptcy Code: How close to the InsO?' in S. Grundmann (eds.), *Festschrift für K. Hopt* (De Gruyter, Berlin, 2010), p. 3251; For an overview in German see D.-P. 'Tzakas, Das neue griechische Insolvenzrecht' (2012) *Recht für internationale Wirtschaft*, 119.

4 See Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, COM(2016) 723 final, 22.11.2016, p. 28 (18).

5 H. Eidenmüller/K. van Zwieten, 'Restructuring the European Business Enterprise: The EU Commission Recommendation on a New Approach to Business Failure and Insolvency', (September 2015) Working Paper No. 301/2015, p. 13.

debtor's business.[6] Such a stay can be granted by the Court only once and for a limited maximum period of four months.

Protecting interim financing

Pursuant to Article 154 GBC, the qualification of the interim financing providing with necessary financial recourses to support the operation of the business during the restructuring effort as debt with priority over other claims is no longer limited to cases where the rehabilitation agreement is ratified by the Court. It is clear that a firm entering a restructuring procedure will usually be cash short, making continuation and restructuring of the enterprise a difficult task that requires 'fresh money'. The purpose of this amendment granting superpriority to interim financing also in case the rehabilitation agreement is not ratified, is to not discourage investors from participating in the restructuring of the debtor's business and thus to enhance the prospects of success, as the latter often depends on whether there is enough liquidity in place to support the implementation of the restructuring plan.[7]

Enhancing the efficiency of the procedure

To improve legal certainty and avoid the risk of abuse of the procedure, Article 104 par. 6 GBC requires that the expert opinion on the financial situation of the debtor and the viability of its business be drafted by an expert appointed both by the debtor and its creditors.[8] Further, pursuant to Article 106γ par. 3 GBC, a Tax Clearance Certificate essential for the implementation of the rehabilitation agreement shall be automatically issued to the debtor by the competent tax authorities upon the ratification of the agreement by the Court. Moreover, the stand-alone restructuring procedure called 'special liquidation' (Article 106ia GBC) is abolished as unnecessary due to its considerable similarity with other proceedings of the same scope.

Enabling creditors to initiate rehabilitation proceedings

Pursuant to Article 100 par. 1 GBC, a rehabilitation agreement may be drafted and submitted to the Court for ratification only by the creditors, without any participation of the debtor, provided that the latter has ceased payments and the required majority of 60% of the creditors' claims, 40% of which should be secured, has been met. This is to ensure that the pre-bankruptcy restructuring of a viable debtor may be implemented even when this is abusively hampered for reasons extraneous to the restructuring.

Changes in Greek insolvency law

Defining new conditions for filing for bankruptcy

As to the opening of insolvency proceedings, Article 3 GBC provides that, except where the debtor has ceased payments or a cessation of payments is imminent, insolvency proceedings can from now on be initiated when there is a likelihood of the debtor becoming insolvent and the latter submits to the Court, along with the petition for bankruptcy, a plan to reorganise its business as per Article 107 seq. GBC. This amendment has been designed to allow for an early opening of the insolvency proceedings and the opportunity to reduce indirect costs accompanying with the late filing for insolvency.[9] As a general comment and from an economic perspective, restructuring a business makes sense only if the firm's going concern value exceeds its liquidation value, e.g. in cases of financial but not economic failure of a business.[10]

Providing for the Insolvency Practitioner

Pursuant to Article 63 GBC, a regulated insolvency profession is established in line with best international practice.[11] Commencing from 1 January 2017, the powers of a bankruptcy administrator (*sýndikos*) may be carried on by an individual registered in a special

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6 H. Eidenmüller/K. van Zwieten, 'Restructuring the European Business Enterprise: The EU Commission Recommendation on a New Approach to Business Failure and Insolvency', (September 2015) Working Paper No. 301/2015, p. 31.

7 Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, COM(2016) 723 final, 22.11.2016, p. 31 (31); see also H. Eidenmüller, 'Comparative Insolvency Law', (June 2016) Working Paper No. 319/2016, p. 22.

8 See H. Eidenmüller/K. van Zwieten, 'Restructuring the European Business Enterprise: The EU Commission Recommendation on a New Approach to Business Failure and Insolvency', (September 2015) Working Paper No. 301/2015, p. 29.

9 *Ibid.*, p. 12.

10 H. Eidenmüller, 'Reformperspektiven im Restrukturierungsrecht', 31 *Zeitschrift für Wirtschaftsrecht* (2010), 649, 650; with a critical view regarding the requirements for the opening of the proceedings (in Greek), S. Frastanlis, 'The Pre-Bankruptcy Procedure and the basic elements of a restructuring' (2012) *Chronicle of Private Law,* 407.

11 See Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, COM(2016) 723 final, 22.11.2016, p. 35 (40). A good overview for both English and German legal systems offers (in German), R. Bork, *Die Rechtsstellung des Insolvency Practitioner* (RWS Verlag, Köln, 2011).

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register and qualified to act as an Insolvency Practitioner. Until recently, the administration of insolvency estates was, and still is, entrusted to attorneys with at least five years of experience selected by the Insolvency Court (the 'Court') on the basis of a list drawn by the competent Bar for each calendar year. When a current list is not available, selection is based on the previous year's list which remains in force and in case no such list is available at all, the Court will freely appoint the receiver in bankruptcy (administrator).

Therefore, a Presidential Decree[12] has been issued providing for the necessary formal and substantive qualifications of Insolvency Practitioners, their appointment and termination thereof, their special powers and duties as well as their supervision and liability. Moreover, an 'Insolvency Administration Committee' will be established, comprised of a chair and four (4) members, along with their substitutes. The Committee will be competent for keeping a register of Insolvency Practitioners and also for issuing, renewing and revoking the relevant licences of the Practitioners. The licence holders, while carrying out their obligations in relation to the administration of the cases with which they have been assigned, will be responsible for attaining the best possible outcome in each respective proceeding. Like under the current regime, responsibility will be primarily due towards the creditors for every loss caused to the insolvency estate, but the Insolvency Practitioners will also have legal, ethical and moral obligations towards employees, directors and other stakeholders of the insolvent person or entity. Further, the Insolvency Practitioners shall be personally liable towards third parties only for wilful misconduct or gross negligence, without excluding tort liability. The Insolvency Administration Committee will be entrusted with monitoring adherence of Practitioners with the above mentioned obligations, while a Disciplinary Board, which is still to be established, will be responsible for applying measures in case of the Practitioners' inappropriate conduct.

Insolvency Practitioners will be selected in the context of a written national examination carried out by an Examinations Committee, competent to assess the professional competence of those seeking to carry out the functions of a licensed Insolvency Practitioner. Taking such examination will necessitate a considerable commitment on the part of the candidates, while the examinations will target the selection of the most suitable Insolvency Practitioners. The composition of the Examinations Committee, the required qualifications for the candidates to participate in the examination, and all related administrative and organisational matters are to be designated by a Presidential Decree following a decision of the Minister for Justice. To ensure that the required practical and technical knowledge requirements will be constantly met and that the Insolvency Practitioners will always be able to perform their duties without facing conflicts of interest, they will have to adhere to an Ethics Code, yet to be issued, as well as to participate in continuing education programs, organised by certified training bodies. Under the current regime, there is no statutory requirement of participation in relevant training programs. Compared to the current legal regime, the introduction of the new legal framework is expected to bring about both the efficient operation of insolvency proceedings and an economically sound outcome.

As licensed Insolvency Practitioners will be trained in all aspects of the law and procedure, it is expected that they will be best placed to provide the relevant advice and only they can act as supervisors of individual voluntary arrangements or as administrators in restructurings and bankruptcies.[13] The above mentioned national legislative initiatives set the base for a solid regulatory background that can contribute to securing higher performance of those entrusted with the administration of insolvency proceedings.

Directors' liability for causing insolvency ('cessation of payments')

Pursuant to Article 98 par. 2 GBC, as amended, the directors of a limited liability company may be held personally liable towards creditors for causing the debtor's 'cessation of payments', defined as the company's inability to pay its debts as they fall due, where the directors' actions involved gross negligence or fraud. Until the discussed amendment, liability claims could be raised on the condition that bankruptcy proceedings against the debtor had already been initiated. In this vein, the opening of the insolvency proceedings is no longer required in order to trigger directors' liability, and, therefore, a strict liability framework that applies even before the initiation of the insolvency proceedings is provided.

Making insolvency proceedings more efficient

To improve the efficiency of the insolvency proceedings and the restructuring option of the reorganisation plan included therein (Article 107 seq. GBC), the legislator proceeded to various changes with a view to a more

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12 Presidential Decree No. 133/29.12.2016.

13 See Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, COM(2016) 723 final, 22.11.2016, p. 35 (40).

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flexible and quick procedure. In particular, the involvement of the Court in the process was confined to the extent necessary and proportionate, i.e. Article 114 GBC providing for the Court's competence to pre-examine a submitted reorganisation plan has been abolished and some of its approving authorities are attributed to the reporting judge, a more flexible supervisory authority of the proceedings. Furthermore, the 'creditors' committee', an optional board supervising the progress of the proceedings and assisting the bankruptcy administrator during the performance of his duties has also been abolished. Finally, the legislator provided for the shortening of the insolvency proceedings by making the timeframes for completion of various stages thereof even stricter.

Allowing for a full discharge of debts

Pursuant to Article 167 seq. GBC, as lately amended, the debtor may be fully discharged of its debts after two years as of the declaration of its bankruptcy, as opposed to three years under the previous regime, provided that it acted in good faith, cooperated with the administrative authorities during the procedure and the insolvency was not a result of the debtor's fraud. Only then, the Court may grant the debtor upon request a relevant 'debt relief order' enabling the debtor to make a 'fresh start'. Furthermore, such a debt relief discourages the debtor from relocating to in other jurisdictions, in order to benefit from a fresh start in a reasonable period of time.[14]

Final remarks

The above amendments should be seen as an effort of the legislator to establish a more efficient Greek insolvency and restructuring law by making it more flexible and attractive for the parties involved. Moreover, in this manner, the legislator has achieved to reduce overall costs, improve quality of the insolvency framework and strike a fair balance between the interests of the debtor and its creditors.

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14 See Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, COM(2016) 723 final, 22.11.2016, p. 25 (4).

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