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Distressed Loans and Workout Strategies in Greece

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Synopsis

The global financial and economic crisis has caused uncertainties and serious disruptions in the Greek market. The financial distress and the huge amount of non-performing loans ('NPLs') have led to enormous losses and the Greek financial system is suffering. To tackle those problems Greece has lately reformed its national Restructuring and Insolvency law and additionally introduced new laws providing for competitive mechanisms to facilitate the transfer of NPLs and the restructuring of distressed loans. In this context, Greece has lately introduced Law 4354/2015, the main statute regulating the transfer and servicing of non-performing loans in the Greek market (as amended and currently in force, the 'NPL Law'). The newly introduced NPL Law was long awaited to improve the existing statutory legal framework of the national restructuring and insolvency law and enhance its effectiveness with regard to the sale and restructuring of non performing portfolios. The aim of the Greek legislator was to have in place an efficient stand-alone regulatory framework in order to facilitate Greek banks in their effort to address an increased NPL formation accumulated in the past years. Herein under are the key principles of the main legal frameworks available in the Greek market for the transfer, restructuring and servicing of NPLs:

Available workout strategies in the Greek NPL market

The new NPL Law

The NPL Law provides for a regulated system in relation to the transfer and servicing of loan portfolios. Such portfolios may include both performing and non performing loans. The provisions of the NPL Law do not affect the application of previous and well-established legal frameworks as for example the Securitisation Law, which provides since 2003[1] for an efficient system for loan portfolio transfers by issuing securities backed by the transferred assets. The NPL Law since its introduction on November 2015 has been further amended by Laws 4389/2016, 4393/2016 and 4472/2017. The latest amendments to the NPL Law were voted on June 14, 2018 aiming to further enhance the flexibility and efficiency of the new legal framework.[2]

NPL purchasers and servicers

Ability to acquire NPLs from credit institutions under the regime of the new NPL Law have only specific kind of entities, which are also required to have entered into an agreement with a licensed servicing entity, in order to be permitted to receive the transferred portfolios. The servicing entities must hold a license issued by the Bank of Greece, the supervising authority that except for its competence to grant licenses is also responsible for monitoring the operations and governance of the NPL servicers. Prospective servicers must be either a Greek joint stock company or a European Economic Space entity with an establishment in Greece for the purpose of servicing loan portfolios. Additional requirements are a minimum share capital and the satisfaction of certain organisational requirements. In particular, the licensing process involves significant disclosure on the part of the servicer's capital structure, the UBOs, officers and business strategy. Also, strict operational requirements such as the timely publishing of the financial statements and other technical financial and accounting information must be available to the supervisory authority.

Furthermore, servicers are authorised to interact with debtors, communicate with them for the purposes of a debt settlement, restructure loans, implement refinancing schemes and also proceed to enforcement actions against the debtors, if this is necessary in order for them to satisfy their claims. These operations shall comply with the Code of Conduct issued by the Bank of Greece, a chart containing ethical principles and standards governing the behaviour of all banks towards their

Notes

1 Law 3156/2003.
2 Law 4549/2018.

debtors.[3] In particular, the transferee may take into account all previous stages of communication that have taken place and been implemented by the respective seller until the time of the transfer and may continue the communication process with the debtor aiming at a settlement from that previous stage.

Operational and technical issues

The NPL Law provides further for the registration of the NPL transfer in a public book, in order for the latter to be effective.[4] Until recently, the NPL Law (article 3 par. 2) was requiring the credit institution to invite the debtor within twelve (12) months prior to the transfer of the NPLs in order to agree on a proposed settlement of its outstanding debt. Initial aim of this measure was to ensure that borrowers are not taken by surprise and still have the possibility to settle their outstanding debts before the relevant claim is transferred to a third person. However, the above prior invitation of the debtor was criticised as unnecessary and cost-intensive and was therefore cancelled with regard to business debtors by virtue of Law 4549/2018.[5] Further, the same law provides for legal certainty with regard to the appropriate means of notifying the debtor of the relevant transfer following the completion of the latter by determining that an Email constitutes an appropriate means of such notification.

Tax

Loan portfolio transfers under the NPL Law are subject to a VAT exemption. Further, the NPL Law exempts the transfer from withholding tax on interest but subjects the transfer to corporate income tax with regard to any capital gain arising from the transfer of the receivables to the transferee. Furthermore, any benefit from the full or partial write off of a debt towards the credit institution is within certain time limits and under certain conditions, not subject to income nor gift taxation.

The restructuring procedure of the Greek Insolvency Law[6]

Objective and structure of the procedure

In the context of the rehabilitation proceedings a company concludes an out-of-court agreement with its creditors (the ‘rehabilitation agreement’),[7] in order to restructure its business at a pre-bankruptcy stage. Within the out-of-court ‘negotiation period’ a restructuring agreement has to be reached by the debtor and its creditors representing a majority of 60% of the total claims, 40% of which should be secured. Thereafter the executed agreement by the above required majority is submitted to the court for ratification. The pattern and timing of satisfaction of creditors is regulated by the rehabilitation agreement that becomes valid and enforceable upon its ratification by the court. The agreement may consist of: a sale of all or part of the debtor’s business to a third party; a disposition of assets; a debt equity swap (conversion of debt into equity); a write down of debt; an extension of the repayment date; a restructuring of loans and contract terms etc.

Duration and timing

No timeframe applies on the out-of-court ‘negotiation period’ between the debtor and its creditors with a view to reaching an out-of-court restructuring agreement. However, suspension of enforcement actions may be granted for a maximum period of four months, which usually coincides with the negotiation period. Once the agreement is concluded, it is submitted to the court for ratification. Court hearing is set within two months and decision on the ratification of the agreement is issued approximately within four months from the hearing, although no deadline is set by law in this regard. The court decision opening the procedure is not appealable. However, the court’s ruling ratifying the rehabilitation agreement is subject to third-party opposition within one month from the court decision ratifying the agreement, a remedy available to persons who were not present at the hearing and who were not lawfully invited. *Timing*: approximately 10-16 months (including out-of-court negotiations of the rehabilitation agreement and possibility of a third party opposition).

Notes

3 Code of Conduct (CoC) introduced by Law 4224/2013.
4 The relevant transfer must be registered in the registry books kept in accordance with Law 2844/2000.
5 The obligation of this prior invitation of the debtor to a settlement is, however, still in force for consumers, under the definition of article 1a of the consumer protection Law 2251/1994.
6 Articles 99 et seq. of Greek Insolvency Law; 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.
7 An overview on restructuring proceedings as alternative to insolvency proceedings offers S. Frastanlis, ‘The Pre-Bankruptcy Procedure and the basic elements of a restructuring’ (2012) *Chronicle of Private Law* 407.

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Protection from creditors – moratorium

Upon submission of the rehabilitation agreement for ratification by the court, an automatic stay of four months, subject to extension until the issuance of the court decision, is granted on all individual and collective enforcement actions of creditors, immovable property and equipment and other movables related to the operation of the business. Such protection applies also to the negotiation period, provided that, among others, creditors representing at least 20% of the total value of the outstanding claims issue a written statement that they participate in the negotiations for the conclusion of a rehabilitation agreement. Following ratification of the agreement if the debtor does not meet its obligations as provided in the agreement, creditors are free to enforce their claims and dissipate the debtor's assets.

Content of the agreement; restrictions

Non-consenting creditors must not end up being in a less favourable position than what they would be in bankruptcy or in individual enforcement proceedings. Furthermore, each creditor (including non-consenting creditors) may not be treated less favourably than any other creditor of the same class. Notwithstanding the general rule on equal treatment, differentiated treatment could apply even for creditors of the same rank when the respective creditor foregoes the protection allowed under the equal treatment principle or when there is a material business or social reason that justifies different treatment. According to case law, differentiated treatment is accepted, when a bank is the major financing partner of the debtor and further financing is necessary for the continuation of the debtor's business or when a bank has priority in title (first rank pre-notation on mortgage) compared to other secured creditors.

Debt equity swaps

In a debt to equity swap debt is converted into equity by receiving shares of the debtor company. It is generally used when the creditors are unwilling to provide additional debt to the company despite the fact that going concern value of the company is higher than its liquidation value. The usual way to implement a debt equity swap is by means of a capital increase against a payment or contribution in kind, assigning the claim back to the debtor company. By confusion of the corresponding liabilities, the debt ceases to exist. The conversion of a claim against the company into equity with the purpose of restructuring the company is done by a 'capital cut', which consists of a simplified capital decrease with a concurrent effective capital increase whereby the claim is assigned to the company by payment in kind.

Simplified capital reduction eliminates the accounting equity deficit on the balance sheet by adjusting the capital to the current value of assets (book restructuring). In case the company is already over-indebted, a capital reduction to zero is possible. The capital decrease will follow an ordinary capital increase by issuing new shares against a contribution in kind. Both capital decrease and capital increase can be made in the same resolution.

Transfer of business (article 106d GBC)

The rehabilitation agreement may, among other restructuring measures, provide for the transfer of the debtor's business as a whole or in parts to a third party, including a company to which creditors have contributed their claims. In such case the creditors' claims that are contributed are being evaluated as per articles 9 and 9a of Greek Law 2190/1920 on the establishment and operation of societes anonymes.[8] Furthermore, the agreement may also entail the transfer of part of debtor's liabilities as well as the repayment of the remaining (non-transferred) liabilities by the relevant consideration of the transfer. Article 479 of Civil Code regarding the ex lege transfer of all debtor's liabilities along with the transfer of the business does not apply. Licenses pertaining to the operation of the debtor's business and necessary for its continuation are transferred by law. Moreover, any transfer of business made in the context of the rehabilitation proceedings is ring-fenced from bankruptcy clawback. Last, the parties may amend the terms and conditions of the agreement pertaining to the transfer of business if the value of the transferred business has changed until the court hearing regarding the ratification of the agreement.

Completion of the rehabilitation proceedings

The procedure ends with the ratification of the agreement. If the rehabilitation agreement is rejected, the procedure is terminated. The agreement may provide that a breach of its terms operates as a condition automatically to cancel it. The court's ruling ratifying the rehabilitation agreement is subject only to third-party

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8 The valuation of contributions in kind in a capital increase is effected following the opinion of a three-member experts committee consisting of employees of the Greek Ministry of Development or by certified auditors and accountants and expert representing the competent Chamber. The members of the committee must not have any kind of dependence from the company. The committee drafts a report that has to be submitted to the Ministry of Commerce within two months from the appointment of its members.

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opposition, a remedy available to persons who were not present at the hearing and were not lawfully invited. If there are bankruptcy petitions pending, the court can proceed to examine them, but there is no automatic conversion into bankruptcy; bankruptcy applications are activated in the event of unfruitful termination of the rehabilitation proceedings.

Tax

Both the agreement for the transfer of business as a going concern or part thereof as well as all acts that are executed for the consummation of the transfer, including relevant registrations, are exempt from all taxes, duties or rights of the State or third parties as well as stamp tax with the exception of VAT.[9]

Special administration process[10]

Aim and structure of the procedure

A special administration process is a stand-alone restructuring process that aims at the continuation of the debtor's business as a going concern or operative parts thereof through its/ their transfer to the highest bidder by means of a public auction according to GCCP;[11] this means that the debtor's business (or operative parts thereof), following a successful auction will continue to operate in the hands of the highest bidder/ transferee, while the debtor will concurrently be divested of the ownership in such business (or operative parts thereof), as well as of any administration rights over it. The creditors are being satisfied by the sale proceeds. Upon initiation of the process the management of the company affairs is taken over by the special administrator, a person that must be independent, e.g. who has not acted as an auditor of the debtor for the last five years. Furthermore, the special administrator must have specific qualifications, e.g. he/she must be an auditor or a lawyer equipped with the necessary technical and financial knowledge or a consortium, to the extent at least one of the above persons participates in it. The appointment of the special administrator will be made by the court pursuant to the relevant proposal of the requesting creditor. Although not explicitly stipulated in the law, the special administrator may opt to further appoint specialised operators to run the debtor's business until the auction, nevertheless any faults of the operators with a knock-on effect on the value of the business or the satisfaction of the creditors' rights will continue to be credited directly to the special administrator.

Entitlement to initiate procedure and eligibility criteria

Creditor(s) holding at least 40% of the total claims against the debtor (evidence of 40% threshold resulting from a creditors' list prepared from an accountant/ auditor and based on the published financial statements or/and the accounting books of the debtor or/ and the debtor's creditors) can request the opening of the proceedings when:

(i) a debtor is in cessation of payments; or

(ii) for two consequent years a condition of article 48 of Greek Law 2190/1920 has been met (namely, when the debtor's equity is less than 10% of the initial capital or the debtor has not published financial statements for three years).

Cessation of payments has been defined by Greek courts (in the context of bankruptcy proceedings) as the general and permanent inability of the debtor to pay its financial obligations as they fall due (become outstanding). The default on debts that do not reflect a significant portion of the overall debt does not necessarily signify cessation of payments. The crucial question one has to answer is whether the company meets its financial obligations in general. Even the inability to pay a single debt may signify a cessation of payments status, if such debt represents a significant portion of the company's overall outstanding financial exposure. The courts have not set a fixed minimum threshold of the inability to satisfy outstanding claims but decide each time on an ad hoc basis.

Duration and timing

The court must hear the application for the initiation of special administration within two months and must reach a decision on the opening of the procedure and the appointment of a special administrator within a further month from the date of the hearing. The court may invite at the hearing one or more creditors, other than the one(s) that have submitted the application(s). After the opening of the procedure, the administrator must conduct a public auction for the transfer of the debtor's business and assets and the offers will have to be submitted within 20 to 40 days from the publication of the respective tender. Further and following the acceptance of the highest bid, the results of the auction shall be approved and ratified by the court to be convened within two months from the relevant application and decide within a further month. In general, the transfer of the debtor's business or assets must complete within 12 months from the appointment of

Notes

9 Articles 106d and 133 GBC.
10 Articles 68 et seq. of Greek Law 4307/2014.
11 Greek Code of Civil Procedure.

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the administrator. This time period cannot be extended by the court unless there is pending a public auction aiming to dispose at least 90% of the debtor's business/assets, or the approval of the results of a completed auction by the court. The court decision opening the procedure is not appealable. However, creditors not having been invited to the hearing for the opening of the procedure may seek to upset the decision on this ground via a third party opposition that can be filed within one month from the decision opening the special administration procedure.

Protection from creditors – moratorium

The opening of a special administration procedure involves an automatic stay on all enforcement actions of creditors with regard to creditors' claims that arose prior to the submission of the application, irrespective of whether they were outstanding at the time of the filing, (including a ban on the divestiture of immovable property and equipment and other movables related to the operation of the business). Until the issuance of the decision on the opening any interested party can apply for a stay and other injunction measures it deems appropriate. Furthermore, the application for the opening of the special administration procedure suspends all pending petitions for bankruptcy or pre-bankruptcy rehabilitation proceedings. The opening of the procedure does not constitute a legal ground for terminating of contracts or revocation of licenses.

Auction

The special administrator must continue the business of the debtor until its transfer to a third investor. The offers submitted by the bidders at the auction must not be subject to conditions or reservations and the purchase price must be paid in full and in cash. If the transfer of at least 90% of the debtor's assets is not completed within 12 months from the publication of the decision opening the procedure, the special administrator must file for the bankruptcy of the debtor. Moreover, any transfers of business or assets made in the context of the special administration procedure are ring-fenced from claw-back in the event of the subsequent bankruptcy of the debtor. Furthermore, the debtor's business or assets are transferred to the investor free of all liabilities, including claims of the state or third parties, or any encumbrances.

Tax

Both the agreement for the transfer of the business as a going concern or part thereof as well as all acts that are executed for the consummation of the transfer, including relevant registrations, are exempt from all taxes, duties or rights of the State or third parties as well as stamp tax with the exception of VAT (article 75 (4) & (5) of Greek Law 4307/2014). Therefore, no stamp tax and Real Estate Transfer Tax would be due in case of transfer of an operating business as well as in case of transfer of real estate properties that are part of the operating business which is being transferred. On the other hand in case that a relevant transfer is deemed to constitute a transfer of single assets, then Real Estate Transfer Tax at 3.09% should be due on the transfer of real estate properties, computed on the higher between the statutory value of the property and the transfer value agreed.

Extrajudicial Settlement Law (ES Law)[12]

To enhance the legal framework of out of court debt settlements in the Greek market the Greek legislator has recently introduced the Law 4469/2017. The new law provides for a proceeding of an extrajudicial settlement of debt obligations deriving from the debtor's business activity or any other cause. The ES Law applies to individuals who may be declared bankrupt as well as to legal entities that gain income from business activities and have a tax residence in Greece, provided that on 31 December 2017[13] they a) had a debt obligation towards a financial institution from a loan or credit overdue by at least ninety (90) days or b) overdue debt obligations towards the tax authorities or social security funds or public law legal entities or c) failed to pay checks due to insufficient balance or had payment orders or court orders issued against them. Further, in order for the debtors to be eligible to apply for the ES Law, the aggregate amount of debt obligation must exceed the amount of EUR 20,000 and the business must have either a positive EBITDA or a positive net equity during at least one of the last three fiscal years prior to the filing of an application for the initiation of the proceeding.

The debtor's application is submitted electronically to the EGDIX[14] via a dedicated electronic platform hosted on the official website of the EGDIX. The proceeding may also be initiated by creditors by written notice to the debtor inviting the latter to file an application for an ES Law proceeding. EGDIX appoints a coordinator from a special registry kept for this purpose to coordinate

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12 Law 4467/2017.

13 As currently in force, following latest amendments made by Law 4549/2018.

14 The Special Private Debt Management Secretariat ('EGDIX').

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the negotiation process between the debtor and its creditors. In order for the negotiation stage to be initiated, creditors of at least 50% of all claims against the debtor must participate. The approval of the settlement proposal requires the debtor's consent and a voting majority of three-fifths of the participating creditors, including a two-fifths of the secured creditors. The overall timing of the negotiation period may not exceed the seven months. Further, from the date of invitation of creditors to participate in the negotiations an automatic stay for 90 days on all enforcement actions is granted to the debtor.[15] Such stay may be extended to four months subject to the debtor's request and the consent of the majority of the participating creditors.

The debtor and its creditors are free to determine the content of the restructuring agreement provided that a) the creditors are not placed in a worst financial position than the one in the event of a liquidation of its property and b) any remaining amounts for distribution are distributed on a *pari passu* basis. For debtors that are large businesses the proceeding provides for the mandatory appointment of an expert in order to prepare a viability assessment and draft a restructuring plan, while for small debtors the above appointment is optional.

The restructuring agreement must be ratified by the competent court upon submission of a relevant application from the debtor or the participating creditors. From the filing of the above application and until the issuance of the decision an automatic stay on all individual and collective enforcement actions is granted. Once ratified the restructuring agreement is binding for all non-contracting creditors. Non compliance of the debtor with the terms of the agreement as ratified by the court e.g. the debtor fails to pay any amount to any creditor as agreed in the restructuring agreement for more than 90 days, the affected creditor may apply for the cancellation of the agreement towards all parties, this resulting in the revival of the claims.

Final remarks

The above workout strategies are providing for effective competitive mechanisms for the survival of viable businesses in financial distress. It should be taken into account that legal frameworks cannot work miracles but they can provide efficient tools to either facilitate an orderly insolvency process or the restructuring of viable companies in financial distress. In Greece the appropriate tools and legal frameworks are already in place, in order to encourage debtors to initiate a restructuring at an early stage. It still needs to be seen in practice how these mechanisms work and if they are able to establish a rescue culture in which legal frameworks may give companies a real chance to survive.

Notes

15 As currently in force, following latest amendments made by Law 4549/2018.

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International Corporate Rescue

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