

# Insolvency Proceedings In Greece After Recent Reforms

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Recently, reforms regarding insolvency proceedings took place in Greece (the “**Reforms**”), in order to meet the demand for a system which is easier to use and closer to the needs of the market. The need for the Reforms was exacerbated by the financial crisis in Greece, leading to an increased number of businesses in financial distress, which, if not timely and efficiently rescued or liquidated, can create a domino effect to the market, by adversely affecting the creditors, employees, and stakeholders. Moreover, most of the Reforms are in line with European Commission Recommendation 2014/1500 of 12.3.2014 “on a new approach to business failure and insolvency” (hereinafter the “**Recommendation**”).

### Key Reforms

1. Acceleration and simplification of bankruptcy procedures.
2. “*Second chance*” mechanism for honest and in good faith bankrupt natural persons.
3. Enhancement of pre-bankruptcy rescue mechanisms.

Such Reforms were introduced by virtue of Law 4446/2016 (Government Gazette 240/A/22-12-2016) (the “**Amendment**”), which amended Law 3587/2007 (the Greek Bankruptcy Code). All references to the Greek Bankruptcy Code hereinafter include the newly introduced or amended provisions as in force. The Reforms apply to proceedings initiated after 22.12.2016, while previous proceedings in principle remain governed by Law 3587/2007 as in force before the Amendment. Though several bankruptcy and rehabilitation petitions have been filed since the Amendment, empirical evidence is not yet available from which any conclusions can be drawn with respect to the Reforms.

## Main Aspects of the Reforms

### a. The acceleration and simplification of bankruptcy procedures generally consists of the following amendments:

- Limiting the involvement of the bankruptcy court in the bankruptcy procedure, by transferring many of its duties to the bankruptcy trustee;
- Abolishment of the creditors’ committee as one of the participants in the bankruptcy proceedings<sup>1</sup> (a body that, under the previous regime, was proven to stall rather than facilitate the proceedings)<sup>2</sup>;
- Adding flexibility to the court with respect to the procedure to be followed as far as “small” bankruptcies<sup>3</sup> are concerned;
- Shortening of certain applicable deadlines, such as (i) the deadline for the convocation of the creditors’ meeting, (ii) the deadline for a delayed submission of a creditor’s claim and (iii) the deadline for the submission of the reorganization plan and its acceptance;
- Elimination of pre-judgement of the reorganization plan by the court, which prior to the reforms had allowed the court to examine the reorganization plan before the creditors vote on it and to dismiss the plan if (i) its content did

not comply with the requirements of the law, (ii) it was obvious that it would not be accepted by the creditors or ratified by the court or (iii) the creditors’ claims, as modified by the plan, could not be fulfilled.

- b. **Second chance:** In line with the Recommendation, a bankrupt debtor who is a natural person (hereinafter an “**entrepreneur**”) who has (i) acted in good faith before and throughout the bankruptcy procedure, (ii) been cooperative with the participants during the bankruptcy, (iii) not fraudulently caused the bankruptcy and (iv) not been convicted for certain crimes, can be fully discharged from any of the creditors’ claims which have not been fully satisfied, by virtue of a court decision which is issued following an application by the debtor after the lapse of two years from the declaration of bankruptcy or any time after the completion of bankruptcy. The entrepreneur is in principle discharged if and when a reorganization plan is ratified for the bankrupt business (and upon such ratification), unless such plan provides otherwise (though any debts arising out of fraud or gross negligence are not discharged). The short time period for discharge is an important change, because prior to the amendment, an entrepreneur could be discharged only ten years after the declaration of bankruptcy or if he had paid in full all bankruptcy creditors for the principal and interest of their claims up to the declaration of bankruptcy

Such second chance is available only once per entrepreneur, subject to a limited exception.<sup>4</sup>

### c. The enhancement of the pre-bankruptcy rescue mechanisms include:

- No opening of rehabilitation procedures (discussed further below) without a pre-agreed rehabilitation plan already in place (“pre-pack”); thus the courts are not overloaded with petitions that are not probable to succeed and/or aim only at stalling bankruptcy proceedings;
- Creditors with claims above certain thresholds can initiate rehabilitation proceedings (provided that the debtor is already in a *cessation of payments*, i.e. that the debtor is unable to meet overdue financial obligations in a general and permanent way<sup>5</sup>);
- New procedures to deal with non-cooperating shareholders<sup>6</sup>;
- Abolishment of the special liquidation procedure<sup>7</sup>;
- The debtor can file for bankruptcy even before cessation of payments in the case of contingent insolvency,<sup>8</sup> provided that it simultaneously files a reorganization plan.

## General Framework of Bankruptcy proceedings in Greece

Insolvency proceedings in Greece are governed by: (a) the “Greek Bankruptcy Code” and (b) by articles 68-77 of Law 4307/2014 (the “Special Administration Law”).

### Four types of insolvency proceedings under Greek law

1. *Stricto sensu* bankruptcy-liquidation
2. Pre-bankruptcy rehabilitation proceedings<sup>9</sup>
3. *Stricto sensu* bankruptcy-reorganization plan<sup>10</sup>
4. Special administration proceedings<sup>11</sup>

Insolvency proceedings are applicable either to legal entities organized for an economic purpose or to individuals or other legal entities who are merchants<sup>12</sup>.

### Bankruptcy-liquidation

#### BANKRUPTCY DECLARATION

Bankruptcy may be declared only through the issuance of a court decision. Such a decision is possible (a) following the application by either the insolvent debtor or any of its creditor(s) or the public prosecutor (for public interest purposes), when a debtor is unable to meet overdue financial obligations in a general and permanent way (*cessation of payments*), in which case the debtor is obliged to apply for bankruptcy within thirty (30) days from the occurrence of *cessation of payments*; (b) following an application by the debtor, who foresees an imminent inability to fulfill its financial obligations when they become due and payable (threatened cessation of payments); or (c) pursuant to the recent Amendment, following an application of the debtor in case of contingent insolvency. In case of contingent insolvency, the debtor must submit, together with the application for the declaration of bankruptcy, a reorganization plan.

An important determination made by the bankruptcy court is the exact date of cessation of payments, which in the case under (a) above cannot be more than two years before the date of the declaration of bankruptcy and in the cases under (b) and (c) above is on the same day as publication of the court decision declaring bankruptcy, and orders that the estate of the debtor be sealed. The date of cessation of payments is important for determining the *suspect period*, defined as the time period between cessation of payments and declaration of bankruptcy,

which is important for the revocation of acts of the debtor and for certain bankruptcy related criminal offenses (including concepts similar to fraudulent conveyances and preferential treatment of creditors). The debtor is declared bankrupt as long as, based on the financial information submitted to the bankruptcy court, its assets are adequate for covering the expenses of the bankruptcy proceedings. In this way proceedings doomed to cause costs instead of fulfilling obligations are avoided.

#### APPOINTMENT OF TRUSTEE

Upon initiation of the bankruptcy proceedings by the bankruptcy court, a bankruptcy trustee (“*syndikos*”) is appointed. The Amendment provides for specific criteria, both affirmative and negative, that must be met for a person to be appointed as bankruptcy trustee. The affirmative criterion is that the person holds a license to act as insolvency administrator. The duties of such a person are regulated and a registry of persons qualified as insolvency administrators is expected to be established soon. Negative criteria regarding the bankruptcy trustee aim at ensuring the trustee’s total independence with respect to the debtor. Generally, the bankruptcy trustee must not be a relative of the debtor, contractually related to a person controlling the debtor, or a person controlled by the debtor; moreover, the trustee may not have served as a representative of the debtor or as its legal auditor during the period up to five years back from the time of the bankruptcy application’s submission. The extended provisions introduced with the Amendment further prevent the appointment of a person somehow related to the debtor or the management of the bankrupt entity as bankruptcy trustee.

The role of the bankruptcy trustee is key. After the initiation of the bankruptcy proceedings, the estate of the insolvent entity/person is exclusively administered by the bankruptcy trustee<sup>13</sup>, although the bankruptcy court may allow, at an initial stage, that the debtor manages its assets together with the bankruptcy trustee (restricted or not by the terms and conditions set by the bankruptcy trustee), if this is more likely to serve creditors’ interests. At a later stage the bankruptcy trustee is also obliged to publicly invite the creditors to submit their claims and then verify them.

One important responsibility of the bankruptcy trustee is that it may apply for the revocation of transactions entered into by the debtor in the *suspect period*, and that are deemed detrimental to the debtor’s creditors<sup>14</sup>. If a creditor requests the filing of an application by the trustee aiming at the revocation of a transaction within the suspect period in writing and for a specific legal reason and the trustee fails to take any such action within two months from the creditor’s request, the creditor may exceptionally file such application itself.

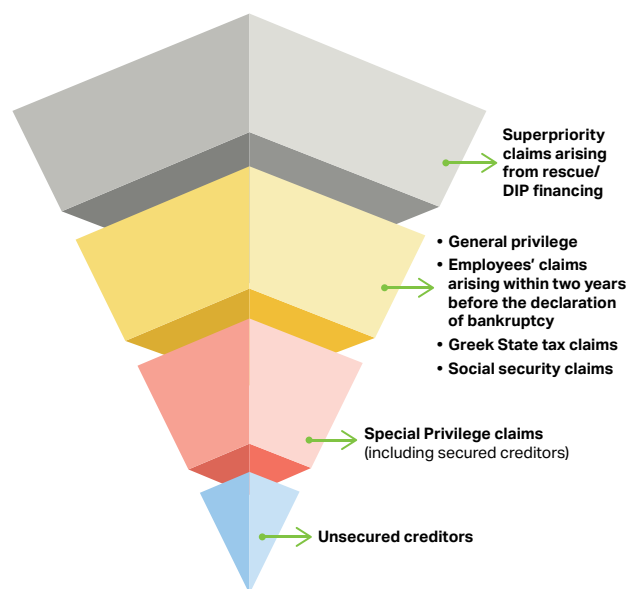
## LIQUIDATION PROCEEDINGS

The bankruptcy trustee is also responsible for the liquidation proceedings. Following the finalization of the creditors' claims verification, the liquidation stage starts, to the extent that no reorganization plan has been ratified (see below for more information on the reorganization plan). Liquidation of the debtor's business and assets is initiated by the bankruptcy trustee, while the distribution of the liquidation proceeds takes place in accordance with the applicable rules regarding the ranking of the creditors' claims. Creditors are divided in three categories: (a) those with a general privilege, including claims arising from financing provided for the rescue or preservation of the debtor's business in the context of a rehabilitation or reorganization plan, or during the negotiations for the agreement on a rehabilitation plan (which have a super-privilege) (similar in concept of superpriority claims for DIP lenders in U.S. Chapter 11 proceedings), employees' claims which arose within two years before the declaration of bankruptcy, claims of the Greek State for taxes and claims of social security organizations (the latter in case they arose before the declaration of bankruptcy); (b) those with a special privilege, especially claims secured by virtue of a pledge or mortgage or mortgage prenotation; and (c) unsecured claims. Same category claims are satisfied in the order set forth in the Greek Bankruptcy Code and claims of the exact same ranking are satisfied proportionally. In case of claims belonging to two or three of the above categories, the Greek Bankruptcy Code provides the exact percentage of the liquidation proceeds that is allocated to the claims of each category.

### Pre-bankruptcy proceedings- Rehabilitation agreement

The recent Reforms aimed at making rehabilitation agreements easier to reach, simpler and harder to dismiss in court. A huge benefit of reaching a rehabilitation agreement is that the debtor remains operational and is not ousted from the market. Articles 99-106 (f) of the Greek Bankruptcy Code provide for a collective pre-bankruptcy rehabilitation procedure, pursuant to which a rehabilitation agreement is reached either between the debtor and its creditors or between the creditors (in the second case provided that the debtor is already in a status of cessation of payments). The purpose of this is that the debtor satisfies its creditors at least in part, while remaining operational following the ratification of the agreement. It is now no longer possible for the debtor to submit an application for the opening of pre-bankruptcy proceedings without a rehabilitation agreement already in place. Such agreement may provide for, *inter alia*, a haircut of claims, a rescheduling of payments, a debt-to-equity swap, a sale of the debtor's business or specific business divisions or specific assets or a contribution in kind to a *société anonyme* to be established by the creditors.

### Illustrative Liquidation Waterfall Under Greek Law



## COURT APPLICATION

The rehabilitation agreement must be ratified by a court decision. Therefore, an application must be submitted to the competent court by (a) the insolvent debtor, provided that it has been agreed to between the debtor and creditors representing 60% of claims, at least 40% of which must be of (to the extent the debtor has any) secured creditors; or (b) creditors representing 60% of claims at least 40% of which must be of (to the extent the debtor has any) secured creditors, regarding the rehabilitation plan agreed between them and provided that the debtor is already in a status of cessation of payments. The agreement must be concluded prior to the opening of the scheme process (in the form of the so called pre-pack). The recent Reforms explicitly included the transfer of the debtor's business (either to a third party, to a company to be established by the creditors or to another company existing or newly established) as one of the possible solutions that may be agreed upon in the rehabilitation agreement.

The hearing date for the ratification of the agreement is set within 2 months from the submission of the application for the ratification. The submission of the application may also be filed even if a petition for the declaration of bankruptcy has already been filed. In such case, the petition for the declaration of bankruptcy is examined by the court only if the latter rejects the ratification of the rehabilitation agreement. In case of a rehabilitation agreement submitted only by the creditors, it is compulsory for them, according to article 104 p. 4 of the Bankruptcy Code, to submit, together with the ratification application, a petition for the declaration of bankruptcy. If the



debtor is in cessation of payments, it submits together with the pre-bankruptcy application, an application for the declaration of bankruptcy.

#### CONDITIONS TO RATIFICATION

The court will ratify the rehabilitation agreement if the following preconditions are met: (i) the debtor's business is likely to remain viable; (ii) the collective satisfaction of creditors is not impaired (i.e., the creditors will not receive less than what they would have received in a liquidation); (iii) the agreement is not the outcome of willful misconduct or other bad-faith behavior of any of the involved parties and does not contravene any mandatory law provisions, especially competition law ones; (iv) the creditors are treated equally, if of equal ranking; and (v) the debtor provides consent, in the case of an application submitted by the creditors, or fails to argue against any such application within the strict deadlines set by the law.

#### STAY PERIOD

From the submission of the application for the ratification of the rehabilitation agreement and until the issuance of a relevant court decision, any individual and collective enforcement actions against the debtor are automatically suspended for a maximum period of four (4) months. Such suspension is available only once per debtor. Following the above mentioned 4-month period a moratorium may be imposed following an application to that effect by anyone having a legal interest. For important business or social reasons<sup>55</sup>, such moratorium may also be extended in favor of guarantors. Additionally, a moratorium may also be imposed even before the submission of the application for the ratification of the rehabilitation agreement, following an application by the debtor or a creditor provided that the request for pre-application moratorium is accompanied by a written declaration of support signed by creditors representing at least 20% of claims and there is an urgent situation or an imminent danger. Such moratorium is valid until the application for the ratification of the rehabilitation agreement and up to a maximum period of four (4) months<sup>56</sup>.

The rehabilitation pre-bankruptcy proceeding has been used a lot in practice in the Greek market. A great number of rehabilitation petitions were unsuccessful and many of them were filed only in order to benefit from the moratorium. On the other hand, there are also a number of successful rehabilitation proceedings.

#### Notable Greek Rehabilitation Cases

Debtor	Date	Outcome
DIAS S.A.	2014-2016	Agreement provided for, <i>inter alia</i> , the transfer of the assets and part of the liabilities of the debtor to another legal entity of the fishery sector, Selonda S.A.
Marinopoulos S.A.	2016-2017	Agreement provided for the haircut of the obligations of the debtor and transfer of part of its assets and liabilities to another retailer (in the supermarkets sector), Sklavenitis S.A.

#### Bankruptcy-Reorganization Plan

Articles 107 et seq. of the Greek Bankruptcy Code allow the debtor to distribute the estate on the basis of a specific reorganization plan, thus giving an end to the (already opened) bankruptcy procedure and making fulfillment of obligations

more likely. The reorganization plan is similar to the rehabilitation plan, with the difference that the former takes place in the context of bankruptcy and the latter before bankruptcy. The reorganization plan may allow the continuation of the debtor's business as a going concern, while the debtor may retain management of its own business under the supervision of the bankruptcy trustee based on the provisions of the plan. The business continuation may give the debtor a last chance to fulfill obligations and find a way to turn viable in the long term, while remaining in the market.

### COURT SUBMISSION

The reorganization plan may be submitted to the competent court by the debtor with the application to be declared bankrupt or at any point until three (3) months after the decision declaring bankruptcy. Thanks to the Amendment, submission of a reorganization plan by creditors is now possible. More specifically, creditors representing 60% of claims, with at least 40% of which being claims of (to the extent the debtor has any) secured creditors, along with the application for declaration of bankruptcy, may submit a reorganization plan to the competent court. Upon ratification by the court, the plan is binding upon all creditors of the debtor including any dissenting and non-participating creditors. Thereafter, the bankruptcy proceedings are terminated and, unless otherwise provided in the reorganization plan, the debtor resumes administration of its business, being bound to meet obligations undertaken on the basis of the reorganization plan.

### REORGANIZATION PLAN CRITERIA

The proposed reorganization plan may provide for any reorganization measure, such as haircut of claims, rescheduling of payments and/or the sale of any of the debtor's business divisions as a going concern. It should be emphasized that following the recent Reforms, it is no longer possible for the competent court to pre-examine the proposed reorganization plan. By eliminating the judicial *a priori* examination, the Amendment excluded the possibility of an *a priori* rejection of any such plan.

### Special administration proceedings

Any natural or legal person that is eligible for bankruptcy, has its registered seat (as set forth in its articles of association) or domicile in Greece and is in a cessation of payments, may also utilize special administration proceedings. For this to happen a petition needs to be filed by its creditors representing at least 40% of the total amount of claims, among which at least one creditor is a credit institution<sup>17</sup> or leasing or factoring company which are supervised by the Bank of Greece. The hearing date is set within two (2) months from the filing of the petition, while the decision of the court must be issued within one (1) month after the hearing, thus making special administration proceedings a quick process, to the benefit of everyone involved.

#### Reorganization plan minimum required content

1. Accurate and complete information on the debtor's financial status.
2. Comparison of the amount expected to be received by creditors on the basis of the reorganization plan against the amount that creditors would be projected to receive in a liquidation proceeding.
3. Measures implemented or proposed to be implemented (e.g., financing, corporate reorganization) in order for the terms of the reorganization plan to be fulfilled.
4. Description of the rights and obligations of each creditor and of the debtor pursuant to the reorganization plan.

Pending petitions regarding the opening of a rehabilitation process for the debtor or its declaration into bankruptcy are automatically suspended upon filing the special administration petition with the competent court. This means that the opening of a rehabilitation process for the same debtor or the debtor's declaration into bankruptcy is not possible until the acceptance or rejection of the petition for the initiation of special administration proceedings. If accepted, the petition results in a *special administrator* being appointed for a period of twelve (12) months and all individual enforcement actions against the debtor, including the administrative enforcement measures that are available to state authorities, are automatically suspended for as long as the special administration procedure is open. The special administrator proceeds to a public tender (on the basis of the "highest offer price") with regards to the sale of the business assets (either as a whole or by division or any parts thereof), which will then be ratified by the competent court provided that all legal requirements are met. The creditors are expected to submit their claims following a relevant invitation by the special administrator and the sale consideration paid by the purchaser(s) is distributed to such announced creditors according to a ranking list created by the special administrator as described under articles 153-161 of the Greek Bankruptcy Code. The special administrator will decide on whether the liquidation amount is adequate for all the debtor's creditors.

If the administrator is of the view that this amount does not suffice, then the administrator is obliged to file a petition with the bankruptcy court for the debtor to be declared bankrupt.

The special administration procedure expires if the disposal of minimum 90% of the debtor's assets, in terms of accounting value, has not been concluded within twelve (12) months from the publication of the court's decision to open the special administration procedure.

## Conclusion

The recent Reforms are an attempt to better protect creditors' interests and maximize the likelihood of fulfillment of obligations, while in parallel enhancing the chances of survival for insolvent businesses. However, such proceedings remain time-consuming when compared to similar proceedings in other jurisdictions, mainly due to the workload of Greek courts. A boost may be given to the procedures upon establishment of the registry of persons qualified as insolvency administrators, which is provided for by the Reforms but is still pending. One has to keep an eye on the Greek market and the solutions opted for by the market players themselves, i.e., debtors and creditors, before providing any final assessments on the Reforms' value. ■

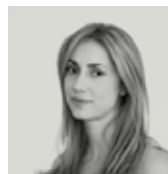
- The remaining participants are the bankruptcy court, the judge rapporteur, the bankruptcy trustee and the creditors' meeting. Following the Reforms, while the creditors' committee may still be elected, its role is substantially decreased and its main responsibility is to observe the process and acquire information on behalf of the creditors.
- Prior to the Reforms, the consent or cooperation of the creditors' committee was required in several instances (e.g., in order for the bankruptcy court to give to the bankruptcy trustee permission to sell assets of the estate), and the creditors' committee could object to any settlement reached by the bankruptcy trustee with regards to any claim of or against the debtor. While such powers of the creditors' committee were well-intentioned from a policy perspective, in practice they often led to unhelpful delays.
- "Small bankruptcies" are bankruptcies with a bankruptcy estate of less than €100,000.
- Such exception is in the case of a new ratified reorganization plan.
- Pursuant to Greek case law, the term "general" means that the debtor is unable to meet either all or the most important part of its obligations, or even one obligation if such obligation is important enough. The term "permanent" means that the inability of the debtor to meet its obligations is not due to temporary causes.
- Under the new procedures, the court can appoint an authorized representative who will participate in the required general meeting of the shareholders of the debtor and vote on behalf of the non cooperating shareholders, as long as such debtors would not collect from the liquidation proceeds in case of bankruptcy (if the debtor is already in a cessation of payments or if the non conclusion of the rehabilitation agreement is anticipated to lead to bankruptcy).
- Pursuant to the abolished article 106ia of Greek Bankruptcy Code.
- "Contingent insolvency" is not defined under the Greek Bankruptcy Code, and no court has interpreted the provision to date.
- Articles 99-106f of the Greek Bankruptcy Code.
- Article 107 *et seq.* of the Greek Bankruptcy Code.
- Articles 68-77 of the law Special Administration Law.
- Pursuant to Greek law, merchants are the individuals or legal entities (such as general or limited partnerships) who engage in commercial transactions as a regular occupation or purpose, as well as the legal entities which are characterized as "merchants" directly by the law (e.g., sociétés anonymes and limited liability companies).
- The directors and officers are not engaged in the administration of the debtor following the initiation of the bankruptcy proceedings. However, they have an obligation to cooperate with the bankruptcy trustee and provide information to the latter.
- In certain ways, the "harmful transactions" framework mirrors that of fraudulent conveyances under the U.S. Bankruptcy Code. For example, transactions considered especially harmful include (i) donations and gratuitous acts in general, as well as those for which the debtor received disproportionately low consideration (similar in concept to constructive fraudulent conveyance under the U.S. Bankruptcy Code, where a debtor receives less than reasonably equivalent value for prepetition transfers or incurrences of obligations) and (ii) acts of the insolvent debtor concluded during a five-year period before the declaration of bankruptcy if the debtor acted with the intention to harm or to benefit certain of its creditors and its counterparties knew that the debtor was acting maliciously (similar in concept to actual fraudulent conveyance under the U.S. Bankruptcy Code, where a debtor makes prepetition transfers or incurs obligations with the "actual intent to hinder, delay, or defraud" its creditors). The Greek Bankruptcy Code also safe-harbors certain transactions, such as those entered into in the ordinary course of business or those for which the debtor received contemporaneous new value.
- The notion of "important business or social reasons" is interpreted and specified on an ad hoc basis. It has been held in one case by Greek courts that there is an important business reason when the guarantor must be protected in order to be able to provide a new a guarantee in favor of the debtor, so that the latter can be rescued.
- Before the Reforms, the moratorium usually covered the period from the filing of the rehabilitation petition until the issuance of the court decision opening the rehabilitation procedure, the interim negotiations period and, in case of an agreement, the period between the filing for the ratification of the rehabilitation agreement and the relevant court decision, which was far more extended than four (4) months.
- Pursuant to Regulation 575/2013, "credit institution" means an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account. Most commercial banks would qualify as credit institutions.



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