Streamlining proceedings in the Greek Insolvency Code

Yiannis G. Sakkas and Yiannis G. Bazinas outline new amendments in Law 4446/2016 aimed at simplifying and streamlining the insolvency process

YIANNIS G. SAKKAS
Scientific Advisor,
Bazinas Law Firm, Athens (Greece)

YIANNIS G. BAZINAS
Attorney-at-law,
Bazinas Law Firm, Athens (Greece)

The Greek insolvency code (IC) has been going through an endless reform cycle ever since its total revamping in 2007[1].

The most recent amendment, sixth so far[2], was adopted in December 2016 as Law 4446/2016[3]. The legislator, once again, is trying to attune available insolvency procedures in search of measures that will:

a) make feasible a second chance for honest entrepreneurs;
b) streamline rescue proceedings; and
c) expedite and de-formalize the insolvency process overall.

A second opportunity

So far, an attempt for a fresh start, to the extent that the prospect is linked to discharge, stumbled upon an overly complex framework that required the lapse of 10 years before debtors could apply for the cancellation of residual debt[4]. However, the said proviso was revisited, drawing inspiration from similar national rules in other EU jurisdictions.

The resulting framework is fully in line with the European Commission's recommendation on a new approach to business failure (the Recommendation)[5]. Specifically, the new provisions allow honest entrepreneurs to file for discharge two years after the declaration of insolvency and be released from all residual obligations on the condition that the court finds the debtor "excusable", that is, in good faith and cooperative throughout insolvency proceedings[6]. However, the IC provides that only one discharge may be awarded per debtor. Any additional discharges will have to be decided on the basis of a reorganization plan[7].

Streamlining rescue proceedings

An important direction of the new law is to promote less formal and earlier reorganization of viable enterprises. To achieve this, the legislator has taken another crack at the two pre-insolvency rescue proceedings of Chapter 6, i.e. special liquidation and rehabilitation.

For starters, special liquidation, introduced in 2011[8], was abolished altogether. The procedure was never a success and was in mismatch with the rest of the IC[9].

Rehabilitation, on the other hand, was vastly reformed. Prior to the recent amendment, rehabilitation was exclusively a voluntary rescue procedure, allowing debtors the option to follow either a pre-pack or a judicial route. In the first case, the debtor would conclude a rehabilitation agreement with the required majority of creditors before the inception of any formal proceedings and then file the agreement to court for ratification. In the judicial route, the debtor filed an application requesting the opening of proceedings. If the court accepted the petition, the debtor and the creditors would set out to conclude a rehabilitation agreement, which was then entered to the court for ratification. Nevertheless, the judicial route was often blamed for encouraging debtor malfeasance as in many cases the real intention for the opening of proceedings was to take advantage of any provisional measures granted, without a true intention to conclude a rehabilitation agreement[10].

With this in mind, the new rehabilitation procedure only provides for a pre-pack route. The agreement must gather the approval of creditors holding 60% of all claims (40% of which must be secured claims) and is submitted to court for ratification. An automatic stay goes into effect until the court decides on the ratification. The *moratorium* has a maximum duration of four months, upon the lapse of which any stay will have to be decided by the insolvency court[11].

The court can also order preventive measures to cover the negotiation period, for a period of up to four months before the submission of the agreement, provided that creditors holding 20% of total of claims consent. In addition, rehabilitation is no longer exclusively a voluntary procedure. Creditors holding the above percentages of claims (60%-40%) can also submit a rehabilitation agreement to the court for ratification, provided that the debtor is in cessation of payments[12].

In order to further promote the early and prompt restructuring of viable enterprises, Law 4446/2016 also includes changes regarding the reorganization procedure. More specifically, the commencement standard has been expanded to include the "*likelihood of insolvency*" in order to allow the (voluntary) filing for debtors that are not yet in cessation of payments but only begin to experience economic difficulties. This provision, which also applies to rehabilitation proceedings, aligns the IC with the Recommendation and seeks to support early restructuring.

Furthermore, the new amendments restrict the right of the syndic[13] to submit a reorganization plan and reserve such right only for the debtor and the creditors holding the aforementioned percentages, but on the condition that creditors file the plan together with the involuntary insolvency petition[14].

The deadline for the submission of a plan by the debtor is also shortened to 3 months from the declaration of insolvency. The main reasoning behind these amendments is to simplify the procedure and shift the burden and the responsibility for submission to the debtor, who is considered to have more intimate knowledge of the business and be in a better position to make a timely and informed decision about the opening of proceedings.

Expediting the insolvency process

Finally, another set of amendments aim at simplifying and expediting the insolvency process by streamlining procedures and by removing bottlenecks. More specifically, the creditors' committee is abolished, since its usefulness, as envisaged by the law, was not confirmed in practice and it was considered that maintaining it would render the procedure even more burdensome and slow[15]. In addition to the above, the authority of the insolvency court has been reduced and many of its competencies have been transferred to the judge-rapporteur, who is now in a position to govern significant parts of the procedure (particularly the submission of claims and the liquidation) by virtue of final decisions.

Furthermore, the preliminary review of the reorganization plan by the court has now been abolished to further streamlining the procedure. In addition, the right of appeal for offended parties has been drastically reduced and the relevant deadlines have been shortened.

Last but not least, amendments have also been included in order to expedite small insolvency proceedings, allowing the court to derogate from the provisions of the IC in the context of such cases[16].

Summary

It is clear that the amendments to the law have a specific direction. The simplification and the streamlining of the insolvency process is indeed a crucial step forward, particularly if one considers that the chronic problem of the Greek insolvency system was the long duration of proceedings, which rendered any chance of rescue meaningless. Additionally, a debtor-friendly and workable discharge regime was urgently needed in order to remove the stigma of insolvency and support entrepreneurs and SMEs, which means 99% of all businesses in the country.

Yet, it would be unrealistic to expect too much of the new provisions. As noted before, the IC has been amended numerous times in the past decade and has in time incorporated the majority of international best practices, currently ranking highly among international peers[17]. However, the practical application of all these efforts has been significantly undermined by the prevailing economic conditions, which leave little room for successful business-turnaround.

The absence of an investor-friendly regime and difficulties in accessing new financing effectively sabotage restructuring efforts of the magnitude required to support the recovery of the Greek economy. In this respect, the new amendments to the IC, while well-intentioned, should not be expected to exhibit significantly different results in the insolvency practice, unless combined with an ambitious initiative to reshape the economic profile of the country. ■

Footnotes:

1 For a full English translation of the Greek insolvency code, see www.bazinas.com
2 This does not include insolvency related laws like the emergency para-insolvency legislation that was rarely deployed and is now being replaced or the consumer bankruptcy law (L.3869/2010), which was adopted (and amended) during the same period.
3 Law 4446/2016, State Gazette A 240/22.12.2016.
4 Discharge only applies to natural entities. After a brief amendment in 2015, Article 170a officially reduced the time limit for discharge to 3 years, yet this provision proved inapplicable without a full reform of the discharge framework.
5 C 2014/1500, 12.03.2014.
6 See articles 167-169 IC.
7 See article 169(4) IC.
8 See law 4013/2011.
9 Apparently, special liquidation was not in the initial drafts of the bill for the amendment of the pre-insolvency proceedings and was added at a much later stage.
10 See Explanatory Report to Law 4446/201, p., 2.
11 See articles 106(1),(3) and 106a IC.
12 See articles 100(1) and 104(1) IC.
13 The syndic is the office holder empowered to administrate the insolvency estate, see articles 63 et seq IC. His office is now being replaced with the Insolvency Practitioner, a fully regulated profession according to international best practices.
14 Reorganization is an *intra*-insolvency procedure under Greek law, considered the *ultimum refugium* for the cases where the declaration of insolvency does not result in an irreversible "trading death", see Explanatory Report.
15 The committee was composed of three members, one from each group of secured, unsecured and preferred creditors and its functions and responsibilities included the monitoring of insolvency proceedings, assisting the syndic etc, see G. B. Bazinas, Y. G. Sakkas, Greece, Chapter 23A, Collier International Business Insolvency Guide, Matthew Bender/Lexis-Nexis, 2014, p., 23A 32.
16 See articles 162 and 163 IC.
17 The 2017 World Bank Doing Business Report assigns a score of 12.0/16.0 to Greece on the Strength of Legal Framework Index, which is fully in line with regional peers.

> **AN IMPORTANT DIRECTION OF THE NEW LAW IS TO PROMOTE LESS FORMAL AND EARLIER REORGANIZATION OF VIABLE ENTERPRISES**

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