New rules for corporate rescue in Greece

Alex Kastrinou brings us a timely analysis of the effectiveness of the recent changes to corporate rescue in Greece

ALEXANDRA KASTRINOU
Principal lecturer,
Nottingham Law School

"THE LAW OF 2007 CONSTITUTES THE FIRST SERIOUS EFFORT TO PROMOTE THE CONCEPT OF CORPORATE RESTRUCTURING"

Following the example set by many other European jurisdictions, Greece sought to reform its Insolvency Code in 2007, in order to introduce procedures that offered a genuine chance of survival to ailing companies.

The Law of 2007 has been subsequently tweaked a few times[1] in attempts by the legislator to strengthen the rescue culture nurtured by the 2007 reforms and to facilitate corporate rescue in a financially challenging environment, where the stigma of failure still has a strong presence.

The aim of this article is to offer a brief analysis of the corporate rescue provisions of Greece as they now stand and to assess their efficiency.

As opposed to other European Member States, Greece traditionally lacked a sophisticated corporate rescue regime. The Law of 2007 constitutes the first serious effort to promote the concept of corporate restructuring in this jurisdiction, which was previously geared towards the liquidation of traumatised companies. As with almost every other jurisdiction in current times, one of the key aims of the new Greek insolvency rules is to provide ailing but salvageable companies with a possibility of recovery, or crucially facilitate an orderly exit of insolvent entities from the market.[2] Never before have those two functions of insolvency law been more important for the Greek economy. Greece is slowly but steadily recovering from a financial crisis that brought the county's economy to its knees. The drastic steps taken by the legislator back in 2007 to foster a corporate rescue culture, as well as the subsequent multiple efforts (in the form of legislative reforms) to boost that rescue culture appear now to be bearing fruit.

Prior to the 2007 reforms, corporate rescue provisions did not have a codified form. Instead, various dispersed rejuvenation provisions existed, which dealt with the avoidance of corporate failure and distress. The Law of 2007, striving to mark a shift in policy, replaced all of the (primarily creditor-friendly) dispersed laws with a unified Insolvency Code, which contained some starkly debtor-friendly rescue procedures.

Law 3588/2007 was particularly aimed at offering the honest but ill-fated debtor a second chance, facilitating the rescue of viable distressed companies and preserving employment. Importantly, two clear-cut rescue procedures were introduced, namely the pre-insolvency procedure of rehabilitation (Article 99) and the reorganisation plan procedure (article 108).

The rehabilitation procedure

Article 99, introduced a new type of 'debtor in possession' procedure, which allows debtors to overcome their financial difficulties, whilst they remain in control of their company. The rehabilitation procedure, in its inception, highly resembled the French conciliation procedure and involved the appointment of a mediator, whose task would be to negotiate an agreement with the creditors, which would then be subject to ratification by the court.

A debtor, who is either experiencing imminent or foreseeable financial difficulties, or is in cessation of payments, can petition the court for the ratification of a rehabilitation agreement.[3] Originally, under the 2007 regime, in order for a collective negotiation process to commence, the debtor would have to apply to the court for the initiation of the rehabilitation procedure. Such a requirement, defeated any rescue prospects, as it effectively prevented the debtor from taking action at an earlier stage (i.e. before their application to the court), but also resulted in increasing the procedural costs, as well as the delays. It has been argued that this requirement also made the rehabilitation procedure prone to abuse, as unscrupulous debtors would aim to open proceedings solely to take advantage of court delays and a moratorium, which would become effective at the time a petition was submitted to the court to open proceedings, therefore, postponing the opening

of liquidation proceedings.[4]

The latest reforms[5] of the Greek Insolvency Code effectively address the issues of procedural costs and delays, because, pursuant to the amended Article 99, the debtor must commence negotiations as early as possible and without the need to apply to court for an order. The debtor is to achieve an out of court collective agreement with the creditors,[6] which may then be submitted to the court for ratification.

Additionally, amendments were introduced to Article 99 with regard to the moratorium that is attached to the rehabilitation procedure, aimed at reducing the risk of abuse by bad- intended debtors.[7] In particular, pursuant to Article 106a, in order for the debtor to benefit from a moratorium during the negotiation period, creditors representing 20% of the total value of claims must issue a written statement, confirming that they consent to participate in the negotiations with a view to reaching a reorganisation agreement. Accordingly, debtors lacking the support of creditors would arguably avoid submitting an application for the protection of a preliminary moratorium. Furthermore, pursuant to Article 106, the court receiving an application to ratify a rehabilitation agreement would grant an automatic moratorium of four months with the possibility of extension until the closure of the proceedings. Again, the legislator leaves little room for abuse by unscrupulous debtors, as in order for a debtor to reach that stage (i.e. applying for ratification of the agreement) it is presupposed that they would have acquired the requisite creditor approval.[8]

Seeking to enhance the efficiency of the rehabilitation procedure and to avoid applications from dubious debtors, an additional safeguard was introduced, namely that an application to have an agreement ratified must be accompanied by an expert's report. The expert, who typically is a financial institution or an auditing firm, is appointed by the debtor and his/her approving creditors.[9] The expert's report, *inter alia*, must contain information in relation to the financial situation of the debtor, a detailed list of the creditors' claims (particularly secured creditors), the market conditions and the prospects of success of the agreement.[10]

It could be argued that under the revised Article 99, where there is no longer a need to petition the court for approval of the opening of a negotiation period, the debtor is provided with a key opportunity to commence discrete restructuring negotiations with the creditors. The lack of publicity during the process of negotiations is arguably a significant development, as it safeguards the value of the business and protects it from the stigma, which is associated with failure.

“THE LACK OF PUBLICITY DURING THE PROCESS OF NEGOTIATIONS IS ARGUABLY A SIGNIFICANT DEVELOPMENT”

> WHERE ATTEMPTS TO AVERT A FINANCIAL CRISIS AT THE PRE-INSOLVENCY STAGE HAVE PROVED FUTILE, AN ALTERNATIVE ROUTE TO CORPORATE RESCUE MAY BE AVAILABLE

Once an agreement has been reached, the debtor may apply to the court in order to have the agreement ratified. Upon the judicial ratification, the agreement becomes binding upon all creditors, including dissenting creditors (cram down effect).[11]

Although, one of the key functions of the rehabilitation procedure is to encourage ailing debtors to take action and to restructure their affairs whilst in control of the company (i.e. debtor in possession), it is important to note that like in any other rescue procedure, the support of creditors plays a crucial role. As far as the functioning of the rehabilitation procedure is concerned, the legislator appears to be putting the debtor in the driver's seat. However, it should also be noted, that where the debtor has reached a state of cessation of payments, it is possible for its creditors[12] to draft a rehabilitation agreement without any debtor involvement and lodge an application to the court to have it ratified.[13] Arguably, the rationale behind this provision is to encourage viable debtors to take preventative action as early as possible. At the same time, it appears that a balance is achieved between the promotion of rescue through a 'debtor in possession' regime and the protection of the creditors' rights, by way of allowing them to take control of the debtor's rehabilitation, where the latter has failed to propose and implement any restructuring measures.

Article 99, as amended, aims to facilitate the conclusion and implementation of restructuring agreements and, importantly, provides for a moratorium, which safeguards the debtor against any creditor enforcement claims. It remains to be seen, whether there will be an actual shift towards a rescue culture, where the procedure will operate as a stand-alone 'debtor-in-possession' rescue procedure, or whether it will simply function as a device that enables creditors to have pre-pack agreements ratified by the courts.

The reorganisation plan

Where attempts to avert a financial crisis at the pre-insolvency stage have proved futile, an alternative route to corporate rescue may be available for an insolvent debtor, namely by way of a reorganisation plan, which forms part of the traditional liquidation procedure. In particular, the debtor may submit to the court a reorganisation plan within three months from the moment they entered a state of cessation of payments, together with their application to open liquidation proceedings.[14] Once the reorganisation plan is ratified by the court, it becomes binding upon all creditors, including dissenting creditors. Only where a reorganisation plan does not receive the requisite creditors' support[15] and subsequently, judicial ratification, liquidation proceedings will be initiated.[16] This formal reorganisation phase is designed to ensure that the debtor is given another chance, even at a later stage, and consequently avoid liquidation.

The information contained in the reorganisation plan is divided into three stages, namely an 'informative', a 'descriptive' and a 'development' stage. In particular, the debtor is required to submit a plan, which contains important information in relation to the financial situation of the company and describes the origins of the company's distress. In addition, the debtor is required to disclose any information which would be likely to affect the implementation of the reorganisation plan, its acceptance by the creditors or its ratification by the court.[17] Moreover, the plan must provide a report comparing how the creditors' claims would be satisfied as part of the suggested reorganisation plan and liquidation proceedings.[18] Furthermore, the debtor must provide a list of the measures adopted, or going to be adopted, in order to ensure the satisfaction of the proposed change to the creditors' claims, as well as a list of measures which would outline any changes in the operational aspects and the unproblematic continuation of the company.[19]

Furthermore, a crucial amendment was introduced in 2016 to the Reorganisation Plan procedure, namely, it is no longer necessary for the court to approve the content of a proposed plan prior to this being submitted to creditors for approval[20]. This effectively limits the involvement of the court in the process and accordingly eliminates the associated procedural delays and costs, making the procedure more attractive to ailing debtors and their creditors.

It could be argued that the introduction of the reorganisation plan procedure in 2007 and its subsequent amendments demonstrate the intention of the legislator to promote the idea of corporate rescue where informal rescue attempts have failed. Under the current legal framework, the debtor is encouraged to submit a reorganisation plan even at a later stage, therefore adding an extra defence against liquidation.

Conclusion

It is argued that, following the introduction of the Law of 2007 the insolvency laws of Greece witnessed a remarkable shift of ethos. The legislator's intention to promote the concept of corporate rescue and to encourage a second chance culture is clearly reflected in the current legal framework. One must nevertheless be reminded that a legal framework can only operate efficiently if it is supported by equally efficient institutional frameworks. A first step to strengthen the institutional framework in Greece was made in 2016, where for the first time a provision was made for the creation of a regulated insolvency profession. Arguably, next on the reform agenda should be the efficiency (or lack of it) of the judicial system, as though the reforms somewhat solved this problem by reducing the level of court involvement, courts remain notoriously slow and are not necessarily specialist bankruptcy courts.

Finally, at a time where Greece appears to be recovering slowly from the financial crisis, one must not forget that the restructuring of problematic companies has proven to be a rather difficult task in an economic environment where banks frequently struggle themselves to keep up with their own capital requirements.

One would hope that the much-needed reforms to the judicial system will soon be introduced in Greece. This, coupled with what appears to be (at least in theory) an effective legal framework and a recovering financial sector, should contribute to the establishment of a corporate rescue culture. The corporate rescue rules in Greece have come a long way in the last decade, the numerous reforms demonstrating that the legislator is actively striving to create a framework (both institutional and legal) which facilitates rescue. However the establishment of a reformed judiciary and the new laws still only in the books are insufficient in themselves and the system can only effectively develop through their application. Here, one cannot fail to remember Aristoteles's wise words that "*When we have to learn things before we can do them, we should learn them by doing them*". Therefore, the journey towards a sophisticated corporate rescue culture is likely to be a long one. ■

Footnotes:

1 Reforms to the Greek Insolvency Code have been introduced by Law 3588/2007, Law 4013/2011, Law 4446/2016 and Law 4549/2018.

2 See Paulus, C., Potamitis, S., Rokas, A., & Tirado, I., *Insolvency Law as a Main Pillar of Market Economy- A Critical Assessment of the Greek Insolvency Law*, 2015 (24) Int. Insolv. Rev. 1-27, at p.3.

3 Article 99(3) Where the debtors is are in a state of cessation of payments, at the time of applying to the court for ratification of the agreement, it is required that they also file for the opening of formal insolvency/liquidation proceedings. If the court ratifies the rehabilitation agreement, the debtor's application to open liquidation proceedings is rejected. Conversely, where the court rejects the debtor's application to ratify the agreement, the court proceeds to consider the application to have liquidation proceedings opened.

4 See Frastanlis, *Pushing Towards Efficiency: New Changes in Greek Restructuring and Insolvency Law*, (2018), Int. Corp. Resc. 14(4), 281-284 at p. 281. See also Paulus, C., Potamitis, S., Rokas, A., & Tirado, I., note 2 above, at p. 10

5 By way of Law 4446/2016, as restated in Law 4549/2018.

6 A rehabilitation agreement may be submitted to court for ratification, where it has been approved by creditors representing 60% of the total value of claims, including 40% of secured creditors. See Article 100(1).

7 See Frastanlis, S.,note 4 above at p. 281.

8 I.e. Creditors representing 60% of the total value of claims, including 40% of secured creditors must give their approval

9 Article 104(6).

10 Article 104 paras. (3)(4) &(5).

11 See Article 106b para. 3 (a), (b) & (c).

12 Creditors representing 60% of the total value of claims, including 40% of secured creditors.

13 Article 100(1).

14 Article 108 (2). This is subject to extension by maximum one month, where the court is satisfied that the delay does not prejudice the interests of the creditors and that there is a real prospect that the plan will be accepted by them.

15 The reorganisation plan has to be approved at a creditors' meeting by creditors representing at least 60% of the total claims and at least 40% of these must be secured. See Article 108.

16 Article 107.

17 Article 109a (a).

18 Article 109a (b).

19 Article 109 (b).

20 The Law of 2016 abolished what was previously Article 114 of the Insolvency Code.

> "THE CORPORATE RESCUE RULES IN GREECE HAVE COME A LONG WAY IN THE LAST DECADE"