

Bankruptcy Law



Articles 99 et seq. of the Greek Bankruptcy Code:
Pre-insolvency Rehabilitation Procedure and Special Liquidation following the enactment of Laws 4013/2011 & 4072/2012

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I. Introduction

New Law 4072/2012, published in the Greek Government Gazette no. 86/11.04.2012 (the “Law 2012”), amended, among others, certain provisions of the pre-insolvency rehabilitation procedure of the Greek Bankruptcy Code (the “GBC”), recently introduced into the Greek legal system pursuant to the innovative provisions of Law 4013/2011 (Gov. Gazette no. 204/15.09.2011) (the “Law 2011”).

Law 2011 came into effect to reform the previous “conciliation process”, which was broadly characterized as inefficient, though popular due to its abusive use by debtors. Instead, the rehabilitation procedure focuses on the collective negotiations between debtor and creditors, which will set favorable conditions for the conclusion of an effective rescue agreement (the “Rehabilitation Agreement”), without the collective interests of the creditors to be impaired¹.

The new procedure provides for (i) a “cram-down” effect of the Rehabilitation Agreement over the objections of the minority creditors, (ii) the possibility for conclusion and ratification of the Agreement prior to the initiation of the rehabilitation procedure, (iii) the optional involvement of a mediator, (iv) the mandatory filing of an expert’s report, (v) the expansion of the potential scope of the Agreement and (vi) the re-introduction of the special liquidation procedure.

Almost one (1) year after the implementation of the new procedure, the provisions of Law 2012 came into effect to amend three (3) of its main aspects by (i) accelerating the process for the conclusion of the rehabilitation agreement, (ii) providing higher protection to the debtor’s personnel and (iii) suspending the criminal prosecution of the debtor during the said procedure.

In light of the above, the key points of the currently applicable rehabilitation procedure are as follows:

II. Petition for the initiation of the rehabilitation procedure

A. Filing of the Petition

Natural persons or legal entities, with insolvency capacity, whose main interests are in Greece and who suffer from a present or a threatened inability to fulfill their pecuniary obligations, are entitled to file for a petition with the competent Multi-member Court of First Instance (the “Insolvency Court”) requesting the initiation of the rehabilitation procedure. The hearing for the trial shall be scheduled within two (2) months from the filing of the petition, in accordance with Law 2012.

A deposit slip of the Deposits and Loans Fund, amounting to four thousand Euros (€4,000), and, in the event of an S.A., to seven thousand Euros (€7,000), is required to be submitted along with the petition, under the penalty of inadmissibility.

In addition, according to the provisions of Law 2012, in the event a Rehabilitation Agreement is reached and ratified by the Insolvency Court, the debtor may not file for a second petition unless a period of five (5) years has passed from the time of ratification of the previous Rehabilitation Agreement.

1. Namely, without the economic position of the creditors who have not entered into the Agreement to become worse than the position they would have been, in the event of enforcement proceedings or cessation of payments of the debtor (article 99§2 of GBC).

B. Content of the Petition

In contrast to the previously applicable “petition for conciliation”, the petition for the rehabilitation procedure shall be accompanied, under the penalty of inadmissibility, by an expert’s report; the expert may be chosen by the debtor. In addition, such petition must describe in detail the financial situation of the debtor, the reason of its economic inability, the proposed measures to face such inability, the size of its business and personnel etc.

It should be noted that one of the most innovative aspects of the new procedure is the ability of the debtor and its creditors to conclude a Rehabilitation Agreement prior to the initiation of the process; in such a case, the Rehabilitation Agreement shall be submitted with the petition for the initiation of the procedure.

C. Cessation of Payments

One of the most significant and innovative introductions of Law 2011 is the application of the rehabilitation procedure to debtors who have already entered into the state of cessation of payments, in other words, who fulfill the insolvency requirements. In that case, the rehabilitation petition of such debtors must be accompanied by a petition for their declaration as insolvent, the examination of which shall be suspended until the relevant procedure is terminated²; in the event the Insolvency Court finally ratifies the submitted Rehabilitation Agreement, it is presumed that the petition for the insolvency declaration is rejected.

Likewise, in the event a relevant petition for the debtor’s declaration as insolvent³ is pending at the time of filing of the petition for initiation of the rehabilitation procedure, or in the event it is submitted after such filing, its hearing may be scheduled for the time of the rehabilitation’s hearing.

D. Provisional Measures

Any person with legitimate interest may file a petition before the Insolvency Court, in the context of provisional measures, seeking the suspension of individual enforcement proceedings against the debtor’s assets; the said petition may be filed along with the main petition for the initiation of the rehabilitation procedure.

Such suspension shall concern solely liabilities of the debtor arisen prior to the filing of the relevant petition⁴ and may be extended to guarantors or other co-debtors, in case of significant business or social reasons; the suspension shall last no more than two (2) months from the initiation of the procedure.

It should be noted, that the provisional measures shall in no case affect any financial collateral agreements or any closed-out netting clauses under the meaning of article 2 of Law 3301/2004 (implementing EU Directive 2002/47), as well as any rights of termination of lease agreements and repossession of leased premises, in the event the debtor has been in payment default for more than six (6) monthly rents.

Moreover, article 234§6 of Law 2012, provides for certain exceptions from the suspension effect, where social reasons require so (i.e. payments necessary for creditors’ children support or payment of employees’ claims).

2. According to article 99§6 of the GBC, the Rehabilitation Procedure is deemed as terminated in the following cases: (i) ratification of the Rehabilitation Agreement, (ii) rejection of the petition for initiation of the procedure, (iii) lapse of the two (2) months’ period, and (iv) revocation of the decision that orders the initiation of the procedure.

3. The petition for the debtor’s declaration as insolvent may be submitted by the debtor itself, its creditors or the Public Prosecutor of the Court of First Instance.

4. For claims arising after the filing, suspension may be granted only under special circumstances and at the discretion of the Insolvency Court.

III. Initiation of the rehabilitation procedure

In the event the Insolvency Court deems that the rescue of the business appears possible and that the collective interests of the creditors will not be impaired, it shall order the initiation of the rehabilitation procedure for a period not exceeding two (2) months, in accordance with Law 2012; such period may be extended by the Insolvency Court for one (1) more month, following a petition of the debtor, the creditor or the mediator.

A. Mediator and Special Administrator

In order for the conclusion of the Rehabilitation Agreement to be facilitated, the Insolvency Court may appoint a mediator and/or a special administrator (for the preservation of the debtor's assets)⁵, upon a relevant petition of the debtor, the creditors or *ex officio*⁶.

In particular with respect to the mediator, its appointment shall be mandatory either upon the debtor's request or in case a creditors' assembly is convened. If the purpose of its appointment cannot be fulfilled (i.e. no agreement can be reached), the mediator shall immediately notify the competent court, in order for the relevant Decision to be revoked and the initiation procedure to be terminated.

B. Conclusion of the Rehabilitation Agreement

The Rehabilitation Agreement may be concluded either upon direct negotiations between the debtor and its creditors or after the convocation of the creditors' assembly by the Insolvency Court, following a petition of the debtor. Despite the previously applicable "*conciliation process*", the Rehabilitation Agreement may be concluded and filed prior to the initiation of the said proceedings.

Convocation of the Creditors' Assembly

The invitation of the creditors, which shall include the agenda, the place and the time of the meeting, shall be undertaken by the mediator⁷ at least fifteen (15) days prior to the day of such meeting. A plan of the rehabilitation agreement, signed by the debtor, as well as the expert's report, shall be available to the creditors ten (10) days prior to the meeting as well. All creditors having a claim at the time of initiation of the procedure shall be entitled to participate in the assembly.

The assembly is considered in quorum if attended by creditors representing, at least, 50% of the total amount of claims against the debtor; in order for a resolution to be validly taken, a majority of creditors representing 60% of the claims of the present creditors shall be met, 40% of which shall correspond to secured claims (secured by in rem rights or holding a special lien or a pre-notation of mortgage).

In the event a Rehabilitation Agreement is reached, the assembly shall authorize its representative(s) to co-sign the agreement with the debtor.

Direct Negotiations

In the event no creditors' meeting has been convened and in order for a Rehabilitation Agreement to be concluded, the relevant plan shall be signed by creditors representing 60% of the total amount of claims against the debtor, 40% of which shall correspond to claims secured by in rem rights or holding a special

5. Either a natural person or a legal entity.

6. On the contrary, under the previously applicable provisions, the appointment of the mediator was mandatory.

7. As previously mentioned, the appointment of a mediator is mandatory in case a creditor's assembly is convened.

lien or a pre-notation of mortgage. The same majority applies in case the Rehabilitation Agreement is concluded prior to the official initiation of the proceedings (prepackaged plan).

C. Abusive Refusal of Shareholders or Partners - Participation of the State

In order for the debtor to lawfully enter into the Rehabilitation Agreement, a relevant decision of its board of directors or administrators is sufficient. In cases, however, where, the fulfillment of certain terms of the Rehabilitation Agreement require, under the applicable Company Law, a resolution of the general assembly of its shareholders or partners (depending on the debtor's legal form) or in the event one or more of such shareholders or partners abusively refuse to consent to the conclusion of the "rescue" agreement, the Insolvency Court may appoint a special representative who will substitute them in their voting rights⁸.

It should be noted, that the State or the public entities, in general, may participate in the rehabilitation procedure entering into the relevant Agreement. However, we are not aware of any case where the State participated as the major creditor and provided its consent thereto.

IV. Content of the rehabilitation agreement

The Rehabilitation Agreement, aiming to regulate the debtor's assets and liabilities in such a way so that all the involved parties are satisfied, must be accompanied by a business plan and may provide for the following terms:

- Amendment of the terms of the debtor's obligations (i.e. repayment schedule, interest rate, securities);
- Capitalization of the debtor's liabilities by issuing shares (debt-for-equity swap);
- Regulation of the future relationship between creditors;
- Reduction of claims against the debtor;
- Disposal of the debtor's assets;
- Assignment of the debtor's management to a third party;
- Transfer of the debtor's business, in whole or in part;
- Suspension of individual enforcement actions by creditors⁹;
- Appointment of a supervisor for the execution of the terms of the Rehabilitation Agreement; and/or
- Payment of additional amounts to creditors in cases where the financial position of the debtor gets improved (*this case has been added pursuant to article 234§9 of Law 2012*).

V. Ratification of the rehabilitation agreement

A. Petition

For the ratification of the Rehabilitation Agreement, a petition must be filed with the Insolvency Court, by the debtor, the creditor or the mediator, accompanied by the Rehabilitation Agreement (promptly signed) and the expert's report; the hearing for the trial shall be scheduled within two (2) months.

8. According to the Introductory Report of Law 2012, such substitution does not violate the voting rights of the shareholders/partners, and, therefore, it does not constitute an abuse of property rights under article 25§3 of the Greek Constitution.

9. Under Law 2012, such suspension shall not bind the non-contracting creditors for a period exceeding three (3) months from the ratification of the Agreement.

B. Ratification

Provided that the Rehabilitation Agreement has been duly drafted and signed, the Insolvency Court shall proceed with its ratification except for the following cases:

- If it is not presumed that, following the ratification, the debtor or its business will become sustainable;
- If it is presumed that the collective satisfaction of the creditors is impaired;
- If the Rehabilitation Agreement has resulted from malice, unfair act or bad faith of the debtor, the creditor or any third party or it violates mandatory provisions of law;
- If creditors have not been treated on the basis of equal treatment for creditors ranking in the same position¹⁰; or
- In the event of cessation of payments, if such cessation may not be lifted by the Rehabilitation Agreement.

Instead of rejecting the petition, the Insolvency Court may request the filing of additional documents or the amendment of the Rehabilitation Agreement within a deadline which shall not exceed ten (10) days.

The decision of the Insolvency Court that ratifies the Agreement may be challenged by a third party, exercising a third party intervention, whereby showing that such party had legitimate interest to be present at the relevant hearing. The decision that rejects the Agreement may be challenged by an appeal filed in accordance with the standard civil procedure rules.

C. Consequences of Ratification

The Insolvency Court decision that ratifies the Rehabilitation Agreement shall constitute an *enforcement title* in relation to the undertaken obligations.

Upon its ratification, the Rehabilitation Agreement binds all the creditors whose claims have been regulated thereunder, even those who have dissented or those who have not been involved as contracting parties¹¹ (*cram-down effect*); such binding effect is one of the main aspects of the rehabilitation procedure set forth by Law 2011, as opposed to the previously applicable "*conciliation process*".

In addition, following such ratification, (i) any previous prohibition concerning the issuance of cheques is lifted, (ii) any criminal prosecution of misdemeanor, relating to bounced cheques or to payments in default towards the State or social security funds is suspended (provided that such offenses have occurred prior to the filing of the petition for initiation of the procedure) and (iii) all third parties' securities remain unaffected¹².

It is worth noting that the said criminal liability (under case ii above) shall be eliminated only upon the promptly fulfillment by the debtor of its obligations under the Rehabilitation Agreement (provision introduced by Law 2012); on the contrary, under the provisions of Law 2011, such liability was extinguished ex officio following the notification.

In case of non-compliance by the debtor with its obligations under the Rehabilitation Agreement, the creditors may exercise the rights provided by the standard provisions of civil & civil procedure law, relating

10. Unless a significant business or social reason exists or the creditor provides its consent thereto.

11. Except for claims that came into existence after the initiation of the procedure.

12. Without prejudice to any special provision stating otherwise.

to the non-fulfillment of debtors' obligations or debtors' delay in payments, including termination or withdrawal rights.

D. Transfer of Business

In cases where the Rehabilitation Agreement provides for the transfer of the debtor's business, in part or as a whole, the acquirer may undertake part of the liabilities of the business, whereas the remaining liabilities may be repaid, with the proceeds of the sale, or capitalized or even deleted; the law provides for the possibility such acquirer to be a *societe anonyme* established by creditors through contributions in kind of part or the whole of their claims against the debtor.

VI. Special Liquidation

One of the most significant introductions of Law 2011 is the pre-bankruptcy procedure of "Special Liquidation" provided by article 106(ia) of the GBC. Such procedure is applicable only to debtors who have already entered into the status of cessation of payments (or such entrance is imminent) and who qualify as medium and large enterprises, satisfying at least two (2) of the following three (3) criteria: (i) the asset value of their balance sheet equals, at least, €2.500.000, (ii) their net turnover equals, at least, €5.000.000, and (iii) the average number of personnel occupied for the last fiscal year was, at least, fifty (50).

The petition for submission of the debtor to the special liquidation procedure may be filed by one or more of the creditors, the debtor itself or even the Public Prosecutor and must be accompanied by (i) a certification of a Bank or an investment services firm for the existence of a solvent investor interested in buying the assets of the business and (ii) a declaration by which the proposed (according to the petition) liquidator shall accept its appointment and confirm that the funds, required for the completion of the procedure, are available.

In the event all the aforementioned requirements are met and the maintenance of the business is deemed possible, the Insolvency Court shall accept the petition and appoint a special liquidator. In case, however, of a pending rehabilitation procedure and until its completion, the examination of the special liquidation petition shall be suspended¹³.

By the time of its appointment, the special liquidator shall undertake the management of the business and proceed with the conduct of a public auction for the transfer of the relevant assets as a whole; the creditors' claims shall be repaid out of the proceeds of such liquidation.

VII. Final Comments

The rehabilitation procedure, newly introduced into the Greek legal regime (September 2011) and recently amended (April 2012), is considered a far more efficient tool for a business in need to be rescued and for the creditors' claims to be satisfied.

13. According to the Introductory Report of Law 2011, the possibilities of an enterprise to survive through a Rehabilitation Agreement are much higher than those through the special liquidation process, since the former results from negotiations between the interested parties, whereas the latter involves a third-person's management.

However, in order for the new legislative framework to be functional in practice and for the interested enterprises to be successfully restructured, especially in times of economic turmoil, a less time-consuming judicial procedure is undoubtedly required, though hardly achieved. New Law 4072/2012 dealt with such an issue accelerating the relevant procedures; however, the well-performing co-operation of all the parties involved is the most significant element for a successful rescuing outcome.

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