(2022) 10 NIBLeJ 1

The Transposition of the Directive on Preventive Restructuring Frameworks into Greek Law

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The newly enacted Greek law titled "Debt Settlement and Facilitation of a Second Chance" (Law No. 4738/2020 Greek Government Gazette A' 207 27/10/2020) introduces an integrated framework for dealing with early warning, personal and corporate insolvencies as well as discharges of debt under specific criteria. In addition, the law transposes the provisions of Directive 2019/1023[1] on preventive restructuring frameworks into Greek law and replaces the majority of the existing mechanisms for debt settlement and restructuring schemes that are currently in force. A unified legal framework for modern and preventive restructuring, pre-insolvency and insolvency proceedings, implementing internationally-tested mechanisms and restructuring tools has been introduced into Greek law.[2]

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[1] EU Directive 2019/1023 of the European Parliament and of the Council on the 20 of June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L172/18.

[2] The preliminary attempt for a comprehensive insolvency legislation was made in 2007. The debt crisis which caused numerous business failures and bankruptcies lead to the introduction of various procedures

According to the explanatory memorandum[3], the overall objective of the new law is to increase the effectiveness of restructurings, insolvencies and to ensure at least one full debt discharge procedure as well as to shorten their relevant timelines through the simplification of procedural requirements and the implementation of a central electronic insolvency registry to serve as a means of communication for court and insolvency practitioners with all the parties involved. This might speed up the insolvency process through the sale of the business or parts thereof at real market values, and might also help preserve viable businesses through access to an out-of-court operating environment for formulating proposals for the settlement of the debtor's debts and the avoidance of his insolvency risk or preventive restructuring frameworks by strengthening the role of creditors and limiting the involvement of the courts.

The legislative text includes tools of modern technology, as well as new legal instruments, along with the already established insolvency procedures. This paper outlines the most important characteristics of the Greek preventive restructuring frameworks, points out more challenging elements and compares the Greek transposition with other implementation acts.

I. OVERVIEW OF THE TRANSPOSITION ACT AND EMBEDDING INTO GREEK LAW

The Greek parliament implemented the EU Directive 2019/1023 on preventive restructuring frameworks on 20 of October 2020.[4] The transposition act (Law No. 4738/2020) is divided into components which address the following three strategic areas:

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as amendments to the existing law in order to respond in a timely matter to the increasing private debt. The coherence and structure of the law was in some way jeopardised, whereas a patchwork of parallel procedures undermined its status; Yiannis G. Sakkas and Yiannis G. Bazinas, 'The new Greek Insolvency Law: A turning point', Eurofenix Winter 2021/2022, p. 22.

[3] Explanatory memorandum of Law No. 4738/ 2020, p. 162 et. seq.

[4] The Dutch transposition act (Wet homologatie onderhands akkord - WHOA) dated 7 of October 2020 entered into force on the 1 of January 2021 and amends – like the Greek transposition – the existing insolvency code (Faillissementswet), see for the core elements Robert van Galen KTS 2021, 225; Dominik Skauradszun, in BeckOK StaRUG (Dominik Skauradszun and Alexander Fridgen), 3rd ed. 15.10.2021, sec. 84 mn. 9.1 et seq. The Austrian transposition entered into force on 17 of July 2021 as a new stand-alone bill (Restrukturierungsordnung - ReO), see for an overview Eva Ringelspacher and Magdalena Nitsche, ZRI 2021, 477; Dominik Skauradszun, in BeckOK StaRUG (Dominik Skauradszun and Alexander Fridgen), 3rd ed. 15.10.2021, sec. 84 mn. 9.5. The German transposition entered into force as of 1st of

1. Preventive (pre-insolvency) restructurings: The restructuring tools include an improved digitised, automated out-of-court debt settlement procedure, hereafter referred to as out-of-court debt settlement, and an updated pre-pack business recovery procedure contingent to court's confirmation hereafter referred to as rehabilitation agreement (Articles 5-74 Law No. 4738/2020).

2. Insolvency proceedings: The lack of a clear path to debt discharge made the use of insolvency proceedings for merchants infrequent and the substitute of consumer insolvency proceedings (Law No. 3869/2010, also named "Katselis Law") was not effective in practice. A major reform of the new law lies in the introduction to consumer insolvency proceedings. Insolvency capability is now granted to every natural person regardless of whether they have an entrepreneurial activity, as well as legal persons pursuing a financial purpose, and associations engaged in entrepreneurial activity. The extension of insolvency capability even to natural persons without entrepreneurial activity (consumers) and the unification of the provisions for the insolvency proceedings over the assets of merchants and over the assets of consumers was a questionable choice of the Greek legislator.[5] The objection mostly refers to the same entry requirements for both insolvency proceedings (Article 75 Law No. 4738/2020).[6] Nevertheless, the new law introduces some separate insolvency proceedings designed to address different debtor categories based on the size of the liabilities involved. Large scale insolvencies will be conducted under the traditional insolvency process, while small-scale insolvencies (Article 78(2) Law No. 4738/2020) will benefit from a more simplified process (Articles 75-211 Law No. 4738/2020). Furthermore, a major change in the restructuring regime brought by Law No. 4738/2020 lies in the abolishment of the reorganisation plan option.

January 2021 and was designed as a new stand-alone act (Unternehmensstabilisierungs- und –restrukturierungsgesetz – StaRUG).

[5] Theodore Katsas, The new Bankruptcy Code as a reform challenge and opportunity, Synigoros 5/2020, p. 18 (Θεόδωρος Κατσάς, Ο νέος πτωχευτικός κώδικας ως μεταρρυθμιστική πρόκληση και ευκαιρία, Συνήγορος τ. 5/2020, σελ. 18).

[6] George N. Mixalopoulos, 'The new insolvency law' Nomiki Bibliothiki 2021, p. 15.
(Γεώργιος Ν. Μιχαλόπουλος, ΄Το νέο πτωχευτικό δίκαιο' Νομική Βιβλιοθήκη 2021, σελ. 15).

3. Dedicated provisions for exposed individual debtors who may benefit from the social policies framework provided in the structure such as sale and leaseback mechanisms and state subsidies for primary residencies. The new insolvency framework includes, among others, provisions for the discharge of natural persons ('second chance') from their debts under specific conditions to be met (Articles 212 et seq. Law No. 4738/2020).

Even though many elements under the new law focus on insolvency proceedings and a second chance for the discharge of debts, this paper will concentrate on the pre-insolvency proceedings, as they were amended and updated with the implementation of the Directive 2019/1023. The main elements of this paper are the pre-insolvency proceedings and the preventive restructuring frameworks, more precisely, the out-of-court debt settlement and the rehabilitation agreement. The aim of the amendments of the previously existing pre-insolvency framework is not only to harmonise the existing legislation with the Directive 2019/1023, but also to address failures and practical difficulties of the former national law, following the lack of consistency due to the several reforms over the years.

The new frameworks were initially predicted to enter into force on 1 January 2021 but their deferral was voted in a few days before the law came into force, following the enactment of Law No. 4764/2020, which amended the starting day of some provisions of the Law No. 4738/2020.[7] In particular, the provisions on rehabilitation agreement and insolvency proceedings (with the exclusion of small-scale insolvencies) came into force on 1 March 2021, whereas the provisions regulating the out-of-court debt settlement, the small-scale insolvencies and the vulnerable debtors' framework came into force on 1 June 2021. Additionally, some provisions of the new law were also amended by Law No. 4818/2021.

The Greek transposition act aims to unify all former laws regarding insolvency proceedings as well as to implement the provisions of the Directive 2019/1023 on preventive restructuring frameworks. The Greek legislator organised all the provisions in a new Insolvency Code consisting of 308 provisions. However, the number of provisions should not give the impression that the Greek legislator has developed so many provisions

[7] Article 83 of Law No. 4764/2020, amending articles 263, 265, 308 of Law No. 4738/2020.

completely from scratch. In fact, many regulations were taken over from the former Bankruptcy Code[8] and have simply been reformed, especially the ones mentioning the insolvency procedure.[9] However, regarding the preventive restructuring frameworks, the new bill has updated the tools and introduced enhanced and simpler, faster and more effective procedures than the ones that were stipulated in the previous law (Law No. 4469/2017).

1. Legal Nature of the Greek Preventive Restructuring and Insolvency Law

Insolvency law was initially understood as a method of replacing individual enforcement with collective proceedings.[10] However, domestic scholars were claiming that several elements of restructuring and insolvency law demonstrate its constantly diminishing connection with individual enforcement law and the area of law designed to only liquidate the debtor's assets. In particular, it should be noted that insolvency is not only what would be an accumulation of all the individual creditors' actions against debtor's assets, but it exceeds the procedural sum of individual executions; elements such as the decision to maintain a business, to restructure the company by corporate measures, or the opportunity of a discharge from debts, may separate insolvency law from the procedural field and bring it more into line with corporate and commercial law.[11] Indeed, restructuring and insolvency law include strategic elements for an enterprise. Certainly, restructuring and insolvency law can be an instrument of business strategy for both creditors and debtors. Greek restructuring and insolvency law is constantly evolving and increasingly includes substantive provisions for managing business crises, which are more integrated into company law and follow the market rules.[12]

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[8] The previous Bankruptcy Code was referring mostly to bankruptcy issues, while the new law is a combination of provisions, including procedures for the stage before and after insolvency and can probably be better mentioned as Insolvency Code.

[9] George N. Mixalopoulos, 'The new insolvency law' Nomiki Bibliothiki 2021, p. 5.

[10] See for a definition at European level Horst Eidenmüller, ʹWhat is an Insolvency Proceeding' (2018) 92 Am Bankr LJ 53.

[11] The characterisation of insolvency law is important for the application or non-application of European regulations such as the European Insolvency Regulation and the Brussels Ia Regulation (see for this characterisation Horst Eidenmüller, 'What Is an Insolvency Proceeding' (2018) 92 Am Bankr LJ 53 and Dominik Skauradszun and Walter Nijnens, 'Brussels Ia or EIR Recast? The Allocation of Preventive Restructuring Frameworks [2019] ICR International Corporate Rescue 193).

[12] Evanghelos Em. Perakis, 'Insolvency Law' 4th ed., Nomiki Bibliothiki 2021, p. 36, 37. See, therefore, for the market conformity test of the Directive 2019/1023 fn. (2).

It may be argued nevertheless, that the new law can be considered as a turning point again towards procedural law. The two pillars that the allegations can based on are the abolishment of the reorganisation plan[13] that was provided by the previous existing law and could be interpreted as a tool from company law, as well as some of the reforms of the new law in insolvency procedure, which differentiate its nature and structure, particularly with regard to the means and mechanisms used to satisfy the creditors' claims. Under Law No 4738/2020, therefore, the Greek law is left with the following restructuring possibilities: (a) the out-of-court debt settlement, (b) the rehabilitation, and (c) the collective transfer of assets, which can be an optional by-product of the liquidation of the insolvency estate. The fact that the new bill was included in the Insolvency Code and not the Civil Code or a new stand-alone bill also indicates the interpretation of the Greek restructuring and insolvency law as procedural law.[14] All this leads to the understanding that the new Greek restructuring and insolvency law seems to have returned to a more procedural version, even though numerous company law issues may still be found in terms of content.

2. Entry Requirements for the Greek Restructuring and Insolvency Tools

The new law has been designed to provide modern out-of-court or in-court tools to debtors and creditors to promptly resolve debtors' current, foreseeable, or even prospective inability to meet their financial obligations prior to or following permanent termination of payments. The new law now defines an objective assumption of a debtors' 'current financial inability', when a debtor does not pay their obligations, as they become due towards the Greek state, social security institutions, credit or financial institutions, in the amount of at least 40% of their total due obligations to any of the above creditors, for a period of at least six months and, provided that the non-performed obligations exceed

[13] Under Articles 107 et seq. of the former Bankruptcy Code, the rescue of the debtor's business, its utilisation, but also the distribution of the insolvency estate as well as the liability of the debtor after the conclusion of the insolvency proceedings could be regulated by a reorganisation plan.

[14] Evanghelos Em. Perakis, 'Insolvency Law' 4th ed., Nomiki Bibliothiki 2021, p. 36, 37. (Ευάγγελος Εμ. Περάκης, 'Πτωχευτικό Δίκαιο' 4η εκδ., Νομική Βιβλιοθήκη 2021, σελ. 36, 37). The legal nature of the German transposition act is subject to an academic debate. See for an overview of the opinions Dominik Skauradszun, 'Grundfragen zum StaRUG – Ziele, Rechtnatur, Rechtfertigung, Schutzinstrumente' (2021) 82 KTS Zeitschrift für Insolvenzrecht 1-74, 30 et seq and Stephan Madaus, Insolvenzrechtliche Prinzipien für Restrukturierungshilfen – Eine kritische Betrachtung der dogmatischen Grundannahme des StaRUG, Festschrift Reinhard Singer, 2021, 415 et seq.

the amount of €30,000 (Article 77 Law No. 4738/2020). Whereas the Greek legislator defined the current inability to perform, the parliament decided not to specify the foreseeable and the prospective inability to perform. This allows a case-by-case assessment, which is positive in terms of flexibility and individuality, but negative in terms of the predictability of the assessments. How the concept of financial inability relates to the entry requirements of the out-of-court debt settlement and the rehabilitation agreement will be examined in the following.[15]

II. OUT-OF-COURT DEBT SETTLEMENT

The out-of-court debt settlement mechanism can in many cases act as the first opportunity to prevent financial illiquidity and over-indebtedness. It is not a procedure under judicial control, but a confidential[16] procedure for a multilateral negotiation between the debtor and their creditors, such as financial institutions, the state, and social security institutions. The only debts that can be settled with this mechanism are the ones pertaining to the state (by means of legal entities governed by public law, public sector enterprises, state authorities), financial institutions (such as banks) and social security institutions.[17]

The out-of-court debt settlement mechanism provides debtors and public institutional creditors with the possibility of negotiating a debt settlement on a multilateral basis, and in this sense, it is complementary to the bilateral negotiations of the Code of Conduct for Banks of Law No. 4224/2013 and the regulation packages established on a case-by-case basis by the state and social security institutions.[18] Certain elements of the previous law are retained in the proposed procedure, but in particular both the legal nature of the extrajudicial mechanism and its operation have been radically changed. It now becomes fully extrajudicial, being a proceeding for formulating settlement proposals that are at the discretion of the creditors as to their submission and of the debtor as to the acceptance of any proposal submitted. The out-of-court debt settlement is a set of rules that governs the access to an electronic platform by debtors and a limited type of creditor for the purpose

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[15] See II. 2.and, in particular, III. 2.

[16] Confidentiality prevents the proceedings from being covered by the scope of Article 1 of the European Insolvency Regulation.

[17] Explanatory memorandum of Law No. 4738/2020, p. 180. Neither the Dutch nor the German transposition act allow for special proceedings for debts pertaining to the state.

[18] Explanatory memorandum of Law No. 4738/ 2020 Article 5, p. 180, 181.

of seeking a debt settlement, exchange of information and release of confidential data, as well as the formulation of a restructuring offer and the conclusion of a restructuring agreement.

1. Legal Nature

The legislator understands the out-of-court debt settlement as a first opportunity to prevent financial distress and over-indebtedness before preparing a restructuring plan as it is described by the Directive 2019/1023. Article 2(1)(1) of the Directive 2019/1023 defines 'restructuring' as the measures aimed at restructuring the debtor's business that include changing the composition, conditions or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, such as sales of assets or parts of the business and, where so provided under national law, the sale of the business as a going concern, as well as any necessary operational changes, or a combination of those elements. Furthermore, Article 8(1) of the Directive 2019/1023 provides some requirements for restructuring plans, such as the classes into which the affected parties have been grouped, for the purpose of adopting the restructuring plan, and the respective values of claims and interests in each class. Under the new Greek law, a restructuring agreement is defined as a legal agreement concluded between the debtor and the consenting[19] creditors, in the context of the application of the provisions of the first chapter of the law and which has as its object the restructuring of the debtor's debts (Article 6(1)(g) Law No. 4738/2020).

The Greek parliament understood the out-of-court debt settlement as a matter of settling debts, for example, granting a new deadline, reducing obligations, and even the entire discharging of debts, or a combination of all of the above. It is not a genuine plan to restructure a company, provide additional funding, negotiate structural changes in the company or transfer or sell a company. Based on the structure of the new law, these restructurings are possible under the rehabilitation agreement but not under the out-of-court mechanism. Hence, to our understanding, in the sense of the Directive 2019/1023 the out-of-court debt settlement is not a genuine restructuring plan. Most of the

[19] See for the binding force on dissenting creditors subchapter 4, p. 9.

prerequisites mentioned in Articles 2(1)(1) and 8 of the Directive 2019/1023 are not provided in the provisions on the out-of-court debt settlement and, cannot be a part of it.

However, the aforementioned should not give the impression that the out-of-court debt settlement is excluded from the scope of the Directive 2019/1023. As a tool to prevent debtor's financial illiquidity and over-indebtedness and a tool to ensure the viability of the debtor it falls within the scope of Article 1(1) of the Directive. The calculation tool used for the submission of the debt settlement's application and the access to the debtor's financial information seems to be in line with the efficiency approach according to Article 1(c) of the Directive. Furthermore, the Directive explicitly allows out-of-courts procedures, cf. Article 4(5) Directive, which is the case with the out-of-court debt settlement. The debt settlement mechanism allows a debtor in possession and therefore it follows the target of Article 5 of the Directive. It is also important to note that after the submission of the debt settlement's application there is a period of stay of individual enforcement actions, as it is stipulated in Article 6 of the Directive. All in all, the out-of-court debt settlement may be construed based on of the Directive and falls within the scope of the Directive, even though the main restructuring proceeding of the transposition law is the rehabilitation.

2. Entry Requirements for the Out-of-Court Debt Settlement

The out-of-court debt settlement mechanism can be utilised by any individual that has insolvency capability.[20] Under the new law all natural persons (merchants or not) and legal entities may apply to settle debts against financing institutions, social security institutions and the Greek state, which exceed the amount of €10,000, instead of €20,000 under the previous scheme. Article 7(2) Law No. 4738/2020 provides types of debtors that are excluded from the scope of application and cannot apply for a debt settlement, such as investment service providers, credit and financial institutions or insurance and reinsurance enterprises.[21] In addition, the mechanism is not available if the debtor has

[20] The group of persons with insolvency capability is extended with the new law to include any natural person (also consumers) and legal persons which do not pursue an economic purpose but exercise economic activity.

[21] This exclusion is in line with the exclusions in Article 1(2) of the European Insolvency Regulation and Article 1(2) of the Directive 2019/1023 and reasoned by the special nature of these debtors. Therefore, at European level many regulations and directives focus on more customised provisions for credit institutes

already been subject to insolvency proceedings or has been liquidated, or if the debtor has applied for protection under other proceedings and has not withdrawn from that proceeding, or if the debtor (where the debtor is a legal person, its administrators, directors or managers) has been found guilty of fraud, tax evasion, money laundering, bribery, forgery, embezzlement, smuggling or fraudulent bankruptcy.[22]

The law sets out additional exceptions to avoid abuse of the procedure or the cancellation of certain categories of obligations. In particular, it is stated that the proceedings are not available to debtors with more than 90% of their total debts in one financial institution. In this case it is more efficient for cooperative debtors to seek bilateral negotiation with the financial institution that covers the majority of the claims through the Code of Conduct procedure of Law No. 4224/2013.

Although the European legislator has defined the scope and the requirements of preventive restructuring frameworks precisely, the general entry requirement—the likelihood of insolvency—has not been defined.[23] For the purposes of the Directive 2019/1023, the entry requirement 'likelihood of insolvency' is to be defined by national law (Article 2(2)(b) of the Directive 2019/1023).

The Greek legislator decided not to specifically define the entry requirement and the starting point for entering the out-of-court mechanism. It seems reasonable to consider that a state of risk or a probability of an insolvency event is required, determined on a case-by-case basis and assessed *ad hoc* by the affected parties.[24] The consenting creditors may accept (or are deemed to accept if the state or the social security institutions are

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and insurance undertakings (see, e.g., Regulation (EU) No. 806/2014 of 15th of July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No. 1093/2010 – SRMR; Directive 2014/59/EU of 15th of May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No. 1093/2010 and (EU) No. 648/2012 – BRRD).

[22] Those rules preventing non-reliable debtors from using restructuring tools can also be found in other Member States. The German transposition bill, for instance, prevents debtors from getting a stay if the debtor has violated the disclosure requirements under German commercial law regarding annual financial reports.

[23] This is unfortunate because it causes uncertainty (see Christoph Paulus, in: Reinhard Dammann and Christoph Paulus, European Preventive Restructuring, CH Beck, 2021, Article 2 mn. 65) and a different level-playing-field in the Member States.

[24] Evanghelos Em. Perakis, 'Insolvency Law' 4th ed., Nomiki Bibliothiki 2021, p. 51.

involved[25]) the arrangements that make the debtor's business viable or reject it. Furthermore, in the case of a natural person who is not engaged in entrepreneurial activities, they may accept the arrangements, which will prevent the financial illiquidity of the debtor, or decline it (Article 14(2) Law No. 4738/2020). This assessment of debtor's risk status may arise from their declaration of facts indicating a deterioration of their financial situation of at least 20% (Article 7(3)(f) Law No. 4738/2020).[26] The deterioration may be related either to a reduction in their revenues or to the increase of their expenditures. In any case, these risks will be assessed by the creditors to decide whether or not to proceed with the debt settlement.

3. Procedure

In order to facilitate enhanced participation of creditors in proceedings concerning preventing restructuring frameworks and to ensure similar conditions among creditors regardless of where they are located the new Greek law envisages that out-of-court debt settlement applications have to be filed digitally to the Special Secretariat for Private Debt Management through an automated electronic platform.

Under the new law, the digital platform for electronic submission and administration of applications features many useful services for both the debtor and the participating creditors. Among others, it allows the authorisation of the participants, the application submission for the debt settlement, the access to the debtor's financial information and also access to a calculation tool (Article 29 Law No. 4738/2020). The calculation tool processes debtors' information and data, and provides an automated plan, calculating debtors' ability to pay their liabilities based on the intrinsic value of their claims, the liquidation value of debtors' assets, the classification of the creditors' claims, in order to determine the minimum recovery amount per affected creditor, and determines the final repayment amounts to be applied based on not to put a participating creditor in a worse financial situation than they would have been if the debtor's assets were liquidated in the context of enforcement proceedings pursuant to the Civil Procedure Code (Article

[25] See for details: Chapter 4 'Extension of Binding Force to Dissenting Parties'.
[26] Evanghelos Em. Perakis, 'Insolvency Law' 4th ed., Nomiki Bibliothiki 2021, p. 51.

71(2)(f-g) Law No. 4738/2020). This tool is important because in the event that the majority of creditors decide to consider a debt settlement, a proposal for the settlement of total debts is provided, which is derived from the calculation tool (algorithm). If there is no debt to the state, then the financial institutions can start negotiating and make another proposal, without the calculation tool.

To begin with, the application of an out-of-court debt settlement is established either at the debtor's initiative or at the initiative of the creditors (Article 8 Law No. 4738/2020). However, only the debtor can actually submit an application to the platform. Creditors who are eligible to participate in the out-of-court debt settlement may invite the debtor to submit an application to the electronic platform for the debt settlement. Nevertheless, when the process is initiated by the creditors with an invitation to the debtor, the debtor can submit the application within 45 days. Potential failure to reply within the time limit set shall be evaluated accordingly by the creditor in any future request by the debtor (Article 8 Law No. 4738/2020).

Following the submission of the application, the participating creditors who are financial institutions, and did not use the automatic proposal provided by the calculation tool, may make a proposal to the debtor for a debt settlement. In order for the creditors (financial institutions, social security institutions and the state) to request from the debtor a debt settlement, it has to ensure the acceptance of the majority of the creditors—who are financial institutions—in terms of the claims' nominal value and also the debtor (Article 14(1) Law No. 4738/2020). The majority requirement is defined in Article 6(1)(f) Law No. 4738/2020 as consent by creditors with 60% of the total claims and 40% of the total secured claims.

Articles 21 to 25 of the new law regulate the possibility for the state and social security institutions to participate in a debt settlement—or even a debt discharge—by participating in multilateral debt settlements already approved by financial institutions and the debtor. Therefore, if and to the extent they are affected, they are notified electronically in order to obtain their consent (Article 14(2), 21 Law 4738/2020) under the conditions and procedures laid down by law. In addition, bilateral debt settlements may be concluded between the debtors and the state or social security institutions if it is assessed that the debtors will thereby achieve business viability or, in the case of natural persons who are not engaged with entrepreneurial activity, that it prevents them from becoming insolvent (Article 24 of the Law 4738/2020).[27]

If the parties agree to an out-of-court debt settlement they have to sign the agreement within two months. If the debt settlement is not signed within two months from the date of submission of the application, the mechanism shall be deemed to be terminated as unsuccessful (Article 16 Law No. 4738/2020). The signature can be carried out electronically and has the status of a legal private document.

As a result, from the submission of the application until the concrete conclusion of the proceedings, there is a stay on the commencement of enforcement measures and the continuation of the enforcement proceedings on claims, movable and immovable property against the debtor, as well as criminal prosecution for the offences, in respect of being in debt to the state, to third parties, and to social security institutions, by virtue of law. The stay of enforcement actions of participating creditors starts from the submission of the application from the debtor to the electronic platform until the end of the procedure in any way. As defined by Article 16 of Law No. 4738/2020 the limit of the negotiations' duration is two months. Hence, the stay is lifted upon any notification to the debtor of the decision not to submit a debt settlement or for the application to be rejected in any way (Article 18 Law No. 4738/2020).

Upon the conclusion of a debt settlement, an affected creditor shall not be allowed to commence enforcement actions. Measures of individual and collective enforcement proceedings against the debtor for the satisfaction of a claim settled by the restructuring agreement shall be suspended *de lege* for the entire duration of the debt settlement and under the condition of the debtor's conformity (Article 19 Law No. 4738/2020). Hence, this stay of enforcement is considered a partial suspension, which includes only the debts that were settled with the out-of-court debt settlement, and only under the condition that the debtor complies with the debt settlement.[28] Furthermore, if, at the time of reaching the debt settlement, enforcement proceedings are pending against the debtor for a claim that has been settled, initiated by an affected creditor, such proceedings shall be

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[27] George N. Mixalopoulos, 'The new insolvency law' Nomiki Bibliothiki 2021, p. 7, 8.
[28] Evanghelos Em. Perakis, 'Insolvency Law' 4th ed., Nomiki Bibliothiki 2021, p. 62.

suspended upon the notification by the debtor to the creditor's enforcement bodies of the certificate referred to in Article 71(2)(h) Law No. 4738/2020. The aforementioned certification can be used as evidence of the achievement of a debt settlement and can prevent impending enforcement orders.

4. Extension of Binding Force to Dissenting Parties

The out-of-court debt settlement mechanism may in many cases be the first opportunity to prevent financial difficulties. It is not a procedure under judicial control but a framework for multilateral negotiation between the debtor and creditors, which are financial institutions, the state and social security institutions.

The out-of-court debt settlement is, in principle, binding *inter partes*. The affected parties are the debtor and the participating creditors that signed the debt settlement and are bound by accepting it. Furthermore, if the debt settlement is signed by the debtor and the majority of creditors (creditors with 60% of the total claims and 40% of the secured claims), the debt settlement is concluded and binding not only for the agreeing parties. There are some provisions in the new law that extend the binding force of the debt settlement even to dissenting parties, in the sense of creditors that agreed generally to participate in an out-of-court settlement procedure but were not in favour of a specific proposal that the majority voted for.

For example, Article 5(2) Law No. 4738/2020 stipulates that if the majority of creditors that are financial institutions accepts the debtor's request for a debt settlement and they agree on a specific debt proposal, the results of this agreement will be binding even for the dissenting minority of creditors that are financial institutions.

Most importantly, under Article 71(5)(d) Law No. 4738/2020[29], it is stipulated that the debt settlement in which the financial institutions are required to accede in order to be qualified as participating creditors has to provide the acknowledgement of the binding effect even to non-consenting parties, as long as the participating parties are not placed in

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[29] Ministerial Decision (KYA) 77697 ΕΞ 2021 (published in Government Gazette issue B/05-07-2021).

a worse economic position than they would be in the event of liquidation of the debtor's assets in the context of forced execution proceedings under the Civil Procedure Code (no-party-worse-off-principle). However, the aforementioned acknowledgement is not required if the out-of-court settlement proposal arises on the basis of the calculation tool.

This no-party-worse-off-principle basically says that if the minority is not worse off as a result of the debt settlement than in the next-best-alternative scenario, then there is no reason why the minority should be allowed to obstruct the debtor's rescue. At the European level, the no-party-worse-off-principle originates in the best-interest-of-creditors test based on Article 2(1)(6) and Article 10(2)(d) of the Directive 2019/1023.[30] According to its wording, the best-interest-of-creditors test according to Article 2(1)(6) Directive only covers creditors.[31] The no-party-worse-off-principle is another argument why the out-of-court debt settlement may be interpreted in the light of the Directive 2019/1023 since the procedural safeguards resemble each other (cf. Article 2(1)(6) of the Directive).

Regarding debt settlements with the state and social security institutions, a presumed acceptance of the debt settlement with financial institutions is provided in Articles 21, 22 Law No. 4738/2020, under the following conditions: The state and the social security institutions as creditors may consent to the debt settlement or they will be presumed to consent if they do not notify any objection or a request for rectification within fifteen days of them being notified of the settlement agreement. Consenting creditors that are credit or financial institutions are presumed to accept (for the benefit of the state and social security institutions as creditors) that the debt settlement shall make the debtor's business viable or, in cases of a natural person with no business activity, that it prevents its insolvency.[32]

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[30] See for a comprehensive explanation from a law and economics point of view: Dominik Skauradszun, ʽRestructuring Companies During and After the Covid-19 Pandemic: A Law & Economics Approach' (2021) 9 NIBLeJ Nottingham Insolvency and Business Law eJournal 1, 14.

[31] Dominik Skauradszun, 'Challenges of the Transposition of the Directive on Preventive Restructuring Frameworks in German Law' 2022 Wolters Kluwer. Therefore, for the transposition of the Directive into German law, it was proposed (Dominik Skauradszun, 'Ein Umsetzungskonzept für den präventiven Restrukturierungsrahmen' (2019) 80 KTS Zeitschrift für Insolvenzrecht 161 (188)) to apply the best-interest-of-creditors test also to equity holders if a Member States decides to include the equity holders in the restructuring plan.

[32] Anastasia Tsene, 'The insolvency review: Greece', The Law Reviews, 17-10-21.

Under the new law, the out-of-court debt settlement is intended to prevent financial illiquidity and over-indebtedness and to focus on claims pertaining to the state, financial institutions and the social security institutions, while the rehabilitation agreement (whether pre-insolvency or in-insolvency) is aimed at the rehabilitation of the debtor's business.

III. REHABILITATION AGREEMENT

1. Overview

The Directive 2019/1023 aims to ensure that viable enterprises and entrepreneurs that are in financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating (Recital 1 of the Directive 2019/1023). Greek law (Law No. 4738/2020) adapted and updated the pre-insolvency proceedings to harmonise them completely with the scope and provisions of the Directive mentioned above.

The fundamental pre-insolvency tool under the new law is the rehabilitation agreement (Pre-Insolvency Rehabilitation Procedure), which is the implementation of the Directive's restructuring plan according to Article 8. The rehabilitation procedure is a pre-insolvency collective[33] procedure intended to preserve, restructure and rehabilitate the debtor's business through the confirmation of a rehabilitation agreement, provided that the rehabilitation agreement meets the no-party-worse-off-test. The no-party-worse-off principle is deemed to be fulfilled if none of the non-consenting parties is, under the rehabilitation agreement, in a worse position than they would be in the next best alternative scenario, which is in the view of the law an insolvency proceeding over the debtor's assets (Article 31 Law No. 4738/2020).

The Greek insolvency law already had a pre-insolvency framework, in particular the rehabilitation procedure under Articles 99 et seq. of the former Bankruptcy Code.[34] However, with the present bill, further improvements are made to the relevant provisions, so that the legislation fully complies with the European Union's goals. Hence, most

[33] Article 31 Law No. 4738/2020.
[34] Explanatory memorandum of law 4738/ 2020, p. 187 et seq.

provisions regulating the rehabilitation procedure remain in force, updated with certain improvements.

The key points of the envisaged compliance of the Greek law with the Directive's preventive restructuring were the voting on the rehabilitation agreement by the affected parties and the cross-class cram-down mechanism to bind even dissenting classes (cf. Articles 9, 11 of the Directive 2019/1023). Other amendments to the previous pre-insolvency proceedings, except the grouping of creditors in classes (Article 34(1) Law No. 4738/2020) and the cross-class cram-down mechanism, are the presumed consent of the state to accept the agreement (Article 37 Law No. 4738/2020), and the discharge of the employees' liability for signing the rehabilitation agreement (Article 38 Law No. 4738/2020). Furthermore, the new law modifies the criterion[35] of creditors' worst position beyond which the rehabilitation agreement will not be confirmed by the court[36] (Article 31(2) Law No. 4738/2020). It also introduces a new way of dealing with equity holders' hold out problems by delaying the approval and implementation of the rehabilitation agreement (Article 35 Law No. 4738/2020).

2. Scope and Entry Requirements

Unlike the out-of-court debt settlement, the rehabilitation agreement can only involve debtors—natural or legal persons—with entrepreneurial activity, and not any natural or legal entities without such activity. As stipulated by Article 1(4) of the Directive 2019/1023 the extension to insolvent persons with no entrepreneurial activity is subject to the discretion of the Member States. Furthermore, financial institutions and insurance enterprises cannot use this type of rehabilitation procedure, due to other pre-existing procedures (Law No. 4335/2015, Law No. 4364/2016).

Since Article 2(2)(b) of the Directive 2019/1023 does not define the 'likelihood of insolvency' as an entry requirement but wants the Member States to specify it, the Greek legislator had to interpret the likelihood of insolvency. As defined by Article 32 Law No.

[35] Article 31(2) former Bankruptcy Code: For the evaluation of the creditors' economic position, the amounts and any other consideration that they will receive, as well as the payment terms for such amounts, are taken into account.

[36] George N. Mixalopoulos, 'The new insolvency law' Nomiki Bibliothiki 2021, p. 11.

4738/2020 any person who carries on entrepreneurial activity, with the centre of its main interests in Greece and facing a current or prospective inability to meet its due financial obligations in a general manner, may apply for the court's confirmation of a rehabilitation agreement. The entry requirement may be also met in the case of evidence that there is a likelihood that the debtor will become illiquid unless rehabilitated (foreseeable inability to pay). The different entry requirements will be explained as follows:

The Greek legislator understands the prerequisite of 'current inability to meet its overdue financial obligations' in the same means as it is described in Article 77(1) Law No. 4738/2020 for the entry requirement to file for insolvency proceedings. The cessation of payments in this case must be general and permanent. The differentiation in the pre-insolvency proceedings is that the current inability is required to be only general and not permanent (in a sense of payments' cessation)[37]. Thus, this is understandable, since by removing the requirement of permanence, the law allows the debtors to restructure effectively at an early stage, where the distressed financial situation may still be reversible, and to avoid insolvency, thus limiting the unnecessary liquidation of viable enterprises.

It is presumed that a debtor is in cessation of payments when they fail to pay their overdue financial obligations to the state, the social security institutions or financial institutions, amounting to at least 40% of said liabilities to any of the above creditors for a period of at least six months, if its outstanding debt exceeds the amount of €30,000 (Article 77 Law No. 4738/2020).

Regarding the 'prospective inability to meet its overdue financial obligations' (Article 32(1) Law No. 4738/2020), the legislator understands this time period as the time when a cessation of payments has not yet occurred, but the debtor, being aware of its business's financial prospects, predicts that it will not be able to meet its existing and impending payment obligations in the future. In other words, this is an expected cessation of

[37] These two criteria are used by the Greek legislator to describe the level of the debtor's financial instability, in a sense of lack of liquidity and not necessarily the lack of assets. On the one hand, the debtor's permanent cessation of payments is a time-related criterion. On the other hand, the debtor's general inability to pay their overdue financial obligations refers to the type of debts, meaning debts vis-à-vis all types of creditors. However, this criterion can be met even if the debtor is unable to pay a substantial part of their debts.

payments. It is therefore reasonable that in this case only the debtor can request to enter into the proceeding, since it would be an indication of abuse and an infringement of the debtor's property rights if the creditors were able to conclude such an agreement by themselves even before the cessation of the debtor's payments.[38]

Foreseeable inability to pay is a stage even before prospective inability. It indicates business difficulties that could potentially lead to illiquidity. These financial difficulties must be general and at least foreseeable, in order to render the payments uncertain as they fall due. Should general financial difficulties be consequently discerned and not be related to the business's debt position *per se*, but to its prospects, structure and development, such as the termination of a crucial contract. While it is questionable whether insolvency proceedings are appropriate to address such problems, it is necessary to examine all possible assessments of risk.

However, the criterion determining the foreseeable inability to pay is so broad, that it is mostly difficult to predict it.[39] A possible way to define the foreseeable inability for a debtor is that a scenario of becoming insolvent is more likely than a scenario of recovering the business. This matter is at the discretion of the court. The court, nevertheless, has to make sure that the rehabilitation agreement can actually reverse the debtor's inability to pay, in order to confirm it. The rehabilitation agreement has to be the most suitable one and able to overcome the debtor's financial distress.

3. Legal Nature

Under the Greek law 4738/2020 the procedure regarding the adoption of the rehabilitation agreement has not been stipulated in detail by law, as it was under the former Bankruptcy Code (e.g., Article 104(2) Bankruptcy Code about the obligations of the affected parties during negotiations). It is therefore difficult to draw conclusions about the legal nature of the adoption of rehabilitation. The Greek legislator understands the rehabilitation agreement as a pre-pack agreement.[40] Since the legal nature of preventive restructuring

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[38] Evanghelos Em. Perakis, 'Insolvency Law' 4th ed., Nomiki Bibliothiki 2021, p. 154.
[39] See for a similar uncertainty in the German transposition act fn. 12.
[40] Evanghelos Em. Perakis, 'Insolvency Law' 4th ed., Nomiki Bibliothiki 2021, p. 90.

frameworks in other Member States is highly contentious[41] and the legal nature informs whether the rules should be interpreted more contractually or more procedurally, the following observations should be addressed:

To begin with, a rehabilitation agreement can be adopted even without the debtor's consent[42], under the conditions of Article 34(2)[43] Law No. 4738/2020 and the court's confirmation; and it can moreover be binding even for dissenting parties. It is therefore fairly described as a non-voluntary agreement, in the case where it is implemented without all parties' consent. Nevertheless, the legal nature of the agreement could be influenced by its specific content. If the rehabilitation agreement is adopted between the creditors but without the debtor's consent, it usually includes measures regarding the best possible way to satisfy their claims or measures safeguarding a business's viability.[44]

To further elaborate, a rehabilitation agreement resembles a contract due to the many elements of contracts similar to a conciliation agreement, sale, debt discharge, and a takeover of shares. The crucial feature that defines its legal nature appears to be the conciliation agreement, as stipulated in Articles 871 et seq. Greek Civil Code, since in any case the agreement may be reached by a mutual compromise between all parties and settle claims that are at risk of not being satisfied in the event of the declaration of insolvency by the debtor.[45] The main differences between the conciliation agreement under the Greek Civil Code and the rehabilitation agreement, which arise from the collective nature of the rehabilitation procedure, are the voting, which is similar or even equal to a resolution procedure, and the binding of the non-contracted parties, which is achieved by the court's confirmation of the agreement.

Even other agreements with restructuring elements, which are concluded outside formal court proceedings (e.g., out-of-court debt settlement), are commonly held to be contracts.

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[41] Evanghelos Em. Perakis, 'Insolvency Law' 4th ed., Nomiki Bibliothiki 2021, p. 90. See for the German law, inter alia, Dominik Skauradszun, 'Grundfragen zum StaRUG – Ziele, Rechtnatur, Rechtfertigung, Schutzinstrumente' (2021) 82 KTS Zeitschrift für Insolvenzrecht 1-74, 30 et seq and Stephan Madaus, Insolvenzrechtliche Prinzipien für Restrukturierungshilfen – Eine kritische Betrachtung der dogmatischen Grundannahme des StaRUG, Festschrift Reinhard Singer, 2021, 415 et seq.
[42] See for rehabilitation agreement's adoption without debtor's consent: Chapter 3.
[43] As it was amended by Law No. 4818/2021.
[44] Evanghelos Em. Perakis, 'Insolvency Law' 4th ed., Nomiki Bibliothiki 2021, p. 90.
[45] Spyridon Psyxomanis, 'Bankryptcy Law', Sakkoulas Publications, 2017, p. 95-96 (Σπυρίδων Ψυχομάνης, 'Πτωχευτικό Δίκαιο', Εκδόσεις Σάκκουλα Α.Ε., Ζ' Έκδοση 2017, σελ 95-96.).

From a normative view, it is not surprising that a contract-focussed approach argues that there is no reason to interpret differently if the agreement results from court proceedings.[46]

However, if one considers the rehabilitation agreement as a contract with its content being open for whatever is needed in each specific situation and open about whom to contract with in principle, one still has to consider why a non-consenting party can be bound by a contract that it has not been a part of.

Understanding a rehabilitation agreement as a contract explains why all creditors and shareholders whose rights are impaired by the plan should be allowed to vote. If all agree, evidently, a contract is concluded.[47] However, receiving 100% consent of all affected parties is the ideal scenario. The more common scenario in a voting meeting would probably be a rehabilitation agreement supported by only a majority of the affected parties. In this case, it might be more appropriate to interpret the voting as a resolution procedure embedded in a procedural framework.

This common contractual approach of the rehabilitation agreement's legal nature must be enriched by procedural elements so that the declarations of intent by the affected parties—who do not wish to accept the rehabilitation agreement—are deemed to have occurred. Unlike in the case of legal resolutions, in which the minority can be bound, but which in principle require a contractual agreement, the dissenting declarations of intention of those affected parties must be overcome by a procedural element.

Furthermore, the legislator decided to include into the law not only contractual terms, but also terminology that is attributed to procedural law. Some procedural provisions are Article 34 Law No. 4738/2020 referring to the required majority for the adoption of a rehabilitation agreement, Article 41 Law No. 4738/2020 concerning the judicial confirmation of the rehabilitation agreement, Article 50 Law No. 4738/2020 regarding

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[46] Stephan Madaus, 'Leaving the Shadows of US Bankruptcy Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law', (2018) European Business Organization Law Review vol. 19, 616, p. 626.

[47] Stephan Madaus and Bob Wessels, 'Business Rescue in Insolvency Law – A Challenge for Private Law?' (2020) ZEuP, 800, p. 827.

the stay of enforcement measures, Article 60 Law No. 4738/2020 stipulating the results of the confirmation of the rehabilitation for all the creditors.

Considering all the complex features involved, even though the legislator does not clearly state the legal nature of the rehabilitation agreement, it is reasonable that the defining features and provisions indicate a procedural tool. The crucial element of the rehabilitation agreement is not the conclusion of a contract, but the procedure with multilateral proposals and a majority of votes leading to a restructuring plan and finally being legally binding to all parties involved through the judicial confirmation.

4. The Content of the Rehabilitation Agreement

The content of the rehabilitation agreement can be freely formulated by the debtor and may be subject to any arrangements of the debtor's assets and liabilities. Nevertheless, the debtor will discuss particularly important elements with individual creditors in advance. These arrangements shall aim to rescue the debtor's business or simply aim to prevent the possibility of its insolvency, without however affecting the collective satisfaction of the creditors. The law sets some examples of the content of a rehabilitation agreement in Article 39(1) Law No. 4738/2020, like a haircut of claims, a rescheduling of payments' deadlines, a debt-to-equity swap, a sale of the debtor's business or specific business divisions or specific assets.

In any case, the rehabilitation agreement must be accompanied by a business plan with duration equal to that of the agreement, which shall be approved by the affected parties (Article 43 Law No. 4738/2020). The business plan describes the strategy that the debtor will follow based on the rehabilitation agreement and, more importantly, it allows the creditors and the court to gain a clear picture of the business's financial viability and progress (Article 54(3) Law No. 4738/2020).[48]

[48] It is presumed that the rehabilitation agreement provides a realistic prospect of safeguarding the viability of the debtor's business, as it is being restructured under the rehabilitation agreement.

5. Adoption of the Rehabilitation Agreement and Majority Requirements

The rehabilitation agreement may be adopted by the debtor and the creditors, or as mentioned in Article 34(2) Law No. 4738/2020 only by the creditors, without the consent of the debtor. This non-voluntary agreement, that needs to be signed by the required majorities before the time of the submission of the application, is possible on condition that at the time the debtor is already in a cessation of payments status, and the rehabilitation agreement is based on not placing the debtor in a worse legal and economic position than they would be without the agreement (Article 54(3)(e) Law No. 4738/2020).

In accordance with Article 9 of the Directive 2019/1023, the affected parties shall be treated in separate classes for the purposes of adopting a rehabilitation agreement. Under the pre-existing Greek law, the rehabilitation agreement could be adopted, if it was signed by the debtor and the creditors representing 60% of the overall claims, and in which is included 40% of the claims of any secured creditors. Therefore, national law did not ensure that the affected parties are treated in separate classes reflecting sufficient commonality of interest based on verifiable criteria.

The Greek legislator implemented Article 9(4) sentence 2 of the Directive 2019/1023 and decided to separate the classes of the creditors as follows[49]: Creditors are now categorised in creditors with special privileges (secured creditors and, therefore, with special privileges) and creditors with other claims (unsecured creditors and creditors with general privileges[50]).[51] A distinction is therefore introduced between creditors who are seeking to be satisfied by a specific security and those whose satisfaction will come from the debtor's entire assets.

In order for the rehabilitation agreement to be adopted (with or without the debtor's consent) it needs to be signed by the creditors representing more than 50% of secured claims and more than 50% of the other remaining claims of all creditors that are affected

[49] Explanatory memorandum of Law No. 4738/ 2020, p. 188-189.
[50] See for creditors' general privileges Article 975 Code of Civil Procedure. Creditors with general privileges are being treated favourably among the creditors without any security. Employees' claims for example, as unsecured claims with general privilege, are entitled to priority treatment among the remaining unsecured creditors.
[51] According to our understanding, the Greek legislator wants the secured creditors with special privileges to be included in the rehabilitation agreement and, therefore, wants the debtor to establish a group for secured creditors in any case.

by the rehabilitation agreement (Article 34 Law No. 4738/2020). Thus, according to the new categorisation of the creditors, the required majority of more than 50% is no longer based on one unified calculation of creditors' total claims (as it was required under the previous Bankruptcy Code), but on the one hand on the claims secured by a special privilege and on the other hand on all the claims.[52] They are therefore two calculations and not one calculation.

The Greek legislator stipulated that the aforementioned percentages shall be calculated on the basis of a list of creditors attached to the rehabilitation agreement. The list of creditors shall include all creditors, regardless of the secured or unsecured status, whose claims existed before the date of the submission of the adopted rehabilitation agreement, even if they are not yet due (Article 34(3) Law No. 4738/2020).[53] Therefore, the calculation of the majority requirements for the adoption of a rehabilitation agreement is derived from all voting rights per class.[54] Under the previous Bankruptcy Code, the calculation of the majority requirements for the adoption of the rehabilitation agreement was formed for all creditors and did not differentiate per class. The Greek law does not provide an adoption meeting with all affected parties organised and supervised by the court. Hence, an in-court adoption was not envisaged by the Greek legislator.

6. Court's Confirmation of the Rehabilitation Agreement and the Cross-Class Cram-Down Mechanism

The court's confirmation of an adopted rehabilitation agreement can be requested either by the debtor, if the agreement was adopted by both the debtor and the creditors, or by the creditors, in the case that the rehabilitation agreement was adopted only by the creditors without debtor's consent (Article 44(1) Law No. 4738/2020).

Article 34 Law No. 4738/2020 requires submission of evidence that the required majorities have been reached, in the form of a statement of all creditors' claims (secured and unsecured and whether already due and payable or not) that must be attached to the rehabilitation agreement, as at a date not being earlier than three months prior to the date

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[52] Evanghelos Em. Perakis, 'Insolvency Law' 4th ed., Nomiki Bibliothiki 2021, p. 93.
[53] The debtor must also submit an expert report that certifies the validity and accuracy of the creditors' list.
[54] Similar in German Law. See section 25 StaRUG.

of submission of the request to the court for confirmation of the rehabilitation agreement. The above statement of the creditors' claims must be prepared based on information extracted from the debtor's most recent published financial statements, if such exist, the books and documents of the debtor, the books and documents kept by contracting creditors[55] and court judgments of any instance, including judgments issued in conservative measures proceedings.

The adoption of a rehabilitation agreement by all affected parties is not the usual scenario. A common problem in a voting meeting of the affected parties is that a minority may hold out the adoption of a restructuring plan, and in turn, result in the cancellation of the rehabilitation agreement.

A rehabilitation agreement, which has not been approved by all affected parties, may, however, be confirmed by the court and be binding on the dissenting parties (cram-down mechanism) and even on a non-consenting class (cross-class cram-down mechanism) provided that the rehabilitation agreement meets the conditions under Article 54(2) Law No. 4738/2020. Hence, in line with Article 11 of the Directive, the new Greek law allows for a cross-class cram-down mechanism. In this case, the Greek legislator had to ensure that the dissenting class of the affected creditors is not unfairly prejudiced under the proposed plan and provide sufficient protection for such a dissenting class.

According to Article 54 Law No. 4738/2020, if any of the required percentages of claims are not reached, the court may confirm a rehabilitation agreement, whereupon it will be binding on all creditors, provided that at least the following criteria are met:

- the rehabilitation agreement has been adopted by creditors representing at least 60% of all creditors' claims and more than 50 % of the secured creditors' claims,[56]

[55] In the case the rehabilitation agreement has been adopted only by the creditors without the debtor's consent (Article 34(2) Law No. 4738/2020).

[56] This majority requirement is different from the general majority requirement mentioned in Article 34 Law No. 4738/2020. Under Article 54(2) Law No. 4738/2020 the majority requirement of 60% is calculated on all claims, with an additional prerequisite that 50% of the claims have to be secured. If the secured creditors represent 60% of the total claims and from that percentage the 50% of the secured creditors consents to the rehabilitation agreement, this majority may adopt the rehabilitation agreement.

- non-consenting affected creditors are treated more favourably than each creditor whose claim has a lower priority, where this is evident based on their ranking in insolvency liquidation according to Article 167(2) (conforms the relative priority rule),

- no creditor is entitled to receive any value exceeding the total amount of their respective claim, and

- if the debtor is a very small entity (in accordance with the criteria of Law No. 4308/2014), the rehabilitation agreement is proposed by the debtor or is concluded with the consent of the debtor.

Additional prerequisites for the confirmation of the rehabilitation agreement are that the rehabilitation agreement is presumed to form a reasonable prospect of ensuring viability of the debtor's business, and that the no-party-worse-off principle is fulfilled.[57] The fulfilment of this criterion is required only in relation to creditors whose consent is or may be inferred[58] in accordance with Article 37(2) Law No. 4738/2020 and those who oppose the consent of the rehabilitation's agreement adoption.[59]

The Directive 2019/1023 provides a new rule to assess the fairness of the distribution of value under an accepted plan if an affected class of creditors voted against the plan: the relative priority rule (RPR). It is provided in Article 11(1)(c) stating that the plan

> 'ensures that dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class'.

[57] Article 54(3) Law No. 4738/2020, as it was amended by Law No. 4818/2021.
[58] This refers to the participation of the state or public authorities in rehabilitation agreements. According to the explanatory memorandum of Law No. 4738/2020, one of the main problems when the state and public authorities are among a debtor's creditors, is that in general, they rarely provide their consent to restructuring agreements, even when the potential recovery under a restructuring agreement is greater than the recovery in the event of a declared insolvency. In order to facilitate the adoption and confirmation of rehabilitation agreements, it is established that the state and public authorities are deemed to consent to rehabilitation agreements when the conditions of the rehabilitation agreements confirmed by the court are met and if such entities are expected to be in a better position than in a scenario of a declared insolvency.
[59] George N. Mixalopoulos, 'The new insolvency law' Nomiki Bibliothiki 2021, p. 11.

The Greek legislator decided to make use of the RPR, instead of the stricter one, the absolute priority rule (APR) according to Article 11(2) Directive 2019/1023.

Once confirmed by the court, the rehabilitation agreement becomes fully binding on the debtor and on all creditors, whose rights are affected by the rehabilitation agreement, including those who did not consent to it, with respect to claims that came into existence before the date of issue of the confirmation decision (Article 60 Law No. 4738/2020). The only creditors that cannot be bound are those whose claims arose after the confirmation of the rehabilitation agreement (Article 39(3) Law No. 4738/2020, as it was amended by Law. No 4818/2021).

7. Legal Position of the Equity Holders

The matter of the legal position of equity holders (including shareholders) has been extensively discussed between Member States. In particular, the question arose whether the directors of a company can decide autonomously on the initiation of a preventive restructuring framework.[60]

To prevent insolvency and secure the company's continuation, preventive restructuring frameworks shall avoid and solve holdout problems. In the case of a holdout, creditors and equity holders refuse to participate in a promising restructuring or to benefit from a restructuring without having contributed themselves. If the equity holders or any corporate body were to be given a position in which they could decide in advance on the initiation and preparation of preventive restructuring proceedings, this would create a holdout position for them, which was not intended by the European legislator.[61]

The Directive 2019/1023 itself has only one article, namely Article 12 of the Directive, dealing with equity holders. According to this article, when implementing the Directive in the Member States,

[60] Dominik Skauradszun, 'Challenges of the Transposition of the Directive on Preventive Restructuring Frameworks in German Law' 2022, Wolters Kluwer, 65, 79 et seq.
[61] Dominik Skauradszun, 'Challenges of the Transposition of the Directive on Preventive Restructuring Frameworks in German Law' 2022, Wolters Kluwer, 65, 81 et seq.

- either the system of Articles 9-11 of the Directive shall also apply to the equity holders (which means, equity holders' rights can be subject to a restructuring plan, equity holders have a right to vote, but can be outvoted cross-class),
- or the Member States shall otherwise ensure that the equity holders are not allowed to unreasonably prevent or create obstacles to the adoption, confirmation, and implementation of a restructuring plan.

The Greek legislator decided to clarify the legal powers more precisely and stipulated that the corporate body with the exclusive competence for providing consent for the adoption and the request to confirm the adopted rehabilitation agreement is the board of directors or company's administrator (Article 35 Law No. 4738/2020). Holdout problems however may still occur for the implementation of the rehabilitation agreement, especially in the case of a rehabilitation agreement which includes corporate measures that, under the principles of corporate law, need a confirmation decision of the equity holders as well. The reason for this would be that these corporate measures might not be considered as a basic or ordinary decision and therefore do not allow the directors to decide autonomously.[62]

In more details, Article 35(1) Law No. 4738/2020 provides that, if the debtor is a legal entity, its board of directors or its administrator have the exclusively competence to consent to a rehabilitation agreement. Pursuant to the second paragraph of Article 35 Law No. 4738/2020 if the residual claims of the equity holders are not infringed by the rehabilitation agreement, the adoption and implementation of the rehabilitation agreement will not require in any way a confirmation decision of the general meeting of the equity holders. The only exception to this would be if the confirmation decision is expressly and specifically required by the virtue law.

Furthermore, according to Article 35(3) Law No. 4738/2020, if the approval of the general meeting of the equity holders of the debtor would exceptionally be required for the implementation of the rehabilitation agreement, the court will appoint a special representative authorised to convene the general meeting of the equity holders and to

[62] Evanghelos Em. Perakis, 'Insolvency Law' 4th ed., Nomiki Bibliothiki 2021, p. 96 et seq.

exercise the voting rights of non-cooperative equity holders, to efficiently enable the debtor and the creditors to adopt and implement the rehabilitation agreement.

8. The Stay of Enforcement

During the period between the start of negotiations and the court's confirmation of the rehabilitation agreement, there is a risk that the debtor's assets may be seized by creditors that are not party to the envisaged rehabilitation agreement. The seizure of the assets of the debtor's estate is intended to be prevented by Articles 50, 51 Law No. 4738/2020, which regulate preventive measures that the debtor or creditors may take, including the stay of enforcement measures as a preventive measure.

In accordance with Article 6 of the Directive 2019/1013, Member States shall ensure that debtors can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework. Following the guidelines of the Directive, the Greek legislator regulated in Article 50 Law No. 4738/2020 the stay of individual enforcement, as resulting from the submission of the rehabilitation agreement. More specifically, measures of individual and collective enforcement against the debtor, for the satisfaction of creditors' claims that have arisen until the issue date of the decision of the rehabilitation's agreement confirmation, shall be automatically suspended. The time limit for the so-called "automatic" stay of enforcement actions is four months, whether or not the court has already made a ruling regarding the confirmation of the rehabilitation agreement. Additionally, under paragraphs 3-5 of Article 50 Law No. 4738/2020, the court may order the extension of the stay of enforcement as well as any other provisional measure. Such measures may include the forbidding of the termination of a crucial agreement for the operation of the debtor's business. The total duration of the stay, including the automatic stay and the extensions cannot exceed twelve months.

9. International Restructuring Matters

Under national law the matters arising regarding the international insolvency are regulated by Article 78(1)(3) and Article 92(1) Law No. 4738/2020. More specifically, Article 78 provides that the local jurisdiction of the insolvency court depends on the district in which the debtor's centre of its main interests is located or, in the case of natural persons without commercial status, their main residence. The centre of main interests is the place, where the debtor habitually exercises the management of his interests and is therefore identifiable by third parties. For legal persons it is presumed, until the opposite is proved, that the centre of main interests is the place of the registered office, where the legal entity has been incorporated. Regarding cross-border implications of Greek insolvencies, Article 92(1) stipulates that the insolvency estate includes all assets belonging to the debtor at the time of the declaration of insolvency proceedings, wherever it may be situated. Recognition of foreign insolvency proceedings in Greece is provided by Article 3 Civil Procedure Code.[63]

For cross-border matters in the European Union the European Insolvency Regulation Recast (EIR)[64] includes provisions governing jurisdiction for opening insolvency proceedings (Article 3 EIR), provisions regarding the recognition and enforcement of judgments issued in such proceedings (Articles 19, 32 EIR), and provisions regarding the law applicable to insolvency proceedings (Articles 7 et seq. EIR).

The European Parliament and the Council replaced the European Insolvency Regulation with regard to Annexes A and B by Regulation 2021/2260 of 15 December 2021. Preventive restructuring frameworks to be listed in Annex A of the EIR and thus to be considered insolvency proceedings under Article 2 No. 4 EIR have been notified by the Netherlands, Italy, Lithuania, Cyprus, Poland, Germany, Hungary, and Austria. Greece has not notified any preventive restructuring framework to the European Commission. However, Annex A covers two restructuring-related proceedings namely "Σχέδιο αναδιοργάνωσης" (reorganisation plan) and "Διαδικασία εξυγίανσης" (rehabilitation procedure).

Under the EIR, insolvency proceedings, simplified insolvency proceedings for small-scale insolvencies and the rehabilitation agreement procedure are the main proceedings for the purposes of the Regulation. The out-of-court mechanism with a view to reaching a restructuring of debts is not included in Annex A, while two proceedings listed in Annex

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[63] Evanghelos Em. Perakis, 'Insolvency Law' 4th ed., Nomiki Bibliothiki 2021, p. 552 et seq.
[64] Regulation (EU) 2015/848 of 20 May 2015.

A of the Recast Insolvency Regulation (namely special liquidation procedure and reorganisation plan) are no longer available under Law No. 4738/2020.

IV. CONCLUSION

The revised Greek transposition law updated and unified all the legal frameworks of preventive restructuring, pre-insolvency and insolvency proceedings. At the pre-insolvency stage, emphasis is placed on the prevention of over-indebtedness, as well as on the out-of-court debt settlement and the rehabilitation of companies. The abolishment of the reorganisation plan shifted the weight of corporate restructurings to the rehabilitation procedure, as under the new law it's considered the main fully fledged restructuring mechanism.[65]

The out-of-court debt settlement mechanism aims at preventing the debtor's financial illiquidity, by negotiating and settling debts, and furthermore providing up to 240 monthly instalments for the debtor. Debtors who have at least 90% of their total debts placed with a financial institution are not included in this out-of-court mechanism, as the legislator considered that for debtors who are cooperative and owe only to one creditor it is more efficient to resort to a bilateral negotiation. Among other things, the new law introduces the possibility of formulating restructuring proposals on the basis of an automated tool (calculation tool) that will bind all creditors participating in the electronic platform by which the out-of-court settlement procedure is conducted. The out-of-court debt settlement turns into a fully extrajudicial procedure, reducing the waiting process and becoming more effective for both debtors and creditors.

On the other hand, the rehabilitation procedure already existed as a collective pre-insolvency proceeding. Under the new transposition law, however, it becomes completely harmonised with the European Union's goals. Defining amendments of the new law are the prerequisite of the no-party-worse-off principle in order to confirm the rehabilitation agreement, the class formation of creditors into different groups, and the cross-class cram-down mechanism to bind the dissenting classes. It also seeks to prevent equity holders' hold out problems. Notwithstanding, the entry requirements (current financial inability,

[65] Yiannis G. Sakkas, Yiannis G. Bazinas, 'The new Greek Insolvency Law: A turning point', Eurofenix Winter 2021/2022, p. 22

foreseeable financial inability and prospective financial inability) remain complicated and ill-defined, especially if they are compared with the entry requirements of other Member States. Nevertheless, the Greek legislator, even under the new transposition law, decided not to reform them, providing the court with the necessary discretion to examine every debtor's financial distress *at hoc* and define the starting point for entering the restructuring mechanisms.

Finally, taking the above into account, the intent of the law is to rescue the distressed but viable debtors. It seeks to reduce Greek private debt by the use of the updated and modern restructuring tools, even against the will of obstructing minorities. The main goal of the new law was not only to implement the provisions of the Directive 2019/1023 and align the Greek insolvency framework with the European model but to also take the opportunity to secure easier in use and more comprehensive restructuring and insolvency frameworks. Nevertheless, an important trait of the new law encompasses the on-going adoption of secondary rules implementing its provisions. The ministerial decisions already published to detail various matters, as well as the newly enacted Law No. 4818/2021 amending provisions of the new law certainly do not favour its consistency. Even though the amendments are not radical and the structure of the law has not drastically changed, there is only hope this will not undermine its unity and most importantly its long-term goal, which is the systematic utilisation of the enhanced restructuring tools.