



Extrajudicial Debt Settlement Procedure and Officers' Liability in Debt Restructuring

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The long anticipated extrajudicial debt settlement procedure (the “EDS Procedure” or “EDS”) was introduced by Law 4469/2017 to provide an additional option for the rescue of indebted businesses at an early insolvency stage.

The current pre-insolvency regime includes the rehabilitation procedure of Law 3588/2007 (the “Greek Bankruptcy Code” or the “GBC”), most recently revised at the end of 2016, and the special administration procedure of Law 4307/2014. The regime is supplemented by Law 4354/2015, also recently amended, providing for a special framework for handling (transfer and management) of non-performing loans (“NPLs”)¹.

The EDS is an out-of-court workout process intended mostly for small and medium-sized businesses serving as a simplified, expedient and less costly procedure; however it may equally be utilized for larger businesses.

The above changes together with the most recently introduced relief from liability of officers involved in debt restructuring are decisive steps for an efficient insolvency framework leading to the opening of the NPL market.

¹ See our Newsletter “[Changing the NPL Regime and Releasing the Market The Amendments in Greek Law 4354/2015 on Non-Performing Loans](#)”.

Who can apply?

Any natural person that may be subject to bankruptcy procedures (i.e. a merchant) and any legal entity acquiring income from business activities may file an application for the initiation of the EDS Procedure (the “**Initiation Application**”).

Requirements

Apart from being eligible, according to the above, the following conditions should also be fulfilled for the initiation of the procedure:

1. on the 31st of December 2016 (a) the debtor was in delay of payment of its loan or credit obligations for at least 90 days, or (b) had a due debt towards a financial institution which was settled after the 1st of July 2016, or (c) had due debts towards the tax authorities, or a social security organization or another public law entity (including local public authorities), or (d) non-payment of checks issued by the debtor was acknowledged due to inefficient funds, or (e) payment orders or court decisions were issued against such person for due debts;
2. the total debts to be settled exceed the amount of €20,000 and were accrued before the 31st of December 2016;
3. the debtor has been operatively profitable in one of the three last financial years before filing, a fact evidenced through positive EBITDA (in case the debtor keeps a single-book entry accounting system) and

positive EBITDA or positive net equity (where a double-book entry accounting system is applied).

Exceptions

The following categories of debtors are excluded from filing:

1. credit and financial institutions;
2. investment services providers;
3. undertakings for the collective investment of transferable securities (UCITS) and alternative investment funds (AIFs), including their administrators;
4. insurance companies;
5. debtors having filed an application for the initiation of a special administration procedure according to Law 4307/2014 or any relevant procedure under the GBC or with regard to which a court decision has been issued or is expected to be issued according to the above provisions;
6. debtors that have ceased their business activities or legal entities that are in a state of dissolution and liquidation; and
7. debtors, or debtor-companies whose directors, have been irrevocably condemned for crimes such as fraud, tax evasion, money-laundering etc.

The procedure

Filing of application

An eligible debtor may file an Initiation Application electronically through a special platform of the Special Secretariat for the Management of Private Debt (the “**Debt Secretariat**”). The filing deadline is until the 31st of December 2018 and each debtor may use the EDS only once. Until the above platform is brought into operation² the applications are filed with the Development Directorates of the Regional Units.

The Initiation Application should also be simultaneously filed by the co-debtors³ of the applicant debtor, otherwise the procedure may not be initiated, unless there is relevant consent of the creditor or the creditors representing the majority of claims against the co-debtors. If the above consent is not provided, the majority of the remaining creditors may decide to initiate the EDS, but the agreement to be concluded will not have any effect on claims of non-consenting creditors.

More than one debtors may jointly file an Initiation Application if they have the obligation to issue consolidated financial statements according to Law 4308/2014 (related parties).

The EDS may also be put in motion at the initiative of the Greek State, the social security organizations or a financial institution by summoning the debtor to file an Initiation Application within a 2-month deadline. If the debtor does not proceed with the above filing

in time, it is not further entitled to initiate the procedure on its own without previously being summoned by its creditors.

The Initiation Application should contain extensive documentation on, among others, the applicant’s identity, debts (list of creditors, amounts owed, and co-debtors for each creditor), assets (list of assets, commercial value, encumbrances), financial state (annual turnover, financial statements), related parties and employees. The most essential part of the application is the proposal of the debtor for the settlement of its debts, which should include the monthly or annual amount it is able to pay in repayment of its debts, based on its estimated income and expenses for at least the next 3 financial years.

The filing of an Initiation Application does not constitute significant reason for terminating outstanding contracts.

Initiating the procedure

Within 2 business days as of the filing of the Initiation Application, the Debt Secretariat appoints a coordinator, out of an official list kept by it. The coordinator may resign from his/her duties, but has to resign in case of circumstances potentially affecting his/her impartiality (e.g. existence of any kind of personal or professional relationship with the debtor or any participating creditor).

If no resignation takes place, the appointment is deemed accepted and the Debt Secretariat sends to the coordinator an electronic copy of the

² This is expected by August 2017.

³ E.g. guarantors etc.

Initiation Application and the accompanying documents in order for the coordinator to certify their completeness or request further information or documents. The certificate on completeness is sent to the Debt Secretariat, which further verifies such certificate electronically and notifies it to the debtor and the coordinator.

Within 2 business days of certification of completeness of the application (with the possibility of further extension) the coordinator sends an extract of the debtor's application to all the creditors included in the application. Such extract contains the debtor's identity data, the settlement proposal, the documentation evidencing eligibility of the debtor as well as information on the debt pertaining to the notified debtor, including the total amount owed towards financial institutions, the Greek State, Social Security Organizations and the remaining creditors. The creditors who are eligible to participate in the procedure receive also a participation invitation and a template confidentiality declaration.

The above notification towards all the creditors results in the suspension of the procedure of the arrear resolution process that may be pending according to the Code of Conduct for banking institutions⁴. If no agreement according to the EDS is concluded the above process continues from the point the suspension took place.

⁴ In that regard see our [Newsletter on the Amendment of Code of Conduct on handling Non Performing Loans](#).

The negotiations

Within 10 days of the notification of the participation invitation, the creditors shall send to the coordinator a declaration of their intention to participate, along with a signed confidentiality declaration and a statement of the total amount of their claim against the debtor at the time of submission of the Initiation Application.

At the lapse of the above deadline, the coordinator checks whether the necessary quorum of creditors has been established. The quorum is defined as 50% of the total claims against the debtor (excluding claims not regulated through the EDS). If a quorum is found present, the coordinator notifies to the participating creditors the full content of the application and the supplementary documentation and informs the debtor of the initiation of the negotiation procedures.

An expert may also be appointed in order to draft a viability assessment of the debtor as well as a debt restructuring plan. The appointment of an expert is obligatory in case of debtors – major undertakings⁵, but only optional (if requested by creditors representing at least 1/3 of the participating creditors) for debtors – small undertakings⁶. The selection and appointment of the expert is made through a decision of the absolute majority of the participating creditors.

⁵ Defined as those having an annual turnover in the last year prior to the filing of the application higher than €2,500,000 or total debts (due or not) higher than €2,000,000.

⁶ Defined as those which are not considered debtors – major undertakings (see above).



If no expert is appointed according to the above (in case of debtors – small undertakings) or after completion of the selection process, the coordinator sets a deadline of 1 month for the filing of counter-proposals by the creditors. The counter-proposals should include at least (i) the findings on the viability of the debtor’s business, (ii) the estimated liquidation value of the assets of the debtor and co-debtors, if applicable, (in case the counter-proposing creditor does not consent to the value already proposed) (iii) the amount proposed to be paid by the debtor and the co-debtors, if applicable, (in case the counter proposing creditor does not consent to the amount already proposed) and (iv) the total amount to be paid to each creditor.

The counter-proposals are notified to the other participating creditors and specific amendments may be proposed thereto by the debtor and the remaining creditors within 15 days of notification. After the lapse of the above deadline and within 10 days the debtor has to declare whether it accepts any of the counter-proposals. In case it approves one or more counter-proposals, those are put to the vote of the participating creditors. In case no counter-proposals have been submitted or those submitted (including the restructuring plan drafted by the expert) have not been approved by the debtor, the initial proposal of the debtor is put to the vote of the participating creditors.

A debt restructuring proposal is approved with the agreement of the debtor and the majority of creditors representing 3/5 of the total claims of

the participating creditors, including 2/5 of secured claims.

If a proposal is approved a debt restructuring agreement is executed between the debtor and the consenting creditors (the “**EDS Agreement**”).

The deadlines provided throughout the procedure may be extended under certain requirements.

The debtor, the participating creditors and the coordinator have a duty of confidentiality with respect to the negotiations. The debtor and the creditors have a duty of truthfulness and should participate in the procedure in good faith. The publication or any other release to third parties of any confidential information or information with regard to the negotiations without the prior written consent of the parties to the negotiations is forbidden.

Suspension of enforcement

From the point that the invitation for participation is sent by the coordinator to the creditors and for a period of 70 days, any individual and collective enforcement measures against the debtor, pending or not, for the satisfaction of claims the settlement of which is pursued through the EDS, are automatically suspended.

The above suspension: (i) includes any request for preventive measures and the registration of a prenotation of mortgage, unless the taking of preventive measures aims at the prevention of the depreciation of the debtor’s business due to the disposal of its assets; (ii) results automatically in

the prohibition of disposing or encumbering in any way the debtor's assets, unless the disposal falls within its usual business activity; and (iii) does not affect special provisions on the enforcement of financial collateral agreements.

The above suspension ceases automatically in case:

- a) the procedure is terminated without success for any reason, or
- b) a decision is taken by the majority of the participating creditors to that effect.

The debtor may apply for the extension of the above suspension period for a period no longer than 4 more months with the consent of the majority of creditors.

Debts held by a sole creditor

An issue much discussed during the public consultation on the law concerned the exception provided in the initial draft bill for debtors owing 85% or more of their total debt to a sole creditor. Namely, it was supported that in similar cases the lack of the "collective" character of the indebtedness, entails a different treatment. The solution finally adopted provides that in case a creditor's claims exceed 85% of the total debts of the debtor, the Initiation Application is forwarded to the same creditor for bilateral negotiations, and a simplified EDS is followed.

The EDS Agreement rules

The creditors and the debtor may freely formulate the content of the EDS Agreement subject to certain rules provided in the law including the following:

a) the terms of the EDS Agreement may not result in any creditor being found in a worse economic position than what they would have been following compulsory enforcement; similarly the creditors, whose claims are regulated by the EDS Agreement, may not receive less than what they would have received in case of liquidation of the co-debtors' assets or of third parties' assets secured in their favour [*No-worse off principle*].

b) amounts and other considerations which remain undistributed according to (a) above, are distributed to all creditors on a *pro rata* basis for the satisfaction of their claims that remain unpaid.

c) It is exceptionally permitted for the EDS Agreement to provide that claims that (i) arise simultaneously with, or after the conclusion of the EDS Agreement, and (ii) arise from the financing of the debtor or provision of goods or services to the debtor and (iii) are intended to ensure the continuation of the business of the debtor, are preferentially satisfied as compared to all the claims that have arisen prior to the conclusion of the EDS Agreement whether equipped with a privilege or not [*New money preferential treatment*].

The EDS Agreement may provide for the right of creditors to register mortgages, prenotations of mortgage or a special

security on assets of the debtor or the co-debtors in order to secure the claims regulated by the agreement. No new encumbrances, apart from the above, may be created after the conclusion of the EDS Agreement, as long as its terms are complied with by the debtors and the co-debtors.

Any term of the EDS Agreement agreed in favour of the debtor applies also with regard to any co-debtor who has also applied for the procedure together with the primary debtor and any guarantor of the relevant claims.

Court ratification

Despite the title of the procedure as “extrajudicial”, the law provides for the ratification of the EDS Agreement by the court. The judicial involvement and the ratification of an agreement by the court followed by publication allows the “cram-down” effect whereby all creditors of the debtor rather than just the contracting parties are bound by the agreement and its terms⁷.

More particularly, the debtor or any participating creditor may file an application for the ratification of the EDS Agreement (the “**Ratification Application**”) with the Multi-Member Court of the seat of the debtor.

As of the filing of the Ratification Application and until the issuance of the relevant court decision, all individual and collective enforcement measures against the debtor, pending or not, for the satisfaction of claims that have arisen prior to the filing of the Initiation

Application are automatically suspended. During the above suspension period no preventive measures may be requested by the court, including the registration of a prenotation of mortgage, unless so provided in the EDS Agreement, or in case there is a risk of depreciation of the business due to disposal of assets of the debtor’s business.

The hearing of the Ratification Application shall be scheduled to take place within 2 months of the filing and the court’s decision is published within 3 months of the hearing.

The court examines all the objections filed against the procedure and rejects the Ratification Application only if:

- a) there is a breach of specific obligatory rules provided in the law (including the necessary content of the agreement); or
- b) there is a breach of any rule of the EDS and the breach has caused damage to any creditor, which may not be repaired in any other way; or
- c) creditors holding claims of an amount sufficient to reverse the EDS Agreement were not invited to participate in the procedure; or
- d) it is evidenced that the debtor does not fulfil its financial obligations as per the terms of the EDS Agreement.

The decision ratifying the agreement is not subject to any means of appeal or third party opposition.

As already mentioned, the ratifying decision is binding on the debtor and all creditors holding claims regulated according to the EDS Agreement, irrespective of whether they

⁷ As an exception to the principle of the so-called “relative effects of contracts”.

participated in the negotiations or in the conclusion of the EDS Agreement.

Annulment of the EDS Agreement

Non-payment by the debtor of any amount owed in accordance with the terms of the EDS Agreement for a period longer than 90 days entitles such creditor to request the annulment of the EDS Agreement with regard to all creditors through a relevant petition filed with the competent court.

Following annulment of the EDS Agreement the creditors' claims against the debtor and the co-debtors are reinstated and amounts that have been paid according to the EDS Agreement are deducted from such claims.

Special provisions exist with regard to unpaid debts towards the tax authorities or social security organizations, which result to the reversion of the EDS Agreement *vis-a-vis* the above creditors and the reinstatement of their claims. In such case relevant notification is made to the remaining creditors who are entitled to request the annulment of the agreement with regard to all creditors within 30 days as of such notification.

In the case of annulment of the EDS Agreement the cessation of payments of the debtor (leading to bankruptcy) is assumed, subject to counter-evidence. Acts that took place in fulfilment of the terms of the EDS Agreement are exempted from revocation (claw-back) in case of bankruptcy.

The Liability of Bank Officers in Restructuring

The newly introduced Law 4472/2017 provides that a person which by virtue of law or contract is responsible or is managing in any way the property of a credit or financial institution, totally or partially, may not be held personally liable for acts or omissions conducted by them in case of debt restructuring or disposal that took place under the framework of a regulated formal proceeding. Such proceedings are the GBC rehabilitation procedure, the EDS, the procedure on natural persons' indebtedness⁸, the special liquidation procedure followed in case of insolvency of financial institutions and the procedures of sale and management of NPLs according to the NPL law.

The above persons are exonerated from liability (both civil and criminal) if the following requirements are met:

- a) the relevant actions are in accordance with the rules and procedures provided in the then applicable rules, regulations, corporate documents and legal provisions; and, where applicable, depending on particular circumstances,
- b) the acts or omissions are aiming at collecting at least part of the institution's claims or, in case of business loans, at the continuation of the debtor's business on the basis of the relevant restructuring plan or agreement through which partial satisfaction of their claims is expected; and

⁸ Law 3869/2010, also called the natural persons' "bankruptcy" procedure law.



c) the relevant acts and omissions do not breach any regulatory acts of the Bank of Greece concerning due debts and non performing exposures (NPEs) and any rules of the approved policy of the relevant institution in that respect; and

d) relevant decisions of the approving committees or bodies of the institutions have been issued or in case a special liquidator has been appointed a decision of the special liquidation committee has been issued; and

e) the relevant acts do not cause the actual financial state of the creditor to become worse as compared to its state in case direct winding-up or liquidation of the assets of the debtor were followed under enforcement procedures.

The above apply also in case of bilateral agreements between the credit institution and the debtor aiming at the implementation of the internally approved policy for the handling of NPLs under the Code of Conduct for banking institutions⁹.

Overall, the Extrajudicial Debt Settlement Procedure introduced with Law 4469/2017, as well as the provision on the liability for cases of debt restructurings included in Law 4472/2017 are expected to be widely used or relied upon by the actors involved in the NPL scene and insolvency cases more generally. Although, both regulatory developments were much debated and certain issues were considered controversial, these laws have now been finally introduced. No doubt their effect on the market will not go unnoticed already from the first months of their application.

⁹ See footnote 4 above.



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